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S204032

No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,
Petitioner,

v.

CLS TRANSPORTATION OF LOS ANGELES,
Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE B235158

FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES,
CASE NO. BC 356521, ASSIGNED FOR ALL PURPOSES
TO JUDGE ROBERT HESS, DEPARTMENT 24

PETITION FOR REVIEW

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INTRODUCTION

Advancing an unprecedented reading of the FAA, the Court of Appeal issued a decision that threatens to sweep away, in one stroke, years of firmly-established California case law protecting substantive statutory rights from forfeiture by adhesion agreements. These decisions include:

- *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, rev. den., 2011 Cal.Lexis 10809 (Oct. 19, 2011), cert. den., 2012 U.S.Lexis 2934 (April 16, 2012) (No. 11-880) and *Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, holding that PAGA waivers are unenforceable;
- *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, holding that PAGA claims are inherently representative under Labor Code § 2699(a);
- *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, which prohibited enforcement of adhesion contracts that prospectively limit statutory remedies;
- *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, which promulgated a fact-intensive test in accordance with the U.S. Supreme Court's longstanding requirement that a party must be permitted to vindicate her statutory rights in whichever forum the claim is brought;
- *Kinecta Alternative Fin. Solutions, Inc. v. Super. Ct.* (Apr. 12, 2012) 205 Cal.App.4th 506, which, along with *Brown*, recognized that *Gentry* remains the law in California unless and until the Supreme Court abrogates it;
- Numerous California decisions on waiver, including *Hoover v. American Income life Ins. Co.* (May 16, 2012) 206 Cal.App.4th 1193, *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, *Burton v. Cruise* (2010) 190 Cal.App.4th 939, and *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, all of which found the defendants to

have waived arbitration on far less extreme facts.

By rejecting, implicitly or explicitly, no fewer than **nine decisions** from other California appellate courts and at least two from this Court, the Court of Appeal has engendered substantial doctrinal confusion requiring this Court's review.

The Court of Appeal reached its unprecedented holding without grappling with *any* of the numerous U.S. Supreme Court decisions that have limned the "vindication of rights" doctrine over the past quarter century-plus. Seizing on select passages from *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740 divorced from the facts of that case and the larger body of FAA jurisprudence, the Court of Appeal applies them mechanically to the very different record before it. In *Concepcion*, the Court found that the "aggrieved customers would be 'essentially guaranteed' to be made whole," a finding that demonstrated that the plaintiff's statutory rights would be vindicated. (131 S.Ct. at 1753.) Here, the Court of Appeal's analysis appears to begin and end with the premise that the FAA's purpose is to "ensure the enforcement of arbitration agreements according to their terms." (Slip Op. at 7 [quoting *Concepcion*, at 1748].) But the Supreme Court has never endorsed the notion that "arbitration agreements must be enforced according to their terms" *regardless* of whether enforcement would eviscerate a party's substantive rights, as the Court of Appeal did here.

In fact, the FAA operates to make "arbitration agreements as enforceable as other agreements, ***but not more so***." (*EEOC v. Waffle House* (2002) 534 U.S. 279, 294; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1366-67 (Baxter, J., concurring [discussing this maxim].) However, the rule adopted by the decision below actually elevates arbitration agreements ***over*** other contracts. Under the Court of Appeal's reading, substantive statutory rights that cannot be waived in an ordinary agreement ***can be*** waived in an arbitration agreement. This reasoning turns the FAA on its head, inverting the court's duty to "place arbitration agreement on an equal footing with other contracts." (*Concepcion*, at 1745.)

Moreover, although the Court of Appeal apparently believes otherwise, nothing in *Concepcion* indicates that the Court intended to overturn decades of FAA jurisprudence, including the seminal *Mitsubishi* decision. *Mitsubishi* was the first Supreme Court decision to hold that statutory claims, like breach of contract claims, can be compelled to arbitration under the FAA. However, the *Mitsubishi* Court also recognized that substantive rights cannot by extinguished by enforcement of what should merely be a choice-of-forum provision. Integral to the *Mitsubishi* holding is the principle that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral…forum." (473 U.S. at 628.) *Mitsubishi* thus carefully circumscribed the FAA's reach to ensure a "standard by which arbitration agreements and practices are to be measured, and [to] disallow[ ] forms of arbitration that in fact compel claimants to forfeit certain statutory rights." (*Armendariz*, 24 Cal.4th at 99-100.) *Mitsubishi*'s explicit protection of substantive rights undergirds key decisions of this Court, such as *Armendariz* and *Gentry*.

The Court of Appeal's analysis of PAGA further illustrates the dangers of its improper and selective application of FAA doctrine. Under PAGA, a deputized aggrieved employee brings a representative action on behalf of "himself or herself and current or former employees" to enforce the Labor Code, with 75% of the penalty recovery allocated to the state and 25% distributed to the aggrieved employee. The PAGA statute contains no provision regarding arbitration.

Nonetheless, the Court of Appeal proceeded to dismantle the entire statutory design of PAGA by incorrectly treating PAGA like a statute that categorically exempts claims from arbitration, like the statute at issue in *Southland Corp. v. Keating* (1984) 465 U.S. 1. (See Slip Op. at 15.) This comparison fails. In *Brown*, the court, without reaching a conclusion as to arbitrability, only invalidated a representative action waiver because enforcing it would have eviscerated a substantive right and forced a party to arbitrate her "individual PAGA claim"—a result wholly at odds with the PAGA statute. *Brown* correctly

emphasized that PAGA was enacted as a "statutory representative action" designed to enforce the Labor Code through private attorneys general. Subsequently, the *Reyes* court bolstered this conclusion, confirming that PAGA is inherently representative and cannot be brought as an individual claim in ***any*** forum. By holding that PAGA claims can be individually arbitrated, the Court of Appeal's decision directly conflicts with these sister courts. Likewise, the Court of Appeal contravenes *Armendariz*'s prohibition against limitation of statutory remedies, as its enforcement of the representative action waiver essentially caps the employer's potential liability for PAGA statutory penalties—penalties that are measured on a representative basis—to just those of the individual.

The Court of Appeal also ignores the fact that, in a PAGA action, the real party in interest is the state of California. Under the Supreme Court's decision in *Waffle House*, the state cannot waive an enforcement right based on a private contract to which it was not a party. In a PAGA action, the aggrieved employee proceeds as a proxy of the state, collects penalties for the state, and the state is bound by a judgment in the employee's favor. (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 980.) Because the state is the true holder of the claim, it cannot be forced to waive its claims by proxy.

These mistaken findings are premised on a sharp departure from prevailing preemption principles. PAGA is an arbitration-neutral exercise of the state's police power to regulate employer-employee relationships. For this statute to be preempted, there must be a "clear and manifest intent of Congress" to occupy a field traditionally reserved for the states, an analysis entirely absent from the Court of Appeal's decision. By enforcing a waiver that effectively exempts the employer from PAGA liability, the Court of Appeal has authorized the nullification of a state law enforcement action without even attempting to identify any Congressional intent to do so.

The Court of Appeal also creates a conflict by invalidating this Court's *Gentry* decision. *Gentry* comports with *Mitsubishi*, *Gilmer* and *Green Tree Fin.*

Corp.-Alabama v. Randolph (2000) 531 U.S. 79 ("*Randolph*") in holding that a class action waiver may be invalidated if a party can demonstrate, through admissible evidence, that arbitration would not permit a party to vindicate her unwaivable statutory rights. *Randolph*, which directly implicated the vindication of rights doctrine, remains vital, providing the impetus for a recent trend in federal court decisions striking class action waivers in arbitration agreements. (See, e.g., *In Re: American Express Merchants' Litigation* (2d Cir. Feb. 1, 2012) 667 F.3d 204, 214, rev. en banc denied May 29, 2012 ("*AmEx III*") [invalidating a class waiver upon proof that the plaintiffs' statutory claims would be forfeited in individual arbitration]; *In re Elec. Books Antitrust Litig.* (S.D.N.Y. June 27, 2012) 2012 U.S.Dist.Lexis 90190, *11 [invalidating class action waiver after the plaintiffs demonstrated that it would be "economically irrational for them to pursue their claims through individual arbitrations."]; *Sutherland v. Ernst & Young* (S.D.N.Y. Jan. 17, 2012) 2012 U.S.Dist.Lexis 5024, *22-25 [following *Randolph* in invalidating a class action waiver on claims brought under the FLSA and state employment statutes]; *Raniere v. Citigroup, Inc.*(S.D.N.Y. Nov. 22, 2011) 827 F.Supp.2d 294, 313-318 [same].)

The Court of Appeal neither discussed nor distinguished *Mitsubishi*, *Randolph*, or any other Supreme Court cases setting out the "vindication of rights" doctrine. Without attempting to contend with *Gentry*'s foundation, the Court of Appeal hastily "overruled" *Gentry* and, in the process, upended long-settled California law.

Further, the Court of Appeal may not disregard the Board's holding in *D.R. Horton* (2012) 357 NLRB No. 184. Ignoring the Supreme Court-mandated deference owed to the Board in interpreting the NLRA, the Court of Appeal again misapprehends the issue as one of arbitrability even though the Board and the Petitioner made it clear that the violation of the NLRA is, in this context, a contractual defense. A collective action waiver that violates Section 7 of the NLRA renders the contract unenforceable under clear Supreme Court precedent.

(See *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 86 [holding that courts cannot enforce a contractual provision that promotes an unfair labor practice under the NLRA].) The Court of Appeal simply did not address this argument.

Finally, this ruling cannot be reconciled with California's waiver doctrine, since no documented case where waiver **was found** has presented more compelling facts. CLS initially filed its motion to compel arbitration in 2007, but subsequently abandoned its petition when the action was remanded on appeal for a factual showing under *Gentry*. Petitioner, relying on CLS's demonstrated intent to defend the action in court, litigated the matter as a class action for the next **three-and-a-half years**. CLS actively participated in class discovery, contested (and lost) a motion for class certification, and filed a summary judgment motion. Just months before trial, CLS sought to avoid class liability by "renewing" the same motion to compel arbitration that it had abandoned years prior. The trial court granted CLS's motion notwithstanding this extraordinary delay, and the Court of Appeal affirmed. By not finding prejudice on such an extreme set of facts, the Court of Appeal has cast the entire waiver doctrine into doubt.

The decision also credits CLS's "futility" defense, which excuses a party's delay in invoking its right to arbitrate only if it had been ***legally impossible*** to enforce its arbitration agreement before a change in law. However, in the past year, two published decisions, *Roberts* and *Lewis*, expressly held that this defense is unavailable for litigants citing *Concepcion* as the "change in law." By excusing CLS's conduct without even discussing these conflicting decisions, the Court of Appeal failed to articulate a sound rationale for its contrary holding. This opacity was reinforced when the Court of Appeal summarily rejected Petitioner's Petition for Rehearing, which focused on the decision's omissions of fact and errors of law regarding waiver.

Although this case should have been reversed on these narrow waiver grounds, the Court of Appeal unnecessarily seeks to generate a sea change in California arbitration and employment law, creating direct conflicts with and

purportedly "overruling" numerous California precedents. The uncertainty caused by this decision among the trial courts requires this Court's guidance. This decision emboldens California employers who will exempt themselves from civil liability by using arbitration agreements immunized from court scrutiny. If this decision takes root, California employers will demand arbitration not because of its traditional benefits of speed, cost-effectiveness and informality, but because it is a means to make any contract enforceable, thereby avoiding any liability for violations of California law.

Plenary review under Rule of Court 8.500(b)(1) is urgently needed to resolve these multiple conflicts and settle vital questions of law. In the alternative, the Court should grant review and hold based on co-extensive FAA preemption issues arising in *Sanchez v. Valencia Holding Co.*, S199119 (rev. granted March 21, 2012).

STATEMENT OF THE CASE

Plaintiff-Petitioner Arshavir Iskanian brought this wage-and-hour class and representative action on August 6, 2006. (Slip Op. at 3) In February 2007, CLS moved to compel the action to arbitration, under an Arbitration Agreement signed by Petitioner in 2004.

This Agreement purported to cover any disputes arising out of Iskanian's employment, including both hiring by and separation from CLS. The final paragraph bound all employees, whether or not the Agreement was signed:

> The foregoing provisions of this Policy/Agreement are binding upon EMPLOYEE and COMPANY irrespective of whether EMPLOYEE and/or COMPANY signs this Policy/Agreement.

(7 Appellant's Appendix ["AA"] 1975 [¶ 17].)

The Agreement also contained waivers aimed at precluding PAGA and other collective and representative actions:

> (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.

(Slip Op: at 2-3.)

On March 13, 2007, the trial court granted CLS's motion to compel arbitration, which Iskanian timely appealed. (*Id.*) While the appeal was pending, this Court rendered its opinion in *Gentry*. Based on *Gentry*, the Court of Appeal directed the trial court to vacate its previous order if it found that a class action would be a "more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (See *Iskanian v. CLS*

Transp. L.A. LLC (May 27, 2008, No. B198999), 2008 Cal.App.Unpub.Lexis 4302 at *3.)

On remand, rather than reassert its motion to compel arbitration, CLS abandoned its motion, electing to proceed with litigation. (Slip Op. at 3.) The parties subsequently exchanged substantial written merits and class discovery, including three sets of special interrogatories, four sets of requests for production of documents, three sets of requests for admissions and two sets of form interrogatories. (2 AA 419-20; 2 AA 434-510.)

With this supporting discovery, Iskanian moved to certify the class. Both parties contested this motion, debating every aspect of the certification analysis, including the admissibility and sufficiency of the evidence Iskanian offered in support. (See generally 2 AA 383-7 AA 1805.) The trial court granted Iskanian's motion to certify the class by order dated October 29, 2010. (7 AA 1788-1805.) The parties then conducted post-certification discovery. CLS subsequently filed a motion for summary judgment. (Rep.'s Trans. of Proceedings of June 13, 2011 [at A-25:18-22].) Three months before the trial date of August 16, 2011, and after the Supreme Court issued *Concepcion*, CLS "renewed" its earlier motion to compel individual arbitration. (7 AA 1806.) The trial court granted the motion on June 13, 2011, and Petitioner timely appealed.

Soon after the hearing on the appeal, the Court of Appeal issued a published decision on June 4, 2012, affirming the trial court's decision. Petitioner filed a timely Petition for Rehearing, which was summarily denied on June 26, 2012.

ARGUMENT

I. THE COURT OF APPEAL'S RULING COMPELLING PETITIONER'S PAGA CLAIMS TO INDIVIDUAL ARBITRATION DIRECTLY CONFLICTS WITH CALIFORNIA APPELLATE AUTHORITY AND PREVAILING PRINCIPLES OF PREEMPTION

A. The Court Of Appeal's Ruling Creates A Direct Conflict With *Brown* And *Franco*

Foremost, the Court of Appeal's decision creates a direct conflict with *Brown* and *Franco*. Indeed, in rejecting *Brown*, the court below reached a holding that this Court and the U.S. Supreme Court both declined to make when presented with this very issue: that the FAA preempts PAGA's representative right of action. (See Slip Op. at 14-16.) Prior to *Brown*, *Franco* had held that enforcing a representative action waiver would preclude an employee "from seeking penalties on behalf of current and former employees, that is, from performing the core function of a private attorney general." (171 Cal.App.4th at 1303.) Based in part on *Franco*'s reasoning, *Brown* refused to enforce a representative action waiver, distinguishing *Concepcion* because PAGA is a public law enforcement action brought by the state through a proxy. The *Brown* court declined to hold that PAGA claims are inarbitrable, holding only that a PAGA action cannot be nullified via a representative action waiver. (*Brown*, 197 Cal.App.4th at 503 ["Even if a PAGA claim is subject to arbitration, it would not have the attributes of a class action..."].)

While the Court of Appeal clearly believes representative action waivers are enforceable without exception, its reasoning leaves much to be desired. Instead of challenging *Brown*'s reasoning head-on, the Court of Appeal knocks down the straw man of arbitrability. (Slip Op. at 14-17) Petitioner chiefly argued only that *Brown* supports the invalidation of a representative action waiver.[1] Both

[1] Petitioner did **not** argue that "a PAGA action can only effectively benefit the public if it takes place in a judicial forum." (Slip Op. at 15.) Petitioner's arguments regarding PAGA on appeal centered on the unenforceability of the PAGA waiver. (See AOB at 26-28; Reply at 15-17.)

Brown and *Franco* dealt with the protection of the substantive right afforded by PAGA, not with arbitrability. On this issue, the Supreme Court has repeatedly held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." (*Mitsubishi*, 473 U.S. at 628.) If statutory remedies could be waived by arbitration agreement, a party could be stripped of her ability to "vindicate [his or her] statutory cause of action in the arbitral forum." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 27-28.) The Supreme Court emphasized that it would "condemn [] ... as against public policy" an arbitration agreement that operated "as a prospective waiver of a party's right to pursue statutory remedies." (*Mitsubishi*, 473 U.S. at 637, fn.19.)

Yet the Court of Appeal failed to grapple with *Mitsubishi*, *Gilmer*, or any of the other critical Supreme Court cases. Moreover, *Concepcion* is inapplicable because the "vindication of rights" doctrine was not at issue in that case. Nor does the inapposite *Kilgore v. KeyBank, Nat's Ass'n* (9th Cir. Mar. 7, 2012) 673 F.3d 947 support the decision below. (Slip Op. at 16-17.) *Kilgore* held that this Court's *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 decisions, which categorically exempted all UCL and CLRA claims for injunctive relief from arbitration, were preempted by the FAA. (*Id.* at 960.) In contrast to *Broughton-Cruz*, *Brown* ***did not hold*** that PAGA claims are inarbitrable per se, but only that a PAGA claim must be brought as a representative action on behalf of other aggrieved employees, in whichever forum it proceeds. In fact, *Brown* expressly distinguished these cases by noting that "*Broughton* and *Cruz* dealt with arbitrability, not with class and representative action waivers." (197 Cal.App.4th at 500-501.) Rather, *Brown* held that an arbitration-neutral "representative statutory action" to enforce labor laws cannot be nullified by the very party the law is enacted to police: the employer. (*Id.* at 501.) Whatever the fate is of the

Broughton-Cruz rule in California, it has no application to PAGA.[2] *Kilgore*'s ruling thus in no way undercuts *Brown*.

CLS's representative action waiver also operates as a limitation of a statutory remedy in direct conflict with *Armendariz*'s mandate "that an arbitration agreement may not limit statutorily imposed penalties." (24 Cal.4th at 103.)[3] Under PAGA, an "aggrieved employee may recover civil penalties ...filed on behalf of himself or herself and other current and former employees against whom one or more of the alleged violations was committed." (Labor Code § 2699(g)(1).) So, the civil penalties that a PAGA litigant recovers are measured **by the violations committed against all the other aggrieved employees.** However, by enforcing a clause that limits any PAGA recovery to which the aggrieved employee—and ultimately, the state—is entitled by statute, the Court of Appeal's ruling in effect caps a statutory remedy in violation of *Armendariz*.

The multiple conflicts manufactured by the Court of Appeal merit plenary review.

B. The Court of Appeal's Ruling Creates A Direct Conflict With *Reyes*

In deciding whether to enforce CLS's representative action waiver, the Court of Appeal had to determine whether a PAGA claim can exist as an individual claim. On this point, the First Appellate District concluded that a plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but ***must*** bring it as a representative action and include "other current or former employees." (*Reyes*, 202 Cal.App.4th at 1123 [citing *Machado v.*

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[2] While the vitality of the *Broughton-Cruz* rule does not affect the merits of the PAGA issue, the Court should also review the decision below since it adopted, for the first time in the state court, the Ninth Circuit's holding in *Kilgore* to expressly abrogate two decisions from this Court.

[3] This principle applies to agreements governed by the FAA. (See, e.g., *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, 47-48 [severing as unenforceable a provision limiting availability of treble damages under antitrust statute].)

M.A.T. & Sons Landscape, Inc. (E.D.Cal. July 23, 2009) 2009 U.S.Dist.Lexis 63414, *6].) "[B]ecause the PAGA claim is not an individual claim, [the] individual claims [cannot] be submitted to arbitration." (*Id.* at 1124.) In reaching this finding, *Reyes* relied on *Machado*'s detailed analysis:

> The word "and" commonly connotes conjunction and is used "as a function word to indicate connection or addition." Merriam-Webster's Collegiate Dictionary 43 (10th ed. 2002). Giving effect to the "common acceptation" of the word "and," the statute's language indicates that a PAGA claim **must be brought on behalf of other employees**."

(2009 U.S.Dist.Lexis 63414 at **6-7.) A contrary reading makes no sense, as the Legislature could have easily defined the action in a different way if it had intended to allow "individual" PAGA claims.

Explicitly disagreeing with *Reyes*, the Court of Appeal undertakes a contrary reading, asserting that the use of the word "and" in § 2699(a) does not have its ordinary meaning. Instead the Court of Appeal reasoned that "and" is meant "to clarify that an employee may pursue PAGA claims on behalf of others only if he pursues the claims on his own behalf." (Slip Op. at 17, fn.6.) Finding no support from PAGA's legislative history, the Court of Appeal relies on *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, a pre-*Brown* decision that had already been rejected by *Reyes*. (See 202 Cal.App.4th at 1124 fn.3.)

Other district courts support *Reyes*.[4] By re-writing § 2699(a) to concoct an

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[4] A number of district courts hold that aggrieved employees' PAGA claims are "common and undivided" and can be aggregated to determine the amount in controversy partly because in a PAGA action, "aggrieved employees are ***not united in a representative suit merely for convenience*** as Section 2699 requires that PAGA actions be brought in a representative form on behalf of all aggrieved employees." (*Thomas v. Aetna Health of Calif.* (E.D.Cal. June 2, 2011) 2011 U.S.Dist.Lexis 59377, *50; see also *Urbino v. Orkin Services of California, Inc.* (C.D.Cal. Oct. 5, 2011), 2011 U.S.Dist.Lexis 114746, at *27-29.)

"individual" PAGA claim, the Court of Appeal's activist approach ignores the edict that "[c]ourts must take a statute as they find it" and exercise judicial restraint in their interpretation. (*Sierra Club v. Department of Parks & Recreation* (2012) 202 Cal.App.4th 735, 744.) This decision has caused significant, unnecessary confusion regarding whether PAGA is inherently representative, with vexed courts, arbitrators and parties uncertain as to how such a claim may proceed. Should PAGA be litigated or arbitrated individually or, as intended, only as a representative claim? This Court's guidance is needed to settle this issue.

C. The Court of Appeal's Ruling Contravenes The United States Supreme Court's *Waffle House* Decision By Forcing The Non-Party State To Waive Its PAGA Rights

In a PAGA action, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." (*Arias*, 46 Cal.4th at 986.) A PAGA litigant acts as "the proxy or agent of the state's labor law enforcement agencies." (*Ibid.*) The PAGA action thus "functions as a substitute for an action brought by the government itself." (*Ibid.*) In other words, the real party of interest, the one that recovers the lion's share of penalties on a judgment, is the State of California.

By forcing the state to forfeit its right to pursue a proxy representative action, the Court of Appeal's ruling contravenes *Waffle House*, which held that an arbitration agreement cannot bind a governmental enforcement agency situated as the State of California is here. (534 U.S. at 294.) As in *Waffle House*, the decision below "turns what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." (*Id.* at 295.) In fact, "the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." (*Id.* at 294.) Here, the State of California cannot be forced to relinquish its statutory authority to prosecute this action, either on its own or by proxy, based on a private agreement to which it was not party. Because

the Court of Appeal's decision directly contravenes the Supreme Court's *Waffle House* decision, review by the Court is necessary.

D. The Court of Appeal's Ruling Conflicts With The Strong Presumption Against Implied Preemption Of A State's Exercise of Its Police Powers

"States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State...minimum wage and other wage laws [are] examples." (*Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1198.) PAGA is one such statute "validly adopted under the police power." (*Home Depot U.S.A., Inc. v. Super. Ct.* (2010) 191 Cal.App.4th 210, 225.)

For statutes that implicate the state's police powers, courts 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." (*Wyeth v. Levine* (2009) 555 U.S. 555, 565.) Even in areas traditionally regulated by the federal government, the Court will adopt a strong presumption against implied preemption. In the same term that *Concepcion* was decided, the Court held that an Arizona statute that punishes employers for hiring illegal immigrants was not preempted by federal immigration law due to Arizona's interest in regulating employment. (*Chamber of Commerce of the United States v. Whiting* (2011) 131 S.Ct. 1968, 1973-74.) Like the U.S. Supreme Court, this Court has consistently required a showing of "clear and manifest purpose of Congress" to preempt an exercise of the state's police powers. (See, e.g., *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088 ["[C]onsumer protection laws are subject to the presumption against preemption"].)

There is no indication that the 1925 Congress sought to displace state statutes designed to enforce the state's labor laws, such as PAGA. Rather, in enacting the FAA, the "congressional intent [was to] place arbitration agreements 'upon the same footing as other contracts.'" (*Southland*, 465 U.S. at 16 fn.11 [quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)].) As noted above,

PAGA was promulgated to incentivize private litigants to more effectively enforce labor laws. Without the representative action mechanism, California's objective in creating this right of action to enforce labor laws "would be nullified." (*Brown*, 197 Cal.App.4th at 502.) Yet that is exactly the consequence of the decision below.

If *Iskanian* were permitted to stand, and implied preemption could be established without any demonstration of congressional intent to enter a field traditionally occupied by the state, the California legislature would be crippled. Its power to promulgate arbitration-neutral statutes to enforce not just its own labor laws but *any* of its laws would be severely undercut. The staggering implications arising from this decision require this Court's review.

II. THE COURT OF APPEAL'S RULING CONFLICTS WITH THIS COURT DECISONS BY EXPRESSLY "OVERRULING" *GENTRY*

A. The Court Of Appeal Disregards The FAA's Doctrine Protecting The Vindication Of Statutory Rights That Provided The Foundation For *Gentry*

Marking a dramatic shift in California law, the Court of Appeal departs from its sister courts by holding that "*Concepcion* conclusively invalidates *Gentry*." (Slip Op. at 9.) Other courts, including *Brown* and *Kinecta*, have affirmed the vitality of *Gentry*. (See *Brown*, 189 Cal.App.4th at 505; *Kinecta*, 205 Cal.App.4th at 516.) Reiterating that *Gentry* "remains the binding law in California," *Kinecta* found that *Gentry* "must be considered separately" from the *Discover Bank* rule overruled by *Concepcion*. (*Ibid.*) This is because "in contrast to the unconscionability analysis in *Discover Bank*, the rule in *Gentry* concerns 'the effect of a class action waiver on unwaivable statutory rights *regardless of unconscionability*.'" (*Ibid.*)

Gentry was explicitly founded on the Supreme Court's vindication of rights doctrine adopted by this Court in *Armendariz* and *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1079, which relied on *Gilmer* in holding that, when a party submits claims "'to their resolution in an arbitral, rather than a judicial,

forum,' **arbitration cannot be misused to accomplish a de facto waiver of these rights.**" (See *Gentry*, 42 Cal.4th at 456-458.)

Nonetheless, the Court of Appeal held otherwise, asserting without any analysis that the "far-reaching effect of the FAA" renders the "vindication of unwaivable statutory rights" doctrine irrelevant. (Slip Op. at 9-10.) Indeed, the Court of Appeal made no effort to distinguish *Mitsubishi*, *Gilmer*, and *Randolph*—seminal Supreme Court decisions that were extensively discussed in Petitioner's briefs and not overruled by *Concepcion*.

Indeed, the Supreme Court established, in the very first decision to hold statutory claims are arbitrable under the FAA, that statutory claims are arbitrable only "so long as the prospective litigant effectively may vindicate its statutory right of action in the arbitral forum." (*Mitsubishi*, 473 U.S.at 637.) This doctrine is the "standard by which arbitration agreements and practices are to be measured." (*Armendariz*, 24 Cal.4th at 99-100.) Following *Mitsubishi*, the Supreme Court has repeatedly emphasized that the court should ensure that a litigant will "effectively [be able to] vindicate [her] statutory cause of action in the arbitral forum..." before an arbitration agreement will be enforced. (*Gilmer*, 500 U.S. at 28.) *Mitsubishi*'s protections were also invoked in a case where the Supreme Court struck down an administrative prerequisite to a California Labor Code provision only after being assured that the plaintiff "relinquishes no substantive rights... California law may accord him." (*Preston v. Ferrer* (2008) 552 U.S. 346, 359.)

And in *Randolph*, the Court held that if the plaintiff had been able to prove that she would be "required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum," she would have been able to have the arbitration agreement set aside. (*Randolph*, 531 U.S. at 91-92.) The Second Circuit recently applied the *Randolph* analysis to invalidate a class action waiver that would have precluded consumers from vindicating their statutory rights if forced into individual arbitration. (*AmEx III*, 667 F.3d at 214.) *Randolph* thus remains in

force after *Concepcion* to invalidate arbitration agreements if, based on evidence, the plaintiff can demonstrate the she cannot vindicate her statutory rights in individual arbitration.[5] (*Ibid.*)

As demonstrated by the consistent application of the "vindication of rights" doctrine by the U.S. Supreme Court and the circuit courts to both state and federal claims, this doctrine is simply part and parcel of the FAA analysis to ensure that a party's substantive rights are protected. This body of law forms the foundation of *Gentry*. For the Court of Appeal to haphazardly overrule a higher court's ruling without contending with this still vital foundation is improper.

B. The Court of Appeal Erred In Holding That The FAA May Be Applied To Eviscerate Petitioner's Unwaivable Statutory Rights

Concepcion did not abrogate all that came before, or establish a new categorical rule "requir[ing] that all class-action waivers be deemed per se enforceable." (*AmEx III*, 667 F.3d at 214.) Rather, "since there is no indication...in *Concepcion* the Supreme Court intended to overturn either [*Randolph*] or *Mitsubishi*, both cases retain their binding authority." (*Id.* at 217.) So notwithstanding *Concepcion*, *Randolph* continues to empower courts to invalidate a class waiver if enforcement would extinguish statutory rights. (*Id.* at 219.) This is entirely consistent with *Concepcion*, which held that individual arbitration would not forfeit the plaintiffs' statutory rights in that case. In *Concepcion*, AT&T's unusually generous arbitration agreement provided double attorneys' fees and a $7,500 premium if the award exceeded AT&T's last offer.[6]

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[5] Other circuit courts adopted the same analysis and in the context of state statutory rights. For instance, then-Circuit Judge Roberts held that a party may "resist[] arbitration [if] the terms of an arbitration agreement interfere with the effective vindication of statutory rights" conferred by a ***state*** statute. (*Booker v. Robert Half Int'l, Inc.* (D.C.Cir. 2005) 413 F.3d 77, 81 [ensuring the vindication of rights under D.C. Code § 2-1401 *et seq.*]; see also *Anderson v. Comcast Corp.* (1st Cir. 2007) 500 F.3d 66, 71.)

[6] In an article evaluating *Concepcion* while the decision was pending, Professor Nagareda, whose work heavily influenced the reasoning of *Wal-Mart*

Concepcion expressly found that the plaintiffs' rights would be safeguarded by this procedure.[7] (*Concepcion*, at 1745, 1753.) The AT&T agreement's "terms... ensured [plaintiffs] could bring their claim... on an individual basis." (*Sutherland*, 2012 U.S.Dist.Lexis 5024, at *21.) *Concepcion* is thus limited to circumstances where upholding a class waiver would *not* forfeit substantive rights.

Here, Petitioner ***would*** forfeit statutory rights in arbitration. Petitioner submitted competent evidence demonstrating that his rights would be forfeited in individual arbitration (showing the small value of his claims and the difficulty in finding an attorney) sufficient for Respondent to concede that this evidence satisfied the *Gentry* test.[8] (Slip Op. at 19.) Yet the Court of Appeal brushed aside the evisceration of Petitioner's substantive rights by stating that, whatever the "sound policy reasons" are for protecting substantive rights, they are "insufficient to trump the far-reaching effect of the FAA." (*Id.* at 10.) Such a conclusion can only be correct if the protections of substantive rights articulated in *Mitsubishi* and its progeny had been abrogated. They were not.

Stores, Inc. v. Dukes (2011) 131 S.Ct. 2541, found that AT&T's generous arbitration agreement was **not** exculpatory, and would not have been found invalid under a *Randolph* analysis. Nagareda concluded that *Randolph* would be a more useful tool than *Discover Bank* in ferreting out and invalidating exculpatory waivers that implicate substantive rights. (See Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action* (2011) 86 Notre Dame L.Rev. 1069, 1124-1126.)

[7] The question presented in *Concepcion*—whether the FAA would preempt state law that would invalidate a class action ban where class wide treatment is "*not necessary* to ensure that the parties to the arbitration agreement are able to vindicate their claims"—also reflected the assumption that, in *Concepcion*, the plaintiffs' rights would be vindicated. (Petition for Writ of Certiorari, *AT&T Mobility, LLC v. Concepcion*, No. 09-893 (U.S. Jan. 25, 2010) 2009 U.S.Briefs 893, at *i (emphasis added).)

[8] The *Gentry* test is this Court's four-factor test to examine whether unwaivable statutory rights, such as to enforce overtime laws, can be vindicated in individual arbitration. (*Gentry*, 42 Cal.4th at 463.) By definition, when a party passes the *Gentry* test, he or she demonstrated that those rights cannot be so vindicated.

Indeed, *Concepcion* itself stressed that the FAA is intended to "place arbitration agreements ***on an equal footing*** with other contracts." (131 S.Ct. at 1745 [emphasis added].) Courts are not required to enforce ordinary contracts "according to their terms" without exception. For instance, overtime claims under the Labor Code cannot be waived in an ordinary contract. (See *Gentry*, 42 Cal.4th at 456.) The Supreme Court has never held the FAA requires lower courts to rubber-stamp all terms in an arbitration agreement. In holding otherwise, the Court of Appeal's ruling conflicts with a large body of Supreme Court precedent, warranting this Court's review.

III. THE COURT OF APPEAL'S REFUSAL TO FIND WAIVER DESPITE CLS'S DILATORY CONDUCT CONTRAVENES CALIFORNIA WAIVER LAW

A. The Facts In This Case Were Some Of The Most Compelling Presented In Any Reported Waiver Case

The Court of Appeal's overhaul of the waiver doctrine is no less radical than its FAA holding, creating conflicts with essentially every published Court of Appeal decision where waiver was found. Generally, waiver hinges on whether the party seeking to arbitrate delayed invoking his right to arbitrate, litigated the dispute before seeking to arbitrate, and caused prejudice to the other party. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) Underlying this doctrine is the principle that "in litigation as in life, you can't have your cake and eat it too." (*Guess?, Inc. v. Super. Ct.* (2000) 79 Cal.App.4th 553, 555.)

This case presents a particularly stark illustration of the prejudice arising from a party keeping its right to arbitrate in its back pocket—only to spring this right on the other party at an opportune moment. CLS actually abandoned a previously-filed motion to compel arbitration, having refused to participate in an evidentiary showing of the *Gentry* factors. Had CLS followed through on its original motion, Petitioner would have been assured of a forum, either arbitral or judicial. Had CLS prevailed, the action would have gone to arbitration. Had CLS

lost, then the parties would have been secure litigating in court. Instead, CLS was able to have it both ways, "preserving" its right to arbitrate by abandoning its petition and actively litigating the matter as a class action. Petitioner had no choice but to reasonably rely on this conduct demonstrating CLS's intent to litigate. And for the next three and a half years, Petitioner proceeded to litigate this matter in court as a class action in good faith.

Yet the Court of Appeal held that Petitioner **did not suffer prejudice** when CLS abruptly cut off litigation and moved to arbitrate on the eve of trial. By then, Petitioner had already expended considerable effort in certifying a class in reliance on CLS's litigation conduct. Indeed, the following chart illustrates just how exceptional the facts are here:

Case[9]	**Delay**	**Class Disc.**	**Class Certified**	**Merits Disc.**	**MSJ Filed**	**Waiver Found**
Roberts	5 months	Yes	No	No	No	Yes
Lewis	4 months	No	No	Yes	No	Yes
Guess?	4 months	n/a	n/a	Yes	No	Yes
Hoover	11-15 months	Yes	No	Yes	No	Yes
Continental Airlines	5 months	n/a	n/a	Yes	No	Yes
Augusta	6 months	n/a	n/a	Yes	No	Yes
Sobremonte	10 months	n/a	n/a	Yes	No	Yes
Burton	11 months	n/a	n/a	Yes	No	Yes
Adolph	6 months	n/a	n/a	Yes	No	Yes
Iskanian	**3 years**	**All**	**Yes**	**Yes**	**Yes**	**No**

[9] The cases not previously cited in this brief are: *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205; *Augusta v. Heehn & Associates* (2011) 193 Cal.App.4th 331; and *Sobremonte v. Sup. Ct.* (1998) 61 Cal.App.4th 980.

The Court of Appeal dismissed the significance of Petitioner's completion of all class discovery and certifying a class as "not particularly germane." (Slip Op. at 20.) This is supposedly because CLS would still have the right to bring a motion to de-certify the class. But the Court of Appeal overlooks both time and expense that goes into pursuing class certification, which is "rendered useless" in individual arbitration. (*Roberts*, 200 Cal.App.4th at 845.) Likewise in *Hoover*, the plaintiff's participation in class discovery was sufficient to establish prejudice, since "especially in class actions, the combination of ongoing litigation and discovery with delay in seeking arbitration can result in prejudice." (206 Cal.App.4th at 1205-1206.)

The facts here are considerably stronger than in *Roberts*, where the Court of Appeal found ample evidence of prejudice from the five-month delay between the time plaintiff propounded his class discovery and the time defendant moved to arbitrate. (200 Cal.App.4th at 845.) Moreover, the Court of Appeal conflated the waiver and futility analyses by finding no prejudicial delay due to CLS moving to "compel arbitration less than three weeks after the Supreme Court rendered its decision in *Concepcion*." (Slip Op. at 20.) However, the delay is not measured from the purported intervening act or change in law, but from the time the delaying party first began to act in a manner inconsistent with an intent to arbitrate. (See *Lewis*, 205 Cal.App.4th at 446.) Correctly analyzed, the delay was not three ***weeks***, but three ***years***, the length of time from when CLS's abandonment of its motion to compel arbitration and its subsequent renewal of that motion.

If permitted to stand, this decision will create widespread confusion in future cases on waiver, because the lower California courts will be presented with a paradoxical body of law where waiver was **not found** here on some of the most demonstrably prejudicial conduct documented, but **found** in a number of other cases detailing far less dilatory conduct.

B. The Court Of Appeal Improperly Found Futility When It Was Not Legally Impossible To Compel Arbitration Prior To *Concepcion*

The Court of Appeal also erred in crediting CLS's futility defense, triggering yet another conflict. Under the futility doctrine, a party's delay in seeking arbitration will be excused if, prior to an intervening act or circumstance (here, a change in law), it would have been impossible for that party to have compelled arbitration of those claims. (*Fisher v. AG Becker Paribas, Inc.* (9th Cir. 1986) 791 F.2d 691, 696-697.) In *Fisher*, which established the futility defense, prior to an intervening change in law, the defendant had absolutely ***no right*** to arbitrate all of its claims. (*Ibid.*)

This was not case with *Concepcion*. Both *Roberts* and *Lewis* held that, prior to *Concepcion*, there was no legal bar to class action waivers that would excuse a party's resistance in asserting its right to arbitrate. However, nowhere in the decision did the Court of Appeal analyze, distinguish, or discuss either case, the only published California cases on point.[10]

In *Roberts*, the court squarely rejected defendant's excuse that the issuance of *Concepcion* justified its five-month delay, commenting that "it should have promptly invoked arbitration *regardless* of the validity of the waiver provision in the arbitration provision.." (200 Cal.App.4th at 846, fn.10.) *Lewis* rejected the same futility defense "because it relies on a clearly erroneous interpretation" of pre-*Concepcion* law "as invalidating all arbitration agreements that include a class action waiver." (205 Cal.App.4th at 447.) *Lewis* explained that it was not futile to move to compel arbitration pre-*Concepcion*, singling out *Walnut Producers of*

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[10] Federal district courts have limited *Fisher* to the scenario in which there was **no** legal right to arbitrate before the intervening change in law, making them unavailable for defendants invoking *Concepcion* to excuse a belatedly-filed motion to compel arbitration. (See *Kingsbury v. U.S. Greenfiber, LLC* (C.D.Cal. June 29, 2012) 2012 U.S.Dist.Lexis 94854,*10-13; *In re Toyota Motor Corp. Hybrid Brake Mktng.* (C.D.Cal. 2011) 828 F.Supp.2d 1150, 1163.) *Iskanian* also conflicts with these cases.

California v. Diamond Foods, Inc. (2010) 187 Cal.App.4th 634, a pre-*Concepcion* decision granting a motion to compel individual arbitration.[11] (*Ibid.*)

The Court of Appeal signaled that it has no intention of revisiting its erroneous conclusions or confronting the contrary on-point holdings by summarily rejecting the Petition for Rehearing. Review is necessary to prevent this outlier decision, on the most compelling set of facts documented, from potentially doing away with the waiver doctrine altogether.

IV. THE COURT MUST CORRECT THE COURT OF APPEAL'S REFUSAL TO DEFER TO THE NLRB IN CONFLICT WITH THE SUPREME COURT'S *ABF FREIGHTSYSTEMS* AND *KAISER STEEL* DECISIONS, AMONG OTHERS

Finally, the Court of Appeal lacks authority to hold that the Board's decision on a matter of federal labor law is unlawful. Judicial review of decisions by the Board, the body authorized by Congress to interpret the NLRA, is exclusively committed to the federal courts of appeal. See 29 U.S.C. § 160(f). By "declin[ing] to follow the Board" (Slip Op. at 12), the Court of Appeal flouts Supreme Court's mandate that the Board's interpretation of the NLRA is entitled to the "greatest deference." (*ABF Freight System, Inc. v. NLRB* (1994) 510 U.S. 317, 324; see also *Chevron U.S.A. v. NRDC* (1984) 467 U.S. 837, 842-843.)

The stated excuse here is that the *Horton* Board's conclusions allegedly conflict with the FAA. (Slip Op. at 12.) But this explanation misapprehends the nature of the Board's holding and the Petitioner's contractual defense referencing the NLRA. In *Horton*, the Board analyzed a large body of consistent NLRB and court decisional law to conclude that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an

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[11] Petitioner had briefed both *Walnut Producers* and *Borrero v. Travelers Indem. Co.* (E.D.Cal. October 15, 2010) 2010 U.S.Dist.Lexis 114004, both of which enforced class action waivers despite *Gentry*, to demonstrate that it was possible to compel individual arbitration prior to *Concepcion*. (AOB at 14.) The decision omits any mention of these cases, the existence of which fatally undermines the futility finding.

arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." (*Horton*, 2012 NLRB LEXIS 11, *13-14.) An employer's interference with collective litigation, whether brought in court or in arbitration by seeking to enforce a mandatory collective action waiver, is thus an unfair labor practice infringing upon an employee's right to concerted activity. (*Id.* at *16.)

In short, a collective action waiver in a mandatory employment agreement violates the NLRA--a finding that a California court has no authority to reject. When a term violates federal law, it "may not serve as the foundation of any action, either in law or in equity," rendering it unenforceable in state court. (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 541.) Moreover, under Supreme Court authority, an agreement containing a term that violates the NLRA cannot be enforced. (See *Kaiser Steel*, 455 U.S. at 86 [holding that courts cannot enforce a contractual term that would constitute an unfair labor practice under NLRA if given effect].)

The Court of Appeal did not even attempt to grapple with *Horton*'s holding. Instead it mistakenly attacked the Board's ruling on arbitrability grounds, relying on the recent *CompuCredit* decision. However, *CompuCredit* concerned whether a particular statutory claim is intended by Congress to be inarbitrable, not whether a particular federal statutory right, like the NLRA-protected right to concerted activity, can be forcibly waived. (See *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 670-671.) Furthermore, because Petitioner does not assert an NLRA claim,[12] and does not need one for its contractual defense, *CompuCredit* is entirely inapposite.

The Court of Appeal does not, and cannot, demonstrate where the Board goes wrong in interpreting previous Board decisions. And because *Horton* is

[12] Such a claim would have been preempted under *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, 244.

about the validity of a contractual term, its authority is not limited to claims with the Board, but extends to all employment contracts that violate the NLRA. (*Horton*, at *38-39.) Mindful of the co-equal FAA, the Board was careful to harmonize its reasoned conclusions with the FAA's saving clause and the vindication of rights doctrine. (*Horton*, at *38-40.) Yet the Court of Appeal did not address this reasoning at all before insisting that the Board must yield to the FAA.

The reasoning of the Court of Appeal is circular. Starting with the premise that the FAA's preemptive force is unlimited in scope, this premise necessarily dictates that the FAA trumps all other laws, including a co-equal federal statute that protects employees' right to concerted activity as its "central purpose." By sweeping aside the NLRA through judicial fiat, the Court of Appeal violates the rule that "courts are not at liberty to pick and choose among congressional enactments." (*Morton v. Mancari* (1974) 417 U.S. 535, 551.) This misreading of *Horton* conflicts with longstanding Supreme Court precedent and must be corrected by this Court. Otherwise, the core protections accorded by the NLRA, which covers employees in California, will be forfeited.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant plenary review of the Court of Appeal's decision, or in the alternative, grant review and hold for the upcoming *Sanchez* case.

Dated: July 13, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.204(c)(1) and 8.490, the enclosed Appellant's Opening Brief was produced using 13-point Times New Roman type style and contains 8397 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: July 13, 2012

Respectfully submitted,

Initiative Legal Group APC

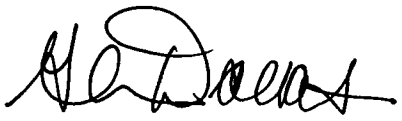
By: 

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EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ARSHAVIR ISKANIAN, Plaintiff and Appellant, v. CLS TRANSPORTATION LOS ANGELES, LLC, Defendant and Respondent.	B235158 (Los Angeles County Super. Ct. No. BC356521)

APPEAL from an order of the Superior Court of Los Angeles County. Robert Hess, Judge. Affirmed.

Initiative Legal Group, Raul Perez, Glenn A. Danas, Katherine W. Kehr for Plaintiff and Appellant.

Fox Rothschild, David F. Faustman, Yesenia M. Gallegos, Namal Tantula for Defendant and Respondent.

This is the second appeal in this case. We issued our opinion on the first appeal soon after the California Supreme Court decided *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), which held that a class waiver provision in an arbitration agreement should not be enforced if "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." (*Id.* at p. 450.) In our prior opinion, in light of *Gentry*, we directed the trial court to reconsider its order granting a motion to compel arbitration and dismissing class claims.

In this appeal, we are faced with an essentially identical order—defendant's renewed motion to compel arbitration was granted and class claims were dismissed. The legal landscape, however, has changed. In April 2011, in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S. Ct. 1740] (*Concepcion*), the United States Supreme Court, reiterating the rule that the principal purpose of the Federal Arbitration Act (FAA) is to ensure that arbitration agreements are enforced according to their terms, held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748.) Applying this binding authority, we conclude that the trial court properly ordered this case to arbitration and dismissed class claims.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff in this matter, Arshavir Iskanian, worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS), from March 2004 to August 2005. In December 2004, Iskanian signed a "Proprietary Information and Arbitration Policy/Agreement" (arbitration agreement) providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement provided for reasonable discovery, a written award, and judicial review of the award. Costs unique to arbitration, such as the arbitrator's fee, were to be paid by CLS. The arbitration agreement also contained a class and representative action waiver, which read: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in

any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person."

On August 4, 2006, Iskanian filed a class action complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner. In its March 2007 order granting CLS's motion to compel arbitration, the trial court found that the arbitration agreement was neither procedurally nor substantively unconscionable. *Gentry*, however, was decided soon after the trial court rendered its order, and we issued a writ of mandate directing the superior court to reconsider its ruling in light of the new authority.

Apparently, following remand, CLS voluntarily withdrew its motion to compel arbitration, making it unnecessary for the trial court to reconsider its prior order. The parties proceeded to litigate the case. On September 15, 2008, Iskanian filed a consolidated first amended complaint, alleging seven causes of action for Labor Code violations[1] and an unfair competition law claim (UCL) (Bus. & Prof. Code, § 17200 et seq.). Iskanian brought his claims as an individual, as a putative class representative, and (with respect to the Labor Code claims) in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (the PAGA).[2]

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1 These were: Labor Code sections (1) 510 and 1198 (unpaid overtime); (2) 201 and 202 (wages not paid upon termination; (3) 226, subdivision (a).(improper wage statements); (4) 226.7 (missed rest breaks); (5) 512 and 226.7 (missed meal breaks); (6) 221 and 2800 (improper withholding of wages and nonindemnification of business expenses); and (7) 351 (confiscation of gratuities).

2 The PAGA (Lab. Code, § 2698 et seq.) allows an aggrieved employee to bring an action to recover civil penalties for Labor Code violations on his or her own behalf and on behalf of current or former employees.

After conducting discovery, Iskanian moved to certify the class. CLS opposed the motion for class certification. By order dated October 29, 2009, the trial court granted Iskanian's motion, certifying the case as a class action.

On April 27, 2011, the United States Supreme Court decided *Concepcion*. Soon after, CLS renewed its motion to compel arbitration and dismiss the class claims, arguing that *Concepcion* was new law that overruled *Gentry*. CLS contended that, pursuant to *Concepcion*, enforcement of the arbitration agreement on its terms was required, and therefore the class and representative action waivers were effective. Iskanian opposed the motion, arguing among other things that *Gentry* was still good law and, in any event, that CLS had waived its right to seek arbitration by withdrawing the original motion. The trial court found in favor of CLS. On June 13, 2011, it entered an order requiring the parties to arbitrate their dispute and dismissing the class claims.

DISCUSSION

Iskanian appeals from the June 13, 2011 order. Although an order compelling arbitration ordinarily is not appealable (see *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591), the order here dismissed class claims. It therefore constitutes a "death knell" for the class claims, and accordingly is appealable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757.)

In the absence of material, conflicting extrinsic evidence, we apply our independent judgment to determine whether an arbitration agreement applies to a given controversy. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.) If the trial court's decision on arbitrability depended on resolution of disputed facts, we review the decision for substantial evidence. (*Ibid.*) The party opposing arbitration has the burden of showing that an arbitration provision is invalid. (*Franco v. Athens Disposal Co., Inc.*, *supra*, 171 Cal.App.4th at p. 1287.)

Here, the dispute is largely a question of whether the subject arbitration agreement—including its prohibition of class and representative claims—is enforceable

under the law. We therefore must independently review the applicable law to determine whether the trial court's order was correct.

I. The FAA and California arbitration law

Section 2 of the FAA makes agreements to arbitrate "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) This provision reflects a "'liberal federal policy favoring arbitration,' . . . and the 'fundamental principle that arbitration is a matter of contract.'" (*Concepcion, supra*, 131 S.Ct. at pp. 1742, 1745.) Arbitration agreements, accordingly, are enforced according to their terms, in the same manner as other contracts. (*Ibid.*) Not all arbitration agreements are necessarily enforceable, however. Section 2's "saving clause" permits revocation of an arbitration agreement if "generally applicable contract defenses, such as fraud, duress, or unconscionability" apply. (*Concepcion*, at p. 1746.)

California law similarly favors enforcement of arbitration agreements, save upon grounds that exist at law or in equity for the revocation of any contract, such as unconscionability. (Code Civ. Proc., § 1281; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.) Under California law, unconscionability, in the context of arbitration agreements as well as contracts in general, "'has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results." (*Id.* at p. 114.)

II. *Concepcion*

In *Concepcion, supra*, 131 S.Ct. 1740, the United States Supreme Court examined the validity of the "*Discover Bank* rule," a rule enunciated in the case *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 153 (*Discover Bank*), in which the California Supreme Court held: "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." Noting the deterrent effect of class actions ("'"class action is often the only effective way to halt and redress . . . exploitation"'") (*id.* at p. 156), the

California Supreme Court explained the reason for its holding in *Discover Bank* as follows: "[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (36 Cal.4th at pp. 162-163.) *Discover Bank* found that class arbitration was "workable and appropriate in some cases," and that class arbitration could be compelled when an otherwise valid arbitration agreement contained an unconscionable class waiver provision. (*Id.* at p. 172.)

The issue before the United States Supreme Court in *Concepcion* was whether the FAA prohibited a state rule, such as the one expressed in *Discover Bank,* that conditioned "the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." (*Concepcion, supra,* 131 S.Ct. at p. 1744.)

Concepcion identified two types of state rules preempted by the FAA. The first type was relatively simple to recognize: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Id.* at p. 1747.) The second type required a more nuanced inquiry. It occurred when a defense seemingly allowed by the FAA section 2 saving clause, such as unconscionability, was "alleged to have been applied in a fashion that disfavors arbitration." (*Concepcion,* at p. 1747.) Such a defense could run afoul of the rule "that a court 'may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" (*Ibid.*, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9.) Accordingly, the Supreme Court held: "Although *§ 2*'s saving clause preserves generally applicable contract defenses, nothing

in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion, supra,* 131 S.Ct. at p. 1748.)

On this basis, the *Concepcion* court found that the *Discover Bank* rule was preempted. The rule interfered with the "overarching purpose" of the FAA: "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Conception, supra,* 131 S.Ct. at p. 1748.)

III. *Gentry*

Concepcion expressly overturned *Discover Bank. Gentry*, the case which we previously directed the trial court to consider on remand, was not referenced in *Concepcion's* majority opinion. Iskanian submits that a portion of *Gentry* was directly based on *Discover Bank* and therefore is no longer valid law. He contends, however, that *Concepcion* was limited in scope, and that *Gentry* remains good law to the extent that it prohibits arbitration agreements from "interfering with a party's ability to vindicate statutory rights" through class action waivers. [3] Iskanian asserts that the trial court should have applied *Gentry* in ruling on CLS's renewed motion to compel arbitration, and that if it had done so it would not have dismissed the class claims.

As in this case, the plaintiff in *Gentry* brought a class action claim for violations of the Labor Code, even though he had entered into an arbitration agreement with class

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3 Iskanian also argues that *Concepcion* does not apply in state courts. Citing to Justice Thomas's dissent in *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 285-286 (*Allied-Bruce*), Iskanian surmises that if the *Concepcion* case had reached the United States Supreme Court from state court, Justice Thomas (who provided the fifth vote) would not have found preemption. This is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court (indeed, Justice Thomas asserted that the FAA has a broader preemptive effect than found by the majority). We also note that Justice Scalia, who authored the *Concepcion* opinion, joined in Justice Thomas's dissent in *Allied Bruce*. Furthermore, following *Concepcion*, the United States Supreme Court has granted petitions for writ of certiorari vacating judgments arising in state courts, and directing the courts to consider *Concepcion*. (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) __ U.S. __ [132 S.Ct. 496]; *Marmet Health Care Center, Inc. v. Brown* (2012) __ U.S. __ [132 S.Ct. 1201].)

waivers. The *Gentry* court, finding that the statutory right to receive overtime pay is unwaivable, concluded that under some circumstances a class arbitration waiver "would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws," and that such a waiver was contrary to public policy. (42 Cal.4th at pp. 453, 457.) The *Gentry* court laid out a four-factor test for determining whether a class waiver should be upheld: "when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" (*Id.* at p. 463.) We previously remanded the instant case to the trial court with instructions to reconsider its ruling in light of this "*Gentry* test."

Now, we find that the *Concepcion* decision conclusively invalidates the *Gentry* test. First, under *Gentry*, if a plaintiff was successful in meeting the test, the case would be decided in class arbitration (unless the plaintiff could show that the entire arbitration agreement was unconscionable, in which case the agreement would be wholly void). But *Concepcion* thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them. (*Concepcion*, *supra*, 131 S.Ct. at pp. 1750-1751.) The *Concepcion* court held that nonconsensual class arbitration was inconsistent with the FAA because: (i) it "sacrifices the principal advantage of

arbitration—informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; (ii) it requires procedural formality since rules governing class arbitration "mimic the Federal Rules of Civil Procedure for class litigation"; and (iii) it "greatly increases risks to defendants," since it lacks the multilevel review that exists in a judicial forum. (*Id.* at pp. 1751-1752; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 130 S. Ct. 1758, 1775 ["a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so"].) This unequivocal rejection of court-imposed class arbitration applies just as squarely to the *Gentry* test as it did to the *Discover Bank* rule.

Second, Iskanian argues that the *Gentry* rule rested primarily on a public policy rationale, and not on *Discover Bank*'s unconscionability rationale. While this point is basically correct, it does not mean that *Gentry* falls outside the reach of the *Concepcion* decision. *Gentry* expressed the following reason for its four-factor test: "[C]lass arbitration waivers cannot . . . be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims." (*Id.* at p. 464.) *Concepcion*, though, found that nothing in section 2 of the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," which are "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (131 S.Ct. at p. 1748.) A rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms.

Third, the premise that Iskanian brought a class action to "vindicate statutory rights" is irrelevant in the wake of *Concepcion.* As the *Concepcion* court reiterated, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (131 S.Ct. at p. 1753.) The sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-

reaching effect of the FAA, as expressed in *Concepcion*. *Concepcion*'s holding in this regard is consistent with previously established law. (See *Perry v. Thomas*, *supra*, 482 U.S. at p. 484 [finding that § 2 of the FAA preempts Lab. Code, § 229, which provides that actions for the collection of wages "may be maintained 'without regard to the existence of any private agreement to arbitrate'"]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11 [holding that the California Supreme Court's interpretation of the Franchise Investment Law as requiring judicial consideration despite the terms of an arbitration agreement directly conflicted with section 2 of the FAA and violated the Supremacy Clause]; *Preston v. Ferrer* (2008) 552 U.S. 346, 349-350 [holding, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA"].)

Because this matter involves analysis of the effect of a federal law, the FAA, on a state rule, we must follow the United States Supreme Court's lead. "'Decisions of the United States Supreme Court are binding not only on all of the lower federal courts [citation], but also on state courts when a federal question is involved . . . .'" (*Elliot v. Albright* (1989) 209 Cal.App.3d 1028, 1034; see also *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209 ["The determination by this court of [a federal] question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding"]; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 679 ["we must bow to the supremacy of the federal constitution in this matter as interpreted by the highest court of our country"].)

Accordingly, we find that the trial court here properly applied the *Concepcion* holding—and properly declined to apply the *Gentry* test—by enforcing the arbitration agreement according to its terms. The trial court correctly found that the arbitration agreement and class action waivers were effective, and ruled appropriately in granting the motion to compel arbitration and dismissing Iskanian's class claims.[4]

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4 Iskanian did not contend that the arbitration agreement was unconscionable on a basis governing *all* contracts, rather than a basis premised on the uniqueness of

IV. ***D.R. Horton***

After Iskanian's opening brief on appeal was filed, the National Labor Relations Board (NLRB or Board) issued a decision analyzing whether and how *Concepcion* and related authority apply to employment-related class claims. In his reply brief, Iskanian contends that this decision, *D. R. Horton* (2012) 357 NLRB No. 184 [2012 NLRB LEXIS 11] (*D. R. Horton*), mandates a finding that the class waiver in the CLS arbitration agreement cannot be enforced.

In *D.R. Horton*, the NLRB held that a mandatory, employer-imposed agreement requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class or collective claims) violated the National Labor Relations Act (NLRA) because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. (*D.R. Horton, supra*, 2012 NLRB LEXIS at p. *6.) Section 7 provides in part that employees shall have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." (29 U.S.C. § 157.) The NLRB found that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by *Section 7 of the NLRA*." (2012 NLRB LEXIS, at p. *9.)

If *D.R. Horton* only involved application of the NLRA we would most likely defer to it. (See *N.L.R.B. v. Advanced Stretchforming Intern., Inc.* (9th Cir. 2000) 233 F.3d 1176, 1180 ["We defer to the Board's interpretation of the NLRA if it is 'reasonable and not precluded by Supreme Court precedent'"]; *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 635 ["we, like the federal courts, defer to the statutory construction adopted by the agency responsible for enforcing the legislation"].) The *D.R. Horton* decision, however, went well beyond an analysis of the relevant sections of the NLRA. Crucially, the decision interpreted the FAA, discussing *Concepcion* and other

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arbitration. Our opinion, therefore, is not inconsistent with *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, 87-89, review granted March 21, 2012, S199119, in which Division One of this Court held that an arbitration provision was unconscionable for reasons that would apply to any contract in general

FAA-related authority in finding that the FAA did not foreclose employee-initiated class or collective actions. (See *D. R. Horton, supra*, 2012 NLRB LEXIS 11 at pp. *32-*55.) As the FAA is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB's analysis. "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." (*Association of Civilian Technicians v. F.L.R.A.* (9th Cir. 2000) 200 F.3d 590, 592; see also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* (2002) 535 U.S. 137, 144 ["we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"]; *N.L.R.B. v. Bildisco & Bildisco* (1984) 465 U.S. 513, 529, fn. 9 ["While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"].)

We decline to follow *D.R. Horton*. In reiterating the general rule that arbitration agreements must be enforced according to their terms, *Concepcion* (which *is* binding authority) made no exception for employment-related disputes. Furthermore, the NLRB's attempt to read into the NLRA a prohibition of class waivers is contrary to another recent United States Supreme Court decision. In *CompuCredit Corp. v. Greenwood* (2012) __ U.S. __, __ [132 S.Ct. 665, 668] (*CompuCredit*), plaintiff consumers filed suit against a credit corporation and a bank, contending that they had violated the Credit Repair Organizations Act (CROA) (15 U.S.C. § 1679 et seq.).[5] The plaintiffs brought the matter as a class action, despite having previously agreed to resolve all disputes by binding arbitration. The Supreme Court rejected their efforts to avoid arbitration, finding that unless the FAA's mandate has been "'overridden by a contrary congressional command,'" agreements to arbitrate must be enforced according to their terms, even when federal statutory claims are at issue. (*CompuCredit*, at p. 669, citing

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5 *D.R. Horton* was issued on January 3, 2012. *CompuCredit* was issued on January 10, 2012.

Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 226.) The Supreme Court held: "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." (*CompuCredit*, at p. 673.)

The *D.R. Horton* decision identified no "congressional command" in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. *D.R. Horton's* holding—that employment-related class claims are "concerted activities for the purpose of collective bargaining or other mutual aid or protection" protected by section 7 of the NLRA, so that the FAA does not apply—elevates the NLRB's interpretation of the NLRA over section 2 of the FAA. This holding does not withstand scrutiny in light of *Concepcion* and *CompuCredit*.

V. The PAGA claims

The arbitration agreement that Iskanian signed contains a waiver of both class claims and representative claims. In addition to bringing the case as a class action, Iskanian also brought his claims for Labor Code violations in a representative capacity under the PAGA. He contends that the claims brought pursuant to the PAGA are inarbitrable.

The PAGA authorizes an aggrieved employee to bring a civil action to recover civil penalties "on behalf of himself or herself and other current or former employees." (Lab. Code § 2699, subd. (a).) This provision has been interpreted as authorizing an aggrieved employee to recover civil penalties for the violation of his or her own rights, and "to collect civil penalties on behalf of *other current and former employees*." (*Franco v. Athens Disposal Co., Inc., supra*, 171 Cal.App.4th at p. 1300.)

Division Three of this Court has observed: "[T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties 'on behalf of himself or herself and other current or former employees' (§ 2699, subd. (a)), as an alternative to enforcement by the LWDA [Labor and Workforce Development Agency]. [¶] The Legislature declared its intent as follows: '(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail

to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.' (Stats. 2003, ch. 906, § 1, italics added.)" (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337-338.)

In summary, there is no question that the PAGA was enacted with the intent of promoting the public interest. The PAGA expressly provides for representative actions so that aggrieved employees can pursue violations that state agencies lack the funding to address. Iskanian contends that, given the clear intent of the Legislature to benefit the public by providing for representative actions under the PAGA, the "public right" of representative actions under the PAGA is unwaivable.

Iskanian's view is supported by Division Five's majority opinion in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*). *Brown* held that the *Concepcion* holding does not apply to representative actions under the PAGA, and therefore a waiver of PAGA representative actions is unenforceable under California law. (*Brown*, at p. 494.)

The claims at issue in *Brown* were similar to those here. The plaintiff sought civil penalties (on behalf of herself and others) pursuant to the PAGA for alleged Labor Code violations. The *Brown* majority noted the differences between class actions and PAGA representative actions. "The representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers that violate the Labor Code. . . . 'Restitution is not the primary object of a PAGA action, as it is in most class actions.' [Citation.] . . . Our Supreme Court has distinguished class actions from representative PAGA actions in holding that class action requirements do not apply to representative actions brought under the PAGA." (197 Cal.App.4th at p. 499.)

In finding that *Concepcion* did not apply to PAGA representative claims, the *Brown* majority wrote: "[*Concepcion*] does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code. As noted, the PAGA creates a statutory right for civil penalties for Labor Code violations 'that otherwise would be sought by state labor law enforcement agencies.' . . . This purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to [*Concepcion*], may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations. [*Concepcion*] does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law." (197 Cal.App.4th at p. 500.)

Respectfully, we disagree with the majority's holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.

In *Southland Corp. v. Keating*, *supra*, 465 U.S. at pages 10-11, the United States Supreme Court overruled the California Supreme Court's holding that claims brought under the Franchise Investment Law required judicial consideration and were not arbitrable. The United States Supreme Court held: "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration*." (*Id.* at p. 10, italics added.) The Court further clarified the reach of the FAA in *Concepcion* by holding: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion*, *supra*, 131 S.Ct at p. 1747.)

Iskanian argues that a PAGA action can only effectively benefit the public if it takes place in a judicial forum, outside of arbitration. Iskanian could be correct, but his point is irrelevant. Under *Southland Corp. v. Keating*, *supra*, 465 U.S. 1, and

Concepcion, *supra*, 131 S.Ct. 1740, any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA.

The Ninth Circuit Court of Appeals recently came to a similar conclusion in *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947 [2012 U.S. App. LEXIS 4736]. (*Kilgore*), in which it examined the continuing vitality of the California "*Broughton-Cruz* rule" in light of *Concepcion*. That rule was first expressed in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1083, which held that prohibiting the arbitration of Consumers Legal Remedies Act (CLRA) claims for injunctive relief did not contravene the FAA because the United States Supreme Court "has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." The rule was extended in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 307, to include claims for public injunctive relief under the UCL.

In *Kilgore*, the plaintiffs brought a class action alleging UCL violations. The district court declined to enforce arbitration agreements between the plaintiffs and defendants. The Ninth Circuit Court of Appeals reversed, finding that the *Broughton-Cruz* rule was preempted by the FAA. The court held that "the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right to a judicial forum—and thus whether that statutory claim falls outside the FAA's reach—applies only to *federal*, not state, statutes." (2012 U.S. App. LEXIS 4736 at p. *33.) The court observed that some members of the United States Supreme Court had expressed the view that section 2 of the FAA should be interpreted in a manner that would not prevent states from prohibiting arbitration on public policy grounds, but that view did not prevail. (2012 U.S. App. LEXIS 4736, at p. *34.) "We read the Supreme Court's decisions on FAA preemption to mean that, other than the savings clause, the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to

keep that *federal* claim out of arbitration proceedings . . . ." (2012 U.S. App. LEXIS 4736,. at pp. *34-*35.)

This reasoning is directly applicable here. Following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.

Therefore, giving effect to the terms of the arbitration agreement here, Iskanian may not pursue representative claims against CLS. The law prohibiting such claims applies to both Iskanian's PAGA claims[6] and his UCL claim.[7]

VI. The trial court's finding of no waiver.

As he did in the trial court, Iskanian argues on appeal that, regardless of the effect of *Concepcion*, CLS waived the right to arbitrate by failing to pursue it. Following our prior remand, CLS voluntarily withdrew its motion to compel arbitration. CLS only renewed the motion after the issuance of the *Concepcion* opinion. In granting CLS's renewed motion, the trial court found that CLS had not waived its right to arbitration.[8]

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6 Although Iskanian may not pursue a representative action, we find that he may pursue his individual PAGA claims in arbitration. Nothing in the arbitration agreement prevents Iskanian from bringing individual claims for civil penalties. We recognize that it has been held that a PAGA claim may not be pursued on an individual basis because of the language of Labor Code section 2699, subdivision (a), which allows an aggrieved employee to bring the action "on behalf of himself or herself *and* other current or former employees." (Italics added.) (See *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124.) We, however, read the function of the word "and" here in a different sense: its purpose is to clarify that an employee may pursue PAGA claims on behalf of others *only* if he pursues the claims on his own behalf. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141.) We do not believe that an individual PAGA action is precluded by the language of the statute.

7 Iskanian has sought only restitution and disgorgement in connection with his UCL claim, and not injunctive relief. His individual UCL claim is arbitrable. (See *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at p. 317.)

8 The trial court was not prevented by our prior opinion from granting the renewed motion by the "law of the case" doctrine, because the doctrine applies only when no

Under both the FAA and state law, a finding of waiver is disfavored. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Any doubts regarding a waiver allegation are to be resolved in favor of arbitration. (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25.) "State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver ([Code Civ. Proc.,] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes, supra,* at p. 1195.)[9]

There is no single test to determine whether a waiver of arbitration has occurred (*St. Agnes, supra,* 31 Cal.4th at p. 1195), though our Supreme Court has identified a number of factors that may properly be considered: "'"(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'" [Citation.]" (*Id.* at p. 1196.)

In cases where the facts are undisputed, a ruling on waiver of arbitration is subject to de novo review. (See *St. Agnes, supra,* 31 Cal.4th at p. 1196.) The determination of

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"intervening change in the law" has occurred. (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146.)

9 Waiver in this context is not used in the ordinary sense of a voluntary relinquishment of a known right, but rather as shorthand for the conclusion that a contractual right to arbitration has been lost. (*St. Agnes, supra,* at p. 1195, fn. 4.)

waiver is generally a question of fact, however, in which event the trial court's finding will be upheld if supported by substantial evidence. (*Ibid.*; *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946; *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 841.)

Reviewing the evidence and the history of this case, we find that the trial court did not err by declining to impose the disfavored penalty of waiver. Substantial evidence supported a finding that CLS acted consistently with its right to arbitrate. CLS originally moved to compel arbitration soon after the case was filed. It likely would have been successful in that effort if not for the issuance of *Gentry* while the case was on appeal.

Iskanian argues that despite its original attempt, CLS thereafter abandoned arbitration by withdrawing its motion to compel. CLS counters that pursuing arbitration at that point would have been futile. It concedes that Iskanian would have satisfied his burden under the *Gentry* test, and argues that prior to the *Concepcion* decision, any attempt to pursue arbitration would have been pointless. We agree with CLS that it did not act inconsistently with the right to arbitrate by failing to seek enforcement of the arbitration agreement when, as both parties agree, Iskanian would have satisfied his burden under *Gentry*. (See *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 [defendant did not act inconsistently with the contractual right to seek arbitration by moving to compel arbitration only after an intervening change in the law].)

Under *Gentry*, even if CLS was able to have the case heard in arbitration, it would have been required to arbitrate the case on a classwide basis (see *Gentry*, *supra*, 42 Cal.4th at p. 463), despite the class waivers in the parties' arbitration agreement. *Concepcion* represented controlling new law, as it clarified that arbitration agreements generally must be enforced according to their terms, and it prohibited the sort of unbargained-for class arbitration that could have been compelled by application of the *Gentry* test. (*Concepcion*, *supra*, 131 S.Ct. 1740, 1748, 1750-1751.)

In *Quevedo v. Macy's, Inc.*, *supra*, 798 F.Supp.2d 1122, the Central District of California addressed a waiver argument nearly identical to the one at issue here. In concluding that the movant did not waive arbitration by failing to pursue it prior to

Concepcion, the Central District court observed: "In light of these disadvantages of class arbitration, it is no surprise that Macy's declined to enforce its arbitration agreement, reasonably believing that, under *Gentry*, it would have to arbitrate Quevedo's claims on a class basis. If Macy's waived any right, it was the right to defend against Quevedo's class and collective claims in arbitration. Because Macy's did not believe that it had the option to defend against Quevedo's individual claims in arbitration, its failure to seek to enforce the arbitration agreement did not reflect any intent to forego that option." (*Id.* at pp. 1130-1131.) Similarly, after *Gentry* and prior to *Concepcion*, CLS had no reasonable basis to believe that only Iskanian's individual claims would be arbitrated. CLS, therefore, did not waive its right to arbitrate these individual claims by renewing its motion following the issuance of *Concepcion*.

Likewise, there is no basis to find that CLS unreasonably delayed in renewing its motion to compel arbitration. The issue of whether a party has sought arbitration within a reasonable time is a question of fact. (*Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 945.) CLS sought to compel arbitration less than three weeks after the Supreme Court rendered its decision in *Concepcion*. The trial court was certainly justified in not finding this an unreasonable delay.

Nor do we discern that Iskanian will suffer any undue prejudice by enforcement of the arbitration agreement. Merely participating in litigation does not result in waiver, and "courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1203.) The fact that Iskanian conducted discovery and submitted extensive briefing in connection with his class certification motion is not particularly germane since, even outside the context of competing arbitration agreements, class certification is not definitively final—defendants may make successive motions to decertify. (See *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1171-1172.) Furthermore, although prejudice may lie when the moving party's conduct has substantially undermined the public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution (*St. Agnes*, at p. 1204), those concerns are not present here. CLS has not sought to

undermine the efficient nature of arbitration; rather, it has quickly sought arbitration when presented with the opportunity.

Moreover, we see no reason to suspect that CLS intentionally delayed seeking arbitration to gain some unfair advantage. Prejudice may occur when a party uses the judicial process to obtain discovery that it would not be able to get in arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) But that does not appear to be an issue for concern here—the parties' arbitration agreement allows for reasonable discovery. In addition, it appears from the record that the parties have litigated very little, if any, of the merits of Iskanian's claims. Thus, arbitration still stands as the more efficient venue for addressing the claims. (See *Ibid.*)

In sum, the evidence amply supports a finding that CLS did not waive its right to arbitration.

DISPOSITION

The June 13, 2011 order granting defendant's motion to compel arbitration and dismissing class claims is affirmed.

CERTIFIED FOR PUBLICATION.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.

Raul Perez
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Division 2
ARSHAVIR ISKANIAN,
Plaintiff and Appellant,
v.
CLS TRANSPORTATION OF LOS ANGELES,
Defendant and Respondent.
B235158

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1800 Century Park East, 2nd Floor, Los Angeles, California 90067.

On **July 13, 2012**, I served the document(s) described as:

1) **PETITION FOR REVIEW**

on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [ ] to interested parties as follows [or] [✓] as stated on the attached service list:

SEE ATTACHED SERVICE LIST

[✓] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[ ] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

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

Executed this **July 13, 2012,** at Los Angeles, California.

Rashan R. Barnes
Type or Print Name

Signature

1800 CENTURY PARK EAST, SECOND FLOOR, LOS ANGELES, CALIFORNIA 90067

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