No. S204032

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Resolution of the appeal below should have been simple. The *Iskanian* court only had to address CLS's waiver of arbitration, which would have compelled reversal. Instead, the *Iskanian* court sought to overhaul the arbitration landscape in California by expressly "overruling" this Court's decision in *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, and rejecting the two leading post-*Concepcion*[1] California appellate decisions regarding PAGA. In its answer, CLS does not meaningfully dispute that these conflicts exist, nor does it persuasively explain why the widespread disarray engendered by the decision below should not be settled by plenary review.

CLS ultimately resorts to the blunderbuss notion that *Concepcion* changed "everything." "Everything" apparently includes not only California law, but separate lines of United States Supreme Court authority as well the authority of the state itself to protect its employees by promulgating arbitration-neutral rules and schemes. A fair reading of *Concepcion* would distill and harmonize its actual holding within the larger body of FAA and pre-emption jurisprudence. Eschewing this restrained approach, the *Iskanian* court instead operated without interpretative constraints to reach the broadest possible reading of *Concepcion*. This conclusion must be reviewed—and ultimately rejected.

Indeed, plenary review of this highly publicized decision, which covers a wide breadth of arbitration issues, would resolve a number of extant conflicts in one stroke. CLS contends that review is unnecessary because the matter will eventually sort itself out, with *Iskanian* ultimately emerging as the controlling authority. Allowing these issues to percolate without Supreme Court guidance would be a mistake. In fact, this would only cause greater confusion because the *Iskanian* court's superficial treatment of complex legal issues provides little guidance.

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[1] (*AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740.)

For instance, a trial court faced with a motion to compel arbitration and to enforce a representative action waiver would be confused by the conflicting holdings of *Brown v. Ralphs Grocery Co.*[2] and *Iskanian*, particularly since *Iskanian* mischaracterizes the primary issue (and the *Brown* decision) as being about arbitrability of PAGA claims. Arbitrators will also encounter greater confusion when faced with whether PAGA claims must be arbitrated on a representative basis, as arbitrability is plainly irrelevant once the parties are already in the arbitral forum. Thus, *Iskanian*'s erroneous **reasoning** would only lead lower courts further astray.

Illustrative is one recent district court opinion purporting to follow *Iskanian*, which **dismissed** a plaintiff's PAGA claims **outright**. (See *Luchini v. Carmax, Inc.* (E.D.Cal. July 23, 2012) 2012 U.S.Dist.Lexis 102198, *45.) As *Luchini* demonstrates, defendants are invoking *Iskanian* to try to wipe out PAGA (or other statutory) claims altogether. That *Iskanian*'s reasoning would countenance such radical conclusions ultimately places the court's other analytic failures in stark relief. First, the *Iskanian* court failed to consider that representative action waivers operate as an impermissible cap on statutorily-mandated representative PAGA penalties. Second, *Iskanian* failed to acknowledge that the real party in interest, the State of California, cannot be forced into arbitration via a private agreement. Third, by holding that the state's arbitration-neutral exercise of its police powers is pre-empted by an unrelated federal statute, *Iskanian* eliminates the state's authority to police its citizens. *Iskanian* compounds these errors by devising its own fictitious PAGA statute in which its representative aspect is entirely optional. The actual PAGA statute states that the action must be brought by an aggrieved employee "on behalf of himself... **and other current and former employees**." (Labor Code § 2699(a).) A fulsome discussion of these issues requires this Court's review.

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[2] ((2011) 205 Cal.App.4th 497.)

Moreover, the *Iskanian* court did not examine *Gentry*'s roots in the still-vital "vindication of statutory rights" doctrine. By focusing solely on dicta from *Concepcion*, and ignoring the directly controlling *Mitsubishi Motors Corp. v. Soler Chysler-Plymouth* (1985) 473 U.S. 615 and *Green Tree Fin. Corp.-Alabama v. Randolph* (2000) 531 U.S. 79 ("*Randolph*") decisions, the *Iskanian* court has impermissibly usurped the role of U.S. Supreme Court. (See *Rodriguez de Quijas v. Shearson/Am. Ex.* (1989) 490 U.S. 477, 484.)

CLS's defense of *Iskanian*'s waiver holding only underscores the errors below. Notably, CLS cannot provide **any** support for *Iskanian*'s "no prejudice" finding given that other California appellate courts have found prejudice on far less compelling facts. CLS also undermines *Iskanian*'s application of the federal futility doctrine by failing to identify any purportedly "new right" created by *Concepcion*—not surprising as it created no such rights. Without plenary review, the decision below, flouting the entire body of case law on waiver, would be cited by every dilatory defendant looking for a last-ditch escape through arbitration.

Finally, *Iskanian*'s erroneous conclusions regarding employees' right to concerted activity protected by NLRA Section 7 require plenary review, as courts below cannot be permitted to follow *Iskanian*'s misapprehension of the *D.R. Horton* ruling.

ARGUMENT

I. *CONCEPCION* CANNOT BE CONSTRUED TO OVERRULE PRIOR SUPREME COURT DECISIONS OR LONGSTANDING FAA PRINCIPLES THAT IT DID NOT ADDRESS

At the heart of this dispute is whether *Concepcion* can be construed to overrule Supreme Court doctrines that were expressly precluded from that Court's consideration. At the outset, *Iskanian* correctly notes that the actual issue "before the [*Concepcion* Court] was whether the FAA prohibited a state rule... that conditioned the 'enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures.'" (Slip op. at 6, quoting *Concepcion*, 131 S.Ct. at p. 1744.)

In *Concepcion*, the Court overruled California's *Discover Bank* rule not because it invalidated exculpatory contracts (the rule's avowed purpose), but because it "swept too broadly, [] subjecting whole classes of claims to mandatory class procedures." (*Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1214 [holding that *Concepcion* "leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimants from vindicating her [state] statutory cause of action."].) Indeed, *Discover Bank* guaranteed the availability of the class action procedure even for actions where the plaintiff was likely to receive "**full or even excess** payment... without the need to arbitrate or litigate." (*Concepcion*, 131 S.Ct. at 1745 [emphasis added].)

The effect of *Discover Bank* was to favor California's policy preference for class procedures **over** contrary contractual terms. Thus, while the *Concepcion* plaintiffs could have fully vindicated their rights through individual arbitration, they insisted on class procedures guaranteed by the now-abrogated *Discover Bank* rule.

By contrast, when an agreement actually prevents an individual from vindicating her statutory rights, the controlling authorities are *Mitsubishi* and *Randolph*. (See *In re American Express Litigation, Italian Colors Rest.* (2d Cir.

Feb. 1, 2012) 667 F.3d 204, 214 ("*AmExIII*").) *Concepcion* simply cannot be construed to overrule prior lines of authority that aim to protect substantive rights from forfeiture, when the Court expressly precluded that issue from consideration. (See Petition at 20, fn.7.)

Iskanian erred by departing from *Concepcion*'s actual holding by implicitly abrogating the Supreme Court's many decisions protecting substantive rights from evisceration. Under *Iskanian*, the mere transfer of claims from court to arbitration would eviscerate substantive rights, include the representative right of action pursuant to PAGA as well the unpaid wages claims that, in some instances, may not be vindicated through individual arbitration as held in *Gentry*. This initial misreading of *Concepcion* drives the *Iskanian* court's errors as it attempts to refashion California arbitration law.

II. BY HOLDING THAT PAGA IS "PREEMPTED" BY THE FAA, THE COURT OF APPEAL REACHED A CONCLUSION FAR BEYOND WHAT *CONCEPCION* PERMITS

A. CLS Merely Repeats The Court Of Appeal's Error By Casting The Issue As One Of Arbitrability Rather Than Enforcement Of A Complete Waiver Of A Substantive Right

Review is needed to settle a direct legal conflict affecting a wide swath of California workers: can a representative action waiver be enforced to transform a PAGA enforcement action into an individual claim? In derogation of the plain statutory text, the *Iskanian* court answered "yes." The decision below muddles the issue by casting *Brown* as having categorically exempted PAGA claims from arbitration, despite *Brown* expressly having held otherwise. (See *Brown*, *supra*, 197 Cal.App.4th at 502 ["[E]ven if a PAGA claim is subject to arbitration, it would not have the attributes of a class action..."].)

The distinction is important. *Brown* invalidated a representative action waiver because such waivers interfered with the statute's purpose and design. PAGA is a state enforcement action by proxy designed to "deter and punish employer practices that violate the rights of numerous employees under the Labor

Code." (*Brown*, *supra*, 197 Cal.App.4th at 502.) Thus, "[i]f the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce labor laws would, in large part, be nullified." (*Id.*) By its holding, the *Brown* court did not rule that PAGA claims would be necessarily exempt from arbitration, only that PAGA cannot be reconfigured as an "individual" claim in whichever forum it is brought.

CLS, like the *Iskanian* court, relies on *Kilgore v. Keybank N.A.* (9th Cir. 2012) 673 F.3d 947 to further confuse the issue. *Kilgore* abrogated a state law rule exempting certain categories of claims (public injunction remedies) from arbitration while neither PAGA nor *Brown* implicates arbitrability. (See Answer at 7.) Although *Brown* explicitly made this distinction,[3] this persistent confusion between arbitrability and enforcement of illegal waivers must be clarified by this Court. If plenary review is not granted, *Iskanian*'s erroneous reasoning would undoubtedly lead many more courts to do what the Supreme Court has repeatedly insisted cannot be done via arbitration: force a party to "forgo the substantive rights afforded by statute."[4] (*Mitsubishi*, *supra*, 473 U.S. at 628.)

In any event, by enforcing CLS's representative action waiver, *Iskanian* set up a direct conflict with *Brown*. CLS tries to reconcile this conflict by inexplicably claiming that because "*Iskanian* and *Brown* were both decided by division five of the Second District Court of Appeal...[t]he purported 'conflict'...is illusory and inconsequential." (Answer at 6.) But *Iskanian* was

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[3] *Brown* clearly acknowledged that its holding did **not** concern arbitrability of PAGA claims. (See *Brown*, *supra*, 197 Cal.App.4th at pp.500-01 ["*Broughton* and *Cruz* dealt with arbitrability, not with class and representative action waivers."].)

[4] A PAGA litigant's substantive rights are forfeited by any order that dismisses representative PAGA claims while forcing PAGA claims to be arbitrated on an "individual" basis. However, at least one court following *Iskanian* has gone even further by foreclosing a PAGA action from being brought in arbitration altogether. (See *Luchini*, *supra*, at *45.)

decided by Division **Two** of the Second Appellate District, while *Brown* was decided by Division Five. Aside from this bald misstatement, CLS asserts, in circular fashion, that *Brown* relies on *Gentry* which "was overruled by *Concepcion*." (*Id.*) Finally, CLS attempts to distinguish the contract at issue in *Brown* by misrepresenting its agreement as "voluntary," a bizarre characterization given that the Agreement's terms bind all employees, signatories and non-signatories alike. (See Petition at 9.) CLS can muster no persuasive arguments to support *Iskanian*'s faulty reasoning regarding PAGA.

B. The Court of Appeal Erred In Holding That Representative Action Waivers Are Enforceable

1. PAGA Is an Unwaivable Substantive Statutory Right

CLS also suggests PAGA claims are not substantive and therefore do not merit protection under *Mitsubishi*. In support, CLS points to *Amalgamated Transit Union Local 1756 v. Super. Ct.* (2009) 46 Cal.4th 993. (Answer at 5.) However, *Amalgamated* only held that the right to sue under PAGA is not a transferable property right (*id.* at 999), and does not hold that PAGA creates a "wholly procedural right." (*Mendez v. Tween Brands, Inc.* (E.D.Cal. July 1, 2010) 2010 U.S.Dist.Lexis 66454 at *7.) Rather, PAGA is substantive because it "serves the important function of protecting the 'public interest'...[and] [s]uch a statute is distinct in purpose and function from a purely procedural rule." (*Id.* at *8.)

Mendez's holding has been adopted by other district courts addressing this very issue. These courts have held that "PAGA transcends the definition of what is simply procedural." (*Moua v. IBM* (N.D. Cal. Jan. 31, 2012) 2012 U.S.Dist.Lexis 11081, *12; see also *Willner v. Manpower Inc.* (N.D. Cal. May 3, 2012) 2012 U.S.Dist.Lexis 62227, *21-22 [summarizing the body of cases and concluding that PAGA confers substantive rights].) The statute's "plain purpose is to protect the public interest through a unique private enforcement process." (*Moua, supra*, at *12.) Thus, "[c]omparing PAGA to a statute or rule of procedure that merely directs the fine details of litigation unfairly minimizes this purpose."

(*Ibid.*)

Furthermore, PAGA creates a unique representative penalties regime, which is substantive. (See *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 63 [holding that the right to punitive damages is "an important substantive right" in the pre-dispute waiver context].) Tellingly, CLS does not even address these cases directly on point.[5] Taken together, the right to pursue PAGA claims is an unwaivable substantive right that cannot be eviscerated by its transfer to an arbitral forum.

2. PAGA Embodies the Substantive Right to Represent the State to Enforce the Labor Code and Recover Civil Penalties on Behalf of Current and Former Employees

Labor Code § 2699(a) defines a PAGA action as one "brought on behalf of himself or herself and other current or former employees." *Iskanian* undertakes a counter-textual[6] reading of this language, concluding that PAGA provides an individual action with an option to bring claims on behalf of others. (See Answer at 9.) Unable to explain or justify such a gross textual misreading, CLS merely states that *Iskanian*'s conclusions caused "no disorder." (*Id.*) But aside from the direct conflicts this holding creates with *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119 and numerous district courts,[7] CLS overlooks the logical connection between the enforcement of a representative action waiver and whether

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[5] CLS does not dispute that PAGA is unwaivable, since "a law established for a public reason cannot be contravened by a private agreement." (Civ. Code § 3513.)

[6] In his treatise on legal interpretation, Justice Scalia instructs that "the conjunction *and* (if there are two elements in the construction) []entails an express or implied 'both' before the first element." (See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at p. 117.) This interpretative principle applies here, and the word "and" between two elements—the aggrieved employee **and** former or current employees—must be read to include both.

[7] (See Petition at 14 fn.4; see also *Casida v. Sears Holding Corp.* (E.D. Cal. Jan. 26, 2012) 2012 U.S. Dist.Lexis 9302, *9 [holding that a PAGA claim brought individually must be dismissed].)

PAGA can exist as an individual claim. As *Reyes* held, PAGA is an enforcement action that must be brought on behalf of others. (*Id.* at 1123.) Thus, a representative action waiver necessarily interferes with this representative aspect of PAGA. Such a waiver, which dramatically reduces an employer's liability, also strips the action of its very purpose: to achieve maximum compliance with Labor Laws through deterrence. (See *Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, 1302.) A representative action waiver is unenforceable *because* PAGA is inherently representative by design. To force a PAGA litigant to bring an "individual" PAGA claim is to effectively nullify the statute. (See *Brown*, *supra*, at 502.)

In short, this irreconcilable conflict as to whether PAGA actions are intrinsically representative must be settled before the *Brown-Iskanian* conflict can be resolved.

3. Representative Action Waivers Operate as a Cap on Statutory Remedies and Cannot Be Enforced

CLS has no meaningful response to Petitioner's argument that representative action waivers operate to cap the statutory remedies provided by Labor Code § 2699(g)(1). This statute measures penalties by reference to Labor Code violations committed against "current and former employees"—penalties that would be capped at individual penalties if a waiver were enforced. Such a result plainly violates this Court's express prohibition against limitations on statutory remedies. (See *Armendariz v. Foundation Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83, 100.)

Under the FAA, if the arbitration clause "acted as a prospective waiver of a party's right to pursue statutory penalties for [statutory] violations, we would have little hesitation in condemning the agreement as against public policy." (*Mitsubishi*, *supra*, at 647.) A representative action waiver, operating as a remedies limitation, directly contravenes *Mitsubishi* and cannot be enforced.

C. The Court of Appeal Erred By Compelling Arbitration Of Claims Held By A Non-Signatory To The Arbitration Agreement

The Supreme Court has held that an enforcement agency, the EEOC, cannot have its statutory remedies limited by an arbitration agreement to which it is not a party. (See *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 ["*Waffle House*"].) CLS tries to distinguish *Waffle House* factually, noting that the EEOC does not stand in the shoes of the employee. (Answer at 10.) But CLS did not address either the contractual issues discussed in *Waffle House*, or the Court's reasoning in balancing an agency's enforcement prerogatives with the FAA.

Waffle House embodies the common law principle "that only parties to an arbitration agreement can be required to arbitrate." (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 23.) Here, the state is the true stakeholder. This is because in a PAGA suit, the employee-plaintiff simply acts a proxy for the state. (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 980.) As the state also recovers the lion's share of penalties, the real party in interest in a PAGA suit is plainly the state, which, as a non-signatory, cannot have its claims compelled to arbitration. (*Waffle House*, *supra*, at 293.) Moreover, as agents may not cause arbitration agreements to be enforced against non-signatory principals, the state cannot be bound by any agreement entered by its agent, the aggrieved employee, without its consent. (See *Britton v. Co-Op Banking Group* (9th Cir. 1993) 4 F.3d 742.)

Just as importantly, *Waffle House* held that courts cannot give greater consideration to an agreement between private parties than to the EEOC's statutory function as an enforcer of public rights, as that would undermine the "detailed enforcement scheme" at issue. (*Waffle House*, *supra*, at 295.) *Waffle House* expressly rejected any construction of the arbitration agreement that would operate "as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and whatever forum the EEOC sees fit." (*Id.* at 295 fn.10.) Thus, *Waffle House* exposes the fallacy that the sole imperative

for courts under the FAA is to mechanically enforce arbitration agreements "according to their terms." Rather, when the FAA's policies implicate public rights enforcement, the court must carefully consider and balance these countervailing policies. (*Id.* at 295.)

D. The Court of Appeal's "Preemption Of PAGA" Conclusion Is Unsupportable

Neither CLS nor the *Iskanian* court meets the high threshold required to establish that "PAGA is preempted by the FAA." (Answer at 10.) In its answer, CLS confuses different categories of preemption, and fails to grasp that PAGA—a straightforward, arbitration-neutral exercise of the state's police powers—cannot be preempted absent manifest congressional intent. (*Wyeth v. Levine* (2010) 555 U.S. 555.) The FAA operates to preempt rules that target arbitration or "stand as an obstacle to arbitration." (*Concepcion*, 131 S.Ct. at 1748.) PAGA does neither; it is simply a representative enforcement scheme that must go forward as designed in court or in arbitration. *Concepcion* cannot be expanded to vitiate the state's authority to enforce its own laws.

III. THE COURT OF APPEAL MISAPPREHENDS STARE DECISIS AND THE SUPREMACY CLAUSE IN "OVERRULING" *GENTRY*

Without addressing any of the *Gentry* arguments raised in the Petition, CLS advances only one curious point: that *Iskanian*'s flouting of stare decisis is justified because a handful of decisions from federal district courts have also reached the same result. (See Answer at 4.) Those decisions do not excuse the *Iskanian* court's failure to follow this Court's commands. (See *Auto Equity Sales, Inc. v. Super. Ct.* (1962) 57 Cal.2d 450, 455.)

The Supremacy Clause also does not authorize this result. As the U.S. Supreme Court has admonished, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overturning its own decisions." (*Rodriguez de Quijas, supra*, 490 U.S. at 484.) This principle directly applies

here. While the Court of Appeal dismisses the "vindication of rights doctrine [as] irrelevant" (slip op. at 9), *Concepcion* never addressed this firmly established FAA doctrine, much less overruled *Mitsubishi* and *Green Tree*, as explained above. (See *AmEx III*, 667 F.3d at 214.) *Gentry* follows from this line of cases.

CLS does not dispute that *Gentry*'s lineage descends from *Armendariz*, which adopted the *Mitsubishi/Gilmer* principle, and *Little v. Auto Stiegler* (2003) 29 Cal.4th 1064. (See Petition at 17-18.) Indeed, *Little* harmonized *Armendariz* and *Green Tree*, which both support the view that "arbitration costs can present significant barriers to the vindication of statutory rights." (*Id.* at 1084.)

Finally, the confusion regarding *Gentry* needs to be settled. Just recently, the court in the Fourth Appellate District found that, while *Gentry* was likely overruled by *Concepcion*, it must "adhere to *Gentry* until the California Supreme Court has the opportunity to review the decision." (*Truly Nolen of Am. v. Super. Ct.* (Aug. 9, 2012) 2012 Cal.App.Lexis 871, at *33-34.) The uncertainty regarding *Gentry*'s vitality requires this Court's intervention.

IV. THE COURT OF APPEAL'S NULLIFICATION OF THE WAIVER DOCTRINE REQUIRES REVIEW

A. CLS Fails To Reconcile *Iskanian* With Recent Waiver Decisions Rejecting Its Approach

It is no surprise that CLS cannot reconcile the vast body of waiver decisions that dictate a different result. It is simpler for CLS to assert, without support, that "waiver is highly disfavored." (See Answer at 11.) Yet numerous courts have found waiver under facts far less prejudicial to the plaintiff than here. (See Petition at 22.) In contrast, neither CLS nor the *Iskanian* court could locate a single published **California** decision that rejects waiver on analogous grounds.

CLS unsuccessfully attempts to supply the analysis lacking in the *Iskanian* opinion. First, CLS argues that *Gentry* "paralyzed its ability to arbitrate" without noting that it abandoned its motion before evidence could be submitted. (Answer at 12.) Then, conceding that the *Gentry* test did not legally foreclose arbitration, CLS explains that "[b]oth Petitioner and Respondent agree that Petitioner would

have easily met the *Gentry* test." (*Id.*) But the parties' respective assessments of the evidence at hand are irrelevant—the trial court determines whether a party meets its evidentiary burden under *Gentry*.

CLS simply made a tactical decision to litigate. While CLS argues that "litigation does not constitute prejudice" (Answer at 13), it notably does not dispute the holdings of *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193 and *Kingsbury v. U.S. Greenfiber, LLC* (C.D.Cal. June 29, 2012) 2012 U.S.Dist.Lexis 94854, all of which hold that a defendant conducting class discovery and contested certification motions will cause prejudice by compelling individual arbitration. *Iskanian* erred in not finding prejudice under these extreme facts, and its finding cannot be reconciled with other waiver cases.

B. CLS Undermines The Court Of Appeal's Erroneous Invocation Of The Futility Defense

As for the futility defense, CLS fails to identify any new right that springs from *Concepcion*, despite having asserted that a new right was born. (Answer at 14.) Moreover, CLS acknowledges that *Borrero v. Travelers Indem. Co.* (E.D.Cal. Oct. 15, 2010) 2010 U.S.Dist.Lexis 114004 "determined that the plaintiff did not meet the *Gentry* test," which fatally undermines its own position. (Answer at 17.) Since *Borrero* demonstrates that *Gentry* did not categorically foreclose a party from successfully compelling arbitration, no new "right to arbitrate" can be created even if *Gentry* were extinguished.

Finally, acknowledging the conflict represented by *Roberts* (which the *Iskanian* court failed to do), CLS unsuccessfully attempts to distinguish the decision. *Roberts* held that *Concepcion* did not create any new rights that excused a plaintiff's delay to compel arbitration until after *Concepcion* was issued. (*Roberts*, *supra*, at 846.) *Roberts* had also rejected the notion, adopted by *Iskanian*, that a party's delay should be calculated from when *Concepcion* was issued. (*Id.* at 846 fn. 10.) Finally, *Roberts* found that "bad faith" is not

dispositive and not material. (*Id.* at 846.) Ultimately *Roberts* comports with the reasoning of both state and federal waiver cases while *Iskanian* represents a stark departure. Plenary review is required to save the waiver doctrine from *Iskanian*'s attempted nullification.

V. THE COURT SHOULD GRANT REVIEW TO CORRECT THE COURT'S MISREADING OF *D.R. HORTON*

This Court should also review the Court of Appeal's rejection of *D.R. Horton* (N.L.R.B. Jan. 3, 2012) 357 NLRB No. 184. The decision below misapprehends the nature of *Horton*'s ruling and the NLRA defense. Although *Horton* creates a defense to contract enforcement, *Iskanian* misreads it to mean that it exempted NLRA claims from arbitration. Relying on *CompuCredit Corp. v. Greenwood* (2012) 132 S. Ct. 665, an entirely inapposite decision holding that a congressional intent to exempt arbitrability of claims is required, CLS reiterates *Iskanian*'s errors. Employees' protections under Section 7 of the NLRB will be forfeited if *Iskanian*'s bald misreading of *Horton* is permitted to stand.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant plenary review of the Court of Appeal's decision.

Dated: August 16, 2012

Respectfully submitted,

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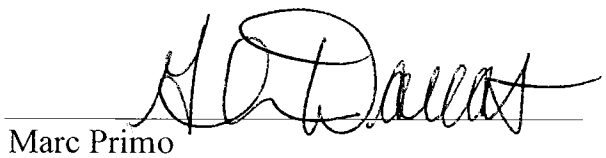
CERTIFICATE OF WORD COUNT

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 4,187 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: August 16, 2012

Respectfully submitted,

Initiative Legal Group APC

By: 

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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 **August 16, 2012**, I served the document(s) described as:

1) **PETITIONER'S REPLY IN SUPPORT OF 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 **August 16, 2012,** at Los Angeles, California.

Rashan R. Barnes
Type or Print Name

Signature

INITIATIVE LEGAL GROUP APC
1800 CENTURY PARK EAST, SECOND FLOOR, LOS ANGELES, CALIFORNIA 90067

SERVICE LIST

Yesenia Gallegos, Esq. David Faustman, Esq. FOX ROTHSCHILD LLP 1800 Century Park East, Suite 300 Los Angeles, CA 90067 Telephone: (310) 598-4159 Facsimile: (310) 556-9828 E-mail: Ygallegos@foxrothschild.com dfaustman@foxrothschild.com	**Attorneys for Defendant/Respondent CLS Transportation of Los Angeles** 1 Copy
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Fifth Floor, North Tower Los Angeles, CA 90013	**Office of the Attorney General** 1 Copy
Office of the District Attorney County of Los Angeles Appellate Division 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	**District Attorney of the county in which the lower proceeding was filed** 1 Copy
The Hon. Robert Hess Department 24 c/o Clerk of the Court Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012	1 Copy
California Court of Appeal Second Appellate District, Div. 2 300 S. Spring Street North Tower, 2nd Floor Los Angeles, CA 90013	1 Copy

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