No. S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION OF LOS ANGELES,
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B235158

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

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A. The *American Express* Decision Affirms that Arbitration Agreements May Not Prospectively Waive Statutory Claims and Remedies

The U.S. Supreme Court's recent decision in *American Express v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, strongly underscores Iskanian's argument that CLS's attempt to prohibit representative claims under the Private Attorneys General Act (PAGA) is unenforceable. While holding that a class-action ban in an arbitration agreement was enforceable under Section 2 of Federal Arbitration Act (FAA) even though it had the practical effect of making the pursuit of particular claims too costly for the plaintiffs, *id.* at p. 2312, the Court reiterated the long-established principle that arbitration agreements may not expressly waive statutory claims and remedies. As the Court explained, the principle that an arbitration agreement may not foreclose the assertion of particular types of claims "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" (*American Express*, *supra*, 133 S.Ct. at p. 2310 [quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 637, fn.19] [emphasis added by Court].) The Court added unequivocally: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." (*Ibid.*)

The Court's statements in *American Express* prescribe the

outcome here. CLS's contractual ban on PAGA representative actions is a prospective waiver of the right to pursue statutory remedies, and the arbitration agreement flatly forbids the assertion of certain statutory rights—namely, the rights to obtain PAGA penalties and other relief. *American Express* states quite clearly that "elimination of the right to pursue [a] remedy," *id.* at p. 2311, remains off-limits for an arbitration agreement.

As the U.S. District Court for the Central District of California recently held in the immediate aftermath of *American Express*, the rule that an arbitration agreement purporting to bar PAGA claims is unenforceable "promotes fundamental policies underlying the FAA" by "ensur[ing] that an employee can assert the same right to recovery in the judicial and arbitral forums." (*Cunningham v. Leslie's Poolmart, Inc.* (C.D.Cal. June 25, 2013) 2013 WL 3233211, at p. *9.) Citing the Supreme Court's affirmation in *American Express* that an arbitration agreement is unenforceable to the extent that it "forbid[s] the assertion of certain statutory rights," 133 S.Ct. at p. 2310, the court in *Cunningham* pointed out that "[i]f a plaintiff is barred from pursuing a representative action under PAGA, he is wholly forbidden from asserting his right to pursue a twenty-five percent portion of the civil penalties recoverable by the government for labor code violations allegedly committed by defendant. Both the FAA and California law are inconsistent with this result." (*Cunningham*, *supra*, 2013 WL 3233211, at p. *9.)

In the face of the *American Express*'s reaffirmance of the principle that arbitration clauses that strip protected parties of

unwaivable statutory rights are unenforceable, CLS's amici's arguments for enforcement of the ban on PAGA representative claims fall flat.

B. Many of Amici's Arguments Address Issues Not Before the Court

Amici argue irrelevantly that California law cannot single out PAGA claims and exclude them from arbitration. But that is not the issue in this case: The question here is whether an arbitration agreement can forbid assertion of PAGA claims by precluding an employee from asserting them in *any* forum, arbitral or judicial, as the arbitration agreement here purports to do.

Thus, amici's invocation of the U.S. Supreme Court's summary reversal of the West Virginia Supreme Court in *Marmet Health Care Center, Inc. v. Brown* (2012) 132 S.Ct. 1201, is misplaced. In *Marmet*, the state court had held that a particular class of claims (personal injury claims against nursing homes) was exempt from arbitration even though the arbitration agreement in question *permitted* their assertion—unlike the agreement here, which *forbids* assertion of PAGA claims. The U.S. Supreme Court had long established that state laws purporting to exclude particular types of claims from arbitration are preempted by the FAA. (See *Perry v. Thomas* (1987), 482 U.S. 483, 491; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; *AT&T Mobility v. Concepcion* (2011) 563 U.S._ ,131 S.Ct. l740, 1747 ["[w]hen state law prohibits outright the arbitration of a particular type of claim," the state-law rule "is displaced by the FAA."].) Because West Virginia's "categorical rule prohibiting

arbitration of a particular type of claim," *Marmet*, *supra*, 132 S.Ct. at p. 1204, clearly contravened that long-established principle, the summary reversal in *Marmet* was unsurprising. But the principle that was dispositive in *Marmet* is inapplicable where the question is not whether state law may prohibit outright the arbitration of a particular type of claim, but whether an *arbitration agreement* may prohibit outright the assertion of a particular type of claim.

Likewise irrelevant are amici's contentions that this Court should abandon its holdings in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, that claims for public injunctive relief are not arbitrable. Whether the so-called *Broughton-Cruz* rule is preempted on the ground that it seeks to prohibit arbitration of a particular type of claim, or permissible because it forecloses arbitration only of claims where arbitrators cannot grant effective relief and requiring arbitration would thus in effect preclude a remedy, is a question that has provoked considerable disagreement, and the en banc U.S. Court of Appeals for the Ninth Circuit recently sidestepped the issue in *Kilgore v. Keybank, Nat'l Ass'n* (2013) __ F.3d __, 2013 WL 1458876. But since that issue is not raised in this case, this is certainly not the case in which to address it. The issue here is not whether claims for public injunctive relief are nonarbitrable, nor even whether PAGA claims are nonarbitrable, but only whether an arbitration agreement may forbid assertion of PAGA claims altogether. Reconsidering *Broughton* and *Cruz* would not answer that

question.

Even further afield are amici's invocation of the U.S. Supreme Court's summary reversal in *Nitro-Lift Technologies, L.L.*C. *v. Howard* (2012) 133 S.Ct. 500, and its order in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 132 S.Ct. 496, vacating and remanding a decision of this Court for further consideration in light of *Concepcion*. *Nitro-Lift*, like *Marmet*, involved a state court's disregard of a long-established rule under the FAA. In *Nitro-Lift*, the dispositive principle was that "attacks on the validity of [a] contract, as distinct from attacks on the validity of [an] arbitration clause itself," should be resolved by arbitrators, not courts. (133 S.Ct. at p. 503 [citing *Preston v. Ferrer* (2008) 552 U.S. 349; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395].) That rule is not at issue in this case.

As for *Sonic-Calabasas*, the suggestion that the U.S. Supreme Court's remand order reflects condemnation of this Court's ruling in the case is completely inaccurate. An order granting certiorari, vacating the judgment below, and remanding for further consideration in light of a recent decision—commonly known as a "GVR"—does not reflect a judgment on the merits by the U.S. Supreme Court. (See *Tyler v. Cain* (2001) 533 U.S. 656, 666 n.6.) It is only a determination that a lower court should consider the matter further "in light of potentially pertinent matters which it appears the lower court may not have considered." (*Stutson v. United States* (1996) 516 U.S. 193, 194; see also *Wellons v. Hall* (2010) 558 U.S. 220, 225; *Lawrence v.*

Chater (1996) 516 U.S. 163, 166–67.) "[A] GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." (*Gonzalez v. Justice of Mun. Court of Boston* (1st Cir. 2005) 420 F.3d 5, 7.)

Moreover, the issue remanded in *Sonic-Calabasas*—whether the FAA preempts a state statute requiring a non-binding administrative hearing as a prerequisite to arbitration of a wage claim—is quite distinct from the issues here. In *Sonic-Calabasas*, this Court had held that a wage claimant could not waive the entitlement to a non-binding administrative hearing prior to a binding judicial or arbitral determination of the claim, and had distinguished *Preston v. Ferrer*, in which the U.S. Supreme Court held that the state may not require resort to binding administrative dispute-resolution proceedings in lieu of arbitration. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, *vacated* (2012) 132 S.Ct. 496.) That issue, turning on whether the arbitration agreement's interference with the administrative process abridges substantive rights, is entirely different from whether an arbitration agreement may expressly waive the right to make a claim for the remedies PAGA provides. The U.S. Supreme Court's apparent view that this Court could benefit from the holding or reasoning of *Concepcion* in considering further whether its holding in *Sonic-Calabasas* is preempted thus has no bearing on the proper outcome of this

appeal.

Equally unpersuasive are amici's suggestions that the Court should use this occasion to overrule aspects of its holding in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. *Armendariz* is implicated in this case only in two limited respects: (1) its definition of the types of claims that are unwaivable as a matter of California law (those that are established for a public reason, *id.* at p. 100) is applicable to PAGA claims, and (2) its holding that an arbitration agreement cannot limit the relief an arbitrator may award supports Iskanian's position that an agreement may not foreclose PAGA remedies. But amici do not appear to dispute *Armendariz*'s definition of what statutory claims are unwaivable, which reflects longstanding principles of California law. And *Armendariz*'s holding that arbitration agreements may not waive statutory remedies is firmly supported by the U.S. Supreme Court's ruling in *American Express*.

Amici appear to take aim at *Armendariz*'s holding that an agreement to arbitrate nonwaivable statutory claims must provide minimal procedural protections (such as allowing discovery, providing for a written award and judicial review, and forbidding imposition of costs and fees on employees). (See *id.* at pp. 103–13.) Amici also challenge *Armendariz*'s holding that a court's consideration of whether an arbitration agreement is unconscionable must take into account the degree to which it imposes unequal obligations to arbitrate on the two parties to the agreement. (See *id.* at pp. 115–21.) But these aspects of

Armendariz's holding are not at issue here. Iskanian's appeal is not based on either lack of mutuality or the absence of particular safeguards within the arbitration agreement. Rather, he objects to the agreement's wholesale prohibition of PAGA claims. Thus, even if amici had a legitimate basis for objecting to *Armendariz*'s fairness criteria and its requirement that arbitration agreements reflect a "modicum of bilaterality," *id.* at p. 117, overruling those aspects of *Armendariz* would not rescue an agreement that bars outright the assertion of an unwaivable statutory claim.

Amici's suggestion that the Court overrule *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, is similarly off the mark. *Little*'s condemnation of asymmetrical appellate review provisions in arbitration agreements and its application of *Armendariz*'s minimal-procedural-fairness requirements (in particular, its requirements as to costs of arbitration) are also not at issue here. As with *Armendariz*, this case has little in common with *Little* other than that it involves an unwaivable statutory claim.

C. The Non-Waiver Principle is Fully Applicable to Claims Under PAGA

Turning to the issue actually before the Court, amici insist that the principle that arbitration agreements may not prospectively bar rights and remedies is inapplicable to PAGA claims because the right to a recovery under PAGA is not "substantive." But what this Court said in *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993, on which amici, like CLS, rely, is that PAGA did not create "substantive rights" because it did not alter employees' underlying rights, or

employers' legal duties and obligations, under the Labor Code. (*Id.* at p. 1003.) This observation, together with prior case law holding that statutory penalty claims are not assignable, formed part of the basis for the Court's conclusion that PAGA claims are not assignable property rights under California law. (*Ibid.*)

At the same time, however, the Court recognized that PAGA allows aggrieved employees a particular remedy in the form of a share of civil penalties. (*Ibid.*) And in stating the rule that disposed of the case—that "the right to recover a statutory penalty may not be assigned," *ibid.*—the Court recognized that PAGA creates a *right to recovery* under the conditions specified in the statute. However that right may be characterized for purpose of assignability law, it is "substantive" for other purposes, such as the *Erie* doctrine, under which federal district courts have recognized that California law governs the remedies available under PAGA in federal as well as state courts. (See *Moua v. Int'l Bus. Mach. Corp.* (N.D.Cal. Jan.31, 2012) 2012 WL 370570, *3.) Thus, the district court in *Cunningham* characterized PAGA claims as "substantive" in the sense that the statute created an "affirmative right to recover penalties," *Cunningham*, *supra*, 2013 WL 3233211, at p. *7 fn.6., and held that "the FAA does not preempt state laws ensuring that a plaintiff may assert substantive rights in arbitration." (*Id.* at p. *10.)[1]

[1] *Cunningham* analogizes PAGA to *qui tam* statutes, which grant private plaintiffs a substantive right to pursue a claim otherwise belonging to the state and to receive a bounty in the form of a share of the state's recovery. (See *id.* at pp. 7–8.) The

Whether it is correct to attach the label "substantive" to PAGA claims, however, is ultimately irrelevant. As the Sixth District Court of Appeal recently recognized in *Brown v. Superior Court* (2013) 216 Cal.App.4th 1302, although PAGA creates no additional rights and duties as between employers and employees in the workplace beyond those already conferred by the Labor Code and in that sense may be termed not "substantive," *id.* at p. 1321, PAGA does provide a *remedy*: "A PAGA claim is a statutory claim that provides a public remedy …." (*Id.* at p. 1322.) Moreover, the court recognized, the statute creates a right to pursue this remedy that, as a matter of California law, is unwaivable because the right is "established for a public reason." (*Id.* [citing *Armendariz*, *supra*, 24 Cal.4th at p. 100].) And because, as *Mitsubishi* held, an arbitration clause may not "prospective[ly] waive[] a party's right to pursue statutory *remedies*," 473 U.S. at p. 637 fn.19 [emphasis added], the Court of Appeal in *Brown* held straightforwardly that "[w]hen applied to the PAGA, a private agreement purporting to waive the right to take representative action is unenforceable because it wholly precludes the exercise of this unwaivable statutory right." (*Id.* at p. 1320.) *American Express*, by reiterating that arbitration

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court's reasoning is similar to that of Stanford Law School Professor Janet Alexander, who explains in a recent article why class action bans in arbitration agreements are inapplicable to *qui tam* and private attorney general actions such as those created by PAGA. (See Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion (forthcoming 2013) 46 U. Mich. J. L. Reform 101, *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2272792_code22570.pdf?abstractid=2260489&mirid=5.)

agreements may not wholly forbid the pursuit of statutory remedies, confirms the correctness of that holding, which in no way depends on whether the label "substantive" is applicable to PAGA's remedies.

Amici further contend that the principle that an arbitration agreement may not waive a statutory claim or remedy that is not otherwise subject to waiver applies only to federal statutory rights. As our opening and reply briefs demonstrate, this argument rests on the misconception that a prohibition on waiver of state-law claims would conflict with the FAA and hence be preempted. In fact, the FAA itself, which makes agreements *to resolve claims by arbitration* enforceable, 9 U.S.C. § 2, does not provide for enforcement of agreements that would operate to foreclose assertion of claims, and therefore does not conflict with state laws disallowing contractual waivers of claims.

Nothing in the U.S. Supreme Court's opinion in *American Express* is to the contrary. The Court's recognition that "an arbitration agreement forbidding the assertion of certain statutory rights" would be unenforceable, 133 S.Ct. at p. 2310, was not by its terms limited to federal statutory rights. A few days before the decision in *American Express*, the Court of Appeal in *Brown v. Superior Court* stated that "[n]either *Mitsubishi* nor *Concepcion*, nor any other United States Supreme Court case of which we are aware, has held that the FAA requires enforcement of a private agreement that wholly prevents the exercise of a statutory right intended for a predominantly public purpose." (216 Cal.App.4th at p. 1320.) That statement

remains as true after *American Express* as it was before.

Justice Kagan's dissent, to be sure, suggests that the "effective vindication of rights" doctrine may not apply to state-law rights. (See 133 S.Ct. at p. 2320 (Kagan, J., dissenting).) But as the court explained in the *Cunningham* case, the principle that an arbitration agreement may not wholly and prospectively *waive* claims is distinct from whether it must, as a *practical* matter, permit "effective" vindication of rights. (See 2013 WL 3233211, at *10.)Here, as in *Cunningham*, "the issue is not whether plaintiff will have access to an effective method of vindicating his rights under PAGA," but whether he can be "forbidden any means of asserting his right[s]" under PAGA. (*Ibid.*) Nothing in either the majority opinion or in Justice Kagan's dissent suggests that arbitration agreements may wholly bar claims, be they state or federal.

The issue of the applicability of the effective-vindication principle to state-law claims was not actually contested between the parties in *American Express*.[2] Had it been, Justice Kagan likely would have realized that her own reasoning that the FAA is not intended "as a foolproof way of killing off valid claims," 133 S.Ct. at p. 2315, like the majority's recognition that the FAA does not provide for prospective waiver of claims and remedies, is not

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[2] Indeed, the respondents in *American Express* (that is, the plaintiffs who argued that the class-action ban at issue in the case was unenforceable) stated explicitly that the effective-vindication principle they advocated did not extend to state-law claims. (Br. for Resp., No. 12-133 (U.S.) at p. 40.) The brief can be found on-line at www.americanbar.org/publications/preview_home/12-133.html.

limited to federal claims. Indeed, the Supreme Court had earlier applied *Mitsubishi*'s effective-vindication limiting principle to a case involving whether an arbitration agreement foreclosed resort to administrative proceedings under the California Labor Code, enforcing the agreement only after being assured that the plaintiff "relinquishes no substantive rights… *California law* may accord him." (*Preston v. Ferrer*, *supra,* 552 U.S. at p. 359 [emphasis added].) The *Preston* Court would not have undertaken this analysis if the effective-vindication principle were inapplicable to state statutory rights.

Moreover, there is a perfectly obvious "earthly reason," *American Express*, *supra*, 133 S.Ct. at p. 2320 (Kagan, J., dissenting), why Congress in the FAA would have been concerned about ensuring that arbitration agreements do not forbid assertion of state-law claims: Having required states to enforce agreements to arbitrate claims arising under their laws, Congress would not have intended to take the much more intrusive step of allowing arbitration agreements to extinguish state-law claims altogether. Arbitration, after all, is supposed to affect only the right to a forum, not the underlying claims to be asserted. (*Mitsubishi*, *supra*, 473 U.S. at p. 628.)

In any event, Justice Kagan's observation that a federal court would have "no earthly interest … in vindicating that [state] law" referred specifically to a state law that "frustrates the FAA's purposes and objectives." (133 S.Ct. at p. 2320.) A state-law principle that a particular claim or remedy may not be waived, however, does not frustrate the purposes and objectives

of the FAA, because, as *American Express* makes clear, those purposes and objectives do not include facilitating the extinguishment of statutory claims and remedies. (See *id.* at pp. 2310–11 (majority), 2315 (dissent).) Indeed, a rule prohibiting waivers of unwaivable rights in the guise of arbitration agreements "furthers the [FAA's] goals by ensuring that arbitration remains a real, not faux, method of dispute resolution." (*Id.* at p. 2315.) Thus, the district court in *Cunningham* concluded that prohibiting enforcement of arbitration agreements purporting to waive PAGA claims "promotes fundamental policies underlying the FAA." (2013 WL 3233211 at p. *9.)

Further, the FAA is not a statute that sweepingly preempts the field of arbitration. (See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 477.) Although it preempts state laws that stand as obstacles to its objectives, courts considering the scope of any such implied preemption must honor the well-established presumption "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.) Although the FAA may displace state laws that reflect procedural choices inconsistent with arbitration, there is no basis for concluding that Congress in 1925 intended to displace the states' authority to create arbitration-neutral wage and hour laws, with accompanying remedies, governing employers subject to their authority.

Finally, as *Cunningham* also pointed out, a state-law rule providing that statutory rights created for a public purpose are not waivable by contract is a general principle of state contract law applicable both to arbitration agreements and other contracts. (*Ibid.*) Thus, it is saved from preemption by the FAA's savings clause, which provides that an arbitration clause may be denied enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." (*Ibid.* [quoting 9 U.S.C. § 2].) Nothing in *American Express* suggests otherwise.

D. The Arbitration Agreement's Prohibition of "Representative" Actions Completely Forecloses Assertion of PAGA Claims

Amici, echoing CLS, assert that the arbitration agreement does not completely prohibit assertion of claims under PAGA, but allows Iskanian to bring an "individual" claim to recover for Labor Code violations that he suffered personally. The arbitration agreement, however, prohibits *all* "representative" actions. Even assuming PAGA permits a plaintiff to seek a recovery based only on violations individually affecting him and excluding penalties attributable to violations as to other employees, such a PAGA claim would remain a "representative" action because even in bringing such an "individual" claim the plaintiff would be *representing the State of California* in seeking penalties for Labor Code violations—penalties inuring primarily to the State. (Lab. Code § 2699(i).) "In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Because an

individual PAGA plaintiff is "acting on behalf of the public" and pursuing a "public purpose," a PAGA action "is necessarily a representative action." (*Brown v. Superior Court*, 216 Cal.App.4th at p. 1321.)

Moreover, amici's insistence that a PAGA plaintiff may pursue a solely individual claim fails to account for the express language of the statute, which authorizes claims on behalf of the aggrieved employee "and other current or former employees." (Lab. Code § 2699(a).) Thus, 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 v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 [citing *Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal. July 23, 2009) 2009 U.S.Dist.Lexis 63414, *6].) In reaching this conclusion, *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 pp. *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.

Amici assert that if PAGA plaintiffs must seek penalties

based on violations against other employees, that would imply that the State of California itself could not exercise its own enforcement discretion to seek remedies for violations affecting one employee while declining to seek the same remedies on behalf of others. (Br. of Amicus Curiae Employers Group at pp. 14-17.) But the State's enforcement powers are not circumscribed by the language of § 2699(a). And there are good reasons for the legislature to authorize an individual to act on behalf of the State only when his efforts benefit others besides himself: "A PAGA action could hardly serve as a substitute for LWDA proceedings if the action were prosecuted by aggrieved employees one at a time." (*Brown*, *supra*, 216 Cal.App.4th at p.1321.) "This is a straightforward consequence of PAGA's purpose of promoting the enforcement of California's labor laws, because an action asserting the rights of only one individual under the Labor Code will not have PAGA's intended punitive and deterrent effects." (*Cunningham*, 2013 WL 3233211 at p. *8.) Thus, as both *Brown* and *Cunningham* recently concluded, "the representative aspect is intrinsic to the [PAGA] claim." (*Brown*, *supra*, 216 Cal.App.4th at p. 1321; *Cunningham*, *supra*, 2013 WL 3233211 at p. *8.)

Finally, even if an "individual" PAGA claim were cognizable and the arbitration agreement in this case permitted its assertion—neither of which is true—that still would not render the agreement's prohibition on representative claims enforceable. At a minimum, the agreement waives Iskanian's right under PAGA to seek the remedy of penalties for violations aimed at other current and former employees of CLS. That

"prospective waiver of a party's *right to pursue* statutory remedies" would remain squarely within the realm of what *American Express* says is invalid under the FAA. (133 S.Ct. at p. 2310.) The possibility that Iskanian might still be able to pursue a truncated remedy does not validate the agreement's waiver of the full remedy provided him by PAGA.

E. Amici's Policy Arguments Do Not Justify a Contractual Ban on PAGA Claims

Amici present a variety of policy arguments against holding that PAGA claims may not be waived by an arbitration agreement, but all are unavailing. Amici's claims that PAGA representative actions entail all the same complexities as class actions flies in the face of this Court's refusal to mandate the formal procedures of class actions, such as notice and opt-out rights, in PAGA cases. (*Arias*, *supra*, 46 Cal.4th at p. 975.)[3] Amici suggest that because, under *Arias*, PAGA judgments may bind other employees (but as to claims for statutory penalties

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[3] "Class actions litigated in federal court also contain numerous procedural protections that are not available in PAGA claims. Unnamed employees need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative PAGA claim. There is no indication that the unnamed plaintiffs can contest a settlement, if any, reached between the parties. The court does not have to approve the named PAGA plaintiff, nor does the court inquire into the adequacy of counsel's ability to represent the unnamed employees. These procedural protections ensure the fidelity of the attorney-client arrangement in a class action. Their absence further militates against considering a PAGA claim akin to a certified class action." (*Ochoa-Hernandez v. CJADERS Foods, Inc.* (N.D.Cal. Apr. 2, 2010) 2010 U.S. Dist. LEXIS 32774, **12-14.)

only, see *id.* at pp. 984–87), due process might require that in an arbitration of PAGA claims, other employees receive notice and the right to appear or opt out, even though, as *Arias* explained, due process does not require such procedures in a PAGA action litigated in court. (See *id.* at 986.) But amici cite no authority for the proposition that due process requires more procedural protections to bind a person to an arbitration award than to bind her to a court judgment. Indeed, arbitration is generally thought to require *less* due process protection of litigants than judicial proceedings. (*Shahinian v. Cedars-Sinai Med. Ctr.* (2011) 194 Cal.App.4th 987, 1007.) There is no basis, then, for the position that permitting assertion of PAGA claims would transform the nature of arbitration in the way the U.S. Supreme Court has held class proceedings would. (See *Concepcion*, *supra*, 131 S.Ct. at pp. 1751–52.)

Of course, PAGA claims will require resolution of issues concerning the treatment of employees other than the plaintiff. But even if the issues PAGA claims present may be somewhat broader than claims relating only to a single individual, that does not mean that arbitration will lose whatever advantages of speed and efficiency, lower cost, and arbitral expertise it may arguably possess. (See *Concepcion*, *supra*, 131 S.Ct. at p. 1751.) Common issues affecting multiple employees have long been one of the principal subjects of labor arbitration under collective bargaining agreements, with unions serving as representative plaintiffs on behalf of their members. (See, e.g., *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247.) The almost universal use of arbitration as

a means of resolving such issues under collective bargaining agreements refutes any notion that the need to adjudicate issues involving multiple employees strips arbitration of whatever advantages it may possess for resolving workplace disputes. (See *id.* at p. 257.) Moreover, there is no reason to think that the stakes in PAGA cases will typically rise to the "bet the company" level that would suggest that permitting a waiver of PAGA claims is essential to allowing arbitration to serve its functions. (Cf. *Concepcion*, *supra*, 131 S.Ct. at p. 1752.) Indeed, PAGA provides discretion to consider a defendant's financial circumstances and ability to pay in establishing penalties, making "bet the company" scenarios even less likely than in other types of cases. (*Thurman v. Bayshore Transit Mgmt.* (2012) 203 Cal.App.4th 1112, 1135-36 [affirming trial court's reduction in PAGA penalties award to $358,588, emphasizing a trial court's broad discretion under Lab. Code § 2699(e)(2) to reduce penalties if the award is "unjust, arbitrary, oppressive or confiscatory."].)

Amici also suggest that PAGA claims do not really benefit employees, and they question the motives and settlement practices of PAGA plaintiffs and their attorneys. Amici's comments, however, have no bearing on whether this Court should countenance enforcement of a prospective waiver of PAGA claims. Rather, amici's views reflect disagreement with the Legislature's choice to allow enforcement of the Labor Code through PAGA representative actions. As this Court recognized in *Arias*, however, that choice reflected the Legislature's judgment as to how best to deal with the problem of

underenforcement of the State's laws protecting employees. (See 46 Cal.4th at pp. 980–81.) Amici's view that the Legislature's policy was misguided or has gone astray provides no basis for deviating from the principle of California law that a right created for a public purpose may not be waived by contract. (*Armendariz*, *supra*, 24 Cal.4th at p. 100.)

Amici's views of the virtues of arbitration are likewise beside the point. Amici's claim that employees benefit from arbitration are, at best, debatable, as recent studies of arbitration results in California employment cases have shown that employees generally win cases less often, and receive smaller awards when they do win, in arbitration than in court. (See Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes* (2011) 8 J. Empirical Legal Studies 1.) But the Court need not resolve the debate over whether, in an appropriate case, arbitration may benefit an employee pursuing a particular type of claim to recognize that an arbitration agreement that *waives* a statutory claim that is unwaivable as a matter of California law benefits neither the plaintiff whose claim it cuts off nor the public for whose protection the claim was created.

F. Allowing an Arbitration Clause to Bar PAGA Claims Would Improperly Impair Interests of the State of California

Amici, unlike CLS itself, attempt to respond to the argumentt that giving effect to the waiver of PAGA claims would improperly bind the State of California to the provisions of CLS's arbitration agreement, in violation of the principles underlying

the U.S. Supreme Court's decision in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279. Amici observe that in *Waffle House*, the EEOC was itself seeking to litigate, and that the majority stated that the outcome "might" have been different under other circumstances. (*Id.* at p. 291.) Ultimately, however, the Court held that the EEOC was not bound because its claim was not "merely derivative" and it did not "stand in the employee's shoes." (*Id.* at p. 297.)

The same is true here: The PAGA claim for penalties is not derivative of an employee's own personal claims, but exists entirely apart from such claims. Indeed, the employee's ability to recover a portion of the penalty under PAGA is entirely derivative of the *State's* penalty claim. (See *Amalgamated Transit Union*, *supra*, 46 Cal.4th at p. 1003.) Far from making the State stand in the shoes of the employee, PAGA requires the employee to stand in the shoes of the State: "the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties." (*Ibid.*) Giving effect to a compelled waiver of PAGA rights in a private arbitration agreement thus would have the effect of impermissibly subjecting a non-party—the State—to the terms of those agreements, in violation of the fundamental principle that "private individuals cannot contract away the state's *right to enforce the law." (Alexander, *To Skin a Cat*, *supra*, at p. 126.)

That the State could still bring its own action through

public agencies does not avoid this objection. The whole point of PAGA was that the Legislature found public enforcement inadequate and therefore chose to pursue such claims through private representative plaintiffs when state agencies could not pursue them, for whatever reason. (See *Arias*, *supra*, 46 Cal.4th at pp. 980–981.) By depriving the State of its chosen instrument for enforcement, the waiver of PAGA claims, if given effect, would directly impair the State's rights. Moreover, contrary to amici's suggestion, the State did not abandon these PAGA claims by not bringing an enforcement action through public agencies itself. The very point of PAGA is to ensure that the agency's decision not to take action does *not* constitute abandonment of the State's claims, which may still be pursued through another agent—the representative plaintiff. *Waffle House* does not permit a private arbitration agreement to prevent the State from pursuing its claims through its proxy, the PAGA plaintiff.

II. GENTRY HAS NOT BEEN OVERRULED

Amici, like CLS itself, devote much attention to the question whether *Concepcion* effectively overruled this Court's decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443. But because their submissions all preceded the U.S. Supreme Court's decision in *American Express*, which further clarified the scope of *Concepcion*, they contribute little to the proper resolution of this case.

American Express holds that the FAA does not preclude enforcement of an arbitration agreement banning class actions merely because the ban will make it economically impossible to pursue particular claims as to which "the plaintiff's cost of

individually arbitrating a federal statutory claim exceeds the potential recovery." (133 S.Ct. at p. 2307.) The Court reasoned that statutes creating substantive rights "do not guarantee an affordable procedural path to the vindication of every claim." (*Id.* at p. 2309.) Thus, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." (*Id.* at p. 2311.)

At the same time, however, as explained above, the Court reiterated that an arbitration agreement cannot be used as a mechanism for prospectively waiving rights to pursue otherwise unwaivable statutory claims and remedies, and that the FAA therefore does not require enforcement of agreements that would have that effect. (*Id.* at p. 2310.) Significantly, the Court reaffirmed its earlier statement in *Green Tree Financial Corp.–Alabama v. Randolph* (2000) 531 U.S. 79, that high arbitration fees could render an arbitration agreement unenforceable if they had the effect of preventing effective vindication of underlying substantive rights. (*American Express*, *supra*, 133 S. Ct. at p. 2311.) The Court explained that the principle that prospective waivers of rights are forbidden "would perhaps" cover fees "that are so high as to make *access to the forum impracticable*." (*Id.* at pp. 2310–11 [emphasis added].)

Thus, the Court in *American Express* drew a distinction between, on one hand, terms in an arbitration clause that effectively waive rights either by expressly precluding their assertion or effectively cutting off access to the arbitral forum, and, on the other hand, provisions such as the class-action ban

before it in that case that merely make pursuing a remedy uneconomical in particular cases but "do[] not constitute the elimination of the *right to pursue* that remedy." (*Id.* at p. 2311.) The FAA, the Court held, provides for enforcement of the latter but may not require enforcement of the former.

Since *American Express* was decided, one lower court has interpreted it to mandate preemption of the rule in *Gentry* by holding that *Concepcion* requires enforcement of arbitration agreements banning class actions even where (unlike in *Concepcion* itself) they are essential to the vindication of statutory rights. (See *Cunningham*, 2013 WL 3233211, at pp. *4–5.) According to the court in *Cunningham*, "Under the FAA, a state cannot ensure the vindication of statutory rights by making class procedures available in certain categories of cases." (*Id.* at p. *5.)

But *American Express* does not go so far. To be sure, it indicates that the FAA does not authorize a court to determine that a class-action ban is unenforceable merely because its enforcement will make the pursuit of valid claims too costly in particular cases. But it does not exclude the possibility that an arbitration agreement may be unenforceable if it amounts to a waiver of claims and remedies because its conditions make *access to the forum* impracticable.

This Court's *Gentry* decision is aimed at identifying the circumstances in which a class-action ban in an arbitration agreement amounts to a waiver of unwaivable statutory rights because it effectively precludes access to the forum. Although the

costs of proceeding are one of the factors to be considered (a factor that *American Express*'s favorable citation of *Green Tree* indicates is still relevant), the *Gentry* rule is not simply that class actions must be permitted whenever necessary to make pursuing a claim cost-effective. Rather, *Gentry* requires consideration of whether access to the arbitral forum is cut off not only by such economic factors, but also by employees' fears of retaliation from employers if they proceed individually and by the need for group remedies in a sphere where employees are likely to be unfamiliar with their rights, as well as any and all other "real world obstacles" to access to the arbitral forum. (*Gentry*, *supra*, 42 Cal.4th at p. 463.) At the same time, *Gentry* requires consideration of the features of particular arbitration agreements that might overcome these obstacles to forum access. (*Id.* at p. 464.) In this case, CLS conceded that the *Gentry* factors were satisfied—that is, that all these considerations, not just costs, indicated that absent a class action, the arbitration forum was effectively unavailable.

American Express, like *Concepcion* before it, does not decide the legitimacy of such a rule. To be sure, the two decisions together likely preclude a state from making a determination that a class-action ban in an arbitration clause may not be enforced simply because it would make certain claims economically infeasible because their anticipated payoff does not justify the cost of individual proceedings. But they do not require enforcement of an agreement that, by making "access to the forum impracticable," effectively "constitute[s] the elimination of

the *right to pursue* [a] remedy." (*American Express*, *supra*, 133 S.Ct. at pp. 2310–11.) A state-law principle that makes a class-action ban unenforceable in such limited circumstances remains protected by the FAA's savings clause (which was not directly at issue in *American Express*) as an arbitration-neutral expression of the general principle of contract law that claims and remedies serving a public purpose may not be prospectively waived by contract.

III. CLS'S CONTRACTUAL PROHIBITION OF CONCERTED LEGAL ACTIONS VIOLATES FEDERAL LABOR LAW AND IS UNENFORCEABLE

Under Sections 7 and 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§157, 158(a)(1), and Sections 2 and 3 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. §§102-103, employees have a substantive federal law right to pursue legal actions to enforce workplace rights on a concerted action basis; and no employment agreement or workplace policy stripping them of that "core substantive right" may be enforced without violating those statutes. (See *D.R. Horton, Inc.* (2012) 357 NLRB No. 184, 2012 WL 36274, *12.) For the reasons explained in Iskanian's Opening and Reply Briefs (at pp. 33-38 and pp. 14-21, respectively) and by amici Service Employees International Union and California Employment Lawyers Association ("SEIU/CELA")—whose amicus brief comprehensively analyzes *D.R. Horton* and the longstanding federal labor law principles that support it—these federal labor statutes provide a separate and entirely independent ground for reversing the Court of Appeal in this case, a result required by

the NLRA and NLGA no matter what this Court concludes with respect to whether PAGA claims may be foreclosed by an arbitration agreement or whether *Gentry* remains valid.

Of the seven amicus briefs filed in support of CLS, only that of the U.S. Chamber of Commerce ("Chamber") addresses this independent federal labor law basis for reversal. But that brief adds nothing new to CLS's argument, mostly repeating in slightly different language CLS's arguments that Iskanian and amici SEIU/CELA have already rebutted. Consequently, Iskanian will present only this brief response.

The Chamber begins with the non-controversial proposition that the NLGA and NLRA do not generally prohibit the enforcement of arbitration agreements. (Chamber Br. at pp. 32-35.) That is of course true; but plaintiff and his amici have never contended otherwise. After all, labor arbitrations have long been a mainstay of dispute resolution in union workplaces under the Labor Management Relations Act, 29 U.S.C. § 301, and nothing about arbitration *per se* is inconsistent with federal labor law. (See *Textile Workers Union v. Lincoln Mills* (1957) 353 U.S. 448, 454-55.)[4]

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[4] The Chamber's reliance on the holding of *General Electric Co. v. Local 205* (1957) 353 U.S. 547, that *Section 107* of the NLGA (29 U.S.C. § 107) does not preclude orders compelling arbitration ignores that the NLGA provisions invoked here are Section 102, which protects concerted action by workers, and Section 103, which makes any contract violating Section 102 unenforceable. (29 U.S.C. §§ 102 & 103.) The Chamber's further suggestion that Section 103 of the NLGA only applies to traditional "yellow dog" contracts is contrary to the language of that Section (which applies to "any . . .promise . . . described in

The federal labor law issue presented here is *not* whether Congress intended the NLRA and NLGA to preclude enforcement of private arbitration agreements. Instead, the issue is whether Congress intended the NLRA and NLGA to preclude the enforcement of an employer's prohibitory policy (whether included in a mandatory employment arbitration agreement, another type of employment contract, or as a stand-alone workplace rule) that strips workers of their federal statutory right to pursue workplace claims in concert with others. Seven decades of Board and court decisions confirm that Congress *did* intend to preclude enforcement of such outright prohibitions of concerted legal activity, for the reasons Iskanian and SEIU/CELA have shown.

The Chamber principally relies on *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, which plaintiff discusses in AOB 37-38 and ARB 20, and which SEIU/CELA discuss in their amicus brief at pages 19 to 23. The Chamber offers no new arguments concerning *CompuCredit*, but simply reiterates CLS's point that Congress must be found to have spoken "with . . . clarity" before a court may conclude that it intended to preclude the arbitration of any particular statutory claim. (Chamber Br. at p. 32.) But the issue here is not whether the NLRA and NLGA preclude arbitration: It is whether an arbitration agreement that *forbids collective action* violates the substantive right to engage in such action under the NLRA and NLGA.

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this section or any other . . . promise in conflict with the public policy declared in section 102") and was specifically rejected in *D.R. Horton*, 2012 WL 36274 at p. *7 & fn.12.

CompuCredit involved a different issue altogether. In *CompuCredit,* the Supreme Court was asked to decide whether Congress had intended to preclude arbitration of all claims *arising under the CROA*. The Supreme Court, applying traditional tools of statutory construction, found no such congressional intent. Although the disclosure notices mandated by the CROA required companies to advise consumers of their non-waivable "right to sue" for statutory violations, 132 S.Ct. at pp. 669-70, the Court concluded that such disclosure language, by itself, did not express Congress's clear intent to preclude consensual arbitration *of CROA claims*. (*Id.* at pp. 671-73; *see* App.'s Opening Br. ["AOB"] at pp. 37-38; App.'s Reply Brief ["ARB"] at p. 20; SEIU/CRLA Br. at pp. 19-23.)

The issue in this case is not, as in *CompuCredit*, whether Congress intended to preclude consensual arbitration of claims under the NLRA (*i.e.,* unfair labor practice charges) that would otherwise be filed with the NLRB – although if that were the issue, CLS and the Chamber would undoubtedly agree that such a prohibition on access to the NLRB would violate the NLRA.[5] Nor is the issue whether the federal labor laws reflect an intent to foreclose arbitration of the types of substantive employment-related claims that are at issue in this case. Instead, the issue here is whether Congress in the NLRA and NLGA guaranteed

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[5] See, e.g., *U-Haul Company of California, Inc.* (2006) 347 NLRB 375, 377-78, *enf'd mem.* (D.C. Cir. 2007) 2007 WL 4165670 [employer violates Section 8(a)(1) by maintaining mandatory employment arbitration policy that workers would reasonably construe as prohibiting them from filing unfair labor practice charges with NLRB].

workers the substantive federal statutory right to join with their fellow co-workers in pursuing legal claims against their employer based on an alleged violation of workplace rights. Surely Congress did have that intent, because the right to engage in concerted activity for mutual aid and protection, including *concerted legal activity*, has been enshrined as a "core substantive" right under federal labor law since the 1930's, as a long line of Board rulings and court decisions have established. (See AOB at pp. 33-34; ARB at p. 14; SEIU/CRLA Br. at pp. 5-8; see also *American Express*, *supra*, 133 S.Ct. at pp. 2310-11 [acknowledging that the FAA prohibits enforcement of arbitration clauses that expressly deprive a party of substantive statutory right].) The NLRA and NLGA thus evince whatever congressional intent is requisite here: Intent not to preclude arbitration, but to foreclose a waiver or the right to proceed collectively. (See *American Express*, *supra*, 133 S.Ct. at p. 2309.)

The Chamber treats *CompuCredit* as if it established a new rule of statutory construction, applicable to every federal statute administered by an independent federal agency (like the NLRB, FTC, FCC, etc.). The Chamber's supposed rule would preclude courts, in assessing whether a statute expressed a "clear" congressional intent to create rights that may not be abridged by arbitration, from considering an independent administrative agency's construction of its own enabling statute, even if Congress specifically delegated construction authority to that agency. *CompuCredit* provides no support for that supposed new rule, because it did *not* involve an administrative agency's

construction of its own statute. The Chamber asserts that Congress could only "repeal[] or overrid[e]" the FAA through an "express congressional enactment to the contrary." (Chamber Br. at p. 38.) The Chamber's argument overlooks not only that repealing the FAA is not the issue here, but also that even if it were, the agency's construction of the scope of the NLRA and NLGA would still be entitled to substantial weight. The Supreme Court has consistently and repeatedly held that when an administrative agency construes the statute that Congress delegated it authority to construe, that construction is entitled to full *Chevron* deference because the agency is effectively speaking for Congress. (See *City of Arlington v. FCC* (2013), 133 S.Ct. 1863, 1871 [citing inter alia *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 830, fn.7].)

Moreover, the Chamber's basic premise is wrong to begin with, because Section 15 of the NLGA, 29 U.S.C. § 115, enacted seven years after the FAA, expressly states that any part of any previously enacted statute "in conflict with the provisions of this chapter are repealed." So even if there were a conflict between federal labor law and the FAA (which there is not, see *D.R. Horton*, 2012 WL 36274 at pp. *10-*16; SEIU/CELA Br. at pp. 11-23), the later-enacted federal labor statutes would control.

Ultimately, the Chamber disagrees with the Board's construction of Sections 7 and 8(a)(1) of the NLRA and the parallel provisions of the NLGA. The Chamber reads the decades of decisional law cited by Iskanian and the Board as "hold[ing] only that employees cannot be fired" for filing a concerted action

lawsuit against their employers. (Chamber Br. at p. 37 [citing GC Memo 10-06 (June 16, 2010)].) That is not what those cases say, however, and no Board decision holds that Section 8(a)(1) must be construed so narrowly. To the contrary, the broad language of the NLRA makes it unlawful for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." (29 U.S.C. §158(a)(1).) As demonstrated by the long line of Board and court cases cited by plaintiff and SEIU/CELA, any employer policy or agreement that on its face restricts the exercise of those rights —like CLS's concerted action ban here —necessarily violates Section 8(a)(1) and is therefore unenforceable, in court no less than before the Board. (See, e.g., *Cintas Corp v. NLRB* (D.C.Cir. 2007) 482 F.3d 463, 467-68; *Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646; *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72.)[6]

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[6] Even the non-precedential GC Memo relied upon by the Chamber (whose ultimate conclusions the Board addressed and expressly *repudiated* in *D.R. Horton*, 2012 WL 36274 at pp. *9-*10) recognized as a threshold matter that "[u]nlike other statutory contexts—where a class action lawsuit could be viewed as merely a procedural mechanism for enforcing a separate underlying right—the NLRA's cornerstone principle is that employees are empowered to band together to advance their work-related interests on a collective basis," with the result that "a mandatory arbitration agreement that could be reasonably read by an employee as prohibiting him or her from joining with other employees to file a class action amounts to an overly broad employer rule and hence is unlawful." (GC Memo 10-06 (June 16, 2010) at 3-4, citing *Trinity Trucking & Materials Corp.* (1975) 221 NLRB 364, 365, *enf'd mem.* (7th Cir. 1977) 567 F.2d 391, *cert. denied* (1978) 438 U.S. 914, *Le Madri Restaurant* (2000) 331 NLRB 269, 275-76, *Novotel New York* (1996) 321 NLRB 624, 633-

Finally, amici contend that *D.R. Horton* is not entitled to deference because the members of the Board who issued it included a recess appointee whose appointment would be invalid under the interpretation of the U.S. Constitution's recess appointments clause in *Noel Canning v. NLRB* (D.C.Cir. 2013) 705 F.3d 490. The validity of the *Noel Canning* decision is a hotly contested issue, and the U.S. Supreme Court granted certiorari to resolve it on June 24, 2013. (See *NLRB v. Noel Canning* (2013) __ S.Ct. __, 2013 WL 1774240.) In light of the pendency of *Noel Canning*, deciding this case on the premise that the Board was improperly constituted would be premature. But the Court need not consider the issue, not only because the "de facto officer" doctrine precludes after-the-fact challenges to agency actions based on the validity of an agency officer's appointment, see *Ryder v. United States* (1995) 515 U.S. 177, but also because the NLGA's and NLRA's protections of the right of concerted action, and long-established Board and judicial constructions of their scope, preclude enforcement of a contractual ban on collective actions irrespective of the status of any particular order of the Board. *D.R. Horton*'s reasoning remains compelling regardless of whether the order in that case might be subject to vacatur based on the composition of the Board. And because this Court has its own obligation not to enforce a contract that violates the NLRA, see *Kaiser Steel*, *supra*, 455 U.S. at pp. 83–86, it should decline to enforce the arbitration agreement's ban on class and

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636, *United Parcel Service, Inc.* (1980) 252 NLRB 1015, 1018, 1022 & fn.26, *enf'd* (6th Cir. 1982) 677 F.2d 421, *Saigon Gourmet* (2009) 353 NLRB No. 110.)

representative actions regardless of the ultimate resolution of the *Noel Canning* issue.

IV. CLS WAIVED ITS RIGHT TO ARBITRATE

The Chamber is also the only amicus to address waiver of arbitration. (See Chamber Br. at pp. 40-43.) The Chamber principally attempts to excuse CLS's lengthy delay in moving to compel arbitration by observing that CLS had initially pursued arbitration soon after the case was filed. However, the Chamber notably ignores CLS's *conduct* after the intermediate appellate court first remanded the action for a factual determination under *Gentry*, upon which, as CLS concedes, it withdrew its petition and instead defended the action in court. (Resp.'s Br. at p. 34.) CLS's prejudicial conduct is dispositive.

To determine waiver, the Court does not apply a single test, but must examine the "nature of [the defendant's] *conduct*." (*St. Agnes Medical Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1195 [emphasis added].) Defendant's conduct must be viewed in light of "the litigation as a whole. (*McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 951, fn.2.) Thus, the fact that CLS once "communicated its intent to arbitrate" (Chamber Br. at p. 41) does not mean that that communication preserved CLS's right to arbitrate for the remainder of the litigation. CLS's initial communication was no different than a party's invocation of arbitration as an affirmative defense, or a pronouncement of an intent to move for arbitration in open court. Neither insulates a party from waiver when it fails to take further action. (See *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338.)

Likewise, CLS's initial expressions of intent were superseded by its subsequent conduct demonstrating a clear intent to litigate in court. Upon remand, CLS not only withdrew its motion to compel arbitration and made no further mention of pursuing arbitration until April 2011, it also litigated on a class-wide basis for two years. CLS contested Iskanian's motion for class certification in 2010 and filed a motion for summary judgment in 2011. Under longstanding California law, litigation of motions such as class certification and summary judgment establish waiver. (*McConnell*, *supra*, 105 Cal.App.3d at p. 951 [finding that the defendant waived arbitration after contesting a motion for class certification]; *Zimmerman v. Drexel Burnham Lambert, Inc*. (1988) 205 Cal.App.3d 153. 159-160 [finding waiver due to years of active litigation, which included a motion for summary judgment].)

Neither the Chamber nor CLS has offered a coherent explanation of why the Court should credit CLS's initial communication and overlook its three years of subsequent contrary conduct demonstrating an intent to litigate in court. The Chamber's asserts that, after *Gentry* was decided, "CLS no longer had a right to arbitrate." (Chamber Br. at p. 42.) But *Gentry* is fact-based and establishes no categorical rules regarding arbitration rights. (See AOB at pp. 18-21.) And in the first appeal, the Court of Appeal remanded to the trial court for a *Gentry* determination as to whether class actions 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 p.*3.) At the time, the Court of Appeal presumed that, under *Gentry*, CLS could potentially enforce its arbitration agreement, including its class action waiver.

Moreover, CLS, in its renewed petition to compel arbitration filed in 2011, actually argued that *Gentry* is inapplicable because Iskanian's rights *could* still be fully vindicated individually (see 7AA 1999-2000, 2004-2041), even though it has also conceded that Iskanian's case satisfies the actual criteria set forth in *Gentry*. And CLS reiterates this argument before this Court. (See Resp.'s Br. at p. 12.) CLS could have advanced these points upon remand in 2008, or simply moved for arbitration and put Iskanian to his burden of establishing that individual arbitration would cause an effective forfeiture of his statutory rights. CLS did neither. Amicus's failure to explain or justify CLS's post-remand conduct is telling.

What actually happened is that CLS made a strategic decision to remain in court in 2008. Now, after suffering setbacks such as losing the motion for class certification, it wants to use arbitration as a "do-over." As Iskanian has aggressively litigated the action in court for three years in good faith reliance on CLS's conduct, CLS must bear the consequences of its decision to remain in court.[7]

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[7] In ensuring that parties bear the consequence of their own actions, the principle underlying the waiver doctrine finds a parallel in the Supreme Court's recent unanimous decision in *Oxford Health Plans v. Sutter* (2013) 133 S.Ct. 2064, 2071, which

Other points advanced by the Chamber are equally unavailing. The Chamber tries to distinguish *Gutierrez v. Wells Fargo Bank, NA* (9th Cir. 2012) 704 F.3d 712 on its facts, but neglects to address Iskanian's point that *Gutierrez* held that "it was not inevitably futile" to move for arbitration pre-*Concepcion*. (ARB at p. 24 [citing *Gutierrez*, *supra*, 704 F.3d at p. 721].) *Gutierrez* was subsequently invoked by another court to hold that the futility defense is unavailable for parties claiming that they only had a right to arbitrate after *Concepcion* purportedly overruled *Gentry*. (See *Ontiveros v. Zamora* (E.D.Cal. Feb. 13, 2013) 2013 U.S.Dist. Lexis 20408, at pp.*24-25; ARP at pp. 24, 27.) The reasoning of *Ontiveros*—that the futility defense is unavailable to parties like CLS even under Ninth Circuit case law—remains unrebutted.

Nor has any amicus addressed the inapplicability of the futility defense under California law. The futility defense is premised on the notion that only a "known right" may be waived and disregards that under California law, a party may waive a right to arbitrate even without knowing that the right existed. (AOB at pp. 42-43.)[8]

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applied the same principle to arbitration: "Oxford chose arbitration, and it must now live with that choice… [and] does not get to rerun the matter in a court." Likewise, CLS chose to remain in court, and having litigated this far, does not get to rerun the action by "switching to another forum, and starting the case all over again in arbitration." (*In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices and Prod. Liability Litig.* (C.D.Cal. 2011) 828 F.Supp.2d 1150, 1163.)

[8] Nor has any amicus come to the defense of the Court of Appeal's elastic conception of "futility," where a party may be

The Chamber's final argument, that any prejudice suffered is "self-inflicted" because Mr. Iskanian, having signed an arbitration agreement, should not have brought the action in court, is plainly circular and would fatally undermine the waiver doctrine if accepted. "An arbitration clause…is not self-executing" and a party who wants to arbitrate under an arbitration agreement must take action to do so. (*Augusta*, *supra*, 193 Cal.App.4th at p. 338.) Thus, a party is entitled to pursue his claims in court subject to the possibility of a demand to enforce a valid arbitration agreement. Waiver is meant to protect parties who proceed in this manner by preventing their opponent from "blow[ing] hot and cold by pursuing a strategy of courtroom litigation only to turn towards the arbitral forum at the last minute, thereby frustrating the goal of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 945.) However, if any harm suffered by a plaintiff pursuing claims in court in the face of such apparent acquiescence by the defendant is "just deserts," as amicus contends, then the protections offered by the waiver defense would be meaningless. The result would be to "permit a party to litigate various issues through demurrers,

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excused from delay in invoking arbitration just because the party believed it was *unlikely* to succeed in enforcing each and every term of an arbitration agreement. (See AOB at pp. 43-46 [citing slip op. at p. 20].) Even assuming that a futility defense is available in state court, the Court of Appeal's expansive conception of such a defense—permitting delay based on a party's subjective belief—if affirmed by this Court, would nullify waiver law and the protections it affords to a party litigating in court in good faith.

motions for summary judgment, motions for certification of the class, or opposition thereto, etc., yet just before trial demand arbitration. This is like testing the water before taking the swim. If it's not to your liking you go elsewhere." (*McConnell*, *supra*, 105 Cal.App.3d at p. 951.)

The Chamber's position belies the reality, reflected in the body of waiver case law, that parties frequently enter into arbitration agreements with no intention to actually arbitrate their claims unless and until there is a strategic benefit in doing so. Here, CLS evinced its intent to remain in court by withdrawing its petition to compel arbitration and litigating in court for years. It cannot now wash away three years of prejudicial conduct by claiming that Mr. Iskanian should not have brought the action in court in the first place.

CONCLUSION

Based on the foregoing, the judgment of the Court of Appeal should be reversed.

Dated: August 20, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.520, the enclosed Appellant's Consolidated Answer to Amicus Curiae Briefs was produced using 13-point New Schoolbook Century type style and contains 10,359 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

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