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 B235158

FROM THE SUPERIOR COURT,
COUNTY OF LOS ANGELES,
CASE NO. BC356521, ASSIGNED FOR ALL PURPOSES
TO JUDGE ROBERT HESS, DEPARTMENT 24

APPELLANT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

FEDERAL STATUTES

SECONDARY AUTHORITIES

ISSUES PRESENTED

Did *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S. Ct. 1740] impliedly overrule this Court's holding in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, that an employment arbitration agreement prohibiting class actions is unenforceable if its practical impact is to deprive employees of non-waivable employment-law rights?

2. Does the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) require enforcement of an employment arbitration agreement that prohibits all representative actions, including claims under the Private Attorneys General Act (PAGA) (Lab. Code, § 2698 et seq.)?

3. Does an employer's arbitration agreement that prohibits all class and representative actions violate the right of employees to engage in "concerted activities" for "mutual aid and protection" under Section 7 of the National Labor Relations Act (29 U.S.C. § 157) and Sections 2 and 3 of the Norris-LaGuardia Act (29 U.S.C. §§ 102-103), as held by the National Labor Relations Board, *D.R. Horton* (2012) 357 NLRB No. 184, 2012 WL 36274, *cross-petitions for review and enforcement pending* (5th Cir.) No. 60031?

4. Did the defendant waive its right to compel arbitration by abandoning its petition to compel arbitration after a prior remand to determine the applicability of *Gentry*, participating in extensive class-action discovery, and not renewing its petition until after the decision in *Concepcion*?

INTRODUCTION

The issues presented by this case are linked by a common thread: the principle that an arbitration agreement enforceable under the Federal Arbitration Act does not waive a party's rights, other than the right to choose a judicial forum. The arbitration agreement at issue violates this principle in three ways. Its prohibition of class proceedings, as applied to wage-and-hour claims, prevents effective vindication of unwaivable rights in violation of this Court's holding in *Gentry*. Its ban on PAGA representative claims forecloses altogether the recovery of penalties and fees under that statute—recoveries authorized to serve interests of the state and the public at large. And the prohibition of both class and representative actions directly infringes employees' substantive rights under federal labor law to engage in concerted action. Nothing in *Concepcion*, which overturned California law rendering *consumer* class-action bans unenforceable, allows arbitration agreements to be used to deprive employees of their rights in these ways.

But while arbitration agreements may not waive parties' non-forum rights, both California and federal law provide that parties may waive their rights *to arbitrate*. Here, the defendant knowingly abandoned its efforts to compel arbitration at a time when they were by no means "futile," and attempted to resuscitate its motion to compel arbitration only after years of discovery and litigation over class certification—efforts that would be completely wasted if the case were now forced into individual arbitration. Accordingly, reversal is required both because the defendant's mandatory arbitration agreement imposes an unenforceable burden on the plaintiff's fundamental statutory rights under state and federal law, and because the defendant waived its right to compel individual arbitration.

STATEMENT OF THE CASE

Plaintiff-petitioner Arshavir Iskanian brought this wage-and-hour class action and PAGA representative action against defendant-respondent CLS Transportation on August 6, 2006. (Slip Op. at 3.)[1] CLS moved to compel arbitration in February 2007 under a mandatory pre-dispute employment arbitration agreement that it imposed in 2004 on all of its employees, whether they signed the agreement or not. (*See* 7 Appellant's Appendix ["AA"] 1975 [¶ 17] ["The foregoing provisions of this Policy/Agreement are binding upon EMPLOYEE and COMPANY irrespective of whether EMPLOYEE and/or COMPANY signs this Policy/Agreement."].)

The Agreement expressly prohibited CLS's employees from pursuing any claim on a class or representative basis, and restricted employees to pursuing claims on an individual basis:

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

(Slip Op. at 2-3.)

On March 13, 2007, the trial court granted CLS's motion to compel arbitration. While Iskanian's appeal was pending, this Court decided *Gentry v. Superior Court* (2007) 42 Cal.4th 443. In light of *Gentry*, the

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[1] (Citations to the Court of Appeal's opinion in this case are in the form of "Slip Op. at [ ].")

Court of Appeal reversed and remanded, directing the trial court to vacate its order compelling arbitration if it found that a class action would be a "more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (*Iskanian v. CLS Transp. L.A. LLC* (May 27, 2008, No. B198999), 2008 Cal.App.Unpub.Lexis 4302 at *3.)

On remand, CLS chose not to pursue its motion to compel arbitration. Instead, it proceeded to litigate the putative class action and representative action, without requiring Iskanian to prove any of the applicable *Gentry* factors. (Slip Op. at 3.) At considerable expense and burden to Iskanian, the parties exchanged substantial written merits and class discovery, including three sets of special interrogatories, four sets of requests for production of documents, three sets of requests for admissions and two sets of form interrogatories. (2 AA 419-20; 2 AA 434-510.)

After months of discovery, Iskanian moved to certify the class. CLS vigorously challenged every element of the certification analysis, including the admissibility and sufficiency of Iskanian's evidence. (See generally 2 AA 383-7 AA 1805.) On October 29, 2010, the trial court granted Iskanian's motion to certify the class. (7 AA 1788-1805.) The parties then conducted additional discovery, and CLS filed a motion for summary judgment. (RT June 13, 2011 [at A-25:18-22].) On May 16, 2011, three months before the scheduled trial date of August 16, 2011, CLS "renewed" its abandoned motion to compel individual arbitration, citing the U.S. Supreme Court's new decision in *Concepcion*. (7 AA 1806.)

In response, Iskanian introduced evidence directed at the factors that, under *Gentry*, determine whether enforcement of a class-action ban in a wage-and-hour case violates public policy. (7 AA 1963-82.) CLS conceded that Iskanian satisfied the *Gentry* test, but argued that *Concepcion* effectively overruled *Gentry*. (Iskanian Slip Op. at p. 19 ["**[CLS] concedes**

that Iskanian would have satisfied his burden under the *Gentry* test."].) The trial court compelled arbitration on June 13, 2011, and Iskanian timely appealed.

On June 4, 2012, the Court of Appeal issued a published decision affirming the order compelling arbitration. Iskanian's timely Petition for Rehearing was summarily denied on June 26, 2012.

ARGUMENT

I. THIS COURT'S DECISION IN *GENTRY* REMAINS A VALID APPLICATION OF THE PRINCIPLE THAT ARBITRATION CLAUSES CANNOT WAIVE OTHERWISE UNWAIVABLE RIGHTS

A. *Gentry* Prohibits Class-action Bans When Their Enforcement Would Effect a Waiver of Rights

"California law, like federal law, favors enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) In *Gentry*, this Court announced a limited qualification to California's policy favoring enforcement of arbitration clauses: A class-action ban in an arbitration clause (or any other contract) is unenforceable when the class-action ban would prevent a party from effectively vindicating an unwaivable statutory right. (Id. at p. 450.)

Gentry, unlike the earlier decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which held class-action bans in most consumer contracts unenforceable, was primarily based not on unconscionability, but on the principle that statutory rights serving important public policies are not waivable by contract, and that neither California law nor the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, allows enforcement of a waiver. (See *Franco v. Arakelian Enterprises, Inc.* (Dec. 4, 2012) 211 Cal.App.4th 314 [149 Cal.Rptr.3d 530, 560-61] [explaining why *Concepcion* does not abrogate *Gentry*].) As one lower court explained:

> The seeds for the rule of *Gentry* were planted not in *Discover Bank*, but in *Armendariz*, *supra*, 24 Cal.4th 83. *Armendariz* considered whether a plaintiff could be compelled to arbitrate discrimination claims brought under the Fair Employment and Housing Act (FEHA). The Supreme Court began with the premise that FEHA rights are unwaivable. (*Armendariz*, *supra*, 24 Cal.4th at p. 112.) The court agreed that, as a general matter, assuming the arbitral forum is adequate, an agreement to arbitrate a non-waivable statutory claim does not waive the claim, it simply submits its resolution to another forum. (*Id.* at pp. 98–99.) However, if the arbitral forum is not adequate, an agreement to arbitrate a non-waivable statutory claim may, in fact, improperly compel the claimant to forfeit his or her statutory rights. (*Id.* at pp. 99–100.)

(*Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 839.)

In *Gentry*, an employee subject to an arbitration clause prohibiting all class actions sought to bring a class action under California's minimum-wage and overtime laws. This Court determined that the rights asserted could not be waived by contract because the statutory mandate that employers pay the required amounts regardless of any agreement by employees to accept less embodied an important public policy. (*Gentry*, 42 Cal.4th at pp. 455-56.) *Gentry* then considered whether enforcing the class-action ban would effect an unenforceable waiver of the employees' rights.

Gentry analyzed several factors that may render individual adjudication or arbitration of a claim inadequate to allow vindication of employees' unwaivable rights. Among those factors are the modest potential recoveries and uncertain prospect of attorneys' fee awards (which may render individual pursuit of claims economically infeasible); the prospect that individual claimants may face retaliation by employers, necessitating group proceedings for self-protection; and the unfamiliarity of

many employees with their rights, which may make class proceedings essential to ensuring full compensation to all employees. (See *id.* at pp. 457-62; see also *Franco*, 149 Cal.Rptr.3d at pp. 556-60 [discussing *Gentry* factors and their continued relevance].) Nonetheless, the Court declined to announce a blanket rule that class-action bans are unenforceable as applied to statutory wage and overtime claims. The Court recognized that individual arbitration *could* adequately vindicate employees' rights in some cases (42 Cal.4th at p. 462), and that provisions of particular agreements could ameliorate factors that otherwise would render individual arbitration inadequate. (Id. at p. 464.)

Gentry therefore required a case-specific inquiry to determine the enforceability of a class-action ban in any case involving unwaivable statutory rights, whether that ban was incorporated into an arbitration agreement or another employment contract:

> [W]hen it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the

> employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can "vindicate [their] unwaivable rights in an arbitration forum."

(Id. at p. 463.)

Here, it is undisputed that the rights Iskanian asserts are unwaivable: They are the same rights that were at issue in *Gentry*. And CLS concedes that Iskanian's showing was sufficient to invalidate the class-action ban under *Gentry*.

B. The FAA Does Not Preempt *Gentry*

Four years after *Gentry*, the U.S. Supreme Court decided *Concepcion*, which held that the FAA preempts *Discover Bank*'s holding that most class-action bans in consumer arbitration agreements are unconscionable. The Court of Appeal's holding that *Concepcion* similarly invalidates *Gentry* is erroneous.

Gentry is firmly grounded in a principle incorporated in the FAA itself: Arbitration agreements are choices of forum that do not strip parties of otherwise unwaivable rights. A state-law doctrine embodying that same principle cannot be preempted because it does not conflict with the FAA. And nothing in *Concepcion* requires preemption of state-law doctrines that ensure arbitration agreements preserve substantive rights. Rather, *Concepcion* holds that states may not prevent enforcement of class-action bans in arbitration agreements when class proceedings are *unnecessary* to ensure the vindication of rights. That holding does not require setting aside *Gentry*.

1. The FAA Does Not Preempt State Law Protecting Substantive Rights From Forfeiture

(a) The U.S. Supreme Court's Decisions Consistently Hold That the FAA Does Not Authorize Waiver of Substantive Rights

The FAA makes agreements to *arbitrate* claims enforceable, not

agreements to *waive* claims. Section 2 of the FAA provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to *settle by arbitration a controversy* thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2 [emphasis added].) As its language indicates, the FAA requires enforcement of agreements *to resolve disputes* by arbitration, not agreements that *foreclose* assertion and resolution of claims.

Consistent with this language, the U.S. Supreme Court has characterized the FAA as authorizing a choice of *forum* for resolving disputes, not as a mechanism for preventing assertion of claims. In *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, the Court, in enforcing an agreement to arbitrate federal securities claims, described arbitration agreements as "a specialized kind of forum-selection clause." (Id. at p. 519.) The Court has repeated its characterization of arbitration agreements under the FAA as "forum-selection" or "choice-of-forum" clauses regularly in the decades since *Scherk*. (See, e.g., *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 671; *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 269; *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 295 & fn.10; *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 534; *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 29; *Rodriguez de Quijas v. Shearson/American Express* (1989) 490 U.S. 477, 483; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 629-31.)

A forum-selection clause determines *where* a claim will be decided, not *whether* it may be pursued. Thus, the Supreme Court has emphasized that under the FAA an arbitration agreement "*only* determines the choice of forum." (*Waffle House*, 534 U.S. at p. 295 fn.10 [emphasis added].) As the

Court explained in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (473 U.S. at p. 628.) The Court has repeated these words from *Mitsubishi* no fewer than seven times in subsequent cases. (*Pyett*, 556 U.S. at p. 266; *Preston v. Ferrer* (2008) 552 U.S. 346, 359; *Waffle House*, 534 U.S. at p. 295 fn.10; *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 123; *Gilmer*, 500 U.S. at p. 26; *Rodriguez de Quijas*, 490 U.S. at p. 481; *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 229-30.)

Not only does the FAA not *require* enforcement of agreements that deprive parties of substantive rights in the guise of arbitration; it *prohibits* their enforcement. *Mitsubishi* stated that if an arbitration agreement "operated ... as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." (473 U.S. at p. 637, fn. 19; accord, *Vimar Seguros*, 515 U.S. at p. 540.) Thus, *Mitsubishi* announced that the FAA requires arbitration of claims only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum ...." (437 U.S., at p. 637.) The Supreme Court has repeatedly stated the same point in subsequent decisions. (See *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90; *Gilmer*, 500 U.S. at p. 28; *McMahon*, 482 U.S. at p. 240.)

This effective-vindication principle forbids not only direct waivers of rights but also agreements imposing procedural impediments to effective vindication of rights. The Supreme Court recognized this consequence in *Green Tree*, where it considered a plaintiff's claim that excessive arbitration fees prevented her from vindicating rights under the Truth in Lending Act. *Green Tree* emphasized that an arbitration agreement must

permit effective vindication of statutory rights (531 U.S. at p. 90), and acknowledged that excessive costs could prevent a party from effectively vindicating rights "in the arbitral forum." (Ibid.) The Court held that the plaintiff in *Green Tree* had not demonstrated prohibitive costs, but stated that actual proof of such costs *would* invalidate an arbitration agreement. (Id. at p. 92.) As this Court noted in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, *Green Tree* rests on the "fundamental tenet[]" that "arbitration costs can present significant barriers to the vindication of statutory rights." (Id. at p. 1084.)

(b) The Non-Waiver Principle Applies to State-Law Rights

The FAA's prohibition of arbitration agreements waiving substantive rights is fully applicable to state-law rights. This Court so held in *Little v. Auto Stiegler* and *Armendariz*. *Little* expressly rejected the argument that the FAA requires enforcement of arbitration agreements that waive otherwise unwaivable state-law rights. (29 Cal.4th at pp. 1078-79.) Similarly, *Armendariz* applied the *Mitsubishi* principle that the FAA "disallows forms of arbitration that in fact compel claimants to forfeit certain substantive rights" (24 Cal.4th at pp. 99-100) to rights created by a state statute—the California Fair Employment and Housing Act (FEHA). *Armendariz* expressly held that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA" (id. at p. 101) and that the FAA does not require arbitration of FEHA claims unless the agreement permits a party to "fully 'vindicate [his or her] statutory cause of action in the arbitral forum.'" (Ibid. [quoting *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1087 (quoting *Gilmer*, 500 U.S. at pp. 27-28)].)

This Court is not alone in concluding that an enforceable arbitration agreement must permit effective vindication of state-created rights. The

U.S. Supreme Court expressed the same view in *Preston v. Ferrer*, *supra*. There, while holding that the FAA requires arbitration of a claim under the California Talent Agencies Act, the Court observed that the issue was "only a question concerning the forum in which the parties' dispute will be heard," because "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum.'" (552 U.S. at p. 359 [quoting *Mitsubishi*, 473 U.S. at p. 628].) Underscoring that *Mitsubishi* applies equally to state and federal claims, the Court in *Preston* stated that under the FAA, a party to an arbitration agreement "relinquishes no substantive rights ... **California law** may accord him." (Ibid. [emphasis added]; see also *Circuit City Stores v. Adams*, 532 U.S. at p. 123 [quoting *Mitsubishi*'s statement that parties to arbitration do not forgo substantive rights in a case involving state-law claims].)

Similarly, in *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, the court invalidated arbitration provisions that would "prevent the vindication of statutory rights under *state* and federal law." (Id. at p. 29 [emphasis added].) The court explained that "[u]nless the arbitral forum provided by a given agreement provides for the fair and adequate enforcement of a party's statutory rights, the arbitral forum ... loses its claim as a valid alternative to traditional litigation." (Id. at p. 37.) Finding this principle equally applicable to state and federal claims (see id. at p. 63), the court separately analyzed the plaintiffs' state and federal antitrust claims before determining that certain provisions of the arbitration agreements could not be applied to either. (See id. at pp. 44-60, 64.)

Likewise, in *Booker v. Robert Half International* (D.C. Cir. 2005), 413 F.3d 77, the D.C. Circuit, in an opinion by then-Judge John Roberts, recognized that the FAA permitted arbitration of claims under District of Columbia law only if arbitration allowed effective vindication of those

claims. Judge Roberts began with the unqualified statement that "[s]tatutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute." (Id. at p. 79.) The court therefore refused to enforce a provision in the arbitration agreement foreclosing punitive damages available under D.C. law. (Id. at pp. 79-83.)[2]

The decisions holding that *Mitsubishi*'s prohibition on waivers of statutory rights arbitration agreements applies to state-law as well as federal rights follow logically from the FAA itself. Of course, the FAA displaces contrary state law under the Supremacy Clause. (*Vaden v. Discover Bank* (2009) 556 U.S. 49, 58-59; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 271–272; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10.) Only Congress can *override* the FAA by legislation making it inapplicable to claims otherwise within its scope. (See *CompuCredit, Inc. v. Greenwood* (2012) 132 S.Ct. 665, 669.)

But, as explained above, section 2 of the FAA provides for enforcement only of agreements to *resolve claims by arbitration*, not agreements that *waive* claims and *preclude* their resolution by arbitration. When an arbitration clause imposes terms requiring a party to forgo substantive rights or preventing effective vindication of rights, it exceeds what the FAA requires courts to enforce. (See *supra* 8-11.) A state-law doctrine that likewise prohibits enforcement of arbitration agreements that effectively waive substantive rights does not improperly attempt to *override*

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[2] In *Kilgore v. KeyBank, Nat'l Ass'n* (9th Cir. 2012) 673 F.3d 947, 961-63, a panel of the Ninth Circuit suggested, contrary to the First and D.C. Circuits, that the FAA permits enforcement of arbitration agreements that effectively waive state statutory rights. On September 20, 2012, the Ninth Circuit ordered rehearing en banc in *Kilgore*, depriving it of precedential weight. (*Kilgore v. KeyBank, Nat'l Ass'n*, rehg. en banc granted (9th Cir. 2012) 697 F.3d 1191.)

federal law in violation of the Supremacy Clause, but is fully consistent with the FAA and implements the FAA's own policy.

Put another way, the *Mitsubishi* non-waiver principle and its corollary that arbitration agreements must permit effective vindication of rights is "part of the body of federal substantive law of arbitration," *Kristian*, 446 F.3d at p. 63, and, therefore, a corresponding state-law doctrine does not conflict with federal law. Any suggestion that it would violate the Supremacy Clause to apply *Mitsubishi*'s non-waiver principle to state-law rights "confuse[s] an agreement to arbitrate"—which is protected by the FAA and, hence, the Supremacy Clause—"with a prospective waiver of the statutory right"—which the FAA does not authorize. (*Pyett*, 566 U.S. at p. 265.)

Moreover, any potential conflict between a state-law non-waiver rule and the FAA is obviated by the "savings clause" of FAA section 2, which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) As this Court held in *Little*, "[o]ne such long-standing ground for refusing to enforce a contractual term is that it would force a party to forgo unwaivable public rights." (29 Cal.4th at p. 1079.) As the Court of Appeal recently observed in *Franco*, the California statutory prohibition on exculpatory contracts, Cal. Civ. Code § 1668, is likewise a ground "for the revocation of any contract" within the meaning of the savings clause. (See 149 Cal.Rptr.3d at p. 573.)

These contract-law principles fall within the savings clause because they apply both to arbitration agreements and other contracts: They do not "take [their] meaning precisely from the fact that a contract to arbitrate is at issue," but are "generally applicable contract defenses." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 685, 687.) Nor do they "stand as an obstacle to the accomplishment of the FAA's objectives."

(*Concepcion*, 131 S. Ct. at p. 1748.) Rather, they prevent arbitration only in the limited set of cases where arbitrating would amount to a waiver of substantive rights, and the FAA's objectives do *not* include requiring a party to relinquish any "substantive right ... [state] law may afford him." (*Preston v. Ferrer*, 552 U.S. at p. 359.)[3]

2. *Concepcion* Does Not Overrule the Longstanding Principles Underlying *Gentry*

Concepcion does not require this Court to overrule *Gentry*. *Concepcion* leaves unaltered the Supreme Court's repeated holdings that the FAA neither requires nor allows enforcement of arbitration agreements waiving substantive statutory rights or preventing effective vindication of rights—holdings that necessarily mean the FAA does not preempt state-law doctrines serving exactly those same interests.[4] Moreover, the reasons for

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[3] Whenever a generally applicable ground for revoking a contract applies to an arbitration clause, it will "render[] an arbitration agreement partially or totally unenforceable according to its terms." (*Franco*, 149 Cal.Rptr.3d at p. 566.) If that were enough to make a state contract doctrine an obstacle to the FAA's objectives, it "would render the savings clause meaningless." (Ibid.)

[4] On November 19, 2012, the U.S. Supreme Court granted certiorari in *American Express Co. v. Italian Colors Restaurant* (2012), 133 S.Ct. 594, to review the Second Circuit's decision in *In re American Exp. Merchants' Litigation* (2012) 667 F.3d 204, which refused to enforce a class-action ban in an arbitration agreement because the agreement did not allow effective vindication of the plaintiffs' rights under the federal antitrust laws. The question presented in *American Express* is "[w]hether the Federal Arbitration Act permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." (http://www.supremecourt.gov/orders/grantednotedlist.aspx?Filename=12grantednotedlist.html.) The decision will not be directly controlling because the case involves federal- rather than state-law claims, and there is a possibility of a 4-4 decision because Justice Sotomayor is recused. But if the case does produce a majority opinion it is likely to shed considerable light on the extent to which the FAA requires that arbitration agreements permit vindication of substantive rights.

Concepcion's overruling of *Discover Bank* are inapplicable to *Gentry*.

Concepcion held that the FAA preempted the *Discover Bank* rule because that rule, as the Supreme Court understood it, "interferes with arbitration." (131 S.Ct. at p. 1750.) In *Discover Bank*, this Court held that a class-action ban was unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (36 Cal.4th at p. 162.) *Concepcion* concluded that *Discover Bank* "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable" (131 S.Ct. at p. 1746) because its "malleable and toothless" requirements had "no limiting effect," as virtually all consumer contracts are adhesion contracts, most consumer disputes involve relatively small sums, and merely alleging a scheme affecting many consumers sufficed to invoke the rule. (Id. at p. 1750.) *Discover Bank* thus "allow[ed] any party to a consumer arbitration to demand [classwide arbitration] *ex post*." (Ibid.) By allowing consumers in most cases to avoid arbitration unless classwide arbitration were offered, *Discover Bank* "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." (Id. at p. 1748.)

Nothing in *Concepcion*, however, validated arbitration clauses that waive otherwise unwaivable statutory rights. The Court did not question its many decisions from *Mitsubishi* onward holding that arbitration agreements are not waivers of substantive claims and must permit effective vindication of rights. Nor did the Court cite, let alone overturn, *Green Tree*'s recognition that proof that an arbitration agreement prevents vindication of a party's rights would avoid its enforcement under the FAA. As the Ninth Circuit has acknowledged, *Concepcion* is not "inconsistent with *Green*

Tree." (*Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, 1158.)[5]

Indeed, the question presented in *Concepcion* made clear that the validity of arbitration clauses that prevent vindication of rights was not before the Court:

> Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—*when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims*.

(http://www.supremecourt.gov/qp/09-00893qp.pdf [emphasis added].) Accordingly, *Concepcion* emphasized that under AT&T's arbitration agreement, the plaintiffs' claim "was most unlikely to go unresolved" because the agreement contained provisions that "provide[d] incentive for the individual prosecution of meritorious claims that are not immediately settled" and "essentially guarantee[d]" the plaintiffs would be "made whole." (131 S.Ct. at p. 1753.) Indeed, the plaintiffs actually "were better off under their arbitration agreement ... than they would have been as participants in a class action." (Ibid.)

Concepcion thus did not address whether a class-action ban is enforceable when it demonstrably *prevents* vindication of unwaivable statutory rights. Rather, *Concepcion* held that the FAA preempts a rule prohibiting class-action bans where individual arbitration *assures* vindication of rights. As the Court of Appeal said in *Franco*, "the FAA preempted the *Discover Bank* rule because it operated as a categorical

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[5] *Coneff* held that a plaintiff could not challenge the exact arbitration agreement that *Concepcion* held was enforceable. (*Coneff*, 673 F.3d at p. 1159.) The court, however, acknowledged that *Green Tree* and other decisions requiring that arbitration agreements not waive substantive rights remained valid.

prohibition on class action waivers in consumer contracts," 149 Cal.Rptr.3d at p. 565, regardless of whether the class-action ban effectively waived substantive rights.

Other courts and scholars agree with *Franco*. The Missouri Supreme Court has interpreted *Concepcion* as holding that *Discover Bank* was preempted because "it required class arbitration even if class arbitration disadvantaged consumers and was unnecessary for the consumer to obtain a remedy." (*Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486, 489, 494.) Similarly, a recent analysis of *Concepcion* concludes that:

> [T]he unconscionability defense in *Concepcion* "stood as an obstacle," for preemption purposes, because it was a categorical rule that applied to all consumer cases. The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis.

(Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion (2012) 79 U. Chi. L. Rev. 623, 651.) Even a leading federal appellate decision applying *Concepcion* to bar a challenge to a class-action ban acknowledged that *Concepcion* rested largely upon the view that "although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases ...." (*Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1211.)

Gentry, by contrast, "is not a categorical rule against class action waivers." (*Franco*, 149 Cal.Rptr.3d at p. 567.) *Gentry* explicitly disclaimed any categorical rule:

> We cannot say categorically that all class

> arbitration waivers in overtime cases are unenforceable. ... Not all overtime cases will necessarily lend themselves to class actions, nor will employees invariably request such class actions. Nor in every case will class action or arbitration be demonstrably superior to individual actions.

(*Gentry*, 42 Cal.4th at p. 462.) Unlike *Discover Bank*, which held consumer class-action bans "generally unconscionable" (id. at 453), *Gentry* held only that when a statutory right is unwaivable because of its "public importance," *id.* at p. 456, banning class actions would in "some circumstances" "lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (Id. at p. 457.)

Gentry discussed at length the factors that determine whether a plaintiff has shown that an arbitration agreement banning class actions precludes vindication of statutory rights. (Id. at pp. 457-62.) Only when, upon considering evidence concerning these "real world obstacles to the vindication of class members' right[s] through individual arbitration," a court concludes that class proceedings are necessary to the vindication of unwaivable rights does *Gentry* allow the court to hold a class-action ban unenforceable. (Id. at p. 463.)

These are not "malleable" or "toothless" requirements that effectively allow "any party" to demand class proceedings. (*Concepcion*, 131 S.Ct. at p. 1750.) The Courts of Appeal have interpreted *Gentry* to require an evidentiary showing in which a plaintiff bears the burden of demonstrating, based on the *Gentry* factors, that enforcing a class-action ban would result in a waiver of substantive rights. (See, e.g., *Kinecta Alternative Fin. Solutions, Inc. v. Super. Ct.* (2012), 205 Cal.App.4th 506, 517; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 497; *Arguelles-Romero v. Super. Ct.* (2010) 184 Cal.App.4th 825, 839-43.)

Moreover, while *Concepcion* suggests that the FAA does not allow invalidation of a class-action ban merely because some plaintiffs may "have insufficient *incentive*" to vindicate their rights, it leaves open a challenge where plaintiffs "have no effective *means* to vindicate their rights." (*Coneff*, 673 F.3d at p. 1159.) *Gentry* is squarely aimed at the latter issue.

Notably, *Concepcion* never mentioned *Gentry*, nor did it arise in the employment context. (*Concepcion*, 131 S.Ct. at p. 1746 [citing past California cases in which arbitration agreements have been found unconscionable, all of which were consumer cases].) In contrast to the consumer agreement in *Concepcion* that provided positive incentives for the assertion of claims, prohibitions of class, collective or representative employment actions are much more likely to prevent assertion of claims because of employees' legitimate fear of retaliation, as *Gentry* recognized. (42 Cal.4th at pp. 460-61; see also *Franco*, 149 Cal.Rptr.3d at p.559 [noting that retaliation by employers against employees for asserting statutory rights continues to comprise the largest portion of DLSE complaints].)

Finally, *Gentry* is not vulnerable to condemnation on the ground that it has a "disproportionate impact" on arbitration or is incompatible with "fundamental attributes of arbitration." (*Concepcion*, 131 S.Ct. at p. 1748.) Although *Gentry* contemplates that class procedures are sometimes required to ensure effective vindication of unwaivable rights, and in those instances arbitration will be unavailable,[6] that result will not undermine federal policy favoring arbitration, as that policy does not endorse using arbitration to require parties to forgo substantive rights. By *allowing* arbitration under parties' agreements *except* when it would eliminate

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[6] *Gentry* requires one modification to comply with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758: Where a class-action ban is unenforceable under *Gentry*, the class action must proceed in court rather than arbitration, because *Stolt-Nielsen* does not permit courts to order class proceedings when an arbitration agreement precludes them.

unwaivable rights, *Gentry* maintains the most fundamental attribute of arbitration under the FAA: Arbitration is a choice of forum, not a waiver of substantive claims. (See *supra* 8-11.)

II. THE ARBITRATION CLAUSE'S BAN ON REPRESENTATIVE ACTIONS IS UNENFORCEABLE

Iskanian sought to pursue not only a class action, but also a representative action under the Private Attorneys General Act, Cal. Lab. Code §§ 2698 *et seq.* ("PAGA") , seeking statutory penalties for violations suffered by himself and other employees. CLS's arbitration agreement, however, purports to foreclose such claims. It first provides that such claims may not be *arbitrated*: "representative action procedures shall not be asserted ... in any arbitration pursuant to this Policy/Agreement." It then purports to prohibit such a claim not only in arbitration, but in *any* forum, by providing that an employee "will not assert ... representative action claims ... *in arbitration or otherwise*" (emphasis added). It concludes that employees may pursue only "their own, individual claims in arbitration and will not seek to represent the interests of any other person."

PAGA authorizes employees harmed by violations of California's labor laws to supplement the state's limited enforcement capacity by suing as representatives of the state to recover civil penalties payable partly to the state and partly to employees. By barring representative actions in any forum, the arbitration clause here would eliminate an employee's statutory entitlement to bring a claim under PAGA. But that entitlement, conferred to provide a public rather than private benefit, is not waivable. And because the FAA does not authorize enforcement of agreements waiving otherwise unwaivable claims, it cannot preempt California legal principles forbidding such waiver. Moreover, PAGA claims are asserted on behalf of the *state*, and the U.S. Supreme Court has held that private arbitration agreements cannot bind non-party governmental entities. (*EEOC v. Waffle*

House, Inc. (2002) 534 U.S. 279.)

Nor does *Concepcion* require enforcement of the representative-action ban. The arbitration clause in *Concepcion* barred class-action procedures but did *not* foreclose any claim, and nothing in *Concepcion* validates arbitration agreements that eliminate employees' entitlement to bring particular claims. Further, unlike the class actions at issue in *Concepcion*, PAGA claims do not involve the aggregated adjudication procedures that *Concepcion* found antithetical to arbitration, because PAGA claims are litigated as *bilateral* actions. Enforcing generally applicable state law allowing employees to PAGA claims thus does not frustrate the FAA's objectives.

A. PAGA Advances Important Public Purposes by Empowering Individual Employees to Bring Actions as Representatives of the State

PAGA provides a unique enforcement method for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover statutory penalties on behalf of the state, themselves, and other employees—penalties that, before PAGA's enactment, could be obtained only by the state. PAGA provides that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ..., for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." (Lab. Code, § 2699(a).) For Labor Code provisions that do not specify a penalty, PAGA provides its own penalties, generally $100 per employee per pay period for the first violation, and $200 per employee per pay period for each subsequent violation, likewise recoverable by an aggrieved employee in a representative action. (Id. §§ 2699(f)(2), (g).)

Before filing a PAGA action, an employee must give notice of the claimed Labor Code violations to the employer and the California Labor and Workforce Development Agency. (Id. § 2699.3(a)(1).) The agency is deemed to authorize the employee to sue on behalf of the state if it fails to respond, declines to investigate, or does not issue a citation. (Id. §§ 2699.3(a)(2), 2699(h).)

PAGA actions need not be prosecuted as class actions and are commonly maintained by individuals. (See *Arias v. Superior Court* (2009) 209 P.3d 923, 979-87.) PAGA actions thus require neither class certification nor notice to other employees. (Ibid.) An *individual* PAGA plaintiff "may recover the civil penalty ... in a civil action ... filed on behalf of himself or herself and other current or former employees," as well as "an award of reasonable attorney's fees and costs." (Id. § 2699(g)(1).) Any penalties so recovered are distributed 25% to the aggrieved employees and 75% to the State. (Id. § 2699(i).)

PAGA's empowerment of an individual to recover penalties on behalf of the state, himself, and other employees reflected a legislative determination that

> adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

(*Arias*, 46 Cal.4th at p. 980.) Thus, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state

labor law enforcement agencies." (*Id.* at 986 [emphasis added].)

In short, a PAGA action is inherently "representative": the individual plaintiff represents the interest of the state, acting on behalf of the plaintiff and other employees who were victims of wrongdoing. Any PAGA action—even to the extent it seeks penalties for wrongs suffered by the individual plaintiff—is brought by a private attorney general in a representative capacity.

B. California Law Does Not Permit Contractual Prohibition of PAGA Claims

This Court's decisions establish that a claim is not waivable when the entitlement to bring it is established to benefit the public rather than individuals. (*See Little*, 29 Cal.4th at pp. 1076-77; *Armendariz*, 24 Cal.4th at pp. 99-101.) As the Court explained in *Armendariz*:

> This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." ... Second, Civil Code section 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

(*Id.* at p. 100.) Thus, *Armendariz* held that FEHA rights are unwaivable because the public policy served by FEHA "inures to the benefit of the public at large rather than to a particular employer or employee." (*Id.* [quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90].) Similarly, *Gentry* held that rights under the minimum wage and overtime laws are unwaivable because those laws serve a "clear public policy" and "private action[s] brought by aggrieved employees" are important to that policy. (*Gentry*, 42

Cal.4th at p. 455.)

The entitlement to bring PAGA representative actions was likewise created to benefit the public. PAGA recoveries are principally for the state and only secondarily for aggrieved employees. (Lab. Code, § 2699(i).) Those recoveries are penalties designed to promote compliance rather than compensate employees. (See *Arias*, 46 Cal.4th at p. 986.) A PAGA plaintiff acts as a "proxy agent of the state's law enforcement agencies," *id.*, and PAGA actions are "substitute[s] for an action brought by the government itself." (Ibid.) Thus, a PAGA action "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Id.* at p. 986 [quoting *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17].) That is exactly the type of claim this Court has held unwaivable. (See *Gentry*, 42 Cal.4th at p. 455; *Little*, 29 Cal.4th at pp. 1076-77; *Armendariz*, 24 Cal.4th at pp. 99-101.)

The agreement here, however, plainly purports to compel waiver of PAGA claims. A PAGA plaintiff, by definition, acts as the representative of the state, seeking recovery for the state as well as himself and similarly situated employees. The arbitration agreement here bans **all** such representative actions by prohibiting employees from bringing them in arbitration, and separately forbidding them in any other forum. Because claims created for public purposes are not waivable under California law, the provision banning representative actions *in any forum* cannot, as a matter of California law, be enforced to bar Iskanian's PAGA claims.

It is no answer to suggest, as did the Court of Appeal, that Iskanian may bring a PAGA claim seeking a recovery *solely for himself* as long as he does not seek to represent others. First, that is not what the agreement says: It bars representative actions altogether, and a PAGA plaintiff is always a representative or "proxy agent" of the state. (See *Arias*, 46 Cal.4th at p. 986; see also *Franco*, 149 Cal.Rptr.3d at p. 538, fn.2 ["an

employee who brings a PAGA claim and seeks civil penalties solely on an individual basis is acting as a private attorney general."].)

Second, a PAGA plaintiff *cannot* seek recovery solely for himself. The statute gives 75% of penalties recovered in any PAGA action to the state. (Lab. Code, § 2699(i).) PAGA also requires that a plaintiff seek recovery "on behalf of himself or herself and other current or former employees." (*Id.* § 2699(a).) Courts have held that PAGA's plain language does not permit a plaintiff to seek penalties only for himself when other employees are similarly situated (just as the state would not bring an action solely to benefit a single employee when others suffered identical wrongs). (See *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123 ("[A PAGA claim is not an individual one. 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.'"). The "individual" PAGA claim that the Court of Appeal said the arbitration agreement would permit does not exist.

Third, allowing Iskanian to bring a truncated PAGA action seeking to recover only for himself while enforcing representative-action ban to bar the rest of the relief he seeks would give effect to a waiver of much of what PAGA authorizes him to pursue: penalties on behalf of the state and other employees. Such a waiver would significantly impair PAGA's public purpose: "maximum compliance with state labor laws" (*Arias*, 46 Cal.4th at p. 980), a goal that, the Legislature believed, required a statute permitting individuals to bring suit not merely on their own behalf, but as "private attorneys general" to supplement limited state enforcement. (Ibid.) Thus, even if Iskanian could pursue purely individual PAGA claims under the arbitration agreement, enforcing the representative-action ban would still constitute a prohibited waiver of public rights.

Thus, California law does not permit enforcement of the

representative-action ban. Unless the FAA preempts California law, as the Court of Appeal held, Iskanian's PAGA claims may proceed.

C. The FAA Does Not Require Enforcement of a Waiver of PAGA Claims

1. The FAA Does Not Authorize Agreements Waiving Statutory Claims

The agreement CLS seeks to enforce is not an agreement to *arbitrate* PAGA claims, but one that purports to *forbid both arbitration and litigation* of representative claims under PAGA. The FAA's requirement that *agreements to arbitrate* be enforced provides no basis for displacing California legal principles precluding waiver of PAGA claims. The U.S. Supreme Court has *never* held that the FAA's requirement that arbitration agreements be enforced extends to agreements that completely waive an individual's rights to assert particular claims. As explained above (*supra* 8-11), the FAA authorizes agreements requiring that claims be *pursued in arbitration*; it does not authorize agreements that particular claims *cannot be pursued at all.*

Barring Iskanian from asserting PAGA claims would directly contradict the U.S. Supreme Court's repeated statements that the FAA merely permits choice of forums, not waiver of claims, and that a party who agrees to arbitration does not forgo his rights, but must be allowed to effectively vindicate them. (*Mitsubishi*, 473 U.S. at p. 628; see also cases cited *supra* 9-10.) As both this Court and the U.S. Supreme Court have recognized, these principles apply fully to otherwise unwaivable rights under state law. (See *supra* 11-14.)

For these reasons, the U.S. Supreme Court has explicitly cautioned against "confus[ing] an agreement to arbitrate ... statutory claims with a prospective waiver of the substantive right." (*14 Penn Plaza LLC v. Pyett*

(2009) 556 U.S. 247, 265.)[7] The FAA may require enforcement of the former, but it does not require states to permit the latter. In fact, the Supreme Court has stated that it would "condemn[] ... as against public policy" an arbitration agreement that operated "as a prospective waiver of a party's right to pursue statutory remedies." (*Mitsubishi*, 473 U.S. at p. 637, fn.19.) And in its most recent arbitration decision, *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, the Court again stressed that while parties to arbitration waive the right to bring claims in court, they do not waive their underlying claims. As the Court explained, arbitration of an unwaivable claim is permissible as long as "*the guarantee of the legal power to impose liability* ... is preserved." (Id. at p. 671 [emphasis in original].) Because neither the FAA's text nor its underlying policies require enforcement of agreements waiving particular claims—as opposed to agreements requiring *arbitration* of claims—state-law principles prohibiting waiver of claims that serve public purposes do not conflict with the FAA or obstruct achievement of its purposes, and are therefore not preempted.

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[7] In *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993, this Court held that PAGA claims are not "substantive" in the sense that they do not confer an assignable property right on an aggrieved employee. (Id. at p. 1003.) This Court's reasoning for finding the claims nonassignable—that the PAGA claimant acts as a "proxy or agent ... representing the same legal right and interest" as state agencies, and that the claim for penalties was created "to protect the public, not to benefit private parties" (id.)— supports the conclusion that the claim is unwaivable. The Court's characterization of PAGA as procedural rather than substantive for purposes of *state assignability doctrine* does not suggest that it is not "substantive" within the meaning of the U.S. Supreme Court's case law indicating that the FAA does not authorize arbitration agreements to waive substantive rights. PAGA creates a claim for relief, and the representative actions it creates are not fundamentally incompatible with arbitration. The U.S. Supreme Court has never held that the FAA's authorization of the choice of an arbitral forum carries with it the power to cut off such a claim for relief under state law.

Courts are therefore in broad agreement that an arbitration agreement is unenforceable to the extent it waives a right to a form of legally required relief, or effectively forecloses the pursuit of particular claims. (See, e.g., *Kristian*,446 F.3d at 47-48 [arbitration clause barring statutory treble-damages claims unenforceable]; *Hadnot v. Bay, Ltd.* (5th Cir. 2003) 344 F.3d 474, 478 fn.14 [arbitration clause barring punitive damages under Title VII unenforceable]; *Shankle v. B-G Maint. Mgmt. of Colo., Inc.* (10th Cir. 1999) 163 F.3d 1230, 1234-35 (arbitration agreement requiring excessive fees did allow effective vindication of Title VII claims); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) ("When an arbitration clause has provisions that defeat the remedial purpose of the statute ... the arbitration clause is not enforceable."); *Cole v. Burns Int'l Sec. Servs.* (D.C. Cir. 1997) 105 F.3d 1465, 1468 (arbitration agreements enforceable only if they "do not undermine the relevant statutory scheme"); see also *In re Am. Exp. Merch. Litig.* (2d Cir. 2012) 667 F.3d 204, 218, *cert. granted* (2012) 133 S. Ct. 594 (arbitration provision unenforceable if it "precludes plaintiffs from enforcing their statutory rights").

Here, the arbitration agreement does more than impose practical barriers to assertion of a claim; it expressly precludes assertion of PAGA representative claims. By extracting similar agreements from all its employees, CLS would, if its preemption argument were accepted, immunize itself completely from liability for penalties and fees under PAGA. Allowing employers to opt out of liability for PAGA penalties would effectively overturn California's legislative judgment that it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations." (*Arias*, 46 Cal.4th at p. 980.) The FAA's requirement that states enforce agreements to *resolve disputes by arbitration* does not allow a party to excuse itself

from liability by *forbidding* its employees to to arbitrate *or* litigate claims.

2. *Concepcion* Does Not Address the Issue

Nothing in *Concepcion* suggests that California cannot prevent the waiver of the right to bring PAGA representative claims. *Concepcion* held that a state may not adopt a rule that forecloses individual arbitration when class proceedings are unnecessary to vindicate substantive rights, not that arbitration agreements may waive the right to bring particular claims if state law otherwise forbids waiver. *Concepcion* made clear that it was *not* approving an agreement that would completely foreclose any claim: The Court emphasized that the plaintiffs' claim was "most unlikely to go unresolved" because the arbitration agreement not only permitted it to be arbitrated, but provided incentives for the plaintiffs to arbitrate if the company did not completely satisfy the claim. (*Concepcion*, 131 S.Ct. at p. 1753.)

Moreover, declining to enforce a waiver of PAGA claims does not reflect hostility toward or discrimination against arbitration. It merely involves an arbitration-neutral application of the principle that a party cannot contractually forfeit a right granted for a public reason. (Civ. Code § 3513; *Armendariz*, 24 Cal.4th at p. 100.) It is perhaps for this reason that both this Court and the U.S. Supreme Court declined to interfere with *Brown v. Ralphs*, in which the Court of Appeal declined to enforce a PAGA waiver based in part on the distinct nature of public rights. (See *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, review den. (Oct. 19, 2011, No. S195850) 2011 Cal. Lexis 10809, cert. den. (April 16, 2012) __ U.S. __ [132 S. Ct. 1910].)

Nor does refusing to allow waiver of the entitlement to bring PAGA representative actions "interfere[] with fundamental attributes of arbitration" or "create[] a scheme inconsistent with the FAA," as in *Concepcion*. (*Concepcion*, 131 S.Ct. at p. 1748.) Much of *Concepcion*'s

reasoning rested on the view that requiring classwide rather than bilateral arbitration was incompatible with the FAA because it fundamentally changed the nature of arbitration, requiring complex and formal procedures attributable to the class's inclusion of absent members. (Id. at pp. 1750-52.)

PAGA claims, however, do not require class-action procedures. Although PAGA actions seek recoveries benefiting the state and other employees, they are bilateral proceedings between individual plaintiffs and defendants. (*Arias*, 46 Cal.4th at pp. 980-86.) Class certification, notice, opt-out rights, and other procedural steps that concerned the Court in *Concepcion* (see 131 S.Ct. at pp. 1751-52) are not features of PAGA proceedings. (*Brown*, 197 Cal.App.4th at p. 503.) Because PAGA claims are pursued bilaterally, holding that an arbitration agreement may not require a plaintiff to waive them does not threaten the nature of arbitration in a manner "inconsistent with the FAA." (*Concepcion*, 131 S.Ct. at p. 1751.)[8]

3. The FAA Does Not Bind Non-Party Governmental Entities to Private Arbitration Agreements

Permitting an individual employment agreement to foreclose PAGA claims is particularly unwarranted because PAGA claims are claims of the State of California. As explained above, a PAGA plaintiff acts "as the proxy or agent of the state's labor law enforcement agencies," and "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties," most of which go to the state. (*Arias*, 46 Cal.4th at p. 986.) A PAGA plaintiff effectively steps into the shoes of the state, and any judgment he obtains

[8] As explained below, invalidating the PAGA waiver here would result in judicial resolution of the PAGA claims, not arbitration. (See *infra* 32-33.) But even if the result were arbitration, it would be traditional, bilateral arbitration.

"binds not only that employee but also the state labor law enforcement agencies." (*Arias*, 46 Cal.4th at p. 986.)

Enforcing an employee arbitration agreement prohibiting PAGA claims would effectively impose that agreement on a governmental body that is not party to the agreement. But an arbitration agreement cannot bind a governmental enforcement agency that is not a party to it. (See *Waffle House*, 534 U.S. at 294.) Here, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." (Ibid.) Allowing an arbitration agreement to preclude recovery of penalties on the state's behalf would "turn[] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." (Id. at p. 295.) Neither *Concepcion* nor any other authority under the FAA permits that result.

D. Setting Aside the Invalid Representative-Action Ban Will Result in Judicial Resolution of Iskanian's PAGA Claims

The arbitration agreement here has separate clauses that, respectively, (1) exclude representative claims from arbitration; and (2) forbid representative actions in *any* forum, arbitral or judicial. The first is not in itself invalid: "parties are generally free to structure their arbitration agreements as they see fit" and "may limit by contract the issues which they will arbitrate." (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479.) The second provision, however, unlawfully waives the right to pursue PAGA claims.

When the invalid provision is excised, the prohibition on *arbitrating* PAGA representative actions remains, but there is no bar to litigating such claims in court. Accordingly, the PAGA claims may be pursued judicially; conversely, neither party may be compelled to arbitrate them, as arbitration of a claim excluded by the parties' arbitration agreement would itself

violate the FAA. (*See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S.Ct. 1758, 1774-75.) Iskanian therefore may pursue his PAGA claims in court.

III. THE CLASS-ACTION AND REPRESENTATIVE-ACTION BANS ARE UNENFORCEABLE BECAUSE THEY INFRINGE RIGHTS UNDER THE FEDERAL LABOR LAWS

The Court of Appeal's decision must also be reversed for the independent reason that CLS's prohibition against class and representative actions violates Iskanian's substantive statutory rights under the National Labor Relations Act ("NLRA") and Norris-LaGuardia Act ("NLGA"). As the National Labor Relations Board ("NLRB" or "Board") held in *D.R. Horton* (2012) 357 NLRB No. 184, 2012 WL 36274, *cross-petitions for review and enforcement pending* (5th Cir. No. 12-60031), any contractual prohibition on employees joining together to pursue workplace claims against their employer violates their substantive right under Section 7 of the NLRA "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 157), and is therefore unenforceable under NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1). The Board further held that any such prohibition also violates Sections 2 and 3 of the NLGA, which prohibit "any court of the United States" from enforcing any agreement that interferes with employees' statutory right to engage in "concerted activities." (29 U.S.C. §§ 102-03.)

For more than 70 years, the NLRB and the courts have construed federal labor law as protecting the right of employees, union and non-union alike, to participate in concerted legal action for mutual aid and protection—including joint, class, and collective legal actions. (*See D.R. Horton*, 2012 WL 36274, at *2-*4 [citing *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565-66; *Spandsco Oil & Royalty Co.* (1942) 42 NLRB 942, 948-49; *Salt River Valley Water Users Ass'n* (1952) 99 NLRB 849, 853-54,

enf'd (9th Cir. 1953) 206 F.2d 325; *NLRB v. City Disposal Systems* (1984) 465 U.S. 822].) An individual's action is "concerted" under federal labor law whenever the individual is attempting to act on behalf of one or more co-workers. (See *D.R. Horton*, 2012 WL 36274, at *4 ["an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7"]; *Haney v. Aramark Uniform Servs.* (2004) 121 Cal.App.4th 623, 635 [individual action is "concerted" where individual "acts, formally or informally, on behalf of a group" or "attempts to bring about or prepare for group action, even if those attempts are unsuccessful" (quotation marks and citation omitted].)

According to the Board, the long-established "right to engage in collective action – including collective *legal* action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." (*D.R. Horton*, 2012 WL 36274, at *12.) Any contract abridging this right is legally invalid and unenforceable as a matter of federal law and national labor policy. (See, e.g., *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83-84; *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332, 337; *Nat'l Licorice Co. v. NLRB* (1940) 309 U.S. 350, 355, 360; see also *NLRB v. Stone* (7th Cir. 1942) 125 F.2d 752, 755-56 [contracts requiring individual arbitration of grievances violated right to engage in concerted action under NLRA].)

In *D.R. Horton*, the NLRB held that any prohibition against class or collective proceedings in an employment arbitration agreement violates federal labor law, as it prevents employees from exercising their right to pursue concerted legal activity with co-workers in *any and all* forums. (2012 WL 36274, at *5 fn. 6.) This holding, which as the Board carefully explained was grounded in decades of precedent under the NLRA, is

entitled to great deference because the Board is charged by Congress with interpreting and applying the NLRA. (See *NLRB v. City Disposal Sys. Inc.* (1984) 465 U.S. 822, 829-30; *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 500-01; *Haney*, 121 Cal.App.4th at p. 635 ["we, like the federal courts, defer to the statutory construction adopted by the agency responsible for enforcing the legislation"].)

The Court of Appeal rejected *D.R. Horton* in the mistaken belief that the Board's analysis rested on a construction of the FAA, rather than the NLRAand NLGA. (Slip op. at 11-12.) The Court of Appeal further erroneously reasoned that, because arbitration agreements must generally be "enforced according to their terms" in the absence of a "congressional command" to the contrary, federal labor law provides no basis for declining to enforce the class waiver in this case. (Slip op. at 12-13 [citing *Concepcion,* 131 S. Ct. 1740 & *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665].) In fact, the Board based its decision principally upon its longstanding administrative construction of fundamental labor law principles, which the Court of Appeal offered no reason for disregarding. And the Board's conclusion that the FAA does not override employees' substantive rights under the NLRA and NLGA is entirely correct.

As the Board recognized in *D.R. Horton*, the purpose of the FAA was to "'reverse ... judicial hostility to arbitration agreements' and to place private arbitration agreements 'upon the same footing as other contracts.'" (2012 WL 36274, at *11 [quoting *Gilmer*, 500 U.S.at p. 24] .) The Board's decision was consistent with this purpose, as it hinged not on hostility toward arbitration, but on the unlawfulness of *any* contract prohibiting concerted employee activity. Under *D.R. Horton*, it is not the agreement to arbitrate that is unlawful, but the conceptually separate provision prohibiting employees from engaging in concerted legal activity in any forum. A stand-alone contract provision prohibiting concerted legal

activity would unquestionably violate federal labor laws. (See *D.R. Horton*, 2012 WL 36274 at *11.) Incorporating that unlawful prohibition into an arbitration agreement cannot immunize it from judicial invalidation.

By precluding employees from resorting to court *and* prohibiting collective action in the only forum left available, CLS's agreement forecloses any concerted legal action in violation of the NLRA's "core substantive" right to engage in concerted activity. (*D.R. Horton*, 2012 WL 36274, at *12.) As the U.S. Supreme Court has repeatedly held, the FAA does not permit arbitration agreements to deprive litigants of substantive rights. (See *supra* 8-11.) Here, CLS's arbitration agreement flatly prohibits Iskanian from exercising his substantive right to engage in concerted action by pursuing workplace claims as a representative of his co-workers.

Nothing in *Concepcion* is inconsistent with the Board's *D.R. Horton* ruling, nor could it be, because *Concepcion* involves the FAA's implied preemption of a *state* law under the Supremacy Clause, while *D.R Horton* rests on the Board's construction of two *federal* statutes, implicating no Supremacy Clause issue. (See *Felt v. Atchison, Topeka, & Santa Fe Ry. Co.* (9th Cir. 1995) 60 F.3d 1416, 1418-19.) Where there is potential conflict between two federal statutes, the judicial task is to reconcile them. (See *United States v. Fausto* (1988) 484 U.S. 439, 453.)

Here, as the Board in *D.R. Horton* explained, the statutes are readily reconciled. Under the Board's construction of federal labor law, employers remain free to require arbitration *as long as* those agreements do not unlawfully extinguish the core protected right under the NLRA and NLGA to engage in concerted legal activity. That construction is entirely consistent with the outer boundaries the FAA itself places on the enforcement of arbitration agreements. Section 2 of the FAA expressly provides that arbitration agreements are unenforceable where "grounds ...

exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; see *D.R. Horton*, 2012 WL 36274, at *11-*12.) The illegality of a contract term under the NLRA or NLGA is a ground rendering "any contract," not just an arbitration agreement, unenforceable. (See *Kaiser Steel*, 455 U.S. at pp. 83-84; see also 29 U.S.C. § 1003 ["Any undertaking or promise ... in conflict with the public policy [protecting concerted activity] is declared to be contrary to the public policy of the United States [and] shall not be enforceable in any court ...."].) Moreover, the Supreme Court has consistently engrafted an anti-waiver limitation onto arbitration agreements, prohibiting arbitration agreement provisions that deprive parties of substantive rights. (See *supra* 10.) Thus, the FAA does not transform a contract term violating the labor laws from lawful to unlawful because it is incorporated in an arbitration agreement.[9]

Nor does *CompuCredit* support the Court of Appeal's rejection of *D.R. Horton*. *CompuCredit*held that a consumer credit company could enforce an arbitration agreement that encompassed claims under the Credit Repair Organization Act ("CROA"), 15 U.S.C. § 1679. Applying conventional principles of statutory construction, the Supreme Court held that CROA's language did not create a right to sue in court that guaranteed a judicial forum in the face of an agreement to arbitrate. Rather, Congress intended to do no more than confer on aggrieved individuals the right to pursue claims for statutory violations, without regard to forum. (See 132 S.Ct. at pp. 669-70.) The Court also noted that if Congress had intended to

[9] Even if there were a direct conflict between the FAA and the NLRA and the NLGA, the labor statutes (enacted in 1932 and 1935) would prevail as they were both enacted after the FAA (1925). (See *Posadas v. National City Bank* (1936) 296 U.S. 497, 503 [in the case of an "irreconcilable" statutory conflict, the later-enacted statute controls].) Moreover, Congress specifically provided in the NLGA that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." (29 U.S.C. §115.)

preclude arbitration of all CROA claims, it could easily have done so—as Congress has done several recent federal statutes. (Id. at p. 672.)

Here, the issue is not whether Congress intended a federal statute to preclude arbitration altogether, but whether a particular component of an arbitration agreement violates employees' statutory rights under the NLRA and NLGA. Standard principles of statutory construction, including plain statutory language and deference to the views of the agency charged with implementing the statute, fully support the conclusion that the statutory right to engage in "concerted activities for the purpose of . . . mutual aid or protection" *does* encompass the right to pursue workplace legal claims on a class or representative basis. Although Congress did not expressly refer to "class and representative actions" in the NLRA and NLGA, the broadly written protections of those statutes unambiguously encompass concerted legal activity, as the NLRB and the courts have recognized for more than 70 years. The Court of Appeal erred in not deferring to the NLRB's ruling that the NLRAand NLGA provide precisely the "congressional command" necessary under *CompuCredit* to preclude enforcement of an arbitration agreement that deprives litigants of substantive statutory rights. (See Slip Op. at 13.)

IV. CLS WAIVED ITS RIGHT TO ARBITRATE

By abandoning its petition to compel arbitration and litigating this action for three-and-a-half-years, CLS waived its right to arbitrate. In excusing CLS's actions, the Court of Appeal misapplied the prejudice prong of the waiver test and improperly credited CLS with the Ninth Circuit's "futility" defense. Both errors require reversal.

A. CLS's Dilatory Conduct Prejudiced Iskanian

The right to arbitrate, like most contractual rights, can be waived. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) A party waives arbitration when, by engaging in conduct

inconsistent with the intent to arbitrate, it causes prejudice to the other party. (Id.) Waiver is rooted in the maxim that "in litigation as in life, you can't have your cake and eat it too." (*Guess?, Inc. v. Super. Ct.* (2000) 79 Cal.App.4th 553, 555.)

CLS undisputedly acted inconsistently with an intent to arbitrate. Although CLS could have pursued arbitration by contesting application of the *Gentry* factors on remand from the first appeal, it made the tactical decision to abandon that effort and litigate the action. For three-and-a-half years, CLS actively conducted class discovery, contested (and lost) a class-certification motion, and sought summary judgment. Then, just three months before trial, CLS renewed its petition to compel individual arbitration.

Although CLS's delay was the lengthiest in any California published opinion on waiver of arbitration,[10] the Court of Appeal found that Iskanian suffered no prejudice, holding that "merely participating in litigation does not result in waiver." (Slip op. at p. 20.) That finding, made without addressing many contrary decisions, brooks no possibility that a party's lengthy delay in moving to compel arbitration could, by itself, constitute waiver.

This Court's analysis of waiver in prior cases compels a different conclusion. In *St. Agnes*, the Court recognized that "the critical factor in determining prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a 'speedy and relatively inexpensive' 'means of dispute resolution.'" (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948 [quoting *St. Agnes*, *supra*, 31 Cal.4th at p. 1204.].) Following *St. Agnes*'s logic, *Burton* held that delay itself may be prejudicial because arbitration "loses much, if not all of its value if undue

[10] (See chart of cases set forth in the Petition for Review at p. 22.)

time and money is lost in the litigation process preceding a last-minute petition to compel." (Ibid.) When a party litigates for many months before moving to arbitrate, it deprives its opponents of the "expected benefits of his or her bargain," which "is the epitome of prejudice." (Id. at p. 949.)

In *Burton*, the prejudicial delay was 11 months. In *Sobremonte v. Super. Ct.* (1998) 61 Cal.App.4th 980, 996, the court found prejudicial delay after the plaintiffs "spent 10 months preparing their case for a full trial at a considerable expenditure of time and money." Here, CLS litigated the action for three-and-a-half years, contesting class certification and pursuing a dispositive motion. In terms of time and expense incurred, the prejudice here dwarfs that found in *Burton* or *Sobremonte*.

Downplaying the prejudicial effect of this lengthy delay, the Court of Appeal conflated the waiver and futility analyses to find that the delay was actually "three weeks after the Supreme Court rendered its decision in *Concepcion*." (Slip op. at p. 20.) Delay, however, is not measured from a purported intervening change in law, but from the time a party began to act inconsistently with intent to arbitrate. (See *Lewis*, 205 Cal.App.4th at 446.) Correctly analyzed, the delay was not three ***weeks***, but over three ***years***, starting when CLS abandoned its petition to compel arbitration in order to litigate in court.[11]

The Court of Appeal also dismissed the three years the parties spent litigating class issues as "not particularly germane" because certification decisions are not final. (Slip op. at p. 20.) In doing so, the Court of

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[11] Even if *Concepcion* were relevant to measuring CLS's delay, the beginning date should be May 24, 2010, the day the U.S. Supreme Court granted certiorari in *Concepcion*. (*AT&T Mobility LLC v. Concepcion* (May 24, 2010) 130 S. Ct. 3322.) CLS continued to litigate, despite knowing the Supreme Court would decide an issue it purportedly believed to be critical to enforcement of its arbitration agreement, for another 12 months before signaling further interest in compelling arbitration.

Appeal brushed aside the unique set of problems suffered by class litigants. Because class actions are often bifurcated into certification and merits phases, parties often litigate for months, if not years (as here), just on class certification. A putative class representative may spend the bulk of the litigation pursuing class discovery only to find that "most, if not all, of this discovery would ... be useless in arbitration." (*Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 846.) Thus, "especially in class actions, the combination of ongoing litigation and discovery with delay in seeking arbitration can result in prejudice." (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205-06.)

In this case, Iskanian prevailed on a strongly contested class-certification motion only to have his class decertified solely because the defendant belatedly sought to enforce an arbitration clause precluding class actions. Iskanian thus engaged in three years of effort that would prove completely useless if he were relegated to individual arbitration. Notably, the extent of that wasted effort is much more extensive than in *Hoover*, where the delay was approximately 15 months (206 Cal.App.4th at p. 1200), and *Roberts*, where the Court of Appeal found prejudice from the five-month delay between the time plaintiff propounded his class discovery and the time defendant moved to arbitrate. (200 Cal.App.4th at p. 845.) Thus, CLS "impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration," in which none of this activity would have occurred. (*St. Agnes*, 24 Cal.4th at p. 1203.)

The Court of Appeal asserted that there is "no reason to suspect that CLS intentionally delayed seeking arbitration to gain some unfair advantage." (Slip op. at p. 21.) But waiver does not rest on bad faith. (See *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1372 [["W]e do not....require a finding of bad faith as a prerequisite to finding waiver."].)

B. CLS Has No"Futility" Defense

1. The Ninth Circuit's "Futility" Defense Is Inconsistent With California Law

Without acknowledging the differences between California and Ninth Circuit law, the Court of Appeal erroneously credited CLS with a "futility" defense. The futility defense is only available in jurisdictions that define waiver as "voluntary relinquishment of a known right." (*U.S. v. Park Place Associates Ltd.* (9th Cir. 2009) 563 F.3d 907, 921.) Under this view, if a party did not know he had a right to arbitrate, he cannot have waived it. (Ibid.)

California waiver law, however, does not require knowledge:

> While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform a right, regardless of the party's intent to relinquish the right... In the arbitration context, 'the term "waiver" has also been used as a shorthand for the conclusion that a contractual right to arbitration has been lost.'

(*St. Agnes*, 31 Cal.4th at p. 1195 fn. 4 [citations omitted] .) Under *St. Agnes*, which applies equally to actions covered by the FAA and the California Arbitration Act, it is irrelevant "whether a defendant knew about the arbitration provision." (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 21.) After examining California and Ninth Circuit law, *Zamora* concluded that the lack of knowledge of the right to arbitrate is irrelevant to waiver under California law. (Id. at p. 20.) Rather, in California, waiver is "a forfeiture arising from the nonperformance of a required act." (*Hoover*, 206 Cal.App.4th at p. 1203.) California's waiver test looks strictly at conduct, and the "futility" defense is therefore generally not accepted in California. (See *Bodine v. United Aircraft* (1975) 52 Cal.App.3d 940, 945.)

The Ninth Circuit based its development of the futility defense on

the view that waiver required "knowledge of the right to arbitrate." (See *Fisher v. AG Becker Paribas Corp.* (9th Cir. 1986) 791 F.2d 691, 695.) *Fisher* excused a potential waiver on futility grounds where a defendant "properly perceived that it was futile to file a motion to compel arbitration" and hence did not possess a "known right to arbitrate," (id. at p. 697), until the U.S. Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, which allowed arbitration in the circumstances of *Fisher*. That is, prior to *Byrd*'s change in the law, *Fisher* imputed "a lack of knowledge to defendant," excusing its delay. (See *Kingsbury v. U.S. Greenfiber, LLC* (C.D.Cal. June 29, 2012, No. 2:08-cv-00151-AHM-AGR) 2012 U.S. Dist. Lexis 94854 at *9.) Because the *Fisher* futility defense rests on a subjective knowledge component of waiver that is not present under California law, the Court of Appeal erred in excusing CLS's failure on the basis of supposed futility.

2. Even If The Futility Defense Were Available in California, CLS Would Not Satisfy It

Even if the futility defense applied in California, it would be unavailable to CLS. In *Fisher*, which first articulated the defense, the Ninth Circuit found futility where that a Supreme Court ruling lifted an absolute bar to arbitration. Until the Supreme Court's decision in *Byrd*, the arbitration agreement in this case was unenforceable." (*Fisher*, 791 F.2d at p. 697.) In other words, futility was available to a litigant for whom arbitration was *entirely* foreclosed before the change in law. By contrast, *uncertainty* about the outcome of a motion to compel arbitration does not establish futility. (*Kingsbury*, 2012 U.S.Dist. Lexis 94854, at *7 ["Just because [the defendant's] victory was not assured does not mean that it lacked knowledge of a right to compel arbitration."].)

Thus, the Court of Appeal incorrectly framed the issue by concluding that "after *Gentry* and prior to *Concepcion*, CLS had no

reasonable basis to believe that only Iskanian's individual claims would be arbitrated." (Slip op. at p. 20.) Futility requires the existence of a bar to arbitration that is removed by an intervening decision; it is not enough that party merely had a "reasonable" basis for believing it could not compel arbitration. And neither *Gentry* nor *Concepcion* supports the claim of futility under that standard.

Gentry could not have provided a basis for a belief that arbitration was unavailable because it never barred categorically claims from arbitration. *Gentry* instead promulgated a fact-based test to determine whether a litigant's rights would be effectively vindicated in arbitration. (See *supra* 6-7, 18-20.) *Gentry* itself emphasized that it did not "foreclose the possibility that there may be circumstances under which individual arbitrations may satisfactorily address the overtime claims of a class." (42 Cal.4th at p. 464.) Following *Gentry*, decisions such as *Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634 and *Borrero v. Travelers Indem. Co.* (E.D.Cal. October 15, 2010) 2010 U.S.Dist.Lexis 114004, enforced class-action waivers despite *Gentry*, demonstrating that it was possible to compel individual arbitration before *Concepcion*. Because *Gentry* never categorically prohibited class waivers, its purported abrogation by *Concepcion* cannot have given rise to a new right to enforce individual arbitration.[12]

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[12] Even if "reasonable basis" were the standard, CLS could not have reasonably concluded that it was futile to arbitrate. The remand following *Gentry* was to determine whether a class action would be a "more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." (See *Iskanian v. CLS Transp. L.A. LLC* (May 27, 2008, No. B198999) 2008 Cal.App.Unpub.Lexis 4302 at *3.) Thus, CLS knew *Gentry* was not a categorical rule and that it could continue to attempt to compel arbitration under *Gentry*. At the latest, once the U.S. Supreme Court granted certiorari in *Concepcion* on May 24,

In *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 447, the court rejected the *Concepcion* "futility" defense even in a consumer case where *Discover Bank* had been the governing law because "it relies on a clearly erroneous interpretation of *Discover Bank* as invalidating all arbitration agreements that include a class action waiver." *Lewis* examined two post-*Discover Bank* decisions where a class-action waiver was enforced, concluding that *Concepcion* did not create a new right since "*Discover Bank* did not invalidate all arbitration agreements that included a class waiver." (Ibid.)

Similarly, *Roberts* held that:

> El Cajon argued it waited to compel arbitration because it was unsure of the state of the law regarding the enforceability of the waiver of classwide claims in the arbitration provision at issue here...We find this excuse unavailing. El Cajon cannot proverbially "have its cake and eat it too." That is, if El Cajon wanted to arbitrate the dispute involving Roberts, it should have promptly invoked arbitration regardless of the validity of the waiver provision in the arbitration provision.

(*Roberts*, 200 Cal.App.4th at p. 846, fn.10.) Thus, the principle that a party cannot "have its cake and eat it too" precludes a party from waiting to invoke its right to arbitrate until a new appellate decision boosts its odds of success.[13]

The waiver doctrine ensures that a party will "not have a right to

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2010,CLS must have known that there was at least a "reasonable" possibility that some change in the law would occur.

[13] The majority of federal courts are in accord. "While *Concepcion* may have strengthened [the defendant's] chances for compelling arbitration," this is insufficient to constitute "futility." (*Kingsbury*, 2012 U.S.Dist. Lexis 94854, at *13.); see also *Martinez v. Welk Group, Inc.* (S.D.Cal. Jan. 12, No. 09cv2883), 2012 U.S. Dist. Lexis 3893, at *14 [rejecting a futility defense based on *Concepcion*].)

reset the clock for arbitration based on changing subsequent law, as no party has a right to unfairly play a game of 'wait and see' and not assert its legal rights until and unless the law becomes more favorable to its position." (See *In Re Toyota Motor Corp. Hybrid Brake Marketing Sales Litig.* (C.D.Cal. Dec. 13, 2011) 828 F.Supp.2d 1150, 1163.) The Court of Appeal's elastic "futility" defense, if affirmed, would undermine these policy objectives and create perverse incentives for litigants, as the Eleventh Circuit recently explained in *Garcia v. Wachovia Corp.* (11th Cir. Oct. 26, 2012) 699 F.3d 1273, 2012 U.S. App. Lexis 22268:

> The more lenient "unlikely to succeed" standard that Wells Fargo proposes would only "encourage litigants to delay moving to compel arbitration until they could ascertain how the case was going in federal court" [citation omitted], and would undermine one "of the basic purposes of arbitration: a fast, inexpensive resolution of claims." [citation omitted]

(2012 U.S. App. Lexis 22268, at *14-15.)

This case illustrates the injustice that would result from such a broad "futility" defense. Defendants like CLS could litigate an action for years in court, and then, if it took an unfavorable turn, move to wipe the slate clean by invoking arbitration. Defendants would be armed with a reset button allowing them to spring into action only when a new decision arguably increased the likelihood they would succeed in compelling arbitration. Such a broad futility defense must be rejected because it would incentivize delay and undermine the policy underlying the waiver doctrine.

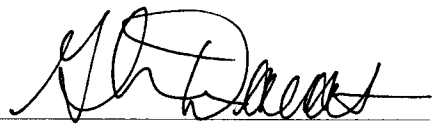
CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: December 19, 2012

Respectfully submitted,

Capstone Law APC

By: 

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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 on the Merits was produced using 13-point Times New Roman type style and contains 13,804 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: December 19, 2012

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **December 19, 2012**, I served the document(s) described as:

1) APPELLANT'S OPENING BRIEF ON THE MERITS

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[ ] **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.

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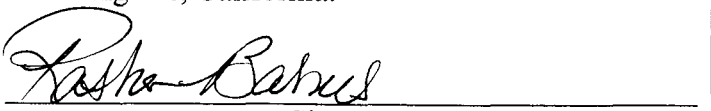
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this **December 19, 2012,** at Los Angeles, California.

Rashan R. Barnes
Type or Print Name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