No. S204032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Two,
Case No. B235158

From the Superior Court, County of Los Angeles
Case No. BC356521, Assigned for All Purposes to
Judge Robert Hess, Department 24

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

To the Honorable Tani Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the defendant and respondent.[*] The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. Recent arbitration cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[†]

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[*] No party or counsel for a party in the pending appeal authored the proposed *amicus brief* in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae* and its members.

[†] The Chamber's most recent briefs in arbitration cases are available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

Many of the Chamber's members and affiliates regularly use arbitration agreements in their employment contracts because arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

Arbitration agreements in the employment context typically require that disputes be resolved on an individual, rather than class or representative, basis. As the U.S. Supreme Court explained in *Concepcion*, class procedures are irreconcilable with the simplicity, informality, and expedition that are characteristic of arbitration; for similar reasons, as we discuss below, arbitration of non-class representative actions is likewise incompatible with arbitration as envisioned by the Federal Arbitration Act ("FAA"). If the decision below—which held that the FAA requires the plaintiff-employee to resolve his disputes through individual arbitration in accordance with the terms of his agreement—were overturned, it would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation.

CONCLUSION

The Court should grant this application and permit the Chamber to file an *amicus curiae* brief.

Dated: May 13, 2013

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

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Many of the Chamber's members and affiliates regularly use arbitration agreements in their employment contracts because arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Arbitration agreements in the employment context typically require that disputes be resolved on an individual, rather than class or representative, basis.

As the U.S. Supreme Court explained in *Concepcion*, class procedures are irreconcilable with the simplicity, informality, and expedition that are characteristic of arbitration; for similar reasons, as we

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[1] The Chamber's most recent briefs in arbitration cases are available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

discuss below, arbitration of representative actions is likewise incompatible with arbitration as envisioned by the Federal Arbitration Act ("FAA").

If the decision below—which held that the FAA requires the plaintiff-employee to resolve his disputes through individual arbitration in accordance with the terms of his agreement—were overturned, it would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, was "[w]hether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1753. The Court ruled that the FAA does prevent States from refusing to enforce arbitration agreements that require individualized proceedings, holding that the FAA preempts the state-law principle set forth in this Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. The Supreme Court explained that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S.Ct. at 1748.

The Court specifically rejected the argument, advanced in the dissenting opinion, that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. *Id.* at 1753. Instead, the Court held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Ibid.*

The Court explained in great detail why "class arbitration" "is not arbitration as envisioned by the FAA" and "lacks its benefits." *Id.* at 1753. To begin with, class arbitration "sacrifices the principal advantage of

arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Yet the purpose of arbitration, the Court explained, "is to allow for efficient, streamlined procedures tailored to the type of dispute" at issue. *Id.* at 1749. Accordingly, refusing to enforce an arbitration agreement on the ground that it does not allow class actions is impermissible because such a requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA. *Id.* at 1753 (internal quotation marks omitted).

Furthermore, because class arbitration involves the same high stakes as a judicial class action without any meaningful opportunity for judicial review, it is "hard to believe" that any company would willingly agree to it. *Concepcion*, 131 S.Ct. at 1751. For this reason, requiring parties to permit classwide resolution of claims in arbitration is tantamount to prohibiting arbitration altogether—a result that is manifestly at odds with the FAA's purpose and objective "to promote arbitration." *Id.* at 1749.

Concepcion also recognized that conditioning enforcement of an arbitration provision on the availability of class procedures is inconsistent with the FAA as a historical matter. When Congress enacted the FAA in 1925, the arbitration that it contemplated necessarily was ***individual*** arbitration. "[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925," as it "is a 'relatively recent development.'" *Id.* at 1751. The FAA's legislative history accordingly "contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration." *Id.* at 1749 n.5. Indeed, because individual arbitration is the form of "arbitration … envisioned by the FAA" (*id.* at 1753), hostility to individual arbitration is the very "judicial hostility to arbitration agreements" that the FAA sought to eliminate. *Id*. at 1745.

In sum, as the Ninth Circuit put it recently, *Concepcion* establishes "that individualized proceedings are an inherent and necessary element of arbitration." *Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, 1158. "[P]olicy concerns, however worthwhile, cannot undermine the FAA." *Id.* at 1159. The FAA therefore requires courts to enforce agreements providing for the individual arbitration that is "envisioned by the FAA," no matter how "desirable for unrelated reasons" class procedures might appear through the lens of state public policy. *Concepcion*, 131 S.Ct. at 1753. Under *Concepcion* and other U.S. Supreme Court precedents, it is clear that the FAA forecloses each of Iskanian's efforts to avoid complying with his agreement to arbitrate.

First, this Court's prior decision in *Gentry* cannot stand in light of *Concepcion*. *Gentry* authorized a court to refuse to enforce an arbitration agreement whenever the court determined, as a matter of state public policy, that class procedures—rather than individual arbitration—are a more desirable means of resolving an employment dispute. That holding flatly violates the FAA in light of *Concepcion*'s determination that enforcement of an agreement to arbitrate cannot be conditioned on the availability of class procedures no matter how desirable they might be for unrelated reasons.

Second, the FAA likewise forecloses Iskanian's contention that he is entitled to proceed in court with representative claims under the Private Attorney General Act ("PAGA") because his arbitration agreement permits him to bring only individual claims in arbitration. For the same reasons that class arbitration is not the type of arbitration that the FAA contemplates, so too are representative action procedures inconsistent with arbitration. *Concepcion* establishes that the FAA preempts any state-law rule either precluding all arbitration of PAGA claims or conditioning

enforcement of the arbitration agreement on Iskanian's ability to pursue representative claims in arbitration.

Third, Iskanian is wrong in asserting that the federal National Labor Relations Act ("NLRA")—as recently interpreted by the National Labor Relations Board ("NLRB") in the *D.R. Horton* case—precludes enforcement of his arbitration agreement. *D.R. Horton* is currently under review by the U.S. Court of Appeals for the Fifth Circuit, which may—like virtually all other courts to address issue—conclude that the NLRB's decision is contrary to law. This Court should do the same: Decades of U.S. Supreme Court precedent—including, most recently, *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665—establish that the NLRA does not contain the clear, "contrary congressional command" needed to override the FAA's mandate to enforce as written agreements to arbitrate on an individual basis.

Fourth, CLS Transportation did not waive its right to compel Iskanian to arbitrate his dispute. Under long-standing U.S. Supreme Court precedent, "any doubts concerning . . . allegation[s] of waiver" "should be resolved in favor of arbitration[.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25. In accordance with that principle, this Court's stringent test provides that "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." *St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195. Iskanian cannot meet that burden because—as the overwhelming majority of federal and state courts in California have held—prior to *Concepcion* it was futile for businesses to pursue enforcement of agreements to arbitrate on an individual basis in California.

ARGUMENT

I. *GENTRY* DOES NOT SURVIVE *CONCEPCION*.

In *Gentry*, this Court outlined a test for determining whether an agreement between an employer and an employee to arbitrate on an individual basis is enforceable as a matter of California law. That standard provides that an arbitration agreement will not be enforced whenever, in the court's judgment, "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of affected employees … [and] disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected." *Id.* at 463.

The *Gentry* test explicitly derived from and expanded upon principles enunciated in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148; indeed, the Court "granted review" in *Gentry* precisely to "clarify [its] holding in *Discover Bank*." *Gentry*, 42 Cal.4th at 452. Because *Concepcion* removed *Gentry*'s foundation—the holding in *Discover Bank*—the employment-specific edifice that *Gentry* based on the *Discover Bank* rule is necessarily preempted as well.

A. The FAA Preempts State Rules Conditioning Enforcement Of Arbitration Agreements On Access To Classwide Procedures.

Gentry expanded *Discover Bank* into a "more general principle" (*Gentry*, 42 Cal.4th at 457) that bans individual arbitration of employment claims whenever a court concludes that class arbitration is "significantly more effective" than individual arbitration. *Id.* at 463. That is, in place of the *Discover Bank* standards specific to consumer litigation, *Gentry* broadly authorized a court to refuse to enforce an agreement to arbitrate an employment dispute individually whenever as a matter of state public policy the court perceived that a "class action or arbitration [would] be demonstrably superior to individual actions." *Id.* at 462.

Concepcion squarely forecloses *Gentry*'s exemption of employment-related claims from individual arbitration. It is obvious that "a state law prohibiting arbitration of employment disputes would be preempted." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (May 6, 2013, S198638) --- Cal.4th ---, 2013 WL 1859214, at *20 (Liu, J., concurring). Yet *Gentry* permits a court to prohibit the individual "arbitration of employment disputes"—the precise form of arbitration "envisioned by the FAA"—whenever the court concludes that class actions are more desirable. That openly subordinates the FAA's policy of enforcing arbitration agreements as written to the state public policy favoring the use of class actions for employment cases. Neither *Gentry*'s analysis nor its result survives *Concepcion*.

Although Iskanian draws fine distinctions between this Court's analysis in *Gentry* and that in *Discover Bank*, the reasoning in *Gentry* brings the rule enunciated there squarely within the holding of *Concepcion*. *Gentry* rested on the notion that employment disputes might involve amounts too small to provide incentives to engage in individual arbitration—the very concern that motivated the *Discover Bank* Court's approach to consumer disputes. Compare *Gentry*, 42 Cal.4th at 457, with *Discover Bank*, 36 Cal.4th at 162-163.

Gentry added other reasons to believe that class procedures would produce a greater volume of disputes, which this Court viewed as a social benefit. See 42 Cal.4th 459-462. But the U.S. Supreme Court in *Concepcion* rejected a similar constellation of assertedly "desirable" policy preferences in favor of the FAA's policy of enforcing arbitration agreements as written. See 131 S. Ct at 1753.

Iskanian contends that *Concepcion* did not address situations where an arbitration clause is alleged to be exculpatory. See Br. 15-18; Reply 4. But the Court in *Concepcion* addressed head-on the argument that

agreements to arbitrate individually could be denied enforcement under "California's policy against exculpation." 131 S.Ct at 1746. And the Court specifically held that courts may not reject fundamental features of arbitration by "say[ing] that such agreements are exculpatory" or by invoking "public-policy disapproval of exculpatory agreements." *Id.* at 1747.

Indeed, the federal courts of appeals applying *Concepcion* have recognized that the FAA's policy favoring the enforcement of agreements to arbitrate individually applies even when the "[p]laintiffs' evidence" is said to "substantiat[e] … that the class action waiver will be exculpatory." *Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1214; see also *Coneff*, 673 F.3d at 1158.

Iskanian also maintains (Br. 18-19) that *Concepcion* preempted the *Discover Bank* rule because that rule supposedly was categorical, and the case-by-case determination required in *Gentry* therefore may escape preemption. The *Concepcion* Court stated the premise that, "[w]hen state law prohibits outright the arbitration of a particular type of claim," the preemption analysis is "straightforward," but the Court immediately acknowledged that the *Discover Bank* rule was "more complex." 131 S.Ct. at 1747. In fact, both the *Discover Bank* and *Gentry* standards appeared to provide for case-specific inquiries but in practice resulted in the refusal to enforce arbitration clauses in virtually every case, because the exceptions under each standard were largely illusory. See *Jasso v. Money Mart Express, Inc.* (N.D. Cal. 2012) 879 F.Supp.2d 1038, 1044 ("Here, the court can find no principled basis to distinguish between the *Discover Bank* rule and the rule in *Gentry*, given the broad language used by the Supreme

Court in *Concepcion*.").[2] Moreover, courts have repeatedly rejected the argument that anti-class-waiver rules which are purportedly more nuanced than *Discover Bank* are exempt from *Concepcion*'s holding. See, *e.g.*, *Cruz*, 648 F.3d at 1213-1214; *Pendergast v. Sprint Nextel Corp.* (11th Cir. 2012) 691 F.3d 1224, 1233-1234.

Nor can the *Gentry* anti-class-waiver rule avoid preemption because it applies to litigation as well as arbitration. Cf. Iskanian Br. 14. *Concepcion* rejected that argument as well. See *Concepcion*, 131 S.Ct. at 1746-1747. Like a rule conditioning enforcement of arbitration agreements on the availability of "judicially monitored discovery" or "the Federal Rules of Evidence" or "ultimate disposition by a jury," a rule that precludes

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[2] As the Supreme Court explained in *Concepcion*, the *Discover Bank* rule in practice constituted a categorical rule "allow[ing] *any* party to a consumer contract to demand [class arbitration] *ex post*." 131 S.Ct. at 1750 (emphasis added). The Court pointed out that (1) although "[t]he rule is limited to adhesion contracts, … the times in which consumer contracts were anything other than adhesive are long past"; (2) the requirement "that damages be predictably small … is toothless and malleable"; and (3) the requirement that "a consumer allege a scheme to cheat consumers … has no limiting effect, as all that is required is an allegation." *Ibid.* (citations omitted).

Gentry's rule also is not categorical in theory because it requires courts to consider four factors: "[1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." 42 Cal.4th at 463. But the winnowing effect of that test is largely illusory as well. A "modest" recovery is in the eye of the beholder. Plaintiffs can assert abstract and baseless risks of retaliation and underinformed employees no matter how fair the employer and how sophisticated the employees may be in practice. And "real world obstacles" are largely equated with individual arbitration itself. Thus, in practice, the pre-*Concepcion* published decisions of the Court of Appeal reflect that this test is almost always met in employment class actions unless the plaintiffs neglected to make any showing addressing these factors.

enforcement of an agreement to arbitrate individually "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1747, 1748.

B. Iskanian's Asserted Inability To Vindicate State Statutory Rights Does Not Bring The *Gentry* Rule Outside The Scope Of *Concepcion*.

Iskanian contends that *Gentry* can be upheld under an "effective-vindication" exception to preemption he purports to find in the U.S. Supreme Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614 and *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79. He contends that *Gentry* survives *Concepcion* because individual arbitration would prevent him from vindicating state statutory rights. See Br. 10-15; Reply 1-3. He is wrong for multiple reasons.

First, to the extent that dicta in *Mitsubishi Motors* and *Randolph* can be read to create an "effective vindication" defense, that defense at most applies in the context of *federal* statutory claims, not state-law claims like Iskanian's. *Second*, even if a "vindication" defense did apply to state-law claims, *Concepcion* makes clear that any such principle cannot be used to invalidate arbitration agreements on the ground that they preclude class procedures, for "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748. *Third*, even if such a defense applied to state law claims and could in some circumstances invalidate arbitration agreements that preclude class procedures, the U.S. Supreme Court decisions on which Iskanian relies would not provide a "vindication" defense here. At most, those cases can be read to stand for the proposition that costs unique to arbitration—such as arbitral filing fees and arbitrator compensation—that preclude an individual from accessing

the arbitral forum or an explicit exclusion of a substantive claim might in some circumstances trigger such a defense. Neither possibility is raised in this case.[3]

1. Any vindication-of-rights defense applies (if at all) only to federal statutory rights, not to state-law rights.

Although dicta in a few decisions of the U.S. Supreme Court suggest that an arbitration clause may be denied enforcement if it prevents a party from vindicating his statutory rights in arbitration, those cases all involved causes of action established by *federal* law.[4] The U.S. Supreme Court has never held that a *state* cause of action trumps the federal substantive law of arbitration created by the FAA.

This critical distinction between federal and state statutory rights flows directly from the Supremacy Clause of the Constitution. The FAA, as a *federal* statute, cannot be overridden or limited by conflicting *state* law or policy. Thus, although "Congress [may] evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Randolph*, 531 U.S. at 90), the Supremacy Clause prevents States from doing the same. The FAA "requires courts to enforce agreements to arbitrate according to their terms … unless the FAA's mandate has been overridden by a contrary *congressional* command." *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 669 (emphasis added; internal quotation marks omitted).

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[3] The U.S. Supreme Court may shed light on the latter two points when it renders its decision in *American Express Co. v. Italian Colors Restaurant* (U.S. No. 12-133, argued Feb. 27, 2013).

[4] See *Randolph*, 531 U.S. 79 (Truth in Lending Act); *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 (Age Discrimination in Employment Act); *Shearson/Am. Express Inc. v. McMahon* (1987) 482 U.S. 220 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi*, 473 U.S. 614 (federal antitrust laws).

Iskanian nonetheless contends that the FAA contains an unwritten exception that extends the vindication-of-rights argument to state-law claims. See Br. 13-15; Reply 2. He relies on two of this Court's pre-*Concepcion* decisions. See Br. 11 (citing *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1078-1079, and *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 101)); see also *Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066, 1082-1083 (similar).

In the wake of *Concepcion*, however, federal courts of appeals and state high courts have held repeatedly that any vindication-of-rights defense is limited to federal statutory claims. See *McKenzie Check Adv. of Fla., LLC v. Betts* (Fla. Apr. 11, 2013) --- So. 3d ---, 2013 WL 1457843, at *8 (vindication-of-rights defense is limited to "claims brought under *federal* statutes" and does not bear on "the issue of whether *state* law [is] *preempted* by the FAA"); *Coneff*, 673 F.3d at 1158 n.2 ("*Mitsubishi*, *Gilmer*, [*Randolph*], and similar decisions are limited to federal statutory rights."); see also *Homa v. Am. Express Co.* (3d Cir. 2012) 494 F. App'x 191, 196 n.2, petition for cert. filed (U.S. Dec. 20, 2012) 81 U.S.L.W. 3370; *In re Am. Express Merchs.' Litig.* (2d Cir. 2012) 681 F.3d 139, 140 (Pooler, J., concurring in denial of reh'g en banc) ("While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction."), cert. granted (2012) 133 S.Ct. 594.[5]

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[5] The same limitation was widely recognized before *Concepcion* as well. See, *e.g.*, *Stutler v. T.K. Constructors Inc.* (6th Cir. 2006) 448 F.3d 343, 346 (the Supreme Court's vindication-of-rights cases "simply do not apply" when a plaintiff "seek[s] to enforce … rights provided by state law"); *Pro Tech Indus. v. URS Corp.* (8th Cir. 2004) 377 F.3d 868, 873 (rejecting application of *Randolph* to claims not arising under federal statutes); *Brown v. Wheat First Secs., Inc.* (D.C. Cir. 2001) 257 F.3d 821, 826 (*Randolph* and *Gilmer* concerned only "whether dispute resolution under the FAA was consistent with the federal right-creating statute in question"); *Rosenberg v. BlueCross BlueShield of Tenn., Inc.* (Tenn. Ct.

These post-*Concepcion* decisions—and *Concepcion* itself—support the view taken by Justice Chin in his dissent in *Broughton*: "[B]inding federal authority forecloses the majority's attempt to base an FAA exception for *state* laws limiting enforcement of arbitration agreements on the 'inherent conflict' analysis applicable to *congressional* action. … [T]he high court's pronouncements regarding the preemptive effect of the FAA on such state laws have been broad and emphatic. They do not appear to permit any exception. ... The Supreme Court's view could hardly be clearer." *Broughton*, 21 Cal.4th at 1091-1092 (Chin, J., dissenting). That has become clearer still in the 14 years since *Broughton* was decided. Iskanian's contention that the vindication-of-federal-statutory-rights defense extends to state statutory rights is contrary to *Concepcion*, and virtually all post-*Concepcion* authority. This Court should reject it as well.

2. *Concepcion* precludes application of a vindication-of-rights defense to condition enforcement of an arbitration clause on the availability of class procedures.

Even if a vindication-of-statutory-rights defense encompassed state-law claims, *Concepcion* would foreclose *Gentry*'s requirement that class

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App. 2006) 219 S.W.3d 892, 908 (*Randolph* does not apply where "no federally protected interest is at stake").

Iskanian points to *dicta* in two federal pre-*Concepcion* decisions. Br. 12-13. The court in *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25, indicated that the vindication-of-rights analysis applied to both federal and state antitrust claims. *Id.* at 29; see also *id.* at 63-64. But the court did not address an argument that state-law claims are not subject to a "vindication" defense. Iskanian's reliance on *Booker v. Robert Half International, Inc.* (D.C. Cir. 2005) 413 F.3d 77, is similarly misplaced. In that case, the only question was one of severability: the parties agreed that the bar on punitive damages in the arbitration clause was unenforceable. *Id*. at 83. Based on that agreement, the D.C. Circuit simply *assumed* that the vindication-of-rights theory applies to state-law claims. In any event, Iskanian does not point to any similar preclusion of a form of relief in his arbitration agreement.

procedures be superimposed on arbitration whenever they are "significantly more effective" than individual arbitration. As we have explained, *Concepcion* holds that States may not condition the enforcement of arbitration agreements on the availability of class-action procedures, no matter what policy concerns are at stake. See *supra* Part I.A. Because the *Gentry* rule requires that in some cases arbitration must proceed either on a class-wide basis or not at all, it cannot be reconciled with *Concepcion* no matter what doctrinal label Iskanian invokes.

Indeed, *Gentry*'s view of the vindication-of-rights defense creates a far broader and more malleable obstacle to arbitration than the one held preempted in *Concepcion*. Under *Gentry*, a plaintiff seeking to avoid individual arbitration need only show that a class action "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees" or that arbitration "will likely lead to a less comprehensive enforcement of overtime laws." 42 Cal.4th at 463. Yet central to *Concepcion*'s holding was the Court's rejection of the notion that states might prohibit the individual arbitration "envisioned by the FAA" merely because claims "might otherwise slip through the legal system" without class-action procedures. See *Concepcion*, 131 S.Ct. at 1753.

For these reasons, even if *Gentry* were framed as a vindication-based defense, it is as much an "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (*Concepcion*, 131 S.Ct. at 1753) as the *Discover Bank* rule. It is therefore preempted.

3. Iskanian's attempt to invoke *Gentry* in this case exceeds the bounds of any vindication-of-rights defense.

Finally, even if a "vindication" defense could apply to state claims, any such defense would be far more limited than Iskanian contends. For the reasons we have just explained, because class arbitration is not the type

of arbitration "envisioned" by the FAA, courts may not invalidate an arbitration agreement based on their own policy judgment that class procedures are "more effective" than individual arbitration.

The language on which Iskanian relies in *Mitsubishi* and *Randolph* stands (at most) for the narrow proposition that arbitration agreements might be unenforceable when costs unique to arbitration make access the arbitral forum prohibitive or when an arbitration agreement eliminates the ability of an arbitrator to award individualized remedies to which a claimant otherwise would be entitled. But the *Gentry* rule does not address the elimination of substantive individualized remedies or the imposition of prohibitive costs for access to the arbitral forum, nor does Iskanian identify any such concerns here. Rather, *Gentry* rests on disapproval of the individual arbitration that the FAA contemplates and, indeed, was "designed to promote." *Concepcion*, 131 S.Ct. at 1749. Because of the mismatch between the limited scope of any "vindication" defense and *Gentry*'s broad invalidation of arbitration clauses, the "vindication" argument provides no basis for sustaining the *Gentry* rule.

a. The U.S. Supreme Court decision that Iskanian chiefly relies upon for a vindication defense, *Green Tree Financial Corp.-Alabama v. Randolph*, considered only whether the operation of the arbitration clause might preclude a plaintiff from accessing the arbitral forum because of administrative costs unique to the arbitration. The plaintiff in *Randolph* contended that she was "unable to vindicate her statutory rights in arbitration" because her "arbitration agreement's silence with respect to costs and fees create[d] a 'risk' that she [would] be required to bear prohibitive arbitration costs if she pursue[d] her claims in an arbitral forum, and thereby force[d] her to forgo any claims she may have against petitioners." 531 U.S. at 90. The Supreme Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a

litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Ibid*. It rejected her vindication argument, however, because "the record does not show that Randolph will bear such costs if she goes to arbitration." *Ibid*.

As reflected in the Court's references to "*arbitration* costs" (*ibid*. (emphasis added)) and "*arbitration* expenses" (*id.* at 84 (emphasis added)) and the two examples of such costs it offered—"filing fees" and "arbitrators' costs" (*ibid.*)—the Court was concerned only with the cost of access to the arbitral forum. The costs associated with proving a claim do not provide a basis for holding that the *arbitration clause* precludes the plaintiff from vindicating statutory rights, any more than identical concerns precluded enforcement of the arbitration clause in *Concepcion*. See *Kaltwasser v. AT&T Mobility LLC* (N.D. Cal. 2011) 812 F.Supp.2d 1042, 1047-1050 (Fogel, J.) (*Randolph* is "confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims.").

b. The other source from which Iskanian discerns a broad vindication-based exception to the FAA is dictum in a footnote in *Mitsubishi*. There, the U.S. Supreme Court suggested that courts might refuse to enforce an arbitration clause if the provision's "choice-of-forum and choice-of-law clauses operated in tandem" to eliminate "a party's right to pursue statutory remedies for antitrust violations." 473 U.S. at 637 n.19. *Mitsubishi* thus addressed a situation in which obstacles imposed by the arbitration agreement would flatly, and explicitly, bar the plaintiff from bringing an antitrust claim. *Ibid.*; see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 539-541 (noting that *Mitsubishi* would provide recourse if an arbitration agreement prevented arbitrators from awarding relief under United States law).

That is not the situation here. Iskanian does not contend that he is barred from pressing for the remedies to which he himself would be entitled in individual arbitration. Rather, he contends that individual arbitration (as contemplated by the FAA) impairs the rights of third parties who could raise their own disputes but (unlike the 60 opt-outs in the present case) have not done so.

The U.S. Supreme Court has never hinted that a plaintiff may avoid an arbitration agreement that would provide full individual remedies for his individual claims simply because it does not allow the plaintiff to seek relief for nonparties. In fact, *Concepcion* expressly rejected an indistinguishable argument. In response to the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court held that the FAA does not permit States to require that arbitration agreements provide for class actions "even if it is desirable for unrelated reasons." 131 S.Ct. at 1753. As the Ninth Circuit recently explained in rejecting a similar argument, Iskanian's "concern is not so much that [employees] have no effective *means* to vindicate their rights, but rather that [they] have insufficient *incentive* to do so. … But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Coneff*, 673 F.3d at 1159.

By identifying individual arbitration as the type of arbitration "envisioned by the FAA" (*Concepcion*, 131 S.Ct. at 1753), *Concepcion* did not suggest that states can pick and choose when to enforce arbitration agreements based on their assessment that class procedures available in litigation are "demonstrably superior" in vindicating the statutory rights of absent parties, as *Gentry* provided. 42 Cal.4th at 462. Even if it applied to state-law claims, a vindication-of-rights defense would not help Iskanian here.

II. THE FAA REQUIRES THAT ISKANIAN PURSUE HIS INDIVIDUALIZED PRIVATE ATTORNEY GENERAL ACT CLAIM IN ARBITRATION

Iskanian next argues that, despite his agreement to arbitrate disputes on an individual basis, the Private Attorney General Act of 2004 ("PAGA") authorizes him to avoid arbitration and instead pursue in court relief under PAGA for himself, for other similarly situated employees, and for the State based on alleged violations of the Labor Code that he allegedly suffered in common with the group of employees he seeks to represent. But while PAGA does provide for representative actions in court, Iskanian is wrong in asserting that a state-law policy favoring the use of that device can supersede the FAA's mandate that an arbitration agreement may preclude the assertion of class or other sorts of representative claims.

The Court of Appeal was right to reject Iskanian's arguments for two reasons. *First*, an unbroken line of U.S. Supreme Court authority holds that the FAA precludes States from declaring causes of action categorically non-arbitrable. *Second*, for purposes of the FAA, there is no difference between a state-law rule conditioning enforcement of an arbitration clause upon the claimant's ability to assert "class" claims and one hinging upon her ability to assert "representative" claims: Both rules would transform the parties' agreement into something that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 131 S.Ct. at 1753.

A. The FAA Forbids California From Placing PAGA's Private Cause Of Action Off-Limits To Arbitration.

A State may not declare a cause of action to be non-arbitrable. The U.S. Supreme Court has consistently held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."

Concepcion, 131 S.Ct. at 1747. This "straightforward" rule precludes California from barring the arbitration of PAGA claims.[6]

Indeed, the Supreme Court has repeatedly overturned decisions of this Court holding that particular statutory claims must be resolved through judicial litigation or before administrative agencies. Nearly three decades ago, the Supreme Court held that the FAA preempted this State's attempt to prohibit arbitration of disputes under the Franchise Investment Law. *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-16. The Court explained that the FAA "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

Three years later, the Court overturned a law requiring a judicial forum for wage-and-hour disputes under the California Labor Code—the same body of substantive law at issue here. *Perry v. Thomas* (1987) 482 U.S. 483, 489-492. Two decades after that, the Court again overturned a decision of the California Court of Appeal holding that the Labor Commissioner had primary jurisdiction of claims under the Talent Agencies Act, and that such claims therefore could not be arbitrated. *Preston v. Ferrer* (2008) 552 U.S. 346, 352-363.

And just last year, the Court again emphasized that the FAA preempts any state-law rule that declares particular claims off-limits to arbitration. In *Marmet Health Care Center, Inc. v. Brown* (2012) 132 S.Ct. 1201 (per curiam), the Court—relying on *Concepcion*—unanimously, and

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[6] It also forecloses this Court's earlier decisions that categorically barred arbitration of claims for "public" injunctive relief under the Consumer Legal Remedies Act, Civil Code §§ 1770 *et seq.* (see *Broughton v. Broughton v. Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066) and the Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et seq.* (see *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303).

summarily, reversed a West Virginia Supreme Court decision that forbade arbitration of certain claims against nursing homes. *Id.* at 1203 (per curiam). That state-law impediment to arbitration was preempted, the Court explained, because it amounted to "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1204.[7]

Recent California opinions have recognized the principle as well. In discussing state-law preemption, Justice Liu observed in passing, "[t]o take an example from federal law, the Federal Arbitration Act (FAA) promotes arbitration, and a state law prohibiting arbitration of employment disputes would be preempted." *City of Riverside*, 2013 WL 1859214, at *20 (Liu, J., concurring) (citing *Concepcion*, 131 S.Ct. at 1747). And the court in *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, review denied (Oct. 31, 2012), explained that "[u]nder *Concepcion,* the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally. Absolute prohibitions on the arbitration of particular kinds of claims such as that reflected in *Broughton-Cruz* [*i.e.*, *Broughton v. Cigna Healthplans of Cal.* (1999) 21

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[7] The U.S. Supreme Court has made clear that lower courts are obligated to apply this principle in accord with the Court's precedents. See *Marmet*, 132 S.Ct. at 1203-1204 (lower court's interpretation of the FAA "was both incorrect and inconsistent with clear instruction in the precedents of this Court"). Most recently, the Court summarily reversed the Oklahoma Supreme Court's determination that a court rather than an arbitrator was entitled to determine whether a non-compete agreement was valid as a matter of state law. *Nitro-Lift Techs., L.L.C. v. Howard* (2012) 133 S.Ct. 500 (per curiam). The Supreme Court explained that "the Oklahoma Supreme Court must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. ... Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Id.* at 503 (quoting *Concepcion*, 131 S.Ct. at 1747).

Cal.4th 1066; *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303] are the clearest example of such policies[.]" *Nelsen*, 207 Cal.App.4th at 1136.

These cases make clear that any "categorical rule prohibiting the arbitration of" PAGA claims would be preempted by the FAA every bit as much as the rules invalidated in *Southland*, *Perry*, *Preston*, and *Marmet*. See *Luchini v. Carmax, Inc.* (E.D. Cal. Sept. 5, 2012) 2012 WL 3862150, at *8 ("A PAGA clam is a state-law claim, and states may not exempt claims from the FAA."); *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D. Cal. 2012) 870 F.Supp.2d 831, 845-846.

B. California Cannot Refuse To Enforce Iskanian's Arbitration Agreement On The Ground That The Agreement Prohibits Him From Pursuing Alleged Labor Code Violations Involving Other Employees.

Perhaps recognizing that the FAA "straightforward[ly]" preempts any effort to declare PAGA claims categorically non-arbitrable, Iskanian focuses much of his energy on achieving the same result by different means. Specifically, he contends that California law grants him an unwaivable "entitlement to bring PAGA representative actions," and that because his arbitration agreement forbids representative arbitrations, he should be allowed to avoid arbitration altogether and pursue the representative claims in court. Br. 25; see generally Br. 27-33. But that contention just reprises arguments considered and rejected by the U.S. Supreme Court in *Concepcion*.

Indeed, employment and consumer arbitration agreements would rapidly become dead letters if States could render arbitration agreements unenforceable simply by enacting laws recharacterizing ordinary individual claims into causes of action that must be pursued on behalf of all similarly situated persons. That would directly frustrate the FAA's purpose of "promot[ing] arbitration." *Concepcion*, 131 S.Ct. at 1749.

1. Iskanian seeks to avoid the impact of *Concepcion* by noting that "PAGA claims ... do not require class-action procedures." Br. 31. And it is true that, under this Court's decision in *Arias v. Superior Court* (2009) 46 Cal.4th 969, a private plaintiff need not satisfy the class action requirements of Code of Civil Procedure Section 382 to pursue a PAGA representative action on behalf of other employees in state court.

But the distinction between "class" and "representative" actions is one without a difference for purposes of FAA preemption. Representative actions under PAGA are just as incompatible with "arbitration as envisioned by the FAA"; they "lack[] its benefits" (*Concepcion*, 131 S.Ct. at 1753) for the same reasons that class actions do.

Thus, the civil penalties potentially available in PAGA representative actions are comparable to the high stakes of class actions; they bear the same "unacceptable" risk of "devastating loss" that arises "when damages owed to tens of thousands of potential claimants are aggregated and decided at once." *Concepcion*, 131 S.Ct. at 1752; see also *Quevedo v. Macys, Inc.* (C.D. Cal. 2011) 798 F.Supp.2d 1122, 1142 ("[R]epresentative PAGA claims 'increase[] risks to defendants' by aggregating the claims of many employees," and "[j]ust as '[a]rbitration is poorly suited to the higher stakes of class litigation,' it is also poorly suited to the higher stakes of a collective PAGA action.") (quoting *Concepcion*, 131 S.Ct. at 1752); *Grabowski v. Robinson* (S.D. Cal. 2011) 817 F.Supp.2d 1159, 1180 (following *Quevedo*).

Given the limited appellate review of arbitration awards, moreover, it is "hard to believe that defendants" would consent to representative arbitration "with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Concepcion*, 131 S.Ct. at 1752; see also *Quevedo*, 798 F.Supp.2d at 1142 ("Defendants would run the risk that an erroneous

decision on a PAGA claim on behalf of many employees would 'go uncorrected' given the 'absence of multilayered review.'") (quoting *Concepcion*, 131 S.Ct. at 1752); *Grabowski*, 817 F.Supp.2d at 1180 (same).

Moreover, this Court has held that a representative PAGA action in court does not raise due process concerns for defendants because a judgment in such an action will have collateral estoppel effect on the "nonparty employees" that the employee represents. *Arias*, 46 Cal.4th at 986. It is not at all clear, however, that a judgment in arbitration would be accorded the same effect. Cf. *Concepcion*, 131 S.Ct. at 1751 ("at least" some "amount of process would presumably be required for absent parties to be bound by the results of arbitration").

Finally, just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S.Ct. at 1751), it is likewise inconceivable that Congress contemplated the arbitration of representative actions akin to the PAGA claim created by this State's Legislature in 2004.

For these reasons (among others), representative actions share many of the features of class actions; in fact, in her concurrence in *Arias*, Justice Werdegar characterized PAGA representative actions as "non-class representative actions" (*Arias*, 46 Cal.4th at 990 (Werdegar, J., concurring))—suggesting that class and representative actions are siblings (or at least close cousins). Certainly PAGA representative actions, like class actions, are drastically different from the type of simplified, individualized arbitration "envisioned by the FAA" (*Concepcion*, 131 S.Ct. at 1753).

Accordingly, any refusal to enforce Iskanian's arbitration agreement because it precludes individual employees from representing others would run afoul of *Concepcion* because it would "interfere[] with fundamental

attributes of arbitration and thus create[] a scheme inconsistent with the FAA." 131 S.Ct. at 1748.

2. Iskanian raises two additional grounds for excepting his PAGA claims from his obligation to arbitrate. First, he argues that he cannot "vindicate" his rights under PAGA in an individualized arbitration because he cannot represent the interests of others. Second, he argues that because PAGA claims are "private attorney general" claims brought as a proxy for a State agency—and the State itself has not consented to arbitrate its disputes—he is entitled to prosecute PAGA claims notwithstanding his agreement to arbitrate. Neither argument justifies allowing Iskanian to evade his contractual commitments.[8]

a. Relying on a line of U.S. Supreme Court cases involving federal statutes, Iskanian argues that the FAA does not require an arbitration agreement to be enforced when the agreement "operate[s] 'as a prospective waiver of a party's right to pursue statutory remedies.'" Br. 28 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). But for the reasons we have explained, any vindication-of-statutory-rights defense does not apply to *state-law* rights; it could only be invoked with respect to claims arising under federal law. See *supra* pp. 11-13. Moreover, even if such a defense applied, it would not help Iskanian, because his arbitration agreement does

[8] These arguments are also inconsistent with Iskanian's position that the PAGA claim is distinguishable from a class action because it does not involve the assertion of rights belonging to others. If Iskanian has a personal right to assert a PAGA claim, then so do all of the other employees in the affected "class"; that highlights the due process concerns with binding absent employees without protections akin to those provided in class actions. Compare *Concepcion*, 131 S.Ct. at 1751.

not waive any of the statutory remedies to which Iskanian *himself* may be entitled.[9]

Iskanian responds that, because PAGA allows for representative rather than class actions, he himself possesses a personal right to seek civil penalties under the statute for ***all*** of CLS's California employees. *See* Br. 24-25; Reply 11-13. But that is no different than saying that class action procedures confer upon the representative plaintiff the "right" to seek relief on behalf of the entire class. In both situations there is an individual claim coupled with a procedural device permitting an individual claimant to obtain broad, class-wide relief.

As this Court has explained, PAGA "does not create property rights or any other substantive rights. Nor does it impose any legal obligations." *Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1003. Rather, PAGA is "simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." *Ibid.* Under PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Arias*, 46 Cal.4th at 980. "Of the civil penalties recovered, 75 percent goes to the Labor and

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[9] Cf. *Gilmer,* 500 U.S. at 28 ("'[S]o long as the prospective litigant effectively may vindicate *[his or her]* statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'") (quoting *Mitsubishi*, 473 U.S. at 637) (bracketed text added by *Gilmer* Court; emphasis added); *Randolph*, 531 U.S. at 90 ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating *her* federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration.") (emphasis added).

Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.'" *Id.* at 981 (quoting Labor Code § 2699(i)).[10]

Iskanian's agreement to arbitrate on an individual basis therefore does not preclude him from obtaining the exact remedies available ***to him*** personally under PAGA for violations of the Labor Code and other provisions of law. As the Court of Appeal recognized, "[n]othing in the arbitration agreement prevents Iskanian from bringing individual claims for civil penalties." Slip op. 17 n.6; see also *Quevedo*, 798 F.Supp.2d at 1141 ("nothing in the arbitration [agreement] would appear to preclude Plaintiff from pursuing this *individual* claim for civil penalties in arbitration") (emphasis in original). These penalties can add up; generally, the penalty is $100 per pay period for a first violation and $200 for each subsequent violation per pay period. Labor Code § 2699(f)(2). And while the State receives 75 percent of any awarded penalties, a prevailing employee is "entitled to an award of reasonable attorney's fees and costs." *Id.* § 2699(g)(1).[11]

Iskanian nonetheless suggests that under PAGA, a private plaintiff ***must*** bring a representative action on behalf of all similarly situated employees. Br. 26 (citing *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th

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[10] In an individual case, of course, the distribution is simple; the employee plaintiff receives the full 25 percent of the civil penalty amount recovered for violations as to him. But in a representative action, the 25 percent share of civil penalties recovered must be distributed among the group of employees represented by the plaintiff who has filed the action. See Labor Code § 2699(i) ("civil penalties recovered … shall be distributed … 25 percent to the aggrieved employees"); see also *Arias*, 46 Cal.4th at 980. PAGA does not entitle a representative plaintiff to recover for herself the full 25 percent share of *all* civil penalties obtained for Labor Code violations involving the other employees.

[11] Moreover, these penalties are atop "other remedies available under state or federal law" (Labor Code § 2699(g)(1)), such as compensatory and punitive private remedies created by federal or state wage-and hour laws.

1119, 1123)). The court in *Reyes* reached that conclusion because PAGA provides that an aggrieved employee may bring a civil action "'on behalf of herself or himself *and* other current or former employees.'" 202 Cal.App.4th 1119, 1124 (citations omitted; emphasis in *Reyes*).

But as the Court of Appeal in this case held, that reading of PAGA's text is unpersuasive: "We ... read the function of the word 'and' here in a different sense: its purpose is to clarify that an employee may pursue PAGA claims on behalf of others *only* if he pursues the claims on his own behalf. ... We do not believe that an individual PAGA action is precluded by the language of the statute." Slip op. 17 n.6. The latter reading is far more sensible, because it would be anomalous indeed—perhaps unprecedented—for a legislature to create a statutory cause of action that could not be pursued on an individual basis, but instead only on a representative, class, or collective basis. That would be akin to holding that because a plaintiff *may* bring a class action, she *must* do so and may never choose to pursue her claims on an individual basis.[12]

Moreover, even if California law truly did mandate that private plaintiffs bring PAGA claims only in a representative capacity on behalf of other employees (as opposed to on their own), that procedural requirement would have to give way to the FAA. As discussed above (at 22-24), representative actions—like class procedures—cannot be engrafted onto

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[12] Indeed, the U.S. Court of Appeals for the Second Circuit recently rejected the notion that there was a "right to bring a substantive 'pattern-or-practice' claim" under Title VII on a class-wide basis only; instead, under federal law, rules of procedure cannot be used to abridge, modify, or enlarge substantive rights. *Parisi v. Goldman, Sachs & Co.* (2d Cir. 2013) 710 F.3d 483, 487. Stated another way, "[t]he availability of the class action Rule 23 mechanism *presupposes* the existence of a claim; Rule 23 cannot create a non-waivable, substantive right to bring such a claim." *Id.* at 488.

arbitration without destroying the benefits of "arbitration as envisioned by the FAA" (*Concepcion*, 131 S.Ct. at 1753).

Every product-warranty claim or breach-of-contract lawsuit could be reframed by state law as a mandatory representative action, thus allowing plaintiffs to avoid agreements to arbitrate on an individual basis. As the Supreme Court noted in a related context, "[s]uch examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S.Ct. at 1747.

In short, a refusal to enforce an arbitration agreement on the ground that PAGA claims are "all or nothing" would interfere with the "overarching purpose of the FAA ... to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" (*Concepcion*, 131 S.Ct. at 1748)—and would therefore be preempted. Instead, as the Court of Appeal and a number of federal courts have held, Iskanian should be required to arbitrate his PAGA dispute on an individualized basis, seeking only those civil penalties available for alleged violations affecting him personally.

b. Iskanian also argues that his PAGA claims are exempt from arbitration because private plaintiffs act as "'a proxy agent of the state's law enforcement agencies.'" Br. 25-26. Pointing to *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, Iskanian contends that he need not arbitrate because "PAGA claims are asserted on behalf of the *state*, and ... private arbitration agreements cannot bind non-party government entities." Br. 21-22. But he misconstrues the Supreme Court's decision in *Waffle House* and its applicability here. That decision held only that a federal government agency that did *not* agree to arbitrate could *itself* pursue claims based on conduct directed at an employee who had agreed to arbitrate. 534 U.S. at 291-294. The decision nowhere suggests that a party who *has*

agreed to arbitrate may escape that obligation whenever a nonparty has an interest in any remedy that could be available in connection with an arbitrable dispute.

Critical to the Court's analysis in *Waffle House* was the fact that the EEOC itself was pursuing the enforcement actions under authority conferred to it by federal law. As the Court explained, "we are persuaded that, pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." 534 U.S. at 296-297.

The Court deemed it significant that "the EEOC is in command of the process" and that "[t]he statute clearly makes the EEOC the master of its own case." *Id.* at 291. The Court noted that if the procedural posture were otherwise—for example, "[i]f it were true that the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]"—then the lower "court's analysis" concluding that the arbitration agreement barred the EEOC from pursuing employee-specific relief "might be persuasive." *Ibid.*

The situation presented by PAGA is a far cry from *Waffle House*. Unless the Labor and Workforce Development Agency chooses to pretermit a private PAGA action by issuing a citation itself after receiving notice of the action from a private plaintiff-employee (*s*ee Labor Code § 2699.3), that private plaintiff is in charge of pursuing and litigating the PAGA representative action. The private party controls the allegations in the complaint, defines the set of employees that he or she seeks to represent, and can settle the claims without agency approval—and in fact, with binding effect on the nonparty employees as well as the State itself. In other words, while PAGA allows the State (through its inaction) to

"deputize" private plaintiffs like Iskanian as proxies for the State, in practice, such individuals are free to prosecute the case however they like, without supervision or control.[13]

When, as here, the claims are being pursued by a private plaintiff who agreed to arbitrate rather than by an agency that did not, *Waffle House*'s reasoning simply does not apply. Unlike the EEOC, Iskanian *is* a party to an agreement to arbitrate employment-related disputes. Even if, as a matter of California law, his claims are deemed to serve public rather than private ends, such considerations of state policy do not justify disregarding the FAA's requirement that arbitration agreements be enforced according to their terms.[14]

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[13] In practice, private plaintiffs are deeply flawed agents for the State. PAGA representative actions are usually brought alongside other claims (such as wage and hour claims), and, as with most class or representative actions, the cases that are not dismissed tend to settle. In a number of those settlements, the parties are careful to attribute the vast majority of the settlement amounts to the other claims, allocating only a tiny fraction of the recovery to the PAGA claims. The reason (although unspoken) seems obvious: Private plaintiffs and their counsel seek to maximize the recovery to themselves, and therefore are loath to recover much in the way of civil penalties when 75 percent of that amount will go to the State for whom the plaintiffs are (nominally) proxies. See, *e.g.*, *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575 ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie v. Fed. Express Corp.* (C.D. Cal. July 2, 2012) 2012 WL 2930201 ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu v. Wells Fargo Inv., LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645 ($7,500 allocated to PAGA claim out of $6.9 million settlement); see also *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (upholding multi-million dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

[14] As explained above (at note 6), for similar reasons the *Broughton/Cruz* exception for "public" injunctions is equally infirm.

In fact, Iskanian's arguments ultimately rest on state public policy grounds. He argues that the waiver of the ability to bring a PAGA representative action in arbitration would "impair PAGA's public purpose: 'maximum compliance with state labor laws' ... 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." Br. 26. But the FAA necessarily displaces such policy concerns about the appropriate balance of public versus private enforcement and their perceived efficacy at deterrence. As the Ninth Circuit recently reiterated, any such "concern is, of course, a primary policy rationale for class actions, as discussed by the district court [in that case] in terms of deterrence. ... But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Coneff*, 673 F.3d at 1159.

III. FEDERAL LABOR LAW DOES NOT OVERRIDE THE FAA'S COMMAND TO ENFORCE AS WRITTEN ARBITRATION AGREEMENTS LIMITED TO CLAIMS FOR INDIVIDUALIZED RELIEF.

Iskanian points to the National Labor Relations Board's decision in *In re D.R. Horton, Inc.* (2012) 357 NLRB No. 184, 2012 WL 36274, appeal pending, *D.R. Horton, Inc. v. NLRB* (5th Cir. No. 12-60031), to contend that federal labor statutes protecting "concerted activities" constitute a congressional directive protecting employees' ability to assert class claims, and therefore override the FAA's command to enforce as written arbitration agreements requiring resolution of claims on an individual basis. The NLRB relied on two statutory provisions, Section 2 of the Norris-LaGuardia Act and Section 7 of the National Labor Relations Act. But the reasoning of the Board's *D.R. Horton* decision (and therefore Iskanian's argument) is flatly contrary to U.S. Supreme Court precedent.

Concepcion makes clear that the FAA requires enforcement of agreements to arbitrate on an individual basis because that is the type of arbitration "envisioned" by the statute. 131 S.Ct. at 1753. "[C]lasswide arbitration interferes with fundamental attributes of arbitration[.]" *Id*. at 1748. The FAA's mandate may, of course, be "'overridden by a contrary congressional command.'" *CompuCredit*, 132 S.Ct. at 669 (quoting *Shearson/Am. Express, Inc. v. McMahon* (1987) 482 U.S. 220, 226). However, any such "command" must be clear: "When [Congress] has restricted the use of arbitration … it has done so with … clarity." *Id.* at 672. If the federal statute "is silent on whether claims under [the statute] can proceed in an arbitrable forum," the FAA "requires the arbitration agreement to be enforced according to its terms." *Id*. at 673.

The Supreme Court has rejected the argument that federal labor law precludes courts from enforcing arbitration agreements in the employment context. *Gen. Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers of Am.* (1957) 353 U.S. 547, 548. Likewise, "there is no language in the NLRA (or in the … Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso,* 879 F.Supp.2d at 1047. Indeed, neither act so much as mentions arbitration in any respect. Because the federal labor laws thus do not contain a clear congressional command overriding the FAA's protection for agreements to arbitrate individually, nearly every court to consider the issue has rejected arguments based on *D.R. Horton* identical to Iskanian's contention here.[15] In line with the overwhelming

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[15] See, *e.g.*, *Owen v. Bristol Care, Inc* (8th Cir. 2013) 702 F.3d 1050, 1053-1054; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D. Cal. Feb. 5, 2013) 2013 WL 452418, at *8-9; *Ryan v. JPMorgan Chase & Co.* (S.D.N.Y. Feb. 21, 2013) --- F.Supp.2d ---, 2013 WL 646388, at *4, *6; *Long v. BDP Int'l, Inc.* (S.D. Tex. Jan. 22, 2013) --- F.Supp.2d ---, 2013 WL 245002, at *15 n.11; *Cohen v. UBS Fin. Servs., Inc.* (S.D.N.Y. Dec. 4, 2012) 2012 WL

weight of authority, the U.S. Court of Appeals for the Fifth Circuit, which is currently reviewing the NLRB's decision, may reject *D.R. Horton* as well; this Court should do the same.

A. The Norris-LaGuardia Act Does Not Override The FAA.

Section 2 of the Norris-LaGuardia Act is on its face a "declar[ation]" of "public policy" designed to inform "the interpretation of" the operative provisions of that statute "in determining the jurisdiction and authority of the courts of the United States." 29 U.S.C. § 102.[16] Neither Section 2 nor the Act's operative provisions have anything to do with whether disputes may be resolved through arbitration.

"Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not … to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards v. Panama S.S. Co.* (1960) 362 U.S. 365, 372; see also, *e.g.*, *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc.* (1940) 311 U.S. 91, 101 ("The Norris-LaGuardia Act … was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes.").

6041634, at *4; *Carey v. 24 Hour Fitness USA, Inc.* (S.D. Tex. Oct. 4, 2012) 2012 WL 4754726, at *1-2; *Tenet HealthSystem Phila., Inc. v. Rooney* (E.D. Pa. Aug. 17, 2012) 2012 WL 3550496, at *4; *Brown v. Trueblue, Inc.* (M.D. Pa. Apr. 16, 2012) 2012 WL 1268644, at *5; *Delock v. Securitas Sec. Servs. USA, Inc.* (E.D. Ark. 2012) 883 F.Supp.2d 784, 786-791; *Spears v. Mid-Am. Waffles, Inc.* (D. Kan. July 2, 2012) 2012 WL 2568157, at *2; *Morvant*, 870 F.Supp.2d at 842-845; *Jasso*, 879 F.Supp.2d at 1046-1049; *Johnmohammadi v. Bloomingdale's, Inc.* (C.D. Cal. Feb. 29, 2012) 2012 WL 3144882, at *1; *LaVoice v. UBS Fin. Servs., Inc.* (S.D.N.Y. Jan. 13, 2012) 2012 WL 124590, at *6. But see *Brown v. Citicorp Credit Servs., Inc.* (D. Idaho Feb. 21, 2013) 2013 WL 645942, at *3 (following *D.R. Horton*); *Herrington v. Waterstone Mortg. Corp.* (W.D. Wis. Mar. 16, 2012) 2012 WL 1242318, at *4-6 (same).

[16] Because the language of Section 7 of the NLRA is drawn from the Norris-LaGuardia Act, we first address the Norris-LaGuardia Act and then discuss the NLRA.

Iskanian tries to read a statute designed to keep the federal courts *out* of labor disputes as a clear congressional command that employment claims must be heard *in* those courts. See Br. 33.

As the First Circuit put it, however, "[a]n order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration," is "not the 'temporary or permanent injunction' against whose issuance the formidable barriers of [the Act] are raised." *Local 205, United Elec., Radio & Mach. Workers of Am. v. Gen. Elec. Co.* (1st Cir. 1956) 233 F.2d 85, 91, aff'd (1957) 353 U.S. 547. In other words, "jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act." *Ibid.*

Affirming that decision, the U.S. Supreme Court rejected the notion that the Act bars arbitration agreements, stating in no uncertain terms that "the Norris LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes." 353 U.S. at 548; see also *Morvant*, 870 F.Supp.2d at 844 ("[T]he Norris-LaGuardia Act specifically defines those contracts to which it applies. An agreement to arbitrate is not one of those … .") (citing 29 U.S.C. § 103(a)-(b)).

Iskanian's argument is far more strained than the one rejected in *CompuCredit*. There, the Court declined to find the FAA displaced on the basis of a provision invalidating waivers of statutory rights, even though statute at issue expressly included "a cause-of-action provision mentioning judicial enforcement." 132 S.Ct. at 671. Here, there is no statutory language whatsoever either precluding arbitration agreements or requiring that class procedures be available to covered employees. That is not a surprising result given the fact that the statute was enacted 34 years before "modern class action practice emerged in the 1966 revision of Rule 23" of the Federal Rules of Civil Procedure (*Ortiz v. Fibreboard Corp.* (1999) 527

U.S. 815, 833), which gave federal-court class actions their "current shape" (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 613).

B. The National Labor Relations Act Does Not Override The FAA.

The language in Section 7 of the NLRA on which Iskanian relies (see Br. 33) is drawn from the policy statement in Section 2 of the Norris-LaGuardia Act. Compare 29 U.S.C. § 157 (discussing "other concerted activities for the purpose of collective bargaining or other mutual aid or protection") with *id.* § 102 (same). As with its precursor, Section 7 of the NLRA contains no hint that Congress meant to bar individual arbitration, much less the clear congressional command needed to override the FAA.

Iskanian contends that Section 7's protection of "other concerted activities" (29 U.S.C. § 157) trumps the FAA because "'fil[ing] a class or collective action'" qualifies as concerted activity. Br. 34 (quoting *D.R. Horton*, 2012 WL 36274, at *4). But the Supreme Court has repeatedly held that statutory provisions authorizing the filing and prosecution of private civil actions are not sufficient to restrict or displace the FAA.[17] Indeed, the Court has held that even statutes expressly providing for collective actions do not override the FAA or preclude arbitration agreements containing class-action waivers: "'[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at reconciliation are intended to be barred.'" *Gilmer v. Interstate/Johnson*

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[17] See, *e.g.*, *CompuCredit*, 132 S.Ct. at 674; *Waffle House*, 534 U.S. at 295 n.10; *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 35; *McMahon*, 482 U.S. at 238, 242; *Mitsubishi*, 473 U.S. at 628-629, 635; see also *Delock*, 883 F.Supp.2d at 790 ("Statutory references to having causes of action, filing in court, allowing suits, and even pursuing class actions are insufficient commands too.") (citing *CompuCredit*, 132 S.Ct. at 670-671).

Lane Corp. (1991) 500 U.S. 20, 32; see also *Delock v. Securitas Sec. Servs. USA, Inc.* (E.D. Ark. 2012) 883 F.Supp.2d 784, 789-790 ("The Act's protection of concerted activities does not guarantee an unwaivable right to proceed as a group in either litigation or arbitration. The Age Discrimination in Employment Act and the Fair Labor Standards Act offer employees collective actions. But this option was an insufficient statutory command [in *Gilmer*].").

Notably, the Supreme Court held in *CompuCredit* that the FAA compelled enforcement of an agreement to arbitrate disputes on an individual basis even though the federal statute under which the claims were brought (i) specifically authorized class actions, (ii) set forth special procedures for adjudicating them, and (iii) provided that "'[a]ny waiver … of any protection provided by or any right … under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.'" 132 S.Ct. at 669 (quoting 15 U.S.C. § 1679f(a)).

As *CompuCredit* recognized, "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." *Id*. at 670. Nonetheless, the Court reasoned, "we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court," even when the arbitration agreement precludes the claims from being made on a class basis or in a type of proceeding described in the statute. *Id.* at 671 (citing, *inter alia*, *Gilmer*, 500 U.S. at 28). If express statutory nonwaiver provisions accompanied by specifications of class-action procedures are insufficient to displace the FAA, the NLRA's reference to "other concerted activities" is plainly insufficient as well.

C. Iskanian's Pre-*D.R. Horton* Authorities Do Not Support His Contrary View.

Iskanian misleadingly contends that the NLRB has "repeatedly" interpreted the NLRA and the Norris-LaGuardia act to afford nonwaivable rights to pursue class claims and that "federal courts have uniformly deferred" to that determination. Reply 16 & n.12. That is not so. The cited decisions hold only that employees cannot be fired for filing a lawsuit, whether an individual claim or a class action.[18]

Indeed, not long before *D.R. Horton*, the NLRB's general counsel declared in a guidance memorandum that the NLRA and the FAA are not in conflict because the relevant substantive guarantee of the NLRA is only that employees may not be "disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim." Ronald Meisburg, General Counsel, NLRB (GC Memo. 10-06, June 16, 2010) *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory*

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[18] See, *e.g.*, *Brady v. Nat'l Football League* (8th Cir. 2011) 644 F.3d 661, 673 (plaintiffs engaged in "concerted activity" simply by filing a lawsuit); *Mohave Elec. Co-op. v. NLRB* (D.C. Cir. 2000) 206 F.3d 1183, 1188-1189 (NLRB applies when employees "'seek to improve working conditions through resort to administrative and judicial forums'"); *NLRB v. United Parcel Serv., Inc.* (6th Cir. 1982) 677 F.2d 421, enf'g (1980) 252 NLRB 1015, 1016 (employee was retaliated against for, *inter alia*, filing suit); *NLRB v. Trinity Trucking & Materials Corp.* (7th Cir. 1977) 567 F.2d 391, enf'g (1977) 227 NLRB 792 (employees "discharged for insubordination and extreme disloyalty to the company" after refusing employer's demand to withdraw a lawsuit); *In re Saigon Gourmet Rest., Inc.* (2009) 353 NLRB No. 110 (employer "offered the employees a raise if they abandoned their wage and hour claims," then discharged them when they refused). As to *NLRB v. Stone* (7th Cir. 1942) 125 F.2d 752, 756, the court held simply (and correctly) that an employee cannot be required to *bargain* individually rather than collectively; it did not restrict the procedures an employee may agree to for filing legal claims against his employer—nor could it, as dispute-resolution agreements, unlike the bargaining process, are protected by the FAA.

Arbitration Policies 6, available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580376447. As the general counsel admonished, whether such actions can proceed to judgment, and in what forum, are "normally determined by reference to the employment law at issue and do[] not involve consideration of the policies of the National Labor Relations Act." *Id.* at 5. That interpretation properly harmonizes the FAA and the NLRA.

D. The NLRB's Decision In *D.R. Horton* Cannot Invalidate Iskanian's Arbitration Agreement In The Absence Of A Clear Congressional Command.

The NLRB's *D.R. Horton* decision cannot manufacture a clear congressional command from language that is not there. And without any sign that "*Congress itself* has evinced an intention" to override the FAA (*Mitsubishi*, 473 U.S. at 628 (emphasis added)), the NLRB's ruling cannot serve as a substitute by action by Congress. That is so for at least four distinct reasons.

First, an agency interpretation cannot, by definition, constitute the "contrary *congressional* command" required to override the FAA. See *CompuCredit*, 132 S.Ct. at 669 (emphasis added). The FAA was enacted by Congress, and can be repealed or overridden only by an express congressional enactment to the contrary—not by action of an administrative agency not based on express congressional authority to override the FAA.[19]

Second, the NLRB's interpretation of Section 7 is not entitled to deference, because Congress "has directly spoken to the precise question at

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[19] When Congress wished to delegate to the Consumer Financial Protection Bureau the power to regulate arbitration, it did so in clear, express, and unmistakable language. *CompuCredit*, 132 S.Ct. at 672; see 12 U.S.C. § 5518(b) (2006 Supp. IV) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement … providing for arbitration … ."); see also 15 U.S.C. § 78*o*(o) (2006 Supp. IV) (similar express delegation to Securities and Exchange Commission).

issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.* (1984) 467 U.S. 837, 842. The U.S. Supreme Court has authoritatively construed the FAA to require a clear and "contrary congressional command" in any statute claimed to override the FAA's pro-arbitration policy. *CompuCredit*, 132 S.Ct. at 669. The NLRB's conclusion that a sufficient congressional authorization may be based on the statute's silence is not entitled to any weight because it is contrary to the standard embodied in the FAA.

The NLRB's interpretation also warrants no deference because Congress has never authorized the NLRB to interpret or override the FAA. "'[T]he Board has no special competence or experience in interpreting the Federal Arbitration Act.'" *Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1054 (citation omitted); see also, *e.g.*, *NLRB v. Bildisco & Bildisco* (1984) 465 U.S. 513, 529 n.9 (refusing to defer to the NLRB's interpretation of the Bankruptcy Code because, "[w]hile the Board's interpretation *of the NLRA* should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel") (emphasis added).

Had Congress intended to give the NLRB extraordinary authority to override the FAA and restrict or prohibit arbitration, it had to "do[] so with … clarity." *CompuCredit*, 132 S.Ct. at 672; see *supra* p. 32. Thus, *D.R. Horton* cannot preclude enforcement of Iskanian's arbitration agreement.

Third, even if it were otherwise supportable, the *D.R. Horton* decision is *void ab initio* because the NLRB lacked a proper quorum at the time of the decision and was therefore without authority to act. Under 29 U.S.C. § 153(b), the NLRB cannot act unless it has at least three members. See generally *New Process Steel, L.P. v. NLRB* (2010) 130 S.Ct. 2635. At the time of the *D.R. Horton* decision, the NLRB had only two duly appointed members; the remaining members sat pursuant to purported "recess appointments" that were in fact unconstitutional because they

violated the Recess Appointments Clause of the Constitution. See generally *Noel Canning v. NLRB* (D.C. Cir. 2013) 705 F.3d 490, pet. for cert. filed (U.S. No. 12-1281). Thus, "[b]ecause the Board lacked a quorum of three members when it issued its decision ... its decision must be vacated." *Id.* at 507; see also *id.* at 514 ("The Board had no quorum, and its order is void.").

IV. CLS DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

The court of appeal correctly held that CLS did not waive its right to arbitrate when it declined to pursue arbitration further after this Court's decision in *Gentry* established that continued efforts to enforce the arbitration clause would be futile. It was enough that CLS clearly communicated its intent to arbitrate at the outset of the case, then acted quickly when *Concepcion* revived the agreement's enforceability. By continuing to litigate his claims in court rather than arbitration, in breach of his contractual agreement, Iskanian assumed the risk that the arbitration clause would subsequently be held enforceable and that he subsequently would be obliged to pursue his claims in arbitration.

As an initial matter, this Court has recognized that "a party who resists arbitration on the ground of waiver bears a heavy burden." *St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal.4th 1187, 1195. Indeed, when "the problem at hand is ... an allegation of waiver," the FAA requires, "as a matter of federal law, [that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25. "'[S]trong public policy in California'" also requires courts "to 'closely scrutinize any allegation of waiver of such favored right' and to 'indulge every intendment to give effect to such proceedings.'" *Doers v. Golden*

Gate Bridge, Highway & Transp. Dist. (1979) 23 Cal.3d 180, 189 (internal citations omitted).

St. Agnes instructs courts to consider several factors when determining whether a party has waived its right to arbitrate:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

31 Cal.4th at 1196 (citations and quotation marks omitted). Under that analysis, there can be no waiver when, as here, (1) the party seeking to compel arbitration communicated its intent to arbitrate at the outset of the case and, indeed, moved to compel arbitration; (2) further pursuit of a motion to compel arbitration would have been futile under binding precedent at that time or became futile shortly thereafter; and (3) the party promptly moved to compel arbitration after intervening events restored the party's right to pursue arbitration.

1. The first four *St. Agnes* factors clearly favor CLS. Because CLS moved to compel arbitration at the very outset of this case, CLS did not act "inconsistent[ly] with the right to arbitrate." *St. Agnes*, 31 Cal.4th at 1196. For the same reason, "'the litigation machinery [was not] substantially invoked' … before [CLS] notified the opposing party of an intent to arbitrate"; and CLS did not first "request[] arbitration enforcement close to the trial date or delayed for a long period." *Ibid.* Finally, CLS

obviously has not "filed a counterclaim without asking for a stay of the proceedings." Cf. *ibid*

Iskanian complains that CLS withdrew its motion to compel arbitration after this Court decided *Gentry*. But under *Gentry*, CLS no longer had a right to arbitrate. As the Ninth Circuit has explained, no "enforceable right to arbitration" existed if "it would have been futile to file a motion to compel arbitration" under binding precedent that was later overturned. See *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 694, 697; accord *Letizia v. Prudential Bache Sec., Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187.

In addition, because CLS filed its renewed motion to compel arbitration within three weeks of the *Concepcion* decision, there is no question that CLS "actively pursued [its] right to arbitrate as soon as [it] believed, in good faith, that [it] had such a right." *Letizia*, 802 F.2d 1185, at 1187 n.3. Contrary to Iskanian's rhetoric, CLS's decision not to pursue a futile motion or appeal prior to the ruling in *Concepcion* did not "keep[] the 'get-out-of-litigation' card in its back pocket[] to be played at an opportune time" (Reply 22). CLS had nothing in its back pocket to play until the Supreme Court of the United States abrogated *Discover Bank* and *Gentry*—at which point CLS promptly renewed its motion to compel arbitration.

Furthermore, it makes little sense to demand, on penalty of waiver, that a party continue to press the issue after it has clearly become futile. That would only further drain the resources of the courts and the parties.

Iskanian is mistaken in claiming (Reply 24) support in *Gutierrez v. Wells Fargo Bank, NA* (9th Cir. 2012) 704 F.3d 712. The defendant there did not "even mention[]" arbitration in four years of litigation "*until after ... the trial was over* and the district court had issued its judgment." *Id.* at 720 (emphasis added). Here, in contrast, CLS communicated its intent to pursue arbitration at the very outset of the case. As a result, Iskanian

knowingly assumed the risk that his pursuit of judicial relief would be set aside if *Gentry* were overturned.

2. The only *St. Agnes* factors that require additional analysis are the final two. It is true that "intervening steps" such as "judicial discovery procedures" occurred while this case was being litigated in court (*St. Agnes*, 31 Cal.4th at 1196), but that can hardly be held against CLS when it was participating in those judicial proceedings only against its will and under protest. And to the extent Iskanian claims that he will be "'affected, misled, or prejudiced'" by the delay attendant to restarting the case in arbitration (*ibid.*), he invited those consequences upon himself when he breached his contractual obligations by bringing his claims in court rather than in individual arbitration.

As the Ninth Circuit has explained, when a plaintiff claims harm from his or her own decision to violate "an agreement making arbitration of disputes mandatory" by bringing "arbitrable claims in this [judicial] action," any "wound" he sustains is "self-inflicted." *Fisher*, 791 F.2d at 698. "Any extra expense incurred as a result of the … deliberate choice of an improper forum, in contravention of [his or her] contract, cannot be charged to [the defendant]." *Ibid.* "[I]t was [Iskanian] who refused to arbitrate, and the costs [he] incurred in pursuing litigation should not count against" CLS. *Britton v. Co-op Banking Grp.* (9th Cir. 1990) 916 F.2d 1405, 1413. Accordingly, Iskanian cannot show prejudice, and CLS cannot be held to have waived its right to compel arbitration.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: May 13, 2013

Respectfully submitted.

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CERTIFICATE OF WORD COUNT
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According to the word count facility in Microsoft Word 2007, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 13,412 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

Dated: May 13, 2013

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CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On May 13, 2013, I served the foregoing document(s) described as:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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

Executed on May 13, 2013, in Palo Alto, CA.

_____

Kristine Neale