S204032

IN THE SUPREME COURT 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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF RESPONDENT CLS TRANSPORTATION LOS ANGELES, LLC

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
JOHN F. QUERIO (BAR NO. 235524)
*FELIX SHAFIR (BAR NO. 207372)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
jquerio@horvitzlevy.com
fshafir@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
CALIFORNIA NEW CAR DEALERS ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE SUPREME COURT OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

Pursuant to rule 8.520(f) of the California Rules of Court, the California New Car Dealers Association (CNCDA) respectfully requests permission to file the attached amicus curiae brief in support of respondent CLS Transportation Los Angeles, LLC.

The CNCDA is a California non-profit mutual benefit corporation chartered to protect and advance the interests of the new motor vehicle dealer industry in California.[1] The CNCDA's members include over 1,000 of the more than 1,200 new car dealers in California. The CNCDA routinely advocates the interests of new

[1] The CNCDA certifies that no person or entity other than the CNCDA and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

car dealers in courts across the state by filing amicus curiae briefs in cases involving issues of vital concern to its members.

In fulfilling that role, the CNCDA has appeared multiple times before this court and the California Courts of Appeal. For example, last year the CNCDA filed amicus curiae briefs in two appeals currently pending before this court that raise questions concerning the proper standards for enforcing arbitration agreements governed by the Federal Arbitration Act (FAA). (See *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475; *Sanchez v. Valencia Holding Co., LLC*, No. S199119.) The parties seeking to compel arbitration in those appeals are CNCDA members.

Like many California businesses, CNCDA members enter into contracts with their employees and customers. Typical among the terms in these contracts are arbitration provisions designed to permit the expeditious resolution of future disputes between the parties, including disputes over the payment of wages. Because of the efficiencies derived from using arbitration to resolve disputes, CNCDA members who contract for arbitration are able to cut down on costs. This allows new car dealers to pass along the resulting savings to employees in the form of higher wages or other job benefits, and to customers in their new car purchases. The predictable ability to arbitrate claims like those at issue here is therefore of enormous interest to CNCDA members.

Court rulings that diminish this predictability affect millions of employment agreements, consumer transactions, and similar contractual relationships involving car dealers and other businesses, large and small, that rely on arbitration to avoid time-

consuming and ruinously expensive court litigation. In particular, if arbitration agreements face rejection based on state policy concerns that stand as an obstacle to the FAA's overriding objective of enforcing arbitration agreements according to their terms, new car dealers and other businesses in this state will face increased costs in what is already a low-margin business, and will suffer a competitive disadvantage relative to out-of-state rivals. This will harm not only the dealers, but also their employees, customers, and the state economy as a whole.[2]

The CNCDA is thus deeply interested in how this court decides the questions presented in this case, especially the effect of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*) on this court's pre-*Concepcion* standards for enforcing arbitration agreements. In particular, the CNCDA believes this court would benefit from additional briefing on the fundamental question whether, under *Concepcion*, the FAA preempts the public policy defense this court applied in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*).

---

[2] In 2012, California new car dealers employed over 119,000 individuals, with annual payrolls totaling nearly $6 billion. (CNCDA, *Economic Impact Report 2013* <http://www.cncda.org/publications/CNCDA_2013_Economic_Impact_Report.pdf> [as of May 10, 2013].)

Accordingly, the CNCDA respectfully requests that this court accept and file the attached amicus curiae brief addressing the continuing vitality of *Gentry*'s public policy defense in light of *Concepcion*.

May 10, 2013

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN F. QUERIO
FELIX SHAFIR

By: _____
Felix Shafir

Attorneys for Amicus Curiae
CALIFORNIA NEW CAR DEALERS ASSOCIATION

AMICUS CURIAE BRIEF

INTRODUCTION

The Federal Arbitration Act (FAA) limits the extent to which courts can refuse to enforce contracts to submit disputes to arbitration. Under a "saving clause" contained in the FAA, state courts may generally invalidate such agreements on grounds that would apply to all contracts independent of their subject matter, such as where a contract has been procured through coercion or fraud. But some courts have invoked this saving clause to cloak a hostility to arbitration by declaring that the arbitration procedures to which the parties contractually agreed as a method for resolving their disputes contravene state public policy and are therefore unenforceable.

The United States Supreme Court has now made clear that any such approach is preempted by the FAA. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 1746-1753, 179 L.Ed.2d 742] (*Concepcion*).) Accordingly, a great many California decisions applying that approach have been directly or indirectly overruled—leaving plaintiff Arshavir Iskanian without any supporting authority for his attempt to invalidate the terms of his arbitration contract.

Stressing that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" *Concepcion* holds that even a state contract defense ostensibly applicable to all contracts (rather than solely to

arbitration agreements) is preempted by the FAA where the defense stands as an obstacle to the FAA's overarching objective of enforcing arbitration agreements as written. (*Concepcion, supra,* 131 S.Ct. at pp. 1747-1748.) For example, an arbitration agreement must not be invalidated on the basis of a state contract defense that:

- derives its meaning from the fact that an arbitration agreement is at issue;
- relies on the uniqueness of an arbitration agreement;
- has a disproportionate impact on arbitration agreements; or
- is otherwise applied in a fashion that disfavors arbitration.

(*Id.* at pp. 1746-1747.)

In crafting these broad guidelines, the Supreme Court in *Concepcion* recognized that doctrines such as "unconscionability" and "public policy" can be twisted to disproportionately invalidate arbitration agreements. (*Concepcion, supra,* 131 S.Ct. at p. 1747 [state court's "unconscionability or public-policy disapproval" for agreements that fail to provide the arbitration procedures mandated by a court "would have a disproportionate impact on arbitration agreements" and "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts"].) The Supreme Court thus took pains to make clear that state courts cannot refuse to enforce the specific arbitration terms to which the parties agreed based on a "vindication principle," that is, based on state policy concerns that the agreed-upon procedure may fail to vindicate state statutory rights in the arbitral forum.

In cases decided before *Concepcion*, this court developed a public policy defense to the enforcement of employment agreements to arbitrate unwaivable state statutory claims. (E.g., *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456-457 (*Gentry*).) *Gentry* applied this defense to hold that a class arbitration waiver cannot be enforced if that arbitration procedure would, in this court's view, impair an employee's ability to vindicate unwaivable state statutory wage rights. (*Id.* at p. 463.) Iskanian relies on *Gentry* here to avoid the class action waiver in his arbitration agreement with his employer. (OBOM 3-21; RBOM 1-7.) But this court should find that *Gentry* is no longer good law because *Gentry*'s public policy defense is preempted by the FAA. After *Concepcion*, there can be no doubt that California's policy to vindicate state statutory rights cannot override the FAA's mandate requiring courts to enforce arbitration agreements according to their terms.

With respect specifically to Iskanian's attempt to apply the vindication principle to class action waivers, it is important to note that class actions are simply procedural devices for pursuing substantive claims, and class procedures, by definition, cannot expand or circumscribe the substantive rights or remedies that could be pursued in an individual action. Even Iskanian does not contend that a class action waiver directly waives any substantive rights. Rather, he argues that a class action waiver must be invalidated under *Gentry*'s public policy defense because it *indirectly* imposes *procedural* impediments to the vindication of state statutory rights. Under *Concepcion* and its progeny, however, the FAA preempts any such state contract defense.

This does not mean, of course, that courts can *never* reject arbitration procedures where the FAA applies. Due process limitations bar a procedure that would result in a party losing the opportunity to present his or her case before an impartial arbitrator, for example. The FAA itself codifies due process limitations on arbitration agreements that fail to meet basic requirements of fundamental fairness. But courts cannot in the name of California public policy invoke a vindication-of-state-statutory-rights rationale to engraft additional fairness limitations onto the test for enforcing the arbitration procedures to which the parties agreed.

ARGUMENT

UNDER *CONCEPCION*, THE FAA PREEMPTS STATE COURT JURISPRUDENCE INVALIDATING ARBITRATION PROCEDURES BASED ON A STATE POLICY CONCERN THAT THE ARBITRATION PROCEDURES SELECTED, RELATIVE TO COURT LITIGATION, IMPEDE A PARTY'S ABILITY TO VINDICATE STATE RIGHTS.

A. The public policy defense this court applied in *Gentry* was the product of a series of cases that departed from United States Supreme Court precedent interpreting the FAA.

This case calls on the court to decide whether the public policy defense this court applied in *Gentry* survives *Concepcion* and its progeny. The defense traces its origins to several pre-*Concepcion* decisions in which this court construed the FAA in light of earlier United States Supreme Court cases. (See *Gentry*, *supra*, 42 Cal.4th at pp. 456-457, 463.) To assess *Concepcion*'s impact on that policy defense, it is first necessary to understand the pre-*Concepcion* decisions and context in which this court developed the defense. We therefore begin by describing the history of that policy defense before addressing whether the defense is now preempted by the FAA under *Concepcion*.

- **Many years before *Gentry*, the United States Supreme Court required lower courts to enforce agreements to arbitrate statutory claims under the FAA, but suggested courts need not do so if arbitration would fail to vindicate *federal* statutory rights.**

The United States Supreme Court has long held that statutory claims are subject to arbitration under the FAA. (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 [111 S.Ct. 1647, 114 L.Ed.2d 26] (*Gilmer*) [collecting earlier cases]; accord, *Shearson/American Exp., Inc. v. McMahon* (1987) 482 U.S. 220, 226 [107 S.Ct. 2332, 96 L.Ed.2d 185] (*McMahon*) [court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights"].) Thus, more than a quarter of a century ago, the Supreme Court held that the FAA requires courts to compel employees (like Iskanian) to arbitrate statutory wage and hour claims brought under California law. (*Perry v. Thomas* (1987) 482 U.S. 483, 486-493 [107 S.Ct. 2520, 96 L.Ed.2d 426] (*Perry*); accord, *Gilmer*, at p. 25, fn. 2 [*Perry* "held that the FAA required a former employee of a securities firm to arbitrate his [California] statutory wage claim against his former employer"].)

At the same time, however, the Supreme Court indicated that, while the FAA, "standing alone, mandates enforcement of agreements to arbitrate statutory claims," this FAA directive may in some instances have to give way if a court finds "an inherent conflict between arbitration" and the underlying purpose of a *federal* statute. (*McMahon, supra*, 482 U.S. at pp. 226-227.) In that narrow context, the Supreme Court hinted that such an inherent conflict may exist where a party cannot effectively vindicate a

federal statutory right in arbitration. (See *id.* at p. 242; accord, *Orman v. Citigroup, Inc.* (S.D.N.Y. Sept. 12, 2012, No. 11 Civ. 7086(DAB)) 2012 WL 4039850, at p. *3 (*Orman*) [nonpub. opn.] ["the entire line of [Supreme Court] case law in which the vindication of statutory rights analysis was developed deals with federal, as opposed to state, statutory rights"].) Thus was born the so-called "vindication principle" that would later find its way into California jurisprudence. (See OBOM 10-11.)

As articulated by the United States Supreme Court, the vindication principle addresses arbitration of *federal* statutory claims and might permit courts to invalidate agreements to arbitrate such claims created by Congress if " 'the prospective litigant' " cannot effectively "vindicate [his or her] statutory cause of action in the arbitral forum . . . .' " (*Gilmer, supra,* 500 U.S. at p. 28, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 637 [105 S.Ct. 3346, 87 L.Ed.2d 444] (*Mitsubishi Motors*).)

But, while the Supreme Court has occasionally discussed the vindication principle in cases addressing federal statutory rights (see OBOM 10, citing *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79 [121 S.Ct. 513, 148 L.Ed.2d 373] [Truth in Lending Act], *Gilmer, supra,* 500 U.S. 20 [Age Discrimination in Employment Act], *McMahon, supra,* 482 U.S. 220 [Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act], and *Mitsubishi Motors, supra,* 473 U.S. 614 [federal antitrust law]), the Supreme Court "has never struck down an [arbitration] agreement for interfering with a plaintiff's

statutory rights" in violation of the vindication principle. (Note, *Arbitration, Class Waivers, and Statutory Rights* (2012) 35 Harv. J.L. & Pub. Pol'y 991, 992, 997-998.)

- ***Broughton* created a new version of the vindication principle permitting courts to invalidate an arbitration agreement that was perceived to be less hospitable than court litigation in protecting state statutory rights.**

In a 1999 opinion, this court recognized that the United States Supreme Court's *Gilmer*, *McMahon*, and *Mitsubishi Motors* decisions discussed the vindication of *federal* statutory rights "in the context of an inquiry into whether *Congress* had intended federal statutory claims to be exempt from arbitration." (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1082-1083 (*Broughton*).) This court extended that principle to state statutory rights to avoid a perceived potential for "the vitiation through arbitration of the substantive rights afforded by" state statutes. (*Id.* at p. 1083.) Specifically, this court held that agreements to arbitrate statutory claims for public injunctive relief brought under California's Consumers Legal Remedies Act (CLRA) could not be enforced because "the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy" and, absent those advantages, this remedy would be diminished or frustrated. (*Id.* at pp. 1078-1088.)

In so holding, this court gave short shrift to the fact that the United States Supreme Court's vindication principle was based on the special interplay between the FAA and subsequent *Congressional* mandates—Congress is free to enact federal laws that overrule or limit earlier federal laws. The federal rights

vindication principle articulated by the Supreme Court is not founded on any exception to preemption contained in the language of the FAA itself, and instead derives from "the congressional intention expressed in some other [federal] statute" in which "Congress itself has evinced an intention" to exempt federal statutory rights from arbitration. (*Mitsubishi Motors, supra,* 473 U.S. at pp. 627-628; accord, *McMahon, supra,* 482 U.S. at pp. 226-227.) But, according to *Broughton,* application of the vindication principle outside the context of competing Congressional enactments survives FAA preemption because this court believed that arbitration of state law claims is just as inappropriate where the arbitral forum "cannot necessarily afford" all the procedural "advantages" available in court: "[T]his inappropriateness does not turn on the happenstance of whether the rights and remedies being adjudicated are of state or federal derivation." (*Broughton, supra,* 21 Cal.4th at p. 1083.)[3]

---

[3] Subsequently, in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 (*Cruz*), this court followed *Broughton*'s application of the vindication principle to state statutory rights to hold that agreements to arbitrate claims for public injunctive relief brought under California's Unfair Competition Law (UCL) cannot be enforced because such claims are "virtually indistinguishable from the CLRA claim that was at issue in *Broughton*."

- ***Armendariz* and *Little* adopted a broad public policy defense to enforcement of arbitration agreements based on *Broughton*'s interpretation of the FAA.**

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 90-91, 99-103 (*Armendariz*), this court—building on *Broughton*—held that courts can, as a matter of state public policy, refuse to enforce as written mandatory employment agreements to arbitrate unwaivable state statutory claims unless the agreed-upon arbitration procedure approximates court procedures that this court believed were essential in enabling an employee to vindicate his or her state statutory rights.

Armendariz held that, as a result of California public policy, arbitration agreements become an unenforceable vehicle for the waiver of unwaivable state statutory rights if a court believes the procedures that the parties adopted in their contract threaten the ability of a party to fully and effectively vindicate a statutory cause of action in the arbitral forum. (*Armendariz, supra,* 24 Cal.4th at pp. 99-103, citing *Broughton, supra,* 21 Cal.4th at p. 1087 and *Gilmer, supra,* 500 U.S. at pp. 27-28; see *Gentry, supra,* 42 Cal.4th at p. 463, fn. 7 ["*Armendariz* makes clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' [state] statutory rights"].) In other words, even though an arbitration agreement may contain no language that prevents an employee from asserting certain statutory claims, this court concluded that the *method* of litigating those claims—i.e., in the

context of an arbitration proceeding with streamlined arbitration procedures—would indirectly waive that which cannot be waived.[4]

Armendariz indicated this public policy defense was consistent with (rather than preempted by) the FAA because, this court concluded, United States Supreme Court precedent permits courts not to enforce arbitration agreements where the "arbitral forum" would not be "adequate" to vindicate statutory rights. (See *Armendariz, supra,* 24 Cal.4th at pp. 98-99; see also *id.* at pp. 101-102 [developing public policy defense to enforcement of agreements to arbitrate unwaivable *state* statutory claims based on federal cases decided under the FAA that discussed vindication of *federal* statutory rights].)

Subsequently, in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076-1081 (*Little*), this court confirmed that *Armendariz*'s procedural requirements imposed a state public policy limitation on the enforceability of arbitration agreements governed by the FAA. *Little* emphasized that *Armendariz*'s "requirements were founded on the premise" that California's "public policy" against exculpatory contracts renders certain state claims unwaivable, and on the further premise that this policy would be violated unless the parties'

---

[4] The arbitration procedures that *Armendariz* mandated as a matter of California policy were: (1) " 'neutral arbitrators' "; (2) " 'more than minimal discovery' "; (3) " 'a written [arbitration] award' "; (4) " 'all of the types of relief that would otherwise be available in court' "; and (5) a prohibition against employees " 'pay[ing] either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.' " (*Armendariz, supra,* 24 Cal.4th at p. 102; accord, *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 506.)

agreed-upon procedures matched up with the list of procedures that *Armendariz* said were "necessary to enable an employee to vindicate these unwaivable rights in an arbitration forum." (*Id.* at pp. 1076-1077; see *id.* at p. 1080 ["The object of the *Armendariz* requirements" is "to ensure minimum standards of fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum"].)

While *Little* acknowledged that *Armendariz*'s public policy defense "specifically concern[ed] arbitration agreements" and was "unique" to the "context of arbitration," *Little* nonetheless maintained that this defense was not preempted by the FAA. (*Little, supra,* 29 Cal.4th at p. 1079.) The FAA's saving clause permits courts not to "enforce an arbitration agreement based on 'generally applicable contract defenses.' " (*Ibid.*) According to *Little*, "[o]ne such long-standing" defense is California's public policy against exculpatory contracts that "force a party to forgo unwaivable public rights"—a policy that this court felt would be undermined unless the parties' agreed-upon arbitration procedure incorporated *Armendariz*'s procedural requirements. (*Id.* at pp. 1079-1080.)

- ***Discover Bank* employed the same public policy rationale as *Armendariz* and *Little* to analyze whether an arbitration procedure was unconscionable.**

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160-173 (*Discover Bank*), this court applied the same policy concern for the vindication of state rights that it had previously applied in *Armendariz* and *Little,* but did so in the form of an unconscionability defense.

Discover Bank addressed whether courts were authorized to invalidate class arbitration waivers in arbitration agreements pursuant to an unconscionability defense. (*Discover Bank*, *supra*, 36 Cal.4th at pp. 152-153, 160-163.) *Discover Bank* held that, since "class actions and arbitrations" are "often inextricably linked to the vindication" of substantive state rights, such waivers are contrary to California's "public policy" against "exculpatory contracts"—and therefore unconscionable—when they are " ' "the only effective way to halt and redress" ' " wrongful conduct. (*Id.* at pp. 160-163.)

Just as this court had previously concluded the public policy defense against arbitration adopted in *Armendariz* and *Little* survived FAA preemption because it was based on a generally applicable California policy against exculpatory contracts, so too did *Discover Bank* hold that the FAA did not preempt its unconscionability defense because it was based on that same public policy against exculpation. (See *Discover Bank*, *supra*, 36 Cal.4th at pp. 163-167.)[5]

- ***Gentry* applied the public policy defense adopted by *Armendariz* and *Little* to class arbitration waivers.**

Gentry applied the public policy defense this court had previously adopted in *Armendariz* and *Little* to the same arbitration procedure that had been the subject of an unconscionability defense in *Discover Bank*: a class arbitration waiver. *Gentry* held that, where employees assert unwaivable state statutory wage claims in

---

[5] Since *Concepcion* addressed the FAA's impact on *Discover Bank* at length, we discuss *Discover Bank* in further detail when we later describe *Concepcion*'s analysis. (*Post*, pp. 23-24.)

the context of an agreement that precludes any attempt to pursue those claims on a classwide basis, this waiver *of a class procedure* is unenforceable as a matter of California public policy if the dispute resolution method specified in the employment contract—i.e., individual arbitration—could not as effectively vindicate the employee's substantive rights under the Labor Code. (*Gentry, supra,* 42 Cal.4th at pp. 456-463.)

Under *Gentry*, where "class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration," then courts must, as a matter of California public policy, "invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' " (*Gentry, supra,* 42 Cal.4th at p. 463.) Like *Little*, *Gentry* maintained that *Armendariz*'s public policy defense—including its application to class arbitration waivers—was not preempted by the FAA because, this court concluded, the FAA permitted courts to limit the enforcement of arbitration procedures based on state policy where those procedures "significantly undermine the ability of employees to vindicate" their state statutory rights. (*Id.* at p. 465 & fn. 8.)

- ***Sonic-Calabasas* applied the public policy defense from *Armendariz*, *Little*, and *Gentry* to procedures available to employees who file their state wage and hour claims with the Labor Commissioner.**

In *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 668-669, 679, 681, fn. 4 (*Sonic-Calabasas*), this court concluded that an agreement to resolve disputes through arbitration impermissibly waived "advantages" consisting of certain "procedures" that

California laws made available to employees who pursue wage and hour claims before the Labor Commissioner's office in a so-called "Berman" hearing. Applying the public policy defense it had first adopted in *Armendariz* and *Little* and subsequently applied in *Gentry*, this court concluded that substituting arbitration as an alternative to "Berman" procedures violated California public policy. (See *id.* at pp. 678-684.)[6]

- **Dissenting interpretation of the FAA before *Concepcion*:**

While a majority of this court had concluded, before *Concepcion*, that state policy concerns for the vindication of state statutory rights could override the FAA's directive to enforce arbitration agreements as written, a significant minority of this court disagreed with that interpretation of the FAA:

***Broughton, supra*, 21 Cal.4th at pp. 1091-1094** (conc. & dis. opn. of Chin, J.) ["binding federal authority forecloses the majority's attempt to base an FAA exception for *state* laws limiting enforcement of arbitration agreements" on the analysis "applicable to *congressional* action"; United States Supreme Court case law holds "that the legal principles governing the scope and exercise of *Congress's* authority to establish exceptions to the FAA may *not* serve as the basis for reading into the FAA an exception for *state* laws that limit enforcement of arbitration agreements"];

---

[6] The United States Supreme Court subsequently vacated this judgment and remanded that case to this court for reconsideration in light of the intervening *Concepcion* decision. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 565 U.S. ___ [132 S.Ct. 496, 181 L.Ed.2d 343].)

***Little, supra*, 29 Cal.4th at pp. 1091-1092 & fn. 2** (conc. & dis. opn. of Brown, J.) [explaining that only federal law may override the FAA's mandate requiring enforcement of agreements to arbitrate statutory claims, but acknowledging that *Broughton* nonetheless permitted state law to restrict arbitration of state statutory claims and "reluctantly conced[ing] that *Broughton* is binding" in California absent intervening United States Supreme Court authority];

***Cruz, supra*, 30 Cal.4th at pp. 327-330** (conc. & dis. opn. of Chin, J.) [intervening United States Supreme Court case law "establishes that an exception to the FAA may not be based on a *state's* view that arbitration is inherently incompatible with some *state* policy"];

***Gentry, supra*, 42 Cal.4th at p. 477** (dis. opn. of Baxter, J.) [California "may not elevate a mere judicial affinity for class actions as a beneficial device for implementing [California's] wage laws above the policy expressed by both Congress and [the California] Legislature that voluntary individual agreements to arbitrate—by which parties *give up* certain litigation rights and procedures *in return for* the relative speed, informality, and cost efficiency of arbitration—should be enforced according to their terms"];

***Sonic-Calabasas, supra*, 51 Cal.4th at p. 711 & fn. 6** (dis. opn. of Chin, J.) [whether arbitration agreement's waiver of procedures "violates state public policy is simply 'irrelevant' " under the FAA; United States Supreme Court cases do not permit California courts to impose limitations on enforceability of

arbitration agreements based on "shortcomings of arbitration as a forum for dealing" with state statutory rights].

As we explain below, *Concepcion* and its progeny now confirm that the interpretation of the FAA articulated in such dissenting opinions was correct, and that the public policy defense the majority of this court applied in *Gentry*—which was based on the erroneous interpretation of the FAA previously endorsed by the court in *Broughton*, *Armendariz*, *Little*, and *Cruz*, as well as later followed by the court in *Sonic-Calabasas*—cannot survive *Concepcion*.

B. *Concepcion* made clear that the FAA now preempts the public policy defense this court applied in *Gentry*.

1. *Concepcion* held that the FAA preempts *Discover Bank*'s state policy concern over whether an agreed-upon arbitration procedure—foreclosing class proceedings—sufficiently vindicates a claimant's state rights.

Concepcion confirmed that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " (*Concepcion*, *supra*, 131 S.Ct. at p. 1748.) Thus, parties may agree "to arbitrate according to specific rules" and courts must "enforce [those agreements] according to their terms" under the FAA. (*Id.* at pp. 1745, 1748-1749.) "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to

the type of dispute." (*Id.* at p. 1749.) Put another way, Congress has declared that it is for the parties, and not the courts, to decide what *procedures* will be used to vindicate the rights asserted—even unwaivable state statutory rights.

This rule is one of constitutional dimension. Where the FAA and state law conflict, the United States Constitution's Supremacy Clause requires state law to "give way." (*Perry, supra*, 482 U.S. at p. 491; accord, *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [104 S.Ct. 852, 79 L.Ed.2d 1] [California law that conflicts with FAA "violates the Supremacy Clause"].)

Congress was careful to balance its mandate to respect parties' freedom of contract by including in the FAA a "saving clause [that] preserves generally applicable contract defenses" from preemption. (*Concepcion, supra*, 131 S.Ct. at p. 1748.) So, for example, the existence of duress or other irregularities in the formation of a contract may defeat enforcement of an arbitration agreement just as it can defeat a contract to paint a house or to repair a car. (See *id.* at p. 1746 [FAA's saving clause permits arbitration agreements to be invalidated based on fraud or duress].)

But *Concepcion* held that even a defense characterized by a state court as generally applicable to all contracts is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion, supra*, 131 S.Ct. at pp. 1747-1748.) When, as a practical matter, a nominally arbitration-neutral defense to a contract disproportionately invalidates arbitration agreements, the defense erects a barrier to the FAA's objective of allowing parties the freedom to structure

contractual terms for dispute resolution—or not to contract at all if those terms are unacceptable. (See *ibid.* [generally applicable state contract defenses are preempted by the FAA where they "disfavor[] arbitration" by having a "disproportionate impact" on arbitration agreements and frustrating the FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms"].) Invalidating parties' contractual provisions impermissibly rewrites the terms of the parties' relationship after they have already entered into and performed under the contract. (See *id.* at pp. 1752-1753 ["FAA requires courts to honor parties' expectations" under the contractual terms of their arbitration agreement].)

Concepcion analyzed whether the FAA preempted the unconscionability standard adopted by *Discover Bank*. (*Concepcion, supra*, 131 S.Ct. at p. 1746.) In *Discover Bank*, after a plaintiff filed a California class action alleging breach of contract and violations of the Delaware Consumer Fraud Act, the defendant sought to compel arbitration on an individual basis pursuant to an arbitration agreement that included a class arbitration waiver. (*Discover Bank, supra*, 36 Cal.4th at pp. 153-154.) The Court of Appeal directed the trial court to compel arbitration, but this court reversed that ruling, concluding that "class actions and arbitrations" are "often inextricably linked to the vindication" of state rights. (*Id.* at pp. 155, 160-161, 174.) This court therefore determined that where the parties' agreed-upon arbitration procedure waives a class proceeding, such waivers "may operate effectively as exculpatory contract clauses" in violation of California "public policy." (*Id.* at pp.

160-163.) *Discover Bank* decided that this standard was not preempted by the FAA because it was, at least nominally, based on a generally applicable California policy against exculpatory contracts. (*Id.* at pp. 165-166.)

Like the plaintiff in *Discover Bank*, the plaintiffs in *Concepcion* brought a class action alleging violations of state statutes. (*Laster v. T-Mobile USA, Inc.* (S.D.Cal. Aug. 11, 2008, No. 05cv1167 DMS (AJB)) 2008 WL 5216255, at p. *1 (*Laster*) [nonpub. opn].)[7] They seized on California public policy underlying this court's version of the "vindication principle" to evade FAA preemption, arguing that the FAA did not preempt *Discover Bank*'s unconscionability standard because it was based on California's generally applicable "policy against exculpation." (*Concepcion*, *supra*, 131 S.Ct. at pp. 1746-1748; accord, e.g., Brief for Respondents 19-20, 51-52, *AT&T Mobility LLC v. Concepcion* (U.S. Sept. 29, 2010, No. 09-893) 2010 WL 4411292 [*Concepcion* plaintiffs' merits brief arguing that *Discover Bank* survives FAA preemption since class actions and arbitrations are inextricably intertwined with the vindication of substantive rights and a waiver of class procedures may therefore violate California's prohibition against exculpatory contracts]; Transcript of Oral Argument 43:7-44:2, 47:10-17, 50:3-7, *AT&T Mobility LLC v. Concepcion* (U.S. Nov. 9, 2010, No. 09-893) <http://www.supremecourt.gov/oral_arguments/

---

[7] Before reaching the Supreme Court, the *Concepcion* case was known as the *Laster* case. (See *Concepcion*, *supra*, 131 S.Ct. at p. 1745.) Plaintiffs Vincent and Liza Concepcion alleged violations of California's UCL, CLRA, and False Advertising Law. (*Laster*, *supra*, 2008 WL 5216255, at p. *1.)

argument_transcripts/09-893.pdf> [as of May 10, 2013] [plaintiffs' counsel asserting at oral argument in *Concepcion* that FAA does not bar state courts from deeming unenforceable arbitration procedure that would not allow parties to vindicate their rights and would thereby be exculpatory].)

Concepcion, however, rejected the assertion that this California policy could override the FAA's principal objective of enforcing arbitration agreements according to their terms. *Concepcion* acknowledged that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.' " (*Concepcion, supra*, 131 S.Ct. at p. 1746.) But *Concepcion* determined that where courts hold arbitration procedures to be "unconscionable or unenforceable as against public policy" *based on their "public-policy disapproval of exculpatory agreements,"* such state defenses "[i]n practice . . . have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. (*Id.* at p. 1747, emphasis added.) *Concepcion* therefore held that state standards (like those applied in *Discover Bank*) that invalidate agreed-upon arbitration procedures (like a waiver of class procedures) based on a state policy against exculpatory contracts are preempted by the FAA. (*Id.* at pp. 1747-1748.)

Concepcion explained that, given the FAA's " 'overriding goal' " of enforcing arbitration agreements as written, parties are permitted *as a matter of contract* to agree to a wide variety of arbitration procedures regardless whether or not those procedures will actually streamline dispute resolution. (*Concepcion, supra*, 131

S.Ct. at pp. 1748-1749, 1752-1753.) Because "[a]rbitration is a matter of contract" and "the FAA requires courts to honor parties' expectations," particular arbitration procedures preferred by state courts "may not be required by state law," even where courts find such procedures desirable for state policy reasons. (*Id.* at pp. 1752-1753.)

2. *Gentry*'s public policy defense cannot survive *Concepcion* because the defense is based on the same state policy as the preempted *Discover Bank* standard.

Under *Concepcion*, the public policy defense this court applied in *Gentry* can no longer be considered good law where the FAA governs. As one court put it, *Concepcion* "found *Discover Bank* objectionable" because *Discover Bank* "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." (*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 506 (*Truly Nolen*).) Contrary to Iskanian's contention that *Discover Bank* and *Gentry* were predicated on significantly different rationales (see, e.g., OBOM 5-8, 15-21; RBOM 3-6), "[t]his discredited reasoning [from *Discover Bank*] is the same rationale employed" by *Gentry* (*Truly Nolen*, at p. 506 [*Gentry* "held that courts have the authority to invalidate class action waivers in wage and hour cases because

the waivers would 'frequently if not invariably' have an 'exculpatory effect' that is 'similar' to the consumer waivers considered in *Discover Bank* and thus would potentially 'undermine the enforcement' of the employee's statutory rights"]).

In short, both *Discover Bank*'s unconscionability standard and the public policy defense applied in *Gentry* are predicated on the same preempted state policy concern for the vindication of state rights. (E.g., *Truly Nolen, supra*, 208 Cal.App.4th at p. 506; *Jasso v. Money Mart Exp., Inc.* (N.D.Cal. 2012) 879 F.Supp.2d 1038, 1044, 1046 (*Jasso*) [there is "no principled basis to distinguish between the *Discover Bank* rule and the rule in *Gentry*" since both were premised on eliminating obstacles "to vindication of the individuals' rights"; this vindication concern cannot override the FAA's mandate since *Concepcion* "held that '[s]uch unrelated policy concerns, however worthwhile, cannot undermine the FAA' "]; *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. 2012) 870 F.Supp.2d 831, 840-841 (*Morvant*) [same]; *Valle v. Lowe's HIW, Inc.* (N.D.Cal. Aug. 22, 2011, No. 11-1489 SC) 2011 WL 3667441, at p. *6 (*Valle*) [nonpub. opn.] [*Discover Bank* and *Gentry* "relied on the same California precedent and logic"]; *Morse v. ServiceMaster Global Holdings Inc.* (N.D.Cal. July 27, 2011, No. C 10-00628 SI) 2011 WL 3203919, at p. *3, fn. 1 [nonpub. opn.] ["*Concepcion* rejected the reasoning and precedent behind *Gentry*"].)[8]

---

[8] See also, e.g.:

• *McKenzie Check Advance of Florida, LLC v. Betts* (Fla. Apr. 11, 2013, No. SC11-514) ___ So.3d ___ [2013 WL 1457843, at pp. *7-*9] (*Betts*) [rejecting contention that "the vindication-of-statutory-rights (continued...)

Since *Concepcion* concluded that this California policy concern is not the type of generally applicable state contract defense that can override the FAA's directive to enforce as written agreements to arbitrate state statutory claims (*ante*, pp. 23-27), the public policy defense this court applied in *Gentry* cannot survive *Concepcion* and is now preempted by the FAA. Likewise, to the extent *Broughton*, *Armendariz*, *Little*, *Cruz*, and *Sonic-Calabasas* developed or applied this same vindication policy for state rights while concluding the policy was not preempted by the FAA (*ante*, pp. 12-19), those decisions equally can no longer be considered good law after *Concepcion*.

(...continued)
analysis applies in the state statutory context"; creating exception to FAA's mandate based on concern for vindication of state statutory rights would be "contrary to the rationale of *Concepcion*"];

- *Miguel v. JPMorgan Chase Bank N.A.* (C.D.Cal. Feb. 5, 2013, No. CV 12-3308 PSG (PLAx)) 2013 WL 452418, at p. *7 (*Miguel*) [nonpub. opn.] [after *Concepcion*, arbitration agreement's class action waiver "is enforceable in spite of Plaintiff's claim that he cannot vindicate his statutory rights if compelled to arbitrate his claims individually"];

- *Steele v. American Mortg. Management Services* (E.D.Cal. Oct. 26, 2012, No. 2:12-cv-00085 WBS JFM) 2012 WL 5349511, at p. *9 (*Steele*) [nonpub. opn.] ["[i]n the wake of *Concepcion*," policy concern that plaintiffs will not be able to vindicate their state statutory rights as a result of an arbitration procedure " 'cannot undermine the FAA' "];

- *Orman, supra*, 2012 WL 4039850, at p. *3 ["applying a vindication analysis to state statutory claims would appear to be incompatible with the Supreme Court's analysis in *Concepcion*"].

Iskanian emphasizes that, when parties agree to arbitrate a statutory claim, they do " 'not forgo the substantive rights afforded by the statute.' " (OBOM 10, quoting *Mitsubishi Motors*, *supra*, 473 U.S. at p. 628.) That is certainly true. But, contrary to Iskanian's suggestion that an arbitration agreement's waiver of a class procedure forgoes a substantive right (see OBOM 16-21; RBOM 3-6), prosecuting a substantive claim in an arbitral forum selected by the parties pursuant to streamlined arbitration procedures is not the same as forgoing substantive rights. (*Mitsubishi Motors*, at p. 628 ["By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"].) As the United States Supreme Court and this court have said, class actions are simply procedural devices for pursuing substantive claims and, by definition, the class procedure is not allowed to *expand* the substantive rights or remedies that could be pursued in an individual action. (See *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___ [131 S.Ct. 2541, 2561, 180 L.Ed.2d 374] [class action procedure cannot be construed " 'to abridge, enlarge, or modify any substantive right' "]; *Shady Grove Orthopedic Associates v. Allstate Ins.* (2010) 559 U.S. 393, ___ [130 S.Ct. 1431, 1439, 176 L.Ed.2d 311] [prohibiting class treatment does "not mean the law provides no remedy" for that claim and instead "affect[s] only the procedural means by which the remedy may be pursued"]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313 ["class action is a procedural device that enforces substantive law" but "does not change that substantive law"].)

Thus, recourse to a class action or class arbitration is not a substantive right or remedy, so waiving such a procedure is not a waiver of a substantive right or remedy. (See, e.g., *Parisi v. Goldman, Sachs & Co.* (2d Cir. 2013) 710 F.3d 483, 486-488 [compelling arbitration on an individual basis does not prevent plaintiff from vindicating any substantive right because a class action mechanism is " 'procedural' " and "*presupposes* the existence of a claim," and thus there is "no entitlement to the ancillary class action procedural mechanism"].) As the Supreme Court has long recognized, "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." (*McMahon, supra,* 482 U.S. at p. 232.)

Indeed, Iskanian appears to acknowledge that the arbitration agreement here does not include a "direct waiver[ ]" of his substantive state rights. (See OBOM 10.) Instead of relying on any direct waiver, Iskanian contends an arbitration agreement's class action waiver must be invalidated because it *indirectly* imposes "procedural impediments" to the vindication of state statutory rights. (OBOM 10, 19-21; RBOM 1-3.) But, as explained above, this contract defense based on a state policy "vindication principle," as set forth in *Gentry,* does not survive *Concepcion.*

3. Post-*Concepcion* United States Supreme Court precedent confirms that *Gentry*'s public policy defense does not survive *Concepcion*.

After *Concepcion*, the United States Supreme Court emphasized that it meant what it said in *Concepcion* about the FAA's preemption of state defenses predicated on state policy. The Supreme Court summarily reversed two state court decisions that, like *Gentry*, relied on state public policy in failing to enforce arbitration agreements according to their terms. (See *Nitro-Lift Technologies, L.L.C. v. Howard* (2012) 568 U.S. ___ [133 S.Ct. 500, 501-504, 184 L.Ed.2d 328] (per curiam) (*Nitro-Lift*) [FAA preempted Oklahoma Supreme Court case law predicated on state law embodying Oklahoma public policy that required a court rather than an arbitrator to decide enforceability of covenants not to compete]; *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. ___ [132 S.Ct. 1201, 1204, 182 L.Ed.2d 42] (per curiam) (*Marmet*) [vacating West Virginia high court's determination of unconscionability where finding was influenced by West Virginia public policy, and directing West Virginia high court to consider whether arbitration clauses were unenforceable absent state "public policy" pursuant to state principles "that are not specific to arbitration"].) *Nitro-Lift* and *Marmet* therefore further confirm that the FAA preempts *Gentry*'s public policy defense in light of *Concepcion* and its progeny.

Nitro-Lift is particularly instructive. There, employees agreed to arbitrate the enforceability of a covenant not to compete in an

employment contract. (*Nitro-Lift*, *supra*, 133 S.Ct. at pp. 501-502.) When the employees quit and then breached the covenant, their former employer demanded arbitration. (*Id.* at p. 502.) Notwithstanding the express terms of their arbitration agreement, which required an arbitrator to pass on the enforceability of the noncompete covenants, the Oklahoma Supreme Court concluded that a court must decide this issue because a state law embodying "Oklahoma's public policy" against noncompetition agreements governed over the more general federal law favoring arbitration. (*Id.* at pp. 502-504.)

The Supreme Court—applying *Concepcion*—summarily reversed. (*Nitro-Lift*, *supra*, 133 S.Ct. at pp. 501-504.) *Nitro-Lift* held, in accordance with the contractual terms of the arbitration agreement, that the arbitrator must decide in the first instance the enforceability of the covenant not to compete. (*Ibid.*) In doing so, *Nitro-Lift* swept aside Oklahoma judicial precedent to the contrary that had been predicated on Oklahoma public policy, "hold[ing] that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.' " (*Ibid.*, quoting *Concepcion*, *supra*, 131 S.Ct. at p. 1747.) As *Nitro-Lift* emphasized, under the United States Constitution's Supremacy Clause, state laws are not of "equivalent dignity" with the FAA, "which is 'the supreme Law of the Land,' " and therefore Oklahoma could not create an exception to the FAA based on a state law embodying Oklahoma public policy. (See *id.* at pp. 502-504; see also *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. ___ [132 S.Ct. 665, 669, 181 L.Ed.2d 586] [FAA "requires courts to enforce agreements to arbitrate according to their terms" even

when the claims at issue are statutory ones "unless the FAA's mandate has been 'overridden by a contrary *congressional* command' " (emphasis added)].)

Nitro-Lift demonstrates, as did *Concepcion,* that since state law is not of "equivalent dignity" to the FAA, state policy disapproving arbitration procedures that may fail to vindicate state statutory rights in the arbitral forum cannot override the FAA's mandate.

Indeed, the Eighth Circuit recently held that neither the text nor the legislative history of the Fair Labor Standards Act—the federal counterpart to California's wage and hour laws (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009)—was sufficient to overcome the FAA's requirement that courts "enforce arbitration agreements according to their terms." (*Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1052-1055 (*Owen*).) Given that *federal* statutory wage and hour rights are insufficient to override the FAA's federal mandate even though they are of equivalent dignity with the FAA, then a fortiori their state statutory counterparts—which are not of equal dignity with the FAA—cannot authorize courts to refuse to enforce arbitration agreements as written.

4. None of the out-of-state cases on which Iskanian relies authorize the invalidation of arbitration procedures under *Concepcion* based on a state policy concern for the vindication of state rights.

Iskanian suggests that the Missouri Supreme Court and the Eleventh Circuit support his attempt to evade the class action waiver in his arbitration agreement. (See OBOM 18.) Iskanian is wrong. The Missouri Supreme Court has held that, "post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement" even where state policy is directed at preventing undesirable results. (*Robinson v. Title Lenders, Inc.* (Mo. 2012) 364 S.W.3d 505, 515.) "Applying state-law policy considerations as the basis for invalidating an arbitration agreement is preempted by the FAA because it creates an impermissible 'obstacle to the FAA's objective of enforcing arbitration agreements according to their terms.' " (*Id.* at p. 516.) Likewise, the Eleventh Circuit has rejected the argument that *Concepcion* does not apply where a plaintiff "will not be able to vindicate" his state statutory rights under Florida law as a result of an arbitration agreement's class action waiver: "*Concepcion* expressly rejected the notion that the state law should not be preempted because the class action waiver would effectively shield the defendant from liability." (*Pendergast v. Sprint Nextel Corp.* (11th Cir. 2012) 691 F.3d 1224, 1228, 1235-1236 (*Pendergast*).) Far from supporting Iskanian, these courts have confirmed that, under *Concepcion*, state policy concerns for the vindication of state

statutory rights cannot be the basis for invalidating arbitration procedure.

The two cases on which Iskanian relies—*Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486 (*Brewer*) and *Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205 (*Cingular*)—are not to the contrary. *Brewer* said nothing about public policy, and instead addressed *Concepcion*'s impact on Missouri's version of an unconscionability defense—which the court did not describe as being predicated on public policy, as was California's unconscionability defense in *Discover Bank*. (See *Brewer*, at pp. 488-496.) Notably, *Brewer* (1) concluded that, after *Concepcion*, the FAA preserves only defenses to contract *formation*, (2) acknowledged that public policy defenses were *not* defenses to contract formation, and (3) insisted that, in contrast, Missouri's unconscionability defense was "linked" to contract formation. (*Id.* at pp. 491-493 & fn. 3.) The unconscionability defense at issue in *Brewer*, focusing on problems during contract formation, had nothing to do with a state policy disapproving of arbitration procedures as a means for the vindication of state statutory rights.

Similarly, in *Cingular*, the Eleventh Circuit did *not* hold that policy concerns permit courts to invalidate arbitration procedures after *Concepcion*. To the contrary, *Cingular* expressly declined to decide that issue, stating: "[W]e need not reach the question of whether *Concepcion* leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action" under Florida law. (*Cingular*, *supra*,

648 F.3d at p. 1215.) *Cingular* concluded that, even *assuming* this vindication policy defense survived *Concepcion* "in the appropriate circumstance, such an argument is foreclosed here, because the *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." (*Ibid.*, internal fn. omitted.) As noted above, the Eleventh Circuit subsequently reached the question left open in *Cingular* and rejected the argument that courts may invalidate arbitration procedures that the courts believe will impede vindication of statutory rights conferred by Florida law. (*Pendergast*, *supra*, 691 F.3d at pp. 1228, 1235-1236.) Since then, the Florida Supreme Court also recently concluded that courts cannot override the FAA's mandate based on concerns for the vindication of state statutory rights. (*Betts*, *supra*, ___ So.3d ___ [2013 WL 1457843, at pp. *7-*9].)

Iskanian suggests that the Ninth Circuit's decision in *Coneff v. AT & T Corp.* (9th Cir. 2012) 673 F.3d 1155 (*Coneff*) would permit a state court not to enforce a class action waiver in an arbitration agreement based on a state policy of ensuring "effective *means*" to vindicate state statutory rights. (OBOM 20.) Again, Iskanian is wrong. *Coneff* expressly held that the vindication principle is "limited to federal statutory rights." (*Coneff*, at p. 1158, fn. 2.) *Coneff* addressed the vindication principle solely because "[p]laintiffs raise[d] at least one federal claim in their complaint." (*Ibid.*) In the context of addressing the application of the principle to that federal claim, *Coneff* referred to the "effective *means*" concern to describe and distinguish—not to endorse—the Second Circuit's rationale for applying the vindication principle to federal

rights in *In re American Exp. Merchants' Litigation* (2d Cir. 2012) 667 F.3d 204 (*American Express*). (*Coneff*, at p. 1159 & fn. 3.) In fact, *Coneff* held that, under *Concepcion*, policies to foster vindication of statutory rights do *not* permit courts to invalidate arbitration procedures governing the arbitration of statutory claims. (*Id.* at pp. 1158-1159.)

As Iskanian acknowledges, *American Express* (distinguished in *Coneff*) decided only whether a class action waiver impaired "effective vindication of the plaintiffs' rights under the *federal* antitrust laws." (OBOM 15, fn. 4, emphasis added.) The Second Circuit held such a waiver could fail to vindicate these federal statutory rights where evidence "establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating" their federal antitrust claims "would be prohibitive." (*American Express*, *supra*, 667 F.3d at 217-219.) And, even with respect to that application of the vindication principle to *federal* statutory rights, several Second Circuit judges have since disagreed with that "vindication" analysis. (E.g., *In re American Exp. Merchants' Litigation* (2d Cir. 2012) 681 F.3d 139, 142-149 (dis. opn. of Jacobs, C.J., to denial of rehearing en banc); cf. *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 258 [129 S.Ct. 1456, 173 L.Ed.2d 398] [explaining, even before *Concepcion*, that employee's challenges to " 'adequacy of arbitration procedures' [are] 'insufficient to preclude arbitration of [federal] statutory claims' " (quoting *Gilmer*, *supra*, 500 U.S. at p. 30)].)

The United States Supreme Court has now granted certiorari to decide whether a defense against arbitration based on *American Express*' vindication-of-federal-rights principle can be squared with

the FAA. (See *American Exp. Co. v. Italian Colors Restaurant* (2012) 568 U.S. ___ [133 S.Ct. 594, 184 L.Ed.2d 390]; OBOM 15, fn. 4.) Iskanian asserts that the decision to grant certiorari in *American Express* somehow means that *Concepcion* left the door open to use of a vindication defense based on state public policy. (See RBOM 5, fn. 4.) Nonsense. The Supreme Court's consideration of *Concepcion*'s impact on the vindication principle in the *federal* context suggests no drawing back from *Concepcion*'s rejection of a vindication defense based on *state* public policy. (See OBOM 15, fn. 4 [Iskanian acknowledging that Supreme Court "granted certiorari" in *American Express* "to review" whether concern for plaintiffs' *federal* "rights under the federal antitrust laws" justified "refus[al] to enforce a class-action ban in an arbitration agreement"].)[9]

If anything, the questions posed by the Justices at the recent oral argument in *American Express* suggest that the Supreme Court is poised shortly to reverse the Second Circuit's decision and apply *Concepcion* to federal statutory rights. (See Parasharami, *Supreme Court Appears Poised To Reject Second Circuit's Articulation of "Effective Vindication Of Federal Statutory Rights" Defense For Avoiding Class Arbitration Waivers*, Class Defense (Feb. 28, 2013) <http://www.classdefenseblog.com/2013/02/28/supreme-court-

---

[9] Thus, the parties in *American Express* argue over *Concepcion*'s impact on the application of the vindication principle to federal rights. (Compare Brief for Petitioners 38-40, *American Exp. Co. v. Italian Colors Restaurant* (U.S. Dec. 21, 2012, No. 12-133) 2012 WL 6755152 with Brief for Respondents 38-40, *American Exp. Co. v. Italian Colors Restaurant* (U.S. Jan. 22, 2013, No. 12-133) 2013 WL 267025.)

appears-poised-to-reject-second-circuits-articulation-of-effective-vindication-of-federal-statutory-rights-defense-for-avoiding-class-arbitration-waivers/> [as of May 10, 2013].)

Additionally, Iskanian argues that one First Circuit decision and one D.C. Circuit decision—both decided before *Concepcion*—held that the FAA authorizes courts to invalidate arbitration procedures based on a concern for the vindication of state statutory rights. (OBOM 12-13, citing *Booker v. Robert Half Intern., Inc.* (D.C. Cir. 2005) 413 F.3d 77 and *Kristian v. Comcast Corp.* (1st Cir. 2006) 446 F.3d 25.) Whatever those lower courts may have said, the Supreme Court's intervening *Concepcion* decision confirms that courts cannot refuse to enforce arbitration agreements according to their terms based on state policy concerns for the vindication of state statutory rights. (*Betts*, *supra*, ___ So.3d ___ [2013 WL 1457843, at p. *9] [creating exception to FAA's mandate based on concern for vindication of state statutory rights would be "contrary to the rationale of *Concepcion*" irrespective of what *Booker* "decided prior to *Concepcion*"].)

5. The United States Supreme Court's on-line docket for *Concepcion* does not change the operative holding in the Supreme Court's opinion.

Iskanian contends that the way in which the United States Supreme Court's on-line docket described the question that was presented in *Concepcion* demonstrates that the opinion later handed down never reached the issue of whether the FAA preempts a state public policy vindication defense. (See OBOM 17; RBOM 4, fn. 3.) Not so.

The *Concepcion* docket described the issue presented as " '[w]hether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.' " (OBOM 17, emphasis omitted.) That summary did not purport to limit the scope of the Supreme Court's analysis of the FAA preemption issue that the Supreme Court decided. " '[T]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.' " (*Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167, 173, fn. 1 [129 S.Ct. 2343, 174 L.Ed.2d 119]; see also *United States v. Mendenhall* (1980) 446 U.S. 544, 551, fn. 5 [100 S.Ct. 1870, 64 L.Ed.2d 497] [question presented includes any question "essential" to the Supreme Court's disposition of the issues in a case]; *Procunier v. Navarette* (1978) 434

U.S. 555, 559, fn. 6 [98 S.Ct. 855, 55 L.Ed.2d 24] (*Procunier*) [same].)

The issue of whether the FAA preempts California's vindication policy was essential to the disposition of the dispute in *Concepcion*, and was therefore included within the question presented in *Concepcion*. Specifically, the Supreme Court was called upon to evaluate *Discover Bank*'s unconscionability standard premised on a state policy prohibiting the exculpatory effect that (according to *Discover Bank*) would result from a failure to vindicate state rights. (*Ante*, pp. 16-17, 23-26.) The plaintiffs in *Concepcion* specifically argued that California policy preserved *Discover Bank* from preemption under the FAA's saving clause. (*Ante*, pp. 24-25.) Indeed, the plaintiffs in *Concepcion* expressly based their arguments against FAA preemption on the vindication principle. (See *ante*, pp. 24-25 [describing arguments *Concepcion* plaintiffs made in their briefing and oral argument].) The docket, then, is entirely consistent with the Supreme Court having reached and rejected that proposition, which confirms that *Concepcion* sweeps away the public policy defense applied in *Gentry* on which Iskanian relies here.

At any rate, the Supreme Court's "power to decide [issues] is not limited by the precise terms of the question presented." (*Procunier*, *supra*, 434 U.S. at p. 559, fn. 6.) Thus, whatever the question presented in *Concepcion* may have been, and whatever issues may have been fairly included in that question, nothing about the question presented constrained the Supreme Court's

authority to decide, as it ultimately did, that the FAA preempts state contract defenses based on state vindication policies.

6. *Concepcion*'s preemption standard is not confined to the consumer context or to arbitration agreements that include the same terms as those to which the parties agreed in *Concepcion*.

According to Iskanian, *Concepcion* cannot apply to *Gentry*'s public policy defense because *Concepcion* addressed a "consumer agreement" whereas *Gentry* concerned the "employment context." (OBOM 20.) This assertion is without merit because " '*Concepcion* cannot be read so narrowly.' " (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1132, fn. 9.) "*Concepcion* is broadly written" (*Coneff, supra*, 673 F.3d at p. 1158), and nothing in *Concepcion* says its standard for FAA preemption is limited to consumer arbitration agreements. Notably, in *Nitro-Lift*, the Supreme Court applied *Concepcion* based on an arbitration clause contained in an employment agreement. (*Nitro-Lift, supra*, 133 S.Ct. at pp. 501-504.) Indeed, federal courts have repeatedly applied *Concepcion* to employment cases, including to cases alleging violations of federal and state statutory wage and hour rights. (E,g., *Owen, supra*, 702 F.3d at pp. 1051-1055; *Miguel, supra*, 2013 WL 452418, at pp. *1-*11; *Steele, supra*, 2012 WL 5349511, at pp. *1-*9; *Jasso, supra*, 879 F.Supp.2d at pp. 1040-1049; *Morvant, supra*, 870 F.Supp.2d at pp. 834, 839-846; *Sanders v. Swift Transp.*

Co. of Arizona, LLC (N.D.Cal. 2012) 843 F.Supp.2d 1033, 1035-1037; *Valle, supra*, 2011 WL 3667441, at pp. *1-*6.)

Also, contrary to Iskanian's assertion (see OBOM 17), *Concepcion*'s preemption standard is not confined to those rare instances where an arbitration agreement is as protective of plaintiffs as the agreement in *Concepcion*. *Concepcion* did not limit its holding in that manner, and cases following *Concepcion* have not construed the opinion as applying only to arbitration agreements containing certain terms. (E.g., *Nitro-Lift, supra*, 133 S.Ct. at pp. 501-504 [applying *Concepcion* to hold that an arbitration agreement must be enforced as written notwithstanding Oklahoma public policy to the contrary even where the arbitration clause's provisions were different from those in *Concepcion*]; *Hodsdon v. DirecTV, LLC* (N.D.Cal. Nov. 8, 2012, No. C 12-02827 JSW) 2012 WL 5464615, at p. *7 [nonpub. opn.] ["the *Concepcion* Court did not depend on the consumer-friendly aspects of the provision there in order to uphold it"]; *Adams v. AT & T Mobility, LLC* (W.D.Wash. 2011) 816 F.Supp.2d 1077, 1088 ["the decision in *Concepcion* did not depend on the relatively consumer-friendly terms" of the arbitration agreement there].)

C. Notwithstanding the FAA's preemption of state public policy defenses, fairness protections built into the FAA to protect due process vitiate the need for states to impose additional limitations on parties' agreed-upon terms for dispute resolution.

The desire to protect contracting parties from unfair terms is an admirable one. But a balance must be struck between that desire, and respecting the freedom to contract with whom, and on what terms, that one pleases. Congress has struck that balance, in part by expressly excepting from preemption those state contract defenses that apply equally to all contracts and do not "derive their meaning from the fact that an agreement to arbitrate is at issue," do not " 'rely on the uniqueness of an agreement to arbitrate,' " do not "have a disproportionate impact on arbitration agreements," or are not otherwise "applied in a fashion that disfavors arbitration." (*Concepcion, supra,* 131 S.Ct. at pp. 1746-1747; see also *Marmet, supra,* 132 S.Ct. at p. 1204 [permitting West Virginia high court, on remand, to consider whether arbitration clauses were "unenforceable under state common law principles" as long as those principles were not based on state "public policy" and were "not specific to arbitration"].)

Thus, for example, courts may refuse to enforce arbitration agreements where there is a lack of mutual consideration and the agreement is therefore illusory. (See *Noohi v. Toll Bros., Inc.* (4th Cir. 2013) 708 F.3d 599, 605-614 [*Concepcion* does not preempt generally applicable state contract defense predicated on lack of

mutual consideration].) Likewise, a court need not enforce an arbitration agreement, like any other contract, that is written in an unreadable font size. (See *Concepcion, supra,* 131 S.Ct. at p. 1750, fn. 6 [permitting states to regulate format of contracts]; see also, e.g., *Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 410 [clause in commercial contract found procedurally unconscionable where it was "buried in diminutive print in the middle of one of five lengthy paragraphs"]; *Conservatorship of Link* (1984) 158 Cal.App.3d 138, 141, fn. 1 [citing examples of font-size rules for contracts under the Civil Code].)

Moreover, the FAA contains carefully crafted arbitration-specific defenses designed to ensure an appropriate level of procedural fairness. Under the FAA, arbitrators "must grant the parties a fundamentally fair hearing," including "notice" of the arbitration and the "opportunity to be heard and to present relevant and material evidence and argument" before arbitrators who "are not infected with bias." (*Bowles Financial Group v. Stifel, Nicolaus & Co., Inc.* (10th Cir. 1994) 22 F.3d 1010, 1012-1013; accord, *Tempo Shain Corp. v. Bertek, Inc.* (2d Cir. 1997) 120 F.3d 16, 20 [section 10(a)(3) of the FAA codifies a "fundamental fairness" standard pursuant to which "an arbitrator 'must give each of the parties to the dispute an adequate opportunity to present its evidence and argument' "].)

Such fairness restrictions (along with others) that are codified as part of the FAA (see, e.g., 9 U.S.C. § 10(a)(2), (3)) are considered due process limitations. (See *Biller v. Toyota Motor Corp.* (9th Cir. 2012) 655 F.3d 665, 663-664 [grounds for vacatur of arbitration

award under FAA are " 'designed to preserve due process' "]; *Prudential Securities, Inc. v. Dalton* (N.D.Okla. 1996) 929 F.Supp. 1411, 1417 ["fundamental fairness" restrictions on "arbitration process" are "fundamental due process" limitations].)[10] There is no need for state courts to impose *additional* fairness requirements.

These fairness limitations are "not to be equated with the full panoply of judicial procedural safeguards [citation] and legal 'niceties' of the courtroom" since "[d]ue process in arbitration means satisfying 'minimal requirements of fairness.' " (*McMahan & Co. v. Dunn Newfund I, Ltd.* (App.Div. 1997) 656 N.Y.S.2d 620, 621.) But that is by Congressional design, and state court efforts to engraft, as a matter of state public policy, procedures more closely approximating courtroom litigation upend the balance Congress sought to achieve when taking into account parties' right to control the terms under which their disputes will be resolved. (See *Concepcion, supra*, 131 S.Ct. at pp. 1746-1748, 1752-1753.)

Finally, should a case present a problem of unfairness that reaches constitutional due process dimensions but that is not already addressed in the FAA, the FAA will, of course, have to give

---

[10] The California Arbitration Act also imposes such fairness limitations on arbitration procedure (see, e.g., Code Civ. Proc., § 1286.2), which likewise safeguard due process. (See, e.g., *Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal.App.4th 1282, 1291-1292 [confirmation of arbitration award "constitutes state action, governed by requisites of due process," and "California's statutory procedures [for confirmation of the award] provide the due process safeguards traditionally required for a judgment that deprives a person of property"]; *City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356, 363 [limitations set by Code of Civil Procedure section 1286.2 are "consistent with due process"].)

way. (See *City of Boerne v. Flores* (1997) 521 U.S. 507, 529 [117 S.Ct. 2157, 138 L.Ed.2d 624] [United States Constitution is the " 'superior paramount law,' " and is not on the same level as ordinary legislative acts].) However, absent an identifiable violation of the United States Constitution, state courts may not refuse to enforce arbitration agreements as written for any reason other than those embodied in the FAA itself, or possibly in competing Congressional enactments that are of equal dignity.

CONCLUSION

For the foregoing reasons, in addition to those set forth in defendant CLS Transportation Los Angeles' brief on the merits, the Court of Appeal's decision should be affirmed. The parties should be compelled to arbitrate their dispute in accordance with the express terms of their arbitration agreement.

May 10, 2013

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN F. QUERIO
FELIX SHAFIR

By: _____
Felix Shafir

Attorneys for Amicus Curiae
CALIFORNIA NEW CAR DEALERS ASSOCIATION

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 10,591 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: May 10, 2013

Felix Shafir

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On May 10, 2013, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF RESPONDENT CLS TRANSPORTATION LOS ANGELES, LLC** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 10, 2013, at Encino, California.

Robyn Whelan

Robyn Whelan

SERVICE LIST

Iskanian v CLs Transportation of L.A.
Supreme Court Case No. S204032

Attorneys	Party(s) Represented
David F. Faustman, Esq. Yesenia M. Gallegos, Esq. Cristina Armstrong, Esq. Fox Rothschild LLP 1800 Century Park East, Suite 300 Los Angeles, California 90067	Attorneys for Defendant and Respondent **CLS Transportation of Los Angeles**
Leo V. Leyva, Esq. Cole, Schotz, Meisel, Forman & Leonardo, P.A. Court Plaza North 25 Main Street Hackensack, New Jersey 07601	Attorneys for Defendant and Respondent **CLS Transportation of Los Angeles**
Raul Perez, Esq. Glenn A. Danas, Esq. Ryan H. Wu, Esq. Capstone Law APC 1840 Century Park East, Suite 450 Los Angeles, California 90067	Attorneys for Plaintiff and Appellant **Arshavir Iskanian**
Scott L. Nelson, Esq. Public Citizen Litigation Group 1600 20th Street, NW Washington, DC 20009	Attorneys for Plaintiff and Appellant **Arshavir Iskanian**
Clerk, Court of Appeal Second Appellate District Division Two 300 South Spring Street, 2nd Flr. Los Angeles, California 90013	[No. B235158] [served electronically]