NO. S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION OF LOS ANGELES,
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO
CASE B235158

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

APPLICATION OF CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AND AMICUS CURIAE BRIEF

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APPLICATION OF CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

TO: THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKUYE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

California Rural Legal Assistance Foundation respectfully requests leave to file the accompanying *amicus curiae* brief in support of the Petitioner Arshavir Iskanian, to address the question whether the Federal Arbitration Act requires enforcement of an employment arbitration agreement that prohibits all representative actions, including claims under California's Private Attorney General Act (PAGA).

I. Amicus

Amicus California Rural Legal Assistance Foundation ("CRLAF") is a non-profit legal services provider that represents low income families in rural California and engages in regulatory and legislative advocacy to promote the interests of low wage workers, particularly farm workers. Since 1986 CRLAF has recovered wages and other compensation for thousands of low-wage workers subjected to multiple schemes intended to defraud them of their hard-earned minimum wages, contract wages and overtime wages. These workers have also endured multiple, hazardous

working conditions such as pesticide poisoning, heat stress, equipment hazards and ergonomic strain. CRLAF has helped conduct surveys of farm workers which suggest that the majority of farm laborers are regularly subjected to violations of state laws and the applicable provisions of the Industrial Welfare Commission (IWC) Wage Orders governing minimum wages and working conditions.

CRLAF supported and provided testimony to the Legislature regarding Labor Code § 2698, et seq. (the Labor Law Private Attorney General Act or "PAGA). That testimony chronicled the persistent and widespread failure of employers to comply with California labor laws. Additionally, CRLAF submitted evidence demonstrating that the California Labor and Workforce Development Agency, through its enforcement arms, the Division of Labor Standards Enforcement and Office of the Labor Commissioner were so underfunded and understaffed as to make it impossible for the state to implement an effective monitoring and enforcement strategy that would ensure compliance with basic labor law protections. CRLAF clients and other low wage workers have benefitted from the expanded enforcement of California labor laws resulting from the passage of PAGA.

CRLAF has been granted leave to submit briefs as *amicus curiae* in a variety of cases before the California Courts of Appeal and the California

Supreme Court on issues relating to PAGA and construction and enforcement of state labor protections including: *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, *Brinker Restaurant Corp. v. Superior Court* (2008) 80 Cal.Rptr.3d 781 (Review Granted Previously published at: 165 Cal.App.4th 25), *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Reyes v. Van Elk, Ltd.* (2007)148 Cal.App.4th 604, *Smith v. Superior Court* (2006) 39 Cal.4th 77, *Sav-on Drug Stores, Inc. v. Superior Court* (2004)34 Cal.4th 319. CRLAF was also counsel for Petitioners in the California Supreme Court case *Martinez v. Combs* (2010) 49 Cal.4th 35, and counsel for Respondents in the case *Fernandez v. California Dept. of Pesticide Regulation* (2008)164 Cal.App.4th 1214.

II. Statement of Interest

Amicus Curiae CRLAF submits this brief for the limited purpose of addressing the second question presented in this appeal, namely, whether the Federal Arbitration Act (FAA) requires enforcement of an employment arbitration agreement that prohibits all representative actions, including claims under the Private Attorney General Act (PAGA) (Lab. Code§ 2698 et seq.). Although the parties addressed this question in their briefing, CRLAF wishes to provide additional analysis regarding the extent to which

the FAA may preempt delegation to the states of the power to enforce their public policy objectives, an issue addressed by the U.S. Supreme Court in the case, *Chamber of Commerce of the United States of America, et al, v Whiting, et al.* (2011) 131 S.Ct. 1968 (hereafter *Whiting*). CRLAF will examine the holding in *Whiting* in conjunction with the holding in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740. CRLAF will also discuss why forced waivers of PAGA claims should be rendered void in violation of public policy, given PAGA's important role in California's comprehensive scheme of labor law enforcement.

No party or counsel for a party has made any monetary contribution to fund the preparation or submission of this brief. (Cal. Rules of Court 8.200 (c)(3))

Dated: May 9, 2013 California Rural Legal Assistance Foundation

By: _____
Julia L. Montgomery
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I. INTRODUCTION

California, through statute, regulation and decisional law has repeatedly recognized that the enforcement of minimum labor protections is a matter of public interest, not solely an individual right. PAGA represents a critical element of the state enforcement mechanism established by the California legislature to ensure compliance with those protections. The cause of action created by PAGA flows, not from the contractual relationship between the employee and employer, but from a delegation by the state of its labor law enforcement powers.

The U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 (hereafter "*Concepcion*") does not compel nor even allow for interference with that state scheme through enforcement of a private contract that purports to waive rights that do not arise from it. As the Supreme court noted in a case decided after *Concepcion*, the federal preemption doctrine must be applied to state enforcement statutes in a manner that considers the "plain wording" of the statute which "contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of the United States of America, et al, v Whiting, et al.* (2011) 131 S.Ct. 1968, (hereafter "*Whiting*") at 1977 (internal citations omitted). This must be done with the recognition that "States possess broad

authority under their police powers to regulate the employment relationship to protect workers within the State," *Id.* at 1974.

The lower court's holding that the FAA requires upholding the waiver of all representative claims including those under PAGA in the arbitration agreement entered into between Arshavir Iskanian and CLS compromises California's ability to enforce its own laws, completely abrogates the intent of the PAGA, and is contrary to the express language and purpose of the Federal Arbitration Act.

II. ARGUMENT

A. THE FAA DOES NOT COMPEL THE WAIVER OR ARBITRATION OF RIGHTS THAT DO NOT ARISE FROM THE CONTRACT.

While concededly broad in scope and application, the FAA must be applied in a manner consistent with the plain language Congress used when enacting it. *Whiting, supra*, at 1977. 9 U.S.C. § 2 provides that:

> A written provision in any maritime transaction or **a contract evidencing a transaction involving commerce** to settle by arbitration a controversy thereafter **arising out of such contract or transaction,** or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id., emphasis supplied.

The Appellant in this case has of course asserted many causes of action that arise out of his contract or employment transaction. His PAGA claim is not one of them. His right to the promised the wage, and even the statutory protections guaranteed to him by operation of state labor laws arise from his employment contract, even though those rights would not have existed but for the overriding application of state protective statutes.[1] However, as demonstrated below, his right to enforce civil penalties due to the state for labor law violations, and his right to proceed on behalf of other aggrieved employees to do the same, do NOT arise from his employment relationship with CLS Transportation (hereafter "CLS"). Those rights come exclusively from a delegation by the State of California of its inherent power to enforce Labor Code provisions and collect civil penalties for violations of those provisions. The court in *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-78 explained the distinction between statutory penalties which may be directly

[1]See, *Gilmer v. Interstate/Johnson Lane Corp.* (1986) 500 U.S. 20, 111 S.Ct. 1647, *E.E.O.C. v. Luce, Forward, Hamilton & Scripps* (2003) 345 F.3d 742, enforcing agreement to arbitrate rights under the Age Discrimination in Employment Act and Title VII, respectively. But see *Davis v. O'Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066, 1082, 1083, finding substantively unconscionable an arbitration clause that limited an employee's right to file an administrative complaint with the U.S. Department of Labor or seek injunctive relief for enforcement of minimum wage and overtime rights under the Fair Labor Standards Act.

explained the distinction between statutory penalties which may be directly recovered by an employee and civil penalties that may be recovered only by the State or by an aggrieved party solely through the delegated power afforded by the legislature in PAGA. "'Generally, civil penalties are recoverable only by prosecutors, not by private litigants, and the monies are paid directly to the government. ....' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.), as amended May 12, 2003, p. 5.)'" *Id.* at 375. Mr. Iskanian's cause of action under PAGA arises from his role, under PAGA, as an enforcement arm of the state -- deputized and empowered by the statute to collect civil penalties, for himself and other aggrieved employees. *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337 -- not from his personal employment relationship.

The U.S. Supreme Court has held that not only does the FAA not compel the arbitration of issues not arising from the contract, but it also does not mention enforcement by public agencies and cannot bind non-party governmental agencies. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 at 296. (hereafter "*Waffle House*"). In *Waffle House*, the court held that the employer could not compel the U.S. Equal Employment Opportunity Commission to arbitrate the claim under Title VII that they filed in court on behalf of an employee who signed an arbitration agreement. Similarly, in the present case, the arbitration agreement Mr.

Iskanian signed cannot be construed to effectuate the forced waiver of the right to recover penalties due the State of California and other aggrieved employees.

Nor do the terms of arbitration agreement itself allow Mr. Iskanian to bring his PAGA action via arbitration. The relevant section of the arbitration clause provides that:

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

As cited in Appellant's Opening Brief, page 3, emphasis supplied. This clause, far from constituting an agreement about procedure, explicitly prohibits any class or representative claims *in arbitration or otherwise*. A representative action on behalf of other CLS employees cannot be arbitrated under the terms of their agreement. Yet Mr. Iskanian has the right under state law to act as a private attorney general and collect penalties for himself, other employees and the State that are available to

him only as a private attorney general acting under the delegation of authority provided to him by PAGA to bring a representative action. Labor Code § 2699(a). The two provisions cannot be reconciled. If effect is given to the arbitration clause, Mr. Iskanian is stripped the substantive right to enforce these penalties, and the State's decision to expand its law enforcement capabilities is undermined. This construction is not countenanced, much the less compelled by the FAA as construed by the Supreme Court in *Concepcion*. As Respondents concede in their briefing, a contract clause that waives substantive as opposed to procedural rights is NOT enforceable merely by virtue of the fact that it is shrouded in an arbitration clause. "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." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 627, *accord, Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 229-230; *Rodriguez de Quijas v. Shearson/American Express, Inc.*(1989) 490 U.S. 477, 481.

The decision in *Concepcion* does not disturb this fundamental qualifier to the enforcement of arbitration clauses.

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B. THE PAGA CAUSE OF ACTION IS AN INDEPENDENT SUBSTANTIVE CAUSE OF ACTION THAT CANNOT BE WAIVED BY THE EMPLOYMENT CONTRACT BETWEEN MR. ISKANIAN AND CLS.

Respondent incorrectly argues that the *Concepcion* disapproval of the "*Discover Bank Rule*" disposes of Mr. Iskanian's PAGA claim.

1. The FAA Does Not Compel Waiver of Substantive Rights Such as the Right to Bring a PAGA Claim

The *Concepcion* Court's rejection of the *Discover Bank Rule* turns on the conclusion that the "FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Concepcion* at 1744. The court relies in part on its prior decision in *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., supra,* citing it for the proposition that parties may agree to limit the issues subject to arbitration (*Concepcion* at p. 1748). In doing so the court implicitly approves the two-step analysis applied in that case, "first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, ... considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.". *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., supra,* 473 U.S. 614, 628. While acknowledging that arbitration clauses must be broadly construed, the Mitsubishi court stated "That is not to say that all

controversies implicating statutory rights are suitable for arbitration." *Id.* at 627. The *Concepcion* court did not call into question this basic premise when it rejected California's elevation of class action procedural rights over the right to enforce an arbitration agreement. *Concepcion* does not allow a forced waiver of substantive rights, as acknowledged by all the parties in this case.

Nor does the *Concepcion* decision undermine the holdings in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (hereafter "*Brown*"), and *Franco v. Athens Disposal Company* (2009) 171 Cal. App. 4th 1277 (hereafter "*Franco*"), which both held that the FAA does not compel the waiver of the right to bring a representative action under PAGA.[1] In *Franco,* the court recognized that the substantive right conferred by PAGA on employees to enforce civil penalty statutes is not procedural in nature. "Here, under the arbitration agreement, Athens sought to nullify the PAGA and preclude Franco from seeking civil penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general." *Id.* at 1303. In the *Brown* case, decided after *Concepcion*, the court held that "United States Supreme Court authority

[1] This Court granted review of the *Franco* case on January 4, 2013 for the issue relating to whether *Concepcion* precludes contractual class action waivers in the context of non-waivable labor rights; it does not appear that the *Franco* court's holding regarding non-waivability of PAGA claims was granted review in that case.

does not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws, for the employee suing under the PAGA 'does so as the proxy or agent of the state's labor law enforcement agencies.' *Arias*, supra, 46 Cal.4th at p. 986." *Brown* at 503. As in *Franco* and *Brown*, the arbitration clause here constitutes a forced waiver of substantive rights that cannot be compromised by application of the FAA.

The right to bring a PAGA action is a non-waivable statutory claim which cannot be waived in an arbitration agreement or any other contract. In *Armendariz v. Foundation Health Psycare Services, Inc.* (2000) 24 Cal.4th 83 (hereafter "*Armendariz*"), the court considered and found invalid an arbitration clause that limited remedies available under non-waivable statutory claims and relied upon the reasoning in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc, supra*, 473 U.S. 614 and *Gilmer v. Interstate/Johnson Lane Corporation* (1991) 500 U.S. 20, 33–34 as construed in *Cole v. Burns Intern. Security Services*(D.C. Cir.1997) 105 F.3d 1465. *Armendariz* at pp. 99, 101. Critical to the court's conclusion was its preliminary determination that the substantive right in question – recovery under the Fair Employment and Housing Act – was non-waivable. That analysis turns on application of California law which governs the scope of contracts.

> This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." "Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065, 64 Cal.Rptr.2d 522.) Second, Civil Code section 3513 states, "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (See *In re Marriage of Fell*, *supra*, 55 Cal.App.4th at p. 1064, 64 Cal.Rptr.2d 522; *Bickel v. City of Piedmont, supra*, 16 Cal.4th at pp. 1048–1049, 68 Cal.Rptr.2d 758, 946 P.2d 427 [rights under statute may be waived by agreement when public benefit is incidental to the legislation's primary purpose].)

Armendariz, *supra,* at 100. Applying these tenets, the *Armendariz* court concluded that an employment contract requiring employees to waive their rights under the FEHA to remedies designed to redress sexual harassment or discrimination would be contrary to public policy and unlawful. *Id.* at 100-101. Respondent's argument that "an important public policy is simply insufficient to trump the FAA" (Respondent's Answer Brief, page 14) misses the point, which is that public policies that states recognize as important and non-waivable have repeatedly been held to invalidate

contractual provisions in general, whether or not they are part of an arbitration clause governed by the FAA. Similar to the provision that the *Armendariz* court invalidated prohibiting certain claims and remedies under the FEHA, a contract provision requiring employees to waive their PAGA claims and remedies is contrary to public policy and thus unlawful. The arbitration clause in Mr. Iskanian's contract with CLS strips him of the right to pursue this substantive cause of action and is unenforceable on that basis.

2. PAGA Confers a Cause of Action and Substantive Right That Does Not Exist Except Through a Private Attorney General Action

California has created a comprehensive scheme that provides minimum workplace protections, articulated in statute and regulation, which are greater than protections found under federal law. Private enforcement of some of these protections – i.e., payment of contract wages, minimum wages, overtime and enforcement of certain penalties payable to employees – is provided to individual employees, who can proceed solely on their own behalf, in an administrative proceeding (Labor Code §98) or civil action (see Labor Code §§ 203, 218, 226.7, 1194, 1194.2). Other provisions vest specific rights in employees that can only be enforced through administrative hearings (see Labor Code §1700.44, Labor Code § 2673.1). Some provisions create substantive rights that have been construed

to be limited to enforcement by the Labor Commissioner (*e.g.*, Labor Code § 351, as construed by *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, no private cause of action to enforce tip withholding statute implied under the Labor Code.).

Finally, there is a series of civil penalties designed to deter violations of specific worker protections that, by express statutory language, are payable to the State and enforceable only by the Labor Commissioner, and other law enforcement officials (*e.g.*, Labor Code §§ 210, 226.3, 558, 1174.5, 1199, 1309.5 1777.7). Although these penalties exist, and employers may be liable for them, individual workers had no right to enforce or collect these penalties prior to the enactment of PAGA. As the court noted in *Caliber Bodyworks, Inc. v. Superior Court*, *supra*, 134 Cal.App.4th at 374, PAGA allows individual employees "to bring a civil action to collect civil penalties for Labor Code violations previously only available in enforcement actions initiated by the State's labor law enforcement agencies." *Id.* The clear thrust of the statute was to provide a mechanism for expanding state enforcement resources, not the creation of a right attendant to an employment contract. This is clear from the legislative findings included in the initial enactment, SB 796:

> SECTION 1. The Legislature finds and declares all of the following:

> (a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.
>
> (b) Although innovative labor law education programs and self–policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.
>
> (c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.
>
> (d) It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

Cal. Stats 2003 ch 906.

This new right to enforce civil penalties--for the state--could be accomplished exclusively through a private attorney general action It promotes the interest of the individual worker, but also establishes a new enforcement arm of the state, allowing the same workforce-wide enforcement of penalties available to the Labor Commissioner (Labor Code

§ 2699 (a))[2] reserving 75% of all penalties collected for the state, (2699(i) but providing a monetary incentive of 25% and the payment of attorneys' fees and costs for the private attorney general who chose to take up the mantle of labor law enforcement (§2699(i) 2699(g) (1). Additionally, PAGA established new civil penalties – payable to the state – for violation of any Labor Code provision that did not have already have a fixed penalty. (2699(f).

A Committee analysis noted the unusual, though not unprecedented, approach of the bill, and emphasized the difference between creating a new monetary remedy for the individual worker, and the purpose of this statute.

> "Generally, civil penalties are recoverable only by prosecutors, not by private litigants, and the monies are paid directly to the government. However, recovery of civil penalties by private litigants does have precedent in the law.... In this bill, allowing private recovery of civil penalties as opposed to statutory damages would allow the penalty to be dedicated in part to public use (to the General Fund and the LWDA) instead of being awarded entirely to a private plaintiff."

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.), as amended May 12, 2003, p. 5, cited in *Caliber Bodyworks, Inc. v. Superior Court*, supra, Cal.App.4th 365, 374.

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[2] PAGA was subsequently amended and several provisions included in the original act were reordered, to avoid confusion these subsections are referred to as currently codified.

The "primacy" of the state enforcement model was reemphasized the following year when a new subsection was added to the law requiring that a litigant provide notice to the Labor and Workforce Development Agency prior to filing the action, and eliminating the right to proceed if the LWDA takes action. Labor Code § 2699.3. Added Stats 2004 ch 221 § 4 (SB 1809), effective August 11, 2004.

The right of a litigant such as Mr. Iskanian to proceed under PAGA is derivative of the state's rights to enforce its labor protections. This has been repeatedly recognized by the courts that have construed PAGA. "Thus, the PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties." *Dunlap v. Superior Court, supra,* (2006) 142 Cal.App.4th 330, 337. The *Dunlap* court relied upon legislative history which included an analysis concluding that "*This bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative 'private attorney general' system for labor law enforcement.*" *Id.*, citing Sen. Rules Com., Off. Of Sen. Floor Analyses, analysis of Sen. Bill No. 796, (2003-2004 Reg. Sess.) as amended Sept. 2, 2003, p. 2, italics added.

The courts in *Brown v. Ralphs, supra*, and *Franco v. Athens Disposal, supra*, reviewed the same legislative history and its analysis that the overriding purpose of PAGA was to ensure the public welfare, and

consequently concluded that PAGA claims could not be waived by operation of an arbitration clause. *Brown* at 503, *Franco* at 1303. In *Franco*, the court acknowledged that the cause of action flows from a delegation of enforcement powers.

> The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions. **Before the PAGA was enacted, an employee could recover damages, reinstatement, and other appropriate relief but could not collect civil penalties.** The Labor and Workforce Development Agency (LWDA) collected them. **The PAGA changed that.**

Franco, supra, at 1300, emphasis supplied. This is a clear recognition that PAGA created a substantive right to recover, not a procedural mechanism for enforcing already existing rights. It did so expressly by providing a cause of action to proceed as private attorney general – a cause that CLS' arbitration agreement expressly excluded.

Respondent repeatedly argues that PAGA is a mere procedural mechanism by which litigants may enforce substantive labor law protections. Respondent fails to understand, however, that PAGA's

purpose is not as a mere procedural tool to recover damages, but rather, it is a substantive, stand-alone statutory claim through which citizens are deputized as private attorneys general to enforce the labor code through assessment of civil penalties that cannot be separately claimed by private individuals. The *Brown* court explained it thus:

> The purpose of the PAGA is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code. (See Michelson, Business Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code (2004) 35 McGeorge L.Rev. 581.) ... And, a representative action has "significant institutional advantages" over a single claimant arbitration. The representative action is a means for public enforcement of the labor laws. Thus, assuming it is authorized, a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. THAT PLAINTIFF AND other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects. (*Arias, supra*, 46 Cal.4th at pp. 985–987, 95 Cal.Rptr.3d 588, 209 P.3d 923.) Other employees would still have to assert their claims in individual proceedings. In short, representative actions under the PAGA do not conflict with the purposes of the FAA.
>
> *Brown* at 502.

In 2009 the California Supreme Court recognized the proxy nature of a PAGA action when rejecting the argument that PAGA claims had to be brought as class actions:

> An employee plaintiff suing, as here, under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the

> state's labor law enforcement agencies. The act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves.

Arias v. Superior Court (2009) 46 Cal.4th 969, 986. The court found that this aspect of the cause of action meant that an action under PAGA was primarily for the benefit of the general public, and not the private litigant.

> The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab.Code, § 2699, subds. (a), (g)), and an action to recover civil penalties "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties" (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17, 141 Cal.Rptr. 20, 569 P.2d 125).

Id.

California law specifically addresses the waiver of public policy protections and makes them unenforceable. "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Civil Code § 3513.

Mr. Iskanian's PAGA cause of action was delegated to him to promote the public interest. It cannot be waived and it would be improper for this court to force such a waiver by application of the arbitration clause. *Benane v. International Harvester Co.* (1956)142 Cal.App.2d Supp. 874 (refusing to enforce collective bargaining agreement waiver of voting time

pay as contrary to public policy.); *EEOC v. Waffle House, supra, at* 296 (holding that FAA did not trump the EEOC's statutory mandate to enforce Title VII claims as "To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.").

3. PAGA Furthers California's Fundamental Interest in Promoting Public Welfare by Strong Labor Laws and Enforcement of Those Laws.

There is no doubt that the primary purpose of PAGA, like the minimum labor protections it enforces, is to promote the public welfare. It is a recent and powerful element of California's long-standing tradition to do exactly that. Through its Constitution, statutes, regulations and case law, California has established and reiterated, for nearly a hundred years, the fundamental nature of the protections afforded its workers.

Article XIV, Section I of the Constitution of the State of California states: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial powers." The Legislature thus conferred on the Industrial Welfare Commission (IWC) the power to investigate the health, safety and welfare, and to regulate minimum wages,

maximum hours and working conditions of California's employees. *See* Labor Code §§1173, *et. seq.*

In 1937, the Legislature established the Department of Industrial Relations (DIR). Labor Code § 50 et. seq. "...to foster, promote and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." Labor Code § 50.5. The provisions of Chapter 1 of Part 4 of Division 2 of the California Labor Code, entitled "Wages, Hours, and Working Conditions," are administered and enforced by the DIR through the Division of Labor Standards Enforcement (DLSE). Labor Code §§ 61, 79.

Labor Code §90.5 codified, in the plainest terms possible, California policy with respect to labor standards:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Id.

California's administrative and regulatory framework has been buttressed by the courts. Private rights of action to enforce wage and hour

protections were recognized in California as early as 1915, the effective date of the act entitled "An act providing for the time and payment of wages," approved May 1, 1911, (Cal. Stat 1911, p. 1268). *Kerr's Catering Service v. Department of Industrial Relations*(1962) 57 Cal.2d 319, 325-26. The California Supreme Court has repeatedly reaffirmed the fundamental nature of California's labor standards.

In 1948, the Court noted that, "[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." *In re Trombley* (1948)31 Cal.2d 801, 809.

In 1962, the Court held, "[w]ages of workers in California have long been accorded a special status... This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages.... California courts have long recognized the public policy in favor of full and prompt payment of wages due an employee." *Kerr's Catering Service v. Department of Industrial Relations*, *supra*, 57 Cal.2d 319, 325-26.

In 1980, the Court found "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and

working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702, a rule the court reiterated in *Murphy v. Kenneth Cole Productions, Inc.*(2007) 40 Cal.4th 1094, 1103.

In 2006, the Court again concluded, "[t]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established." *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.

Most recently, the California Supreme Court reiterated the fundamental importance of California labor protections and expressly recognized that construction and enforcement of those laws must be by reference to California statutes and IWC regulations not federal or common law. (California's employer definition ..." belongs to a set of revisions intended to distinguish state wage law from its federal analogue, the FLSA."). *Martinez v. Combs* (2010) 49 Cal.4th 35, 59. California's IWC Wage Orders, not the common law, control when determining the definition of the employment relationship. *Id.* at 62.

The Legislature has also recognized the need for *increased protection* for workers, particularly those employed in low-wage enterprises or the "underground economy," and enacted legislation specifically designed to further promote the enforcement of basic labor law

protections. Special administrative procedures were enacted to provide remedies for workers in low-wage industries (Labor Code §§ 2670, *et seq.*, relating to garment workers; Labor Code §§ 2050, et seq, relating to car wash workers). Expanded liability was established for businesses that entered into contracts for construction, farm labor, garment, janitorial and security workers, that failed to include funding sufficient to cover the cost of that labor. (Labor Code § 2810).

It was not enough. In 2003, the legislature, while recognizing the state's interest in enforcing basic labor protections that were consistent with but independent of individual worker rights, enacted PAGA as a means of extending the arm of the law by creating a new right to enforce and recover a portion of civil penalties due the state that would otherwise go uncollected.

The robust administrative enforcement framework, the succession of reminders from the California Supreme Court, and the Legislature's recent enactments combine to firmly establish California's longstanding and well-recognized public policy in favor of protecting its workers and ensuring employer compliance with minimum labor standards. That purpose is undermined, and the right extinguished if employers are allowed to condition employment on the execution of arbitration agreements that force

a waiver of the right to proceed as a private attorney general in a PAGA action.

Vigorous public enforcement of labor laws is critical to the workers represented by *Amicus Curiae*, CRLAF. Our clients, and others employed in the underground economy, work in industries where labor law violations are pervasive. The immigrant workers we represent are particularly unaware of or too frightened to enforce basic labor protections such as minimum wage, overtime and meal and rest period requirements.

Unscrupulous employers lie about worker rights and instill fear by threatening deportation, and even filing false police reports. Family members and friends suffer for the actions of workers who do come forward and are subjected to the same reprisals including harassment, discharge and the failure to recall seasonal employees. Employers who fail to comply with labor laws benefit from reduced operating expenses and unfairly compete with law-abiding employers. California has recognized that individual enforcement of labor protections cannot remedy this problem or alleviate the negative effects it has on the economy and well-being of California citizens. Only a workforce wide enforcement strategy can do that. PAGA makes CRLAF clients and other workers, like Mr. Iskanian, a critical arm of that enforcement strategy.

It is clear that extending the right to workers to bring a PAGA action was not primarily intended to benefit the individual employee. The plaintiff bringing a PAGA action stands to recover only 25% of the penalties attributable to the unlawful acts she endures. She will recover NO portion of the penalties for violations suffered by other workers. Other aggrieved workers likewise recover only 25%. It is the state, and specifically the Labor and Workforce Development Agency (LWDA) that recovers the remaining 75% of ALL penalties assessed, and is specifically required to use the money collected for "...enforcement of labor laws and education of employers and employees about their rights and responsibilities under [the Labor Code]." Labor Code § 2699 (i),(j).[3] The public interest in the recovery and appropriate distribution of these penalties is further assured by the statutory requirement that the court "shall review and approve any [PAGA] penalties sought as part of a proposed

[3] This distinction is important and in contrast to the situation in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra*, where the court held that the private enforcement mechanisms of the anti-trust laws while critical to the public interest in preventing anti-trust, were designed "...primarily to enable an injured competitor to gain compensation for that injury..." 473 U.S. at 635. The court analyzed both the nature of the remedy and whether an arbitration forum, per se, would interfere with the public purpose and concluded that "...so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. *Id.* at 637. It is clear here that Mr. Iskanian will be denied the right to vindicate his statutory cause of action to recover penalties due the State on behalf of other aggrieved employees if the arbitration clause is enforced.

settlement agreement..." Labor Code § 2699 (l). These fundamental purposes are undermined, and the right to recover extinguished if an aggrieved employee's right to enforce penalties under PAGA is waived by operation of an arbitration clause prohibiting representative actions.

C. PRESERVING THE PAGA CAUSE OF ACTION IS CONSISTENT WITH FEDERAL PREEMPTION DOCTRINE WHICH RECOGNIZES THE NEED TO HARMONIZE FEDERAL LAW WITH THE EXERCISE OF STATE POLICE POWERS.

Federal preemption does not mean the elimination of state's rights. Even under circumstances where the federal government has occupied an area – such as immigration – the Supreme Court has recognized that state laws promoting the interests and general well-being of the public, should be enforced when possible. *De Canas v. Bica*, 424 U. S. 351, 353, 356. Moreover, preemption cases start with the assumption that the historic police powers of the States are not superseded by federal law "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine* (2009) 555 U.S. 555 at 565.

Additionally, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.* In *De Canas* the court reversed and remanded a lower court decision and held that a state law regulating the employment of undocumented workers was not necessarily preempted by the federal

Immigration and Nationality Act. The court reasoned that preemption only applies if the law constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363. On May 26, 2011, shortly after deciding *Concepcion*, the U.S. Supreme Court reaffirmed *De Canas* in *Whiting, supra,* and upheld an Arizona law requiring immigration screening of all workers and regulating the licensing of employers that have been found to have hired undocumented aliens was not preempted by federal immigration law. In doing so the court recognized the State interest in regulating employment and construed the savings language of the federal act in a manner that allowed enforcement. *Whiting, supra.*

Similarly in the present case, the FAA's saving clause must be construed in a manner that preserves the State's interests. The FAA expressly provides that a contract to arbitrate is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. California law recognizes that contracts that attempt to waive a public policy interest are void and unenforceable. Civil Code § 3513. An arbitration contract that waives the right to proceed as a private attorney general, and state laws critical to the well-being of California workers is void and unenforceable and falls squarely within the savings clause of 9

U.S.C. § 2. *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra,* 24 Cal.4th at 100-101.

Enforcement of Civil Code § 3513 is consistent with the savings clause contained in §2. By definition it does not interfere with the purpose of the FAA, because the FAA preserves the right to assert contract defenses. Nor does it disproportionately burden arbitration contracts. It is a defense applicable to the enforcement of a contract and does not constitute "an obstacle to the accomplishment of the FAA's objectives." *Concepcion* at 1748.

The court in *Concepcion* acknowledged the FAA's preservation of contract defenses and began its inquiry as to the *Discover Bank* Rule by noting that the § 2 saving clause "...permits agreements to arbitrate to be invalidated by "'...generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746. The court rejected the *Discover Bank Rule* because of its nearly unique application to arbitration clauses. *Id.*

Unlike the *Discover Bank Rule* as construed in *Concepcion*, Civil Code §3513 and the case law construing it, prohibit all contractual attempts to waive a substantive right that is in the public interest. The prohibition is applied generally, not just to arbitration contracts, and is not triggered only

under circumstances arising out of arbitration. Far from being an anti-arbitration rule, it has been used to invalidate the waiver of worker protection statutes in a variety of actions not involving arbitration. (See, *Covino v. Governing Bd. of Contra Costa Community College Dist. of Contra Costa County* (1977) 76 Cal.App. 3d 314, teacher could not waive protections under state tenure law as a means of qualifying for other employment; *Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1, 6–7, employee cannot waive Labor Code right to be paid for unused vacation leave; *Grier v. Alameda–Contra Costa Transit Dist.* (1976) 55 Cal. App.3d 325, 334–335, employee cannot waive protections of Labor Code regulating wage reductions for tardiness; *Benane v. Internat. Harvester Co.* (1956) 299 P.2d 750, 142 Cal.App.2d Supp. 874, 878, employee cannot waive Elections Code right to two hours' paid leave to accommodate voting).

California has also expressly acknowledged the need to preserve enforcement mechanisms that protect the public interest, even when construing an arbitration clause, finding an inherent conflict between the FAA policy favoring arbitration and California statutes authorizing "public" injunctive relief. See *Broughton v. Cigna Healthplans of Cal.*(1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (refusing to enforce arbitration clause that would

limit injunctive relief remedies available under the Consumer Legal Remedies Act (Civ.Code, § 1750 et seq), and Unfair Competition Law (Bus. & Prof. Code §§ 17200, et. seq), respectively. As in the *Mitsubishi* case, the California Supreme court in these cases focused in on the question of whether the primary purpose of the statutory right was to provide for individual relief to injured parties, or to promote the public welfare. *See Broughton, supra* at 1077 ("...when the plaintiff is acting authentically as a private attorney general, such a remedy may be inherently incompatible with arbitration."); and *Cruz, supra*, at 315.[4]

California law, as embraced by the savings clause in 9 U.S.C. § 2 of the FAA, compels the conclusion that PAGA claims cannot be waived by operation of a clause in an employment contract. The fact that the waiver is included in an arbitration clause does not change that.

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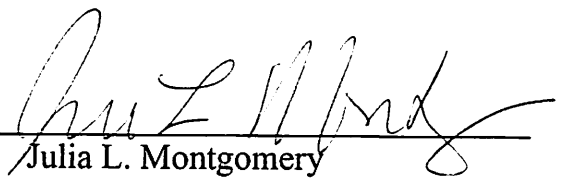
[4] Justice Chin in a thoughtful dissent in *Broughton* concluded that this rationale has been repudiated by subsequent Supreme Court decisions, even before *Concepcion*. However that dissent was not informed by the more recent circumstances where the U.S. Supreme Court recognized the need to give effect to state statutes designed to promote the public interest even in the face of a preemptive statutory scheme. *Chamber of Commerce of U.S. v. Whiting, supra*. As in *Whiting*, where there is no express preemption, the forced waiver of a right to bring such a private attorney enforcement action, and seek remedies only it provides is, must be analyzed as implied pre-emption. Under those circumstances, "...a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Id.* at 1985. citing *Gade v. National Solid Wastes Management Ass'n(1992)*505 U.S. 88 at 110.

III. CONCLUSION

Nothing in the *Concepcion* decision allows the wholesale preclusion of a statutory claim. Yet, if construed as a bar to his right to proceed with his private attorney general claim under PAGA, that is exactly the effect of the arbitration clause included in Mr. Iskanian's contract with CLS. Accordingly, by operation of Civil Code § 3513 and the savings clause included in the FAA, 9 U.S.C. § 2, Mr. Iskanian must be allowed to proceed with his PAGA claim in court.

Dated: May 9, 2013 California Rural Legal Assistance Foundation

By: 

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CERTIFICATION OF WORD COUNT

I, Julia L. Montgomery, certify that the foregoing Amicus Curiae Brief does not exceed 7,035 words. I determined this fact by checking the total word count of the brief using the Microsoft Word, word count feature.

Dated: May 9, 2013

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I, Claudia Bogusz, declare as follows:

I am employed with the law offices of CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, whose address is 2210 K Street, Suite 201, Sacramento, California 95816. I am over the age of eighteen years and I am not a party to this action.

On May 9, 2013, I served the following document: **APPLICATION OF CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AND AMICUS CURIAE BRIEF,** on the party(ies) listed below, addressed as follows:

SEE ATTACHED SERVICE LIST

[X] MAIL: By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Sacramento, addressed as above. That there is delivery service by the Unites States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

[ ] PERSONALLY SERVICE: By leaving a true copy thereof at their office with the person having charge thereof or by hand delivery to the above mentioned parties.

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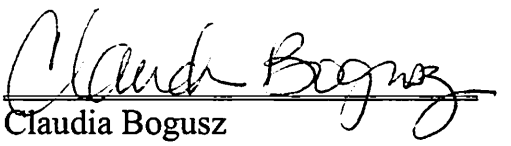
addressed to the person on whom it is served, at the office address as last given by that person on any document filed in the cause and served on that party making service; otherwise at that party's place of residence.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed May 9, 2013 at Sacramento, California.



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