Case No. S204032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC, et.al,
Defendants and Respondents.

After a decision of the Court of Appeal,
Second Appellate District, Division Two, Case No. B235158
(Los Angeles Superior Court Case No. BC356521,
The Honorable Robert Hess)

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF POSITION OF CLS TRANSPORTATION LOS ANGELES, LLC, ET. AL.

LITTLER MENDELSON, P.C.
HENRY D. LEDERMAN, Bar No. 079498
ALEXA L. WOERNER, Bar No. 267609
1255 Treat Blvd., Suite 600
Walnut Creek, CA 94597
Telephone: 925.932.2468

LITTLER MENDELSON, P.C.
ROBERT FRIEDMAN, TX Bar No. 24007207, *pro hac vice* pending
EDWARD BERBARIE, TX Bar No. 24045483, *pro hac vice* pending
2001 Ross Avenue, Suite 1500, Lock Box 116
Dallas, Texas 75201-2931
Telephone: 214.880.8100

Attorneys for Amici Curiae,
The National Retail Federation and Rent-A-Center, Inc.

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EDWARD BERBARIE, TX Bar No. 24045483, *pro hac vice* pending
2001 Ross Avenue, Suite 1500, Lock Box 116
Dallas, Texas 75201-2931
Telephone: 214.880.8100

Attorneys for Amici Curiae,
The National Retail Federation and Rent-A-Center, Inc.

Pursuant to California Rule of Court 8.520(f), The National Retail Federation and Rent-A-Center, Inc. respectfully request leave to file a brief of amici curiae in support of Respondents CLS Transportation Los Angeles, LLC, et. al. The proposed amici brief is lodged concurrently with this application.

ABOUT AMICI AND THEIR INTEREST

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Its global membership includes retailers of all sizes, formats, and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.5 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs – including tens of thousands of jobs in California alone. The total U.S. GDP impact of retail is $2.5 trillion annually.

Rent-A-Center, Inc. ("RAC") is a nationwide rent-to-own chain. Its stores offer name-brand furniture, electronics, appliances and computers through purchase agreements that generally allow the customer to obtain ownership of the merchandise at the conclusion of an agreed upon rental period. It owns and operates more than 3,400 stores in North America and Puerto Rico under the Rent-A-Center, Rent-Way, Rent Rite, Rainbow Rentals, and Get It Now names and franchises almost 300 stores

through subsidiary ColorTyme. It has over 19,000 employees, including over 1,150 employees in California.

RAC as well as many of NRF's membership are employers that enter into arbitration agreements with their employees that are governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, (the "FAA") and contain class action waivers in one form or another. Accordingly, based on the above, amici have a direct and substantial interest in the outcome of the instant case.

HOW NRF AND RAC'S BRIEF WILL ASSIST THE COURT

NRF and RAC's amici curiae participation will assist the Court in this proceeding because they are well-positioned to provide this Court with a perspective that will assist the Court in resolving this action and may help guide the Court in its consideration of the potential reach of its opinion.

The matters asserted in the brief accompanying this motion address FAA preemption and the appropriate interpretation and application of United States Supreme Court precedent interpreting the FAA and the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2, as pronounced in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, 131 S. Ct. 1740, and more recent decisions from the United States Supreme Court. Thus, the matters asserted in the brief accompanying this motion are relevant to the disposition of this case and should be considered by this Court.

CERTIFICATION

No party or counsel for a party in this appeal authored the proposed amici brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in the pending appeal.

Dated: May 9, 2013

LITTLER MENDELSON, P.C.
1255 Treat Blvd.
Suite 600
Walnut Creek, CA 94597

LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500,
Lock Box 116
Dallas, Texas 75201-2931

By: _____
Henry D. Lederman
Robert Friedman, *pro hac vice* pending
Edward Berbarie, *pro hac vice* pending
Alexa L. Woerner
Attorneys for Amici Curiae
THE NATIONAL RETAIL FEDERATION AND RENT-A-CENTER, INC.

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Attorneys for Amici Curiae,
The National Retail Federation and Rent-A-Center, Inc.

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I.

INTRODUCTION

Central to the instant action is fidelity to the rule of law, as mandated by the Supremacy Clause of the United States Constitution and the well-settled doctrine of stare decisis.

AT&T Mobility LLC v. Concepcion (2011) 563 U.S. ___, 131 S. Ct. 1740 ("*Concepcion*"), holds that the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) ("FAA") preempts state law rules, whether court or legislatively made, that impose obstacles to the enforcement or even frustrate the purposes of FAA-governed arbitration agreements. As *Concepcion* holds, the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (131 S. Ct. at 1748.) *Concepcion* further teaches that (1) nothing suggests "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives;" (2) there exists a "liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary;" and (3) "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at 1748-49, and 1753.)

The above holdings and pronouncements from the United States Supreme Court mean that, no matter how well-intentioned a state's

policies or intentions may be, the FAA – and the Supreme Court decisions interpreting it – mandate that FAA-governed arbitration agreements are to be enforced according to their terms, including terms providing for the waiver of the parties' ability to proceed as a class or collective action. (*See Concepcion, supra.*; *see also Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S. Ct. 1201, 1202 ("*Marmet*") ["Interpreting the FAA and stating, "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."]; *Nitro-Lift Techs., L.L.C. v. Howard* (2012) 133 S. Ct. 500, 503 ("*Nitro-Lift*") ["But the Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," and by the opinions of this Court interpreting that law. 'It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" [citations omitted].)

Central to the U.S. Supreme Court's most recent decisions involving the enforcement of arbitration agreements governed by the FAA, therefore, is the obligation of all lower courts to apply faithfully its holdings. Indeed, the Court has been sharply critical of lower courts that have not done so. Unmistakably, *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 464 ("*Gentry*") does not survive *Concepcion*. In *Gentry*, this Court found that California's interest in class-wide resolution of

employees' wage and hour claims in many circumstances trumped a class-action waiver set forth in a FAA-governed arbitration agreement to which those employees were bound.

Gentry, however, cannot be reconciled with the U.S. Supreme Court's controlling decisions. Primarily, *Gentry* is based squarely on *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 153 ("*Discover Bank*"), which was overruled by *Concepcion*. Like *Discover Bank*, (1) *Gentry* finds that there is nothing incompatible between class-actions and a FAA arbitration, while *Concepcion* provides that just the opposite is true; (2) *Gentry* finds that a court may order a case to proceed as a class action notwithstanding an otherwise enforceable FAA arbitration agreement containing a class-action waiver, while *Concepcion* provides that a party cannot be required to arbitrate a class action if it has not agreed to do so; and (3) *Gentry* finds that state law and policy justify a court disregarding a class-action waiver, while *Concepcion* provides that states cannot frustrate the "overarching purpose" of the FAA (i.e. "the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"), "even if it is desirable for unrelated reasons." (*See* Section II(C)(1), *infra*.)

Central to the clash between California's public policies, no matter how well-intentioned or otherwise justified, and the public policy underlying the FAA is the duty of California courts to abide by the

decisions of the nation's highest court. The supreme law of the land requires that agreements to arbitrate governed by the FAA must be enforced according to their terms, and that includes agreements to waive the ability to participate in class or collective action proceedings. (See *Concepcion, supra.*) Here, therefore, this Court should find that *Gentry* is no longer good law and affirm the decision of the Court of Appeals.

II.

ARGUMENT

A. The United States Supreme Court's Interpretation of the FAA in *Concepcion* is the Law of the United States Regarding All Types of Arbitration Agreements.

In *Concepcion,* the United States Supreme Court held that the unconscionability doctrine in *Discover Bank* was preempted by the FAA because it was applied in a fashion that disfavors arbitration, and the Supreme Court reaffirmed that states are not at liberty to apply their public policies if doing so would frustrate the FAA's central purposes. (*Concepcion, supra,* 131 S.Ct. at 1747-48, 1749.) Put another way, if parties enter into a FAA-governed agreement that otherwise is enforceable, states are powerless to interfere with the FAA's "overarching purpose": "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Id.* at 1748.)

Even though the state public policies underlying *Discover Bank* purported to be applicable to "any contract," and not just arbitration

agreements, these policies, as applied, nevertheless interfered with the enforcement of arbitration agreements governed by the FAA and thus were fatally flawed. (131 S.Ct. at 1753 ["Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [citation omitted], [the state law] is preempted by the FAA"].) States, in short, are powerless to frustrate the purposes of the FAA, regardless of the state policies that may have to yield if an otherwise valid arbitration agreement is enforced as written:

- Relying on the text of the FAA, the Supreme Court stated that the "principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" and that nothing suggests "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Id* at 1748.)

- The Supreme Court noted the "liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (*Id.* at 1749.)

- "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at 1753.)

Concepcion's commands are clear and far-reaching. They do not merely apply to class action waivers contained in consumer contracts. The FAA does not distinguish among contracts falling within its coverage. Thus, *Concepcion* reaches all FAA-governed agreements in all types of cases, and the Supreme Court accordingly has applied *Concepcion* broadly. Indeed, just months after it was decided, the Court applied *Concepcion*

outside of the class action waiver context in *Marmet*. Relying on *Concepcion*, the Supreme Court vacated the West Virginia Supreme Court's refusal to enforce an arbitration agreement governed by the FAA based upon a state public policy prohibiting arbitration of personal-injury or wrongful-death claims against nursing homes. (*Marmet*, *supra*, 132 S. Ct. at 1203-04.) The Court also applied *Concepcion* in the employment context when it vacated this Court's decision in *Sonic-Calabasas A, Inc., v. Moreno* (2011) 51 Cal. 4th 659. In that case, this Court had held that the FAA did not preempt a requirement of the Labor Code that an otherwise arbitrable employment claim first be heard through a state administrative adjudicative process. (*Id.*) The United States Supreme Court granted the employer's petition for certiorari, summarily vacated the judgment of this Court, and remanded the case for further consideration in light of *Concepcion*. (*Moreno*, 132 S. Ct. 496.)

It should be well-settled by now that *Concepcion* applies to all cases involving arbitration agreements governed by the FAA, because, as one court put it, there is "no principled basis to distinguish" consumer arbitration cases from other types of cases. (*See Morvant v. P.F. Chang's China Bistro* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 63985, at *19; see also *Jasso v. Money Mart Express, Inc.* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 52538 at *9-14.) Attempting to distinguish *Concepcion* from employment or other non-consumer cases is a false distinction that merely

invites lower courts to attempt to improperly overrule the supreme law of the land regarding FAA preemption as enunciated in *Concepcion*. Because *Concepcion* has sweeping application, courts "must" place ***all*** arbitration agreements, whether in the consumer or employment setting, "on an equal footing with other contracts" and must reject attempts, in any context, which are driven by state law or public policy to frustrate the "overarching purpose" of the FAA: "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion, supra*, 131 S.Ct. at 1748.)

B. This Court Must Follow the Law as the United States Supreme Court has Interpreted It.

The lower court in this case properly did what the Supremacy Clause of the United States Constitution and the long-established rule of stare decisis dictate that it must—apply the law as the Supreme Court of the United States has interpreted it. These principles are not novel. Instead, they are central to our system of jurisprudence.

Long ago, in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, this Court recognized that "[u]nder the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense." An inferior court's obligation in this regard is clear: "Courts exercising inferior jurisdiction must accept the law

declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Id.*)

The United States Supreme Court is, of course, the most superior court in the United States, and all California courts must, therefore, accept the law of the United States as the United States Supreme Court has declared it. (See *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 353 ["Under our Constitution, '[t]he judicial Power of the United States' is 'vested in one supreme Court . . .' [a]nd, as Chief Justice Marshall famously explained, that judicial power includes the duty 'to say what the law is.'] [citing U.S. Const. Art. III, § 1; *Marbury v. Madison* (1803) 5 U.S. 137].) Indeed, "state courts cannot refuse to apply federal law--a conclusion mandated by the terms of the Supremacy Clause" of the United States Constitution. (*Printz v. United States* (1997) 521 U.S. 898, 928-929.)

In the context of the FAA specifically, the Supreme Court, in *Concepcion*, interpreted the statute and spoke to the inability of the states to interfere with its purpose. And, now that the Supreme Court has spoken, all inferior courts must adhere to its rulings. The rule of law demands nothing less. The United States Supreme Court has made this abundantly clear in recent cases where state supreme courts have failed to follow the United States Supreme Court's interpretation of the FAA. In *Marmet*, the Court tersely reminded, "When this Court has fulfilled its duty to interpret federal

law, a state court may not contradict or fail to implement the rule so established." (*supra*, 132 S. Ct. at 1202 [citing U.S. Const., Art. VI, cl. 2].) And, as the Supreme Court even more recently stated, in *Nitro-Lift Techs., L.L.C. v. Howard, infra*:

> But the Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," U.S. Const., Art.VI, cl.2, and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994).

(*supra*,133 S. Ct. at 503.)

As explained above, *Concepcion* applies to *all* FAA-governed agreements, without limitation or exception as to whether the agreement happens to be in an employment or a consumer context and as to whether the agreement touches on some state public policy. Therefore, in determining the viability of *Gentry* and the outcome of this Case, this Court must apply *Concepcion*'s reasoning and holding as the United States Supreme Court has dictated.

C. *Concepcion* Undoubtedly Overruled *Gentry*.

1. *Gentry* is Incompatible with *Concepcion*.

Gentry does not survive *Concepcion*. As an initial matter, the *Gentry* decision is based on the rationale from *Discover Bank*, which

Concepcion expressly overrules. Not only does the discussion section in *Gentry* begin with an in-depth, six-paragraph analysis of *Discover Bank*, but this Court repeatedly relied on *Discover Bank's* principles in deciding *Gentry*. (*Gentry, supra*, 42 Cal.4th at pp. 453-466.) To be sure, the portion of *Gentry* that Iskanian argues remains good law after *Concepcion* – the prohibition against class action waivers "interfering with a party's ability to vindicate statutory rights" – is derived directly from *Discover Bank*: "*Discover Bank* was an application of a more general principle: that although 'class actions and arbitration waivers are not, in the abstract, exculpatory clauses, such a waiver can be exculpatory in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy." (*Id.* at p. 457 [emphasis added].) Moreover, this Court expressly rejected a number of the employer Circuit City's arguments in *Gentry* based upon conclusions also taken from *Discover Bank*. (See e.g. *Id.* at pp. 464-465.)

Additionally, *Gentry* and *Concepcion* cannot coexist for a number of reasons. *Gentry* holds that a court may disregard a class-action waiver and order class arbitration in certain circumstances, but *Concepcion* rejects the concept that a class arbitration can be imposed on a party who never agreed to it. (*Concepcion, supra*, 131 S.Ct. at pp. 1750-51.) *Gentry* finds there is nothing incompatible between class proceedings and arbitration, but *Concepcion* finds that just the opposite is true. (*Id.*) *Gentry*

provides for the court to determine whether class arbitration is a "significantly more effective practical means of vindicating the rights of the affected employees," rather than simply enforcing the terms of the FAA-governed arbitration agreement. (*Gentry*, *supra*, 42 Cal.4th at p. 463.) *Concepcion*, on the other hand, provides that nothing in the FAA, "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," which are "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion*, *supra*, 131 S.Ct. at p. 1748.) And, *Gentry* relies on state public policy and the ability of employees to vindicate their state law rights as justification for disrespecting class action waivers in FAA-governed agreements, while *Concepcion* mandates that, "states cannot require a procedure inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at 1753.)

Furthermore, numerous federal courts have agreed that *Concepcion* impliedly overruled *Gentry*. (See e.g. *Morvant v. P.F. Chang's China Bistro, Inc.*, *supra,* 870 F. Supp. 2d at 831 ["Here, the Court can find no principled basis to distinguish between *Discover Bank*, which was expressly overruled in *Concepcion*, and *Gentry*"]; *Jasso v. Money Mart Express, Inc.*, *supra*, 879 F. Supp. 2d at 1049 ["In light of *Concepcion*, the California Supreme Court's decision in *Gentry* no longer provides a means to avoid enforcement of an arbitration agreement containing a class action

waiver in an employment agreement."]; *Quevedo v. Macy's, Inc.*, (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 83046, *49 [observing that *Gentry*'s "reasoning is no longer tenable in light of the Supreme Court's decision in [*Concepcion*] . . . . Because class arbitration was inconsistent with the FAA, states could not compel it."]; *Sanders v. Swift Transportation Co. of Arizona, LLC* (N.D. Cal. 2012) 843 F.Supp.2d 1033, 1037; *Morse v. ServiceMaster Global Holdings, Inc.* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 82029, *8, fn. 1 ["*Concepcion* rejected the reasoning and precedent behind *Gentry*, which had applied the *Discover Bank* rule to certain employment cases, even if it did not explicitly overrule *Gentry*"]; *Lewis v. UBS Fin. Servs.* (N.D. Cal. 2011) 818 F. Supp. 2d 1161, 1167 ["Like *Discover Bank*, *Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, *Concepcion* effectively overrules *Gentry*."]; *Murphy v. DirecTV, Inc.* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 87625, *11; *Valle v. Lowe's HIW, Inc.* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 93639.)

Accordingly, *Gentry* is undoubtedly no longer good law after *Concepcion* and this Court should affirm the Court of Appeal's holding of the same.

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2. *Concepcion*'s Failure to Explicitly Overrule *Gentry* Does Not Save *Gentry*.

The fact that *Concepcion* did not explicitly overrule *Gentry* does not change the conclusion that *Gentry* is no longer good law after *Concepcion*. This Court has long recognized the concept of one authority *impliedly* overruling another. (See e.g. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal. 4th 643, 673 n.15; *People v. Riel* (2000) 22 Cal. 4th 1153, 1205; *Cummiskey v. Superior Court* (1992) 3 Cal. 4th 1018, 1028.) Where the reasoning or theory of prior authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, courts should consider themselves bound by the later and controlling authority, and should reject the prior opinion as having been effectively overruled. (*Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, 893 [en banc].) As explained above, *Gentry* is clearly incompatible with the reasoning and holding of *Concepcion.* Accordingly, even though *Concepcion* did not expressly declare *Gentry* invalid, *Concepcion* nonetheless overruled *Gentry* by implication. That is because *Gentry* simply cannot be reconciled with *Concepcion*, and therefore *Gentry* must fall.

3. The United States Supreme Court Continues to Reproach Attempts to Undermine FAA Governed Arbitration Agreements.

The U.S. Supreme Court reproaches state supreme courts that rely on state public policies as justification for refusal to enforce FAA-

governed arbitration agreements, including most recently in two cases decided since *Concepcion*: *Marmet* and *Nitro-Lift*.

In *Marmet*, just like in *Gentry*, the West Virginia Supreme Court found compelling state public policy justifications for not enforcing a FAA-governed arbitration agreement. *Marmet* involved three cases brought against nursing homes in state court, each brought by family members of patients who had died. (*Marmet*, *supra*, 132 S. Ct. at pp. 1202-03.) The West Virginia Supreme Court held:

> "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence."

(*Id.* at 1203 [citing *Brown v. Genesis Healthcare Corp.* (W. Va. 2011) 724 S.E.2d 250].)

Just like the Court in *Gentry* relied on the "public importance of overtime legislation" in coming to its decision (*Gentry*, *supra*, 42 Cal.4th at p. 456), the West Virginia Supreme Court relied on the "importance and practical necessity to the public of nursing homes." (*Brown v. Genesis Healthcare Corp, supra*, 724 S.E.2d at 292.) Just like *Gentry* relied on a perceived need to "protect[ ] employees in a relatively weak bargaining position against the 'evil of overwork'" (*Gentry*, *supra*, 42 Cal.4th at p. 456), the West Virginia Supreme Court explained, at great length, the

reasons and equities for protecting nursing home patients who are also in a weaker bargaining position. (*Brown v. Genesis Healthcare Corp, supra*, 724 S.E.2d at 268-70.) And, just like *Gentry* finds that a court must decide the "more effective practical means of vindicating the rights of the affected employees" (*Gentry, supra*, 42 Cal.4th at p. 463), regardless of the agreed-upon terms set forth within a FAA-governed agreement, the West Virginia Supreme Court did just that; it found that "violations of the dignity and well-being of nursing home residents" must be brought in a court, notwithstanding the existence of a FAA-governed arbitration agreement. (*Brown v. Genesis Healthcare Corp, supra*, 724 S.E.2d at 292.)

Ultimately, the West Virginia Supreme Court found that its stated public policy was not preempted by the FAA, "particularly where the agreement involves a service that is a practical necessity for members of the public." (*Marmet, supra*, 132 S. Ct. at 1203.) The U.S. Supreme Court had little trouble rejecting this reasoning: the "West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." (*Id.*)

Relying on *Concepcion*, the Supreme Court reiterated that state rules which conflict with the FAA are displaced, and that West Virginia's public policy, as applied to justify the refusal to enforce the parties' arbitration agreement, was contrary to the FAA. (*Marmet, supra*, 132 S. Ct. at pp. 1203-04 [citing *Concepcion, supra,* 131 S.Ct. at p. 1747].)

The Supreme Court went so far as to say that the FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution," and it held that states are not at liberty to interfere with this policy, even in furtherance of their own legitimate public policies. (*Marmet*, *supra*, 132 S. Ct. at pp. 1202-03.)

Likewise, in *Nitro-Lift,* the Oklahoma Supreme Court refused to yield to Supreme Court precedent interpreting the FAA. (*Nitro-Lift*, *supra*, 133 S.Ct. at pp. 503-04.) The Oklahoma Supreme Court disregarded Supreme Court precedent based on its "own jurisprudence" and improperly assumed the arbitrator's role by declaring the agreements at issue in that case "void and unenforceable as against Oklahoma's public policy..." (*Id.*; *Howard v. Nitro-Lift Techs., L.L.C.* (Okla. 2011) 273 P.3d 20, 23.) In refusing to respect the terms of the FAA-governed arbitration agreement at issue in that case, the Oklahoma Supreme Court relied, in part, on language from one of its prior decisions that the "public right to be free from restraint on trade cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration." (*Howard v. Nitro-Lift Techs., L.L.C.*, *supra*, 273 P.3d at p. 26.) Much like the Court did in *Gentry*, the Oklahoma Supreme Court elevated state public policy over the mandates of the FAA and the prior decisions of the Supreme Court interpreting it. And, once again, relying on the Supremacy Clause of the United States Constitution and *Concepcion* specifically, the Supreme Court

stated, "our cases hold that the FAA forecloses precisely this type of judicial hostility towards arbitration" (*Id.* at p. 503 [citing *Concepcion*]), and it vacated the judgment of the Oklahoma Supreme Court. (*Id.* at p. 504.)

Just like the Supreme Courts of West Virginia and Oklahoma were not at liberty to disregard the precedents of the United States Supreme Court that have interpreted the FAA and the Supremacy Clause, no state court may rely on state policies to disregard *Concepcion* and other Supreme Court precedent that is contrary to *Gentry.* Like the holdings of *Marmet* and *Nitro-Lift*, *Gentry* cannot survive *Concepcion.*

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III.

CONCLUSION

The decision of the Court of Appeal should be upheld.

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LITTLER MENDELSON, P.C.
1255 Treat Blvd.
Suite 600
Walnut Creek, CA 94597

LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500,
Lock Box 116
Dallas, Texas 75201-2931

By: _____
Henry D. Lederman
Robert Friedman, *pro hac vice* pending
Edward Berbarie, *pro hac vice* pending
Alexa L. Woerner
Attorneys for Amici Curiae
THE NATIONAL RETAIL FEDERATION
AND RENT-A-CENTER, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Brief of Amici Curiae The National Retail Federation and Rent-A-Center, Inc. In Support Of Position of CLS Transportation Los Angeles, LLC, et. al. was produced using 13-point, Roman type font and contains 5,264 words.

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ARSHAVIR ISKANIAN
v.
CLS TRANSPORTATION LOS ANGELES, LLC, et al.
After a decision of the Court of Appeal,
Second Appellate District, Division Two, Case No. B235158
(Los Angeles, Superior Court Case No. BC356521,
The Honorable Robert Hess)

Glenn A. Danas
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
[Attorneys for Plaintiff and Appellant]

Scott L. Nelson
Attorney at Law
1600 20th Street, Northwest
Washington, DC 20009
[Attorneys for Plaintiff and Appellant]

Ryan H. Wu
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
[Attorneys for Plaintiff and Appellant]

Raul Perez
Capstone Law
1840 Century Park East, Suite 450
Los Angeles, CA 90067
[Attorneys for Plaintiff and Appellant]

Katherine Ward Kehr
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
[Attorneys for Plaintiff and Appellant]

David F. Faustman
Fox Rothschild LLP
1800 Century Park East, Suite 300
Los Angeles, CA 90067
[Attorneys for Defendant and Respondent]

Yesenia Monique Gallegos
Fox Rothschild LLP
1800 Century Park East, Suite 300
Los Angeles, CA 90067
[Attorneys for Defendant and Respondent]

Ruwani Namal Munaweera
Fox Rothschild LLP
1800 Century Park East, Suite 300
Los Angeles, CA 90067
[Attorneys for Defendant and Respondent]

Office of the District Attorney
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, CA 90012-3266

Deputy Attorney General
State of California, Department of Justice
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013

Clerk of the Court
California Court of Appeal
Second District, Division One
300 South Spring Street
Los Angeles, CA 90013
[Court of Appeal Case No. B235158]

Clerk to the
Hon. Robert Hess
Los Angeles County Superior Court
111 North Hill Street, Dept. 24
Los Angeles, CA 90012
[LASC Case No. BC356521]

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Public Citizen Litigation Group
Scott L. Nelson, Esq.
(Pro Hac Vice)
1600 20th Street, NW
Washington, DC 20009
[Attorneys for Defendant and Respondent CLS Transportation Los Angeles, LLC]