CASE NO. S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an Individual,
Appellant,

VS.

CLS TRANSPORTATION LOS ANGELES, LLC, ET AL.,
Respondents.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO,
CASE NO. B235158
FROM THE SUPERIOR COURT, COUNTY OF LOS ANGELES,
ASSIGNED FOR ALL PURPOSES TO JUDGE ROBERT HESS, DEPARTMENT 24
CASE NO. BC356521

APPLICATION OF TIMOTHY SANDQUIST, INDIVIDUALLY AND ON BEHALF OF A PROPOSED CLASS OF SIMILARLY-SITUATED EMPLOYEES, AND AARP, EQUAL RIGHTS ADVOCATES AND THE IMPACT FUND FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF APPELLANT ARSHAVIR ISKANIAN

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TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant California Rule of Court 8.520(f), Timothy Sandquist, individually and on behalf of a proposed class of similarly-situated employees, and non-profit and public interest organizations AARP, the Impact Fund, and Equal Rights Advocates (collectively "Amici") respectfully request leave to file an amicus brief in support of Petitioner Arshavir Iskanian on the issue whether the California Supreme Court's landmark decision in *Gentry v. Superior Court* (2007) 42 Cal. 4th 443 was impliedly overruled by *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740.

As demonstrated below, Amici can: (1) provide focused assistance to this Court in evaluating the limits of *Concepcion;* and (2) explain the adverse consequences that will necessarily follow the effective abrogation of California's fundamental employment statutes, such as the Fair Employment and Housing Act ("FEHA") and the Labor Code, if *Gentry* is deemed overruled.

In accordance with California Rule of Court 8.250(f)(4), no party or counsel for any party, other than counsel for Amici, have authored the proposed brief in whole or in part or funded the preparation of the brief.

STATEMENT OF APPLICANTS' INTEREST

Amici are comprised of a proposed class of lower-wage workers who will be directly affected by this Court's ruling, as well as several public interest advocacy organizations dedicated to advancing and protecting the rights of traditionally disenfranchised groups. The issues presented in this appeal have a direct impact on the employees for whom Amici provide services and the ability of these workers to obtain legal redress for unlawful employment discrimination.

A brief description of the work and mission of Amici, explaining their interest in the case, is as follows:

***Amicus* Timothy Sandquist** is the named plaintiff in a proposed FEHA class action against Lebo Automotive, Inc., d/b/a/ John Elway's Manhattan Beach Toyota, and its principals (collectively, the "dealership"). *See* BC476523 (Sup. Ct. Los Angeles), B244412 (Ct. of Appeal, Second Appellate Dist., Div. Seven). Mr. Sandquist alleges that racial discrimination was rampant at the dealership – with employees of color frequently referred to as "dumb Mexicans," "goddamn Mexicans," "apes," "Aunt Jemimas," "camel people," and slant eyes." Mr. Sandquist was subjected to a racially hostile work environment, unequal pay, discriminatory denial of promotion, and constructive discharge. Mr. Sandquist alleges that the dealership's other employees of color were similarly affected.

In addition to monetary damages, Mr. Sandquist seeks systematic equitable and injunctive relief on behalf of the class, such as: (a) a declaratory judgment that the dealership's employment practices are unlawful; (b) a preliminary and permanent injunction to prevent these practices from continuing; (c) an order requiring the dealership to initiate and implement specific programs designed to remedy its various discriminatory practices; (d) the establishment of a task force on equality and fairness and other ongoing

monitoring; (e) an order restoring Mr. Sandquist and the class members to their rightful positions at the dealership; and (f) an order removing the dealership's prime racial offender, Defendant Darrell Sperber, from his position as General Manager.

On October 5, 2012, the trial court granted the Sandquist defendants' petition to compel Mr. Sandquist to arbitrate his claims on an individual basis and dismissed the class claims with prejudice. In two simple steps, the trial court dismantled FEHA's remedial scheme as applied to Mr. Sandquist and the class of dealership employees of color. First, contrary to the holdings of other courts, the trial court held that the waiver of a class discrimination claim could be implicit. Second, the court deemed the implicit class waiver enforceable even though Sandquist presented evidence, under the four-factor *Gentry* test, that such waiver would exculpate the dealership for its pervasive violations of the FEHA. Relying on the intermediate appellate court's decision in *Iskanian*, the trial court deemed *Gentry* overruled and refused to consider Sandquist's compelling and unrebutted *Gentry* evidence. As shown by Sandquist's *Gentry* evidence, Sandquist and the class members he seeks to represent will be unable to vindicate their FEHA statutory rights through individual arbitrations. Further, they will be unable to obtain the sweeping equitable and injunctive relief envisioned by the statute. Therefore, Sandquist and the members of the proposed class have a strong interest in this matter.

***Amicus* AARP** is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In a variety of ways, including legal advocacy as an amicus curiae, AARP supports the rights of all Americans, and in particular older workers, to workplaces free of discrimination. To this end, AARP has been vigilant

in advocating for vigorous and full enforcement of state and federal civil rights laws, including the FEHA. The Court of Appeals' decision seriously impairs the ability of older workers to vindicate class wide claims of age discrimination.

***Amicus* Equal Rights Advocates ("ERA")** is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in direct services as well as other advocacy. Since its inception, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women, particularly lower income and immigrant workers. ERA has litigated important gender discrimination cases, including collective and class actions, in state and federal courts, from the trial level up to the United States Supreme Court. ERA also advises over a thousand callers each year on their employment-and education-related civil rights through its free Advice and Counseling Service.

***Amicus* Impact Fund**, is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund is a California State Bar Legal Services Trust Fund Support Center that assists legal services projects throughout the State of California. The organization has served as counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

CONCLUSION

For all of the foregoing reasons, Amici respectfully request that the Court grant Amici's application and accept the enclosed brief for filing and consideration.

INTRODUCTION

This brief addresses the implications of this Court's forthcoming ruling concerning the viability of *Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443 with respect to the unwaivable rights afforded to California residents under the Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code § 12940, *et seq*. For decades, this State has recognized the overriding importance of class-wide systemic relief as a vital tool in the fight against employment discrimination. If *Gentry* is deemed overturned, class waivers within arbitration agreements could be found enforceable even where they undisputably prevent the vindication of important statutory rights. The impact of such a holding could extend well beyond the California Labor Code at issue in Petitioner Arshavir Iskanian's appeal.

Amici also address herewith the vindication of statutory rights doctrine in federal and California state courts and the doctrine's interplay with arbitration issues. Contrary to the Respondent's contention, the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740 did not overturn this Court's decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443. Unlike the categorical consumer-oriented *Discover Bank* rule at issue in *Concepcion*, *Gentry* involves a narrowly-tailored fact-intensive analysis that carefully balances California's pro-arbitration policy against the State's overarching interest in the enforcement of its labor and

employment laws. *Gentry* involves the vindication of non-waivable statutory rights, such as those afforded under the California Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code § 12940 *et seq.* and the California Labor Code. *Gentry* requires the plaintiff to prove, via evidence, that enforcement of a class waiver would effectively prevent the vindication of employment rights. As such, the holding in *Gentry* does not contravene *Concepcion* or the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*

Problematically, Respondents in the instant appeal essentially argues that *Concepcion* held that class action waivers in arbitration agreements are categorically enforceable under the FAA, which marks the beginning and the end of the discussion. Such a result is not required by the FAA or *Concepcion* and cannot be countenanced. This Court should not undertake a radical revision of the law that was not before the U.S. Supreme Court in *Concepcion* and which the *Concepcion* Court had no occasion to consider. In all, pursuant to the vindication of statutory rights doctrine, ever powerful corporate employers are not permitted to exculpate themselves from statutory liability, especially statutory regimes such as the FEHA, which were designed to protect employees and eliminate discrimination.

ARGUMENT

I. CLASS WAIVERS WOULD UNDERMINE FEHA'S STATUTORY ENFORCEMENT CAPACITY

A. Class Procedures are Expressly Permitted in FEHA and are Essential to its Broad Remedial Purposes

The people of California have stated in no uncertain terms that:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.

California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code §§ 12920 *et seq.*

In the statute, the legislature determined that piecemeal, individualized enforcement would be inadequate to accomplish the fundamental societal objective of rooting out employment discrimination in all of its invidious forms. FEHA is expressly designed to allow challenges to systemic discrimination affecting classes of individuals. The statute and the legislative history make clear that class proceedings are an integral part of the FEHA's statutory enforcement mechanism.

FEHA is intended to provide comprehensive and effective remedies to address systematic discriminatory practices. This includes broad-based remedial measures, such as injunctive and equitable relief designed to "prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." *See* Cal. Govt. Code §

12920.5. Such remedies may be implemented both by the DFEH and by a court in a civil action under the statute. *See id.*; Cal. Govt. Code §§ 12920, 12965(c); *Aguilar v. Avis Rent A Car Sys*., Inc. (1999) 21 Cal.4th 121, 131-32; *Dyna-Med, Inc. v. Fair Emp't & Hous. Commn.* (1987) 43 Cal.3d 1379, 1393;[1] *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339.[2]

In accordance with this mandate, multiple provisions of FEHA explicitly authorize class adjudication. Specifically, Cal. Govt. Code § 12961, entitled "Complaint on behalf of class," provides:

> Where an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or where such an unlawful practice raises questions of law or fact which are common to such a group or class, the aggrieved person or the director may file the complaint on behalf and as representative of such a group or class. **Any complaint so filed may be investigated as a group or class complaint, and, if in the judgment of the director circumstances warrant, shall be treated as such for purposes of conciliation, dispute resolution, and civil action**.

(emphasis added). This provision expressly provides for class complaints; if the DFEH director determines that the circumstances warrant, a complaint alleging a class-wide discriminatory practice **shall** proceed on a class basis for all purposes including any subsequent civil action. *See also, e.g., Dyna-Med,* 3 Cal.3d at 1393 (FEHA "authorizes class actions and permits the director of the department to address systemic problems, such

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[1] "The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination." *Dyna-Med, Inc.*, 43 Cal.3d 1379, 1403.

[2] FEHA is to be "construed liberally for the accomplishment of the purposes of [the Act]." Cal. Gov't Code § 12993(a); *Alch*, 122 Cal.App.4th at 463.

as pattern and practice matters . . . [t]he commission, in turn, has broad authority to fashion an appropriate remedy").

Cal. Govt. Code § 12965 echoes the centrality of class procedures. Section 12965(a) addresses civil actions brought by the DFEH and contains special provisions for class actions – such as an extended statute of limitations.[3] Under § 12965(b), if the DFEH declines to pursue a civil action and issues a right to sue, the employee has the right to bring suit – including a class case – on his or her own behalf. There is only a single exception: if a comparable class action is already pending in federal court, the employee may not file a concurrent class action on the same issues – a matter of comity and judicial economy. *See* Cal. Govt. Code § 12965(b); *Alch v. Super. Ct.* (2004) 122 Cal.App.4th 339. Finally, pursuant to Cal. Govt. Code § 12965(c), in either an action filed by the director under § 12965(a) or a private civil action under § 12965(b), a court is empowered to grant comprehensive relief. This includes the class-wide remedial measures specified in Cal. Govt. Code § 12920.5. *See also, Aguilar, supra*, 21 Cal.4th 121.

Thus, in FEHA, the legislature explicitly provided for the availability of class relief as the primary mechanism by which a private dispute serves the larger public goal of eliminating societal discrimination.[4]

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[3] Notably: "In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his her own counsel." Cal. Govt. Code § 12965. In a class action, the aggrieved persons would be not only the individual complainant but also any similarly-situated employees affected by the alleged unlawful practice.

[4] The importance of private class actions in safeguarding FEHA rights is unquestioned. *See, e.g., Sav-On Drug Stores v. Super. Ct.* (2004) 34 Cal.4th 319, 340 ("the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation"); Kaley & Dobbin, *Enforcement of Civil Rights Law*

Alch v. Super. Ct, supra, concerned appeals in 23 class action lawsuits alleging a pattern and practice of age discrimination. In *Alch*, the court conducted a close examination of FEHA's legislative history to determine whether § 12965(b) barred successive class actions in private litigant suits. *Alch*, 122 Cal.App.4th 339. The court noted that the class action provisions of FEHA were included in a 1977 bill designed to address the fact that the administrative mechanism was "totally inadequate" for the timely processing of the vast numbers of discrimination complaints that were being filed. *Id.* at 365, fn.12(1). After several iterations – specifically authorizing class actions – the final bill specified that "should the Division fail to resolve a complaint within a specified time, the complainant would have the right of private civil action. **The bill also permits the filing of class action complaints for the purpose of eliminating industry-wide discriminatory practices**." *Id*. at 365, fn. 12(7) (emphasis added).

Alch concluded that a bar on class procedures in private actions would cause meritorious claims to go unheard and would undermine the fundamental statutory purpose of "eliminating invidious discrimination in employment and providing effective remedies to eliminate discriminatory practices." *Id.* at 366. The court rejected the employers' argument that a class prohibition would not affect individual FEHA claims: "the importance of the class action as a device to remedy systemic discrimination seems obvious, and we are not persuaded that 'sound policy' supports a restriction

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in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time (2006) 31 LAW & SOC. INQUIRY 855, 890 (impact of individual litigation is less sustained and less likely to introduce systematic changes than broader-based approaches); Hegewishch, Deitch & Murphy (2011) *Ending Race and Sex Discrimination in the Workplace: Legal Interventions that Push the Envelope* p.6 (private class action settlements significantly more likely than government enforcement actions to result in comprehensive and effective injunctive relief designed to remedy workplace discrimination).

on its use unless the legislative intent in that regard is clear." *Id*. at 366, fn.15.

As set forth in *Alch*, the legislative history of the FEHA recognizes that the DFEH is overwhelmed and cannot prosecute all valid claims – including class claims against systemic discriminatory practices. *Id.* By providing complainants the right to file civil suits if the DFEH declines to do so, the legislature also vested private litigants with the same right as the DFEH to file class-based proceedings. If the DFEH declines to pursue the action, the aggrieved individual has the right to step in, including by filing a class case where the charge was filed on a class basis. Otherwise, the compelling mandate of providing effective remedies against pervasive discrimination would go unfulfilled.

In many FEHA cases, a class waiver – if deemed valid and enforceable – would mean not only that plaintiffs such Sandquist will be unable to vindicate their own FEHA rights, but also that they cannot fulfill the role entrusted to them under the statute: private attorney generals who have stepped forward to help vindicate the rights of fellow employees and eliminate systemic discriminatory practices. In such cases, a class waiver would cut the heart and soul out of the FEHA.

B. FEHA Calls For Systematic Class-Wide Relief that is Not Ordinarily Available in Individual Proceedings, Including Individual Arbitrations

As set forth above, FEHA expressly provides for broad-based equitable and injunctive relief to root out persistent discriminatory practices. To effectuate such remedies, FEHA expressly authorizes class action suits.

Individual arbitration would often serve to impermissibly restrict the remedies provided by FEHA and contravene its basic purpose. The

California Arbitration Act ("CAA"), authorizes "provisional remedies" – including temporary restraining orders and preliminary injunctions – upon application to a court (Cal. Code Civ. P. § 1281.8), but makes no provision for permanent injunctions or "broad equitable relief." *Compton v. Super. Ct.* (2013) 214 Cal.App.4th 873, 897-98. *See also, e.g., Marsch v. Williams* (1994) 23 Cal.App.4th 238, 245; *Luster v. Collins* (1993) 15 Cal.App.4th 1338; *Schwartz v. Leibel* (1967) 249 Cal.App.2d 761.[5]

For example, in the *Sandquist* case, Sandquist seeks comprehensive dealership-wide reforms which are likely beyond the power of an arbitrator, particularly in an individual matter. The *Sandquist* trial court's enforcement of an implicit class waiver and dismissal of the class claims – in reliance on the *Iskanian* appellate decision deeming *Gentry* overruled– impermissibly restricts Sandquist's and the class members' FEHA remedies and prevents the vindication of their unwaivable statutory rights.

II. *GENTRY* IS A WELL-SUPPORTED APPLICATION OF THE ESTABLISHED VINDICATION OF STATUTORY RIGHTS ANALYSIS

A. The Federal Arbitration Act

The legislative history of the FAA is consistent with the universal understanding that arbitration cannot displace substantive rights or due process of law. The Act establishes a policy in favor of honoring the parties' contractual choice of dispute-resolution forum by placing agreements to arbitrate on the "same footing as other contracts." *See, e.g., Doctor's Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 687-88 (FAA preempts state law that "places arbitration agreements in a class apart from

[5] In *Broughton v. Cigna Health Plans* (1999) 21 Cal.4th 1066, 1079-80, this Court held that it was "beyond the arbitrator's power to grant" a sweeping future injunction on behalf of the general public.

'any contract,' and singularly limits their validity"); *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 270-71, 281 (state may not "place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent").

Importantly, **only an equal footing** is called for; under the FAA, arbitration clauses are made "as enforceable as other contracts **but not more so**." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, fn.12 (emphasis added); *accord*, *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 (quoting *Prima Paint*); *Volt Info. Scis. v. Bd. of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 478 (same). To insulate an arbitration clause from challenges that would invalidate other types of agreements would improperly privilege arbitration over other contracts, in direct contravention of the FAA. *Prima Paint*, 388 U.S. at 404, fn.12.

B. The Federal Precursors to *Gentry*

The "vindication of statutory rights" rubric is essentially derived from the following basic premises: (1) that resort to the arbitral forum does not cause the forfeiture of substantive rights; and (2) that arbitration agreements are not elevated over other contracts – i.e., if a provision would be invalid as unlawfully exculpatory in any other contract, it is not insulated merely because it is contained in an arbitration clause. Moreover, the FAA was not intended to gut other laws wholesale, including a variety of fundamental remedial statutes that had not yet been enacted in 1925 (such as the key legislation of the New Deal and the civil rights era). Put otherwise, a party cannot effectively contract around statutory liability simply by imposing an arbitration clause containing provisions that would otherwise be deemed void or unenforceable.

In its present form, the vindication doctrine originated with the U.S. Supreme Court's decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614. There, the Court sought to assuage concerns regarding arbitration agreements that covered statutory claims: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628. "[S]o 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. However, if provisions of an arbitration clause would effectively operate "as a prospective waiver of a party's right to pursue statutory remedies . . . [the Court] would have little hesitation in condemning the agreement as against public policy." *Id.* The Court reiterated these principles in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 28, an employment discrimination case under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*[6]

In *Green Tree Fin. Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, the Court put teeth in the vindication of statutory rights doctrine. The Court acknowledged "that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory

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[6] *See also, e.g., Vimar Seguros y Reasefuros SA v. M/V Sky Reefer* (1995) 515 U.S. 528, 540 (Kennedy, J.) (if an arbitration provision were to operate "as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy"); *Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 265-66, 273-74 (holding open the possibility that an arbitration agreement could be invalidated if it "prevent[s] respondents from 'effectively vindicating' their 'statutory rights in the arbitral forum,'" but explaining that, because the issue had not been raised below, the Court would not "invalidate arbitration agreements on the basis of speculation"); *Waffle House,* 534 U.S. at 295, fn. 10 (statutory claims may be arbitrated as long as a party can vindicate her substantive rights).

rights in the arbitral forum." *Id*. at 90.[7] Hence, courts have recognized that class action waivers can prevent the vindication of statutory rights where the value of an individual claim would be dwarfed by litigation costs. *See, e.g., Kristian v. Comcast Corp*. (1st Cir. 2006) 446 F.3d 25, 29, 53-55, 58-61; *In re Am. Express Merchs. Litig*. (2d Cir. 2012) 667 F.3d 204, cert. granted, Nov. 9, 2012, 133 S. Ct. 594; *Sutherland v. Ernst & Young, LLP* (S.D.N.Y. 2011) 768 F. Supp. 2d 547, *recons. denied.* (S.D.N.Y. 2012) 847 F. Supp. 2d 528. Courts have widely cited the apt maxim of Judge Posner, discussing class certification concerns: "The **realistic** alternative to a class action is not 17 million individual suits, but zero individual suits, as only a **lunatic** or a **fanatic** sues for $30." *Carnegie v. Household Int'l, Inc*. (7th Cir. 2004) 376 F.3d 656, 661 (emphasis added).[8]

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[7] Both federal and state courts have consistently applied this effective vindication principle to cases in which a party would have to advance costs proven to exceed the actual amount the party stood to recover. *See, e.g., Mendez v. Palm Harbor Homes, Inc*. (Wash. Ct. App. 2002) 45 P.3d 594, 605; *Phillips v. Assocs. Home Equity Servs*. (N.D. Ill. 2001) 179 F. Supp. 2d 840, 846-47; *Jones v. Fujitsu Network Commc'ns, Inc*. (N.D. Tex. 1999) 81 F. Supp. 2d 688, 693; *Brower v. Gateway 2000, Inc*. (N.Y. App. Div. 1998) 676 N.Y.S.2d 569, 571, 574.

[8] Numerous federal courts, including the Supreme Court, have recognized that the vindication doctrine applies to state statutory rights. *See Preston v. Ferrer* (2008) 552 U.S. 346, 359 ("[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . . So here, *Ferrer* relinquishes no substantive rights the [California Talent Agencies Act] or other California law may accord him"); *Circuit City v. Adams* (2001) 532 U.S. 105, 123 (FEHA case: "as we noted in *Gilmer*, '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"); *Kristian*, 446 F.3d at 29 (holding that "the provisions of the arbitration agreements barring the recovery of attorney's fees and costs and barring class arbitration are invalid because they prevent the vindication of statutory rights under state and federal law"); *Booker v. Robert Half Int'l., Inc.* (D.C. Cir. 2005) 413 F.3d 77, 79 (in racial discrimination case, holding that arbitration

Contrary to Respondents' argument, the *Mitsubishi/Green Tree* line of cases make it abundantly clear that it is not only the direct waiver of substantive statutory rights that is fundamentally offensive. By focusing on how arbitration clauses "operate" in practice, the U.S. Supreme Court has not articulated a formalistic test under which such clauses that realistically preclude claimants from bringing their claims are enforceable as long as they sound fine on paper. Instead, arbitration must be structured in a manner that enables the parties to "effectively" vindicate their statutory rights – not as an abstraction, but so that nothing of substance is lost in the translation between the judicial and arbitral forums. For arbitration to have legitimacy, it must ensure that "the statute will continue to serve both its remedial and deterrent function" and that "the legitimate interest in the enforcement of the [] laws has been addressed." *Mitsubishi*, 473 U.S. at 637-38.

C. This Court's Decisions in *Armendariz* and *Gentry*

Following the U.S. Supreme Court's lead, this Court incorporated the vindication of statutory rights rationale into state law in *Armendariz v. Foundation Psychcare Servs.* (2000) 24 Cal.4th 83. The *Armendariz* Court began with *Mitsubishi's* general premise that arbitration clauses cannot curtail substantive statutory rights. *Id.* at 99. Because "a law established for a public reason cannot be contravened by a private agreement" (Cal. Civ. Code § 3513), the *Armendariz* Court further concluded that "arbitration agreements that encompass unwaivable statutory rights must be subject to particular scrutiny." *Id*. at 100. Next, the Court found that "[t]here is no question that the statutory rights established by the FEHA are

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agreement may not require a party to "forgo substantive rights" under the District of Columbia Human Rights Act).

'for a public reason'" and serve a fundamental public interest; thus, they may not be waived in private agreements. *Id*. at 100-01. The *Armendariz* Court went on to establish several minimum requirements for the arbitration of FEHA cases. To enable the effective vindication of FEHA rights, an arbitration agreement must: (1) provide for a neutral arbitrator; (2) provide for more than minimal discovery; (3) require a written award; (4) provide for all of the types of relief available in court; and (5) not require employees to pay either unreasonable costs or any arbitrator's fees as a condition of access to the arbitral forum. *Id*. at 102-07.[9]

Gentry v. Super. Ct. (2007) 42 Cal.4th 443, applied the established vindication of statutory rights doctrine to class action waivers. In the context of an overtime case under Labor Code § 1194, the Court held that, in **some** circumstances, "the prohibition of class-wide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Id*. at 450. In reaching this conclusion, the Court invoked *Armendariz* and found that Cal. Lab. Code § 1194 had a similar public purpose to the FEHA, and, thus, that its protections were unwaivable. *Id*. at 456-57. Relying on Cal. Civ. Code § 1688, which prohibits all exculpatory contracts (*id*. at 453-54), *Gentry* held that a prohibition on class proceedings could potentially lead to a *de facto* waiver of unwaivable statutory rights and result in statutory immunity for the employer.

The Court in *Gentry* adopted a fact-intensive four-part test: (1) the potential individual recovery and whether the prospect of such relief would be an "ample incentive" to pursue individual claims in light of the costs of litigation; (2) the potential for retaliation against members of the class,

[9] The *Armendariz* Court derived these factors from *Cole v. Burns Int'l. Sec. Servs*. (D.C. Cir. 1997) 105 F.3d 1465, which is a vindication of statutory rights case applying *Gilmer*. *See id.* at 101-02.

including the risk of retaliation inherent in individual suits against ones employer; (3) the fact that some employees may not be aware that their legal rights have been violated; and (4) other real world obstacles to the vindication of the class members' unwaivable statutory rights. *Id*. at 457-63. If a court:

> [C]oncludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can vindicate [their] unwaivable rights in an arbitration forum.

Id. at 463. This test focuses not only on the plaintiff but also the absent class members, and is similar to the inquiry a court undertakes when determining class certification. *Id*. at 463-64.

Under the *Armendariz/Gentry* tandem, an arbitration provision that requires employees to waive unwaivable statutory rights or remedies is unlawful and unenforceable. *See*, *e.g.*, *Armendariz*, 24 Cal.4th at 100; *Ajamian v. CantorCO2e, L.P*. (2012) 203 Cal. App. 4th 771, 799; *Walnut Producers of Cal. v. Diamond Foods, Inc*. (2010) 187 Cal.App.4th 634, 651 ("established[ed] that a class action waiver in an employment arbitration agreement is unenforceable if it prevents a person from vindicating unwaivable statutory rights").

III. *GENTRY* IS APPLICABLE TO FEHA CASES AND ITS INVALIDATION WOULD ERODE THE SUBSTANTIVE STATUTORY RIGHTS OF FEHA LITIGANTS

A. *Gentry* Extends to FEHA and Other Unwaivable Statutory Protections

Although *Gentry* arose in a Cal. Lab. Code § 1194 overtime case and discussed its four factors in that context, there is nothing about *Gentry* that is inherently limited to overtime actions. *Gentry* is derived from general principles regarding exculpatory contracts and the vindication of unwaivable statutory rights, of which overtime rights under § 1194 are only one category. Essentially, *Gentry* acknowledges that a class action waiver can lead to *de facto* statutory immunity – a principle widely recognized by other courts. *Gentry's* four-factor test is a distillation of that rule, which provides lower courts guidance to determine when a class waiver would in fact impermissibly interfere with the vindication of unwaivable statutory rights and amount to an unlawful exculpatory clause.

Each of *Gentry's* four factors is easily transferrable to the FEHA employment discrimination context and to other unwaivable statutory protections.

First, although the *Gentry* court noted that overtime cases often involve modest damages, so too do other statutory actions. For example, in Sandquist's counsel's *Novartis* gender discrimination class trial in the Southern District of New York, the evidence demonstrated statistically-significant class-wide pay disparities of approximately $74 per class member per month. *Velez v. Novartis Pharm. Corp.* (S.D.N.Y. 2007, No. 04 Civ. 9194) Dkt. No. 90, Exh. 38 at p. 10. Such discriminatory treatment would not result in any more than modest individual damages for most class members but, in the aggregate, line the defendant-employer's coffers by **millions of dollars**. More broadly, *Gentry* requires a fact-specific

application of its factors, not mere generalities regarding the typical range of damages under a statute.

Second, *Gentry's* focus upon the potential for retaliation in employment cases is equally applicable to FEHA suits. DFEH statistics demonstrate that retaliation claims are one of the most common varieties of employment claims under the FEHA. From 2001 to 2010, there were approximately 52,000 retaliation claims filed. *See* http://www.dfeh.ca.gov/Statistics.htm, Cases Filed From Calendar Year 2001 to 2010 by Bases – Employment Law.

Third, while wage and hour rights may often be technical, class members may be unaware of their rights in other areas including employment discrimination. This is especially true in class cases involving systemic patterns and practices that individual class members might not know about. Further, the Lily Ledbetter Fair Pay Act of 2009 was specifically passed because employees can be unaware of pay disparities for many years. *See, e.g.*, Pub. L. 111-2, S. 181.

Fourth, "other real world obstacles" is a catch-all category. *Gentry's* example of class members with language barriers is equally apt in the employment discrimination context and other areas of the law.

California courts have not limited *Gentry's* application to overtime cases. As recently explained in *Compton*, 214 Cal. App. 4th at 881, fn. 3 (emphasis added):

> *Gentry* held that where employment contracts were concerned, provisions in arbitration agreements barring class claims might be unconscionable in cases involving unwaivable statutory rights **such as** those in the Labor Code concerning overtime pay. It established a four-factor test that employees had to meet in order to show that a class

> proceeding was necessary to secure the nonwaivable statutory rights of potential class members.

See also, e.g., Walnut Producers, 187 Cal.App.4th at 651;[10] *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 454, fn.4. Courts have regularly extended the *Gentry* test to wage and hour claims other than § 1194 overtime claims. *See, e.g., Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, rev. granted Feb. 13, 2013, S207760 (applying *Gentry* test, "the trial court erred in upholding class arbitration waiver with respect to the meal and rest period claims"); *Sanchez v. W. Pizza Enters., Inc.* (2009) 172 Cal.App.4th 154, 170-71 (claim for reimbursement of job-related expenses under Cal. Labor Code § 2802); *Anderson v. Apple Am. Group LLC* (Super. Ct. Sacramento Cty. Aug. 16, 2011, No. 34-2010-93705-CU-OE-GDS) (same).[11]

Further, in *Arguelles-Romero v. Super. Ct.* (2010) 184 Cal.App.4th 825, a consumer protection action, the court recognized that *Gentry* originated in the wage and hour context. Nevertheless, although the court held that plaintiffs had failed to make the required showing under the *Discover Bank* unconscionability rule (now overruled by *Concepcion*), it proceeded to remand the case to the trial court to apply the *Gentry* test. *See id.* at 845-46. (This was based on the court's recognition, pre-*Concepcion*, that the *Discover Bank* and *Gentry* doctrines had distinct and important differences and should not be conflated. *See id.* at 841-43.)

Likewise, courts have extended *Armendariz* well beyond its

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[10] In *Walnut Producers*, the court indicated that *Gentry* was generally applicable to class action waivers implicating unwaivable statutory rights. There, the court determined that *Gentry* did not apply to the dispute before it because the particular right in question (a provision of the Food and Agricultural Code) was not a public right. *Id.* at 651-52.

[11] *See also, e.g., Jackson v. S.A.W. Entm't, Ltd.* (N.D. Cal. 2009) 629 F. Supp. 2d 1018 (action for unpaid wages, including minimum wage claim).

immediate FEHA context. *See, e.g., D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 864; Mercuro v. Super. Ct. (2002) 96 Cal. App. 4th 167, 180 & fn.26. *Gentry* should be treated similarly. There is no principled way to limit *Gentry* to wage and hour actions. Overturning *Gentry* would have vast reverberating effects on large sections of the California Code, including the State's most fundamental statutes.

IV. SANDQUIST TYPIFIES THE IMPOSSIBLE HURDLES VICTIMS OF DISCRIMINATION WILL HAVE IF *GENTRY* IS OVERTURNED AND FEHA RIGHTS ARE OBLITERATED

In *Sandquist*, the trial court relied on the intermediate appellate decision in *Iskanian* to deem *Gentry* overturned. Therefore, the court refused to consider Sandquist's extensive evidence on the four *Gentry* factors. This evidence included nine declarations – from Sandquist, class members, employment attorneys and an expert statitician – demonstrating that: (1) class members' individual damages are low; (2) fear of retaliation is widespread; (3) class members are ill-informed of their rights; and (4) there are other significant obstacles that would prevent class members from vindicating their rights in individual arbitration. Defendants did not refute any of this evidence. Collectively, Sandquist's unrebutted evidence powerfully demonstrates that, without the availability of class proceedings, the class members would be unable to vindicate their FEHA rights and would be left without a meaningful remedy. If *Gentry* is overturned, the FEHA's guarantees against employment discrimination would stop at the dealership gates.

A. The Sandquist Class Members' Individual Damages Are Low

First, Sandquist submitted evidence that the class members' individual damages are low. Former payroll clerk Patti Gonza attested that the majority of class members earned minimum wage to $25 per hour. Damages calculations in employment discrimination matters are primarily based on the employee's wages. In *Sandquist*, the potential economic damages are modest. As discussed below, the costs of proceeding individually would dwarf the likely recovery, making individual arbitrations a fool's errand and rendering the FEHA a dead letter with respect to Sandquist and the class members – the dealership's employees of color.

B. The Class Members Have a Well-Founded and Well-Documented Fear of Retaliation

Second, fear of retaliation is likely to deter employees from bringing individual cases. As the *Gentry* Court recognized, fear of retaliation often prevents employees from initiating individual lawsuits. 42 Cal.4th at 459 ("We have recognized that retaining one's employment while bringing formal legal action against one's employer is not a viable option for many employees") (citations omitted).

This fear is far from hypothetical. Sandquist's declarations and other evidence show that many of the dealership's employees have faced actual retaliation after complaining about the hostile work environment or otherwise challenging the dealership's policies and practices. The very real potential for retaliation is compounded by the dealership's flawed reporting system. Employees are directed to raise complaints of discrimination and other workplace issues by calling a supposedly anonymous hotline. However, the hotline calls are routed directly to Defendant Sperber – the dealership's

prime racial offender. Employees who have used the hotline to complain about discrimination have faced swift retaliation. For example, Sandra Rubalcaba, a Latina employee, was terminated shortly after making a hotline complaint. Likewise, after Iranian employee Carolyn Kay made a hotline complaint, the dealership admonished and denied her a promotion. This omnipresent risk of retaliation is likely to deter class employees from sticking their necks out by pursuing individual claims against the dealership.

C. The Class Members Are Unaware of Their Rights

Third, Sandquist provided sufficient evidence that class members are unaware of their rights. He attested that, during his employment, he was uninformed about his legal rights and the legal process. He did not even know what trial by jury meant. By extension, there is a reasonable basis to conclude that other class members, who like Sandquist have been forced into adhesive arbitration agreements, are also unaware of their rights. Further, Sandquist has pled class-based claims for racial disparities in pay and promotion among other allegations. It is unlikely that class members have access to dealership-wide employment data demonstrating the existence of such pervasive discrepancies.

D. Other Significant Obstacles Would Prevent the Class Members From Vindicating Their Rights in Individual Arbitration

Fourth, Sandquist identified significant obstacles that would preclude the class from vindicating their rights through individual arbitration. Because the time and cost of litigating individual discrimination actions dwarfs any expected damages or relief, it would be

difficult for many class members to find attorneys who would be willing to represent them individually. Pursuing these cases individually would be prohibitively expensive due to discovery and other costs. For example, plaintiffs in discrimination cases typically need to support their claims with an expert analysis, regardless of whether it is an individual or class action. A labor economist estimated these expert discovery costs at $50,000-150,000 in this case. Additionally, labor and employment lawyers submitted declarations stating in no uncertain terms that they would be unable to represent the *Sandquist* class members in individual proceedings.

Further, as discussed above, an arbitrator in an individual case would likely be unable to award the sweeping class-wide declaratory and injunctive relief envisioned by the FEHA and sought by Sandquist and the class.

In short, Sandquist's *Gentry* evidence amply demonstrates that he and other members of the class would be unable to vindicate their statutory rights in individual arbitration. A class waiver if deemed enforceable would be the death knell of their FEHA rights.

V. *GENTRY* WAS NOT OVERRULED BY *CONCEPCION* AND REMAINS GOOD LAW

A. The Favorable Consumer Protections Present in *Concepcion* Distinguish it From This Case

In *Concepcion*, the trial court found that the arbitration provisions at issue were highly favorable to consumers and created a regime that would be even more advantageous to them than individual or class litigation or class arbitration. Nevertheless, the trial court felt constrained by

Super. Ct. (2005) 36 Cal. 4th 148 to invalidate the arbitration clause's class waiver as unconscionable. *Concepcion*, 131 S. Ct. at 1745. *See also id*. at 1753. It is likely that AT&T's favorable arbitration provisions at issue in *Concepcion* could have passed muster under the vindication of statutory rights analysis.

Thus, the "question presented" in *Concepcion* was limited to whether the FAA "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**." *Sutherland*, 847 F. Supp. 2d at 536 (emphasis added).

In this light, the *Concepcion* Court deemed the *Discover Bank* rule preempted by the FAA. The *Discover Bank* unconscionability doctrine operated as a blanket decree mandating class treatment of consumer cases, whether or not there were any statutory rights at stake and whether or not the consumer's rights could be effectively vindicated through individual arbitration. *See Concepcion*, 131 S. Ct. at 1750, 1753.

The most troublesome aspect of *Concepcion* is its questioning of the well-established practice of class arbitration. But this section of the *Concepcion* opinion does not necessarily mean that the vindication of statutory rights analysis is off-the-table whenever a class waiver is contained within an arbitration clause. If that were the case, the extensive briefing and argument in *In re Amer. Express Merchants Litig.* would be pointless, as emphasized by Appellant Iskanian. Further, the calculus is very different where a class waiver will demonstrably interfere with and often undo the substantive rights afforded by other statutes. It would be an unprecedented step to extend *Concepcion* in this manner.

B. There Are Critical Distinctions Between *Gentry* and *Discover Bank*

There are at least two fundamental distinctions between *Gentry* and the *Discover Bank* rule at issue in *Concepcion*.

First, *Discover Bank* is an application of unconscionability principles; *Gentry* is a distillation of the established vindication of statutory rights doctrine. Indeed, in *Discover Bank*, the California Supreme Court explicitly pointed out that its decision was based entirely on an unconscionability analysis and not on the potential implications of an arbitration agreement attempting to impair non-waivable statutory rights. *Discover Bank*, 36 Cal.4th at 160. *See also Arguelles-Romero*, 184 Cal. App. 4th at 840-41 (recognizing that employees have certain unwaivable rights).

Neither Congress nor the Supreme Court has indicated that the FAA was intended as a sledgehammer to demolish the substantive rights provided by a host of federal and state statutes representing society's most important public policy objectives. The *Mitsubishi/Green Tree* line of cases powerfully demonstrates just the opposite.[12]

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[12] The effective invalidation of unwaivable state statutes such as FEHA would also intrude into traditional areas of state power and implicate important federalism concerns. Further, based on federalism considerations and the legislative history of the FAA, some Justices have taken the position that the FAA is a procedural rule that only applies in federal courts. *See Allied-Bruce*, *supra* (Thomas, J. dissenting); *Preston v. Ferrer* (2008) 552 U.S. 346, 363 (same); *Southland Corp. v. Keating*, (1984) 465 U.S. 1 (O'Connor, J., dissenting, joined by Rehnquist). This minority view would only be a somewhat interesting historical footnote were it not for the present composition of the Court. Here, it could provide a basis for a plurality decision upholding *Gentry* – with several justices holding that the vindication of statutory rights analysis remains intact after *Concepcion* and Justice Thomas adhering to his long-held stance that the FAA does not extend to state court proceedings.

The difference between the unconscionability (*Discover Bank*) and vindication of statutory rights (*Gentry*) analyses is important for another reason. Under California law, unconscionability goes solely to the enforceability of a contract. *See* Cal. Civ. Code § 1670.5 (court may limit or refuse to enforce unconscionable contractual terms). In contrast, an agreement designed to prevent the vindication of unwaivable statutory rights has no lawful object. Thus, the parties to such an agreement have never formed a valid contract to arbitrate the claims in question. *See* Cal. Civ. Code § 1550 (one of the four "essential elements" of contract formation is a "lawful object"); Cal. Civ. Code § 1667 (contractual provisions are not lawful if they are: (1) "[c]ontrary to an express provision of law"; (2) "[c]ontrary to the policy of express law, though not expressly prohibited"; or (3) "[o]therwise contrary to good morals"). When the *Gentry* test is met, an agreement to arbitrate unwaivable statutory rights has no lawful purpose and no valid contract to arbitrate these claims has been formed.

This distinction is critical for FAA purposes. It is ordinarily the province of courts to determine whether there is a valid agreement to arbitrate that covers the dispute in question. *See, e.g., First Options v. Kaplan* (1995) 514 U.S. 938, 943-44; *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal. App. 4th 547, 551-53. *See also Volt Info. Scis., Inc. v. Bd. of Trustees* (1989) 489 U.S. 468, 472, 474-75 ("arbitration is strictly a matter of contract;" a finding that the parties had incorporated state arbitration rules that precluded arbitration in particular situations meant that they had no agreement to arbitrate in those circumstances). Further, FAA jurisprudence leaves no doubt that the formation of contracts to arbitrate is governed by generally applicable state contract law. *See, e.g., Wolsey, Ltd. v. Foodmaker, Inc*. (9th Cir. 1998) 144 F.3d 1205, 1210 ("In construing an arbitration agreement, courts must apply ordinary state-

law principles that govern the formation of contracts.") (citations omitted); *Foss v. Circuit City Stores, Inc*. (D. Me. 2007) 477 F. Supp. 2d 230, 235 (citing *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9) ("In determining whether a valid contract exists at all . . . 'state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally'"); *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls* (2008) 343 Mont. 392, 400. *Cf. Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 444 n.1 ("The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and the obligee was ever concluded").

Second, while *Discover Bank* adopted a blanket rule against class waivers in consumer cases, *Gentry* – limited to actions involving unwaivable statutory rights – requires a fact-specific balancing test that favors arbitrability. *See, e.g., Arguelles-Romero*, 184 Cal. App. 4th at 841 (*Discover Bank* involves a determination as a matter of law, which is subject to de novo review; while *Gentry* requires a discretionary factual determination, subject to abuse of discretion review); Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion* (2012) 79 U. CHI. L. REV. 623, 651 ("The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis").

Gentry does not categorically prohibit arbitration of a particular type of claim but upholds California's sovereign interest in the meaningful enforcement of its statutes.

The courts which have considered whether *Gentry* is overruled by *Concepcion* are divided. Most lower courts in this state, with the exception of *Iskanian*, have indicated that *Gentry* remains intact and must be followed until there is a controlling decision to the contrary. *See, e.g., Kinecta*

Alternative Fin. Solutions, Inc. v. Super. Ct. (2012) 205 Cal.App.4th 506, 510, 516; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498. In contrast, a handful of federal district courts have found that *Gentry* was impliedly overruled. *But see Plows v. Rockwell Collins, Inc*. (C.D. Cal. 2011) 812 F. Supp. 2d 1063, 1069 (concluding that *Gentry* was not implicitly overruled by *Concepcion*).

As an elemental principle, the decisions of lower federal courts are not binding on this tribunal. Moreover, the courts proclaiming *Gentry's* demise have made too great a leap from *Concepcion*. They have papered over the key distinctions between *Discover Bank* and *Gentry* and have failed to afford sufficient weight to the compelling reasons against casually extending *Concepcion's* holding. Such considerations are not mere policy preferences, external to the FAA, but are an inherent part of our federal system and are embedded in the Act itself. Legislation designed to ensure that agreements to arbitrate are placed on the same footing as other contracts is not meant to curtail the enforcement of substantive rights set forth in various remedial statutes, but to facilitate the vindication of those rights under a fair procedural method chosen by the parties. Hence, overturning *Gentry* would distort the meaning of the FAA beyond all recognition.

C. There is No Reason For this Court to Overturn *Gentry* and Leave California Citizens Vulnerable to Employment Discrimination, Wage and Hour Violations, and Other Statutory Violations

The consequences of a decision overturning *Gentry* would be far-reaching and dramatic. Every company in California could contract around

statutory liability in a vast range of employment and consumer cases.[13] The expansive remedial protections afforded by state laws such as the FEHA would be whittled down to a splinter. *Sandquist* and the members of the class he seeks to represent are only a case in point.

In the wake of *Concepcion*, the legal community has seen dozens if not hundreds of valid and important cases abandoned around the country. The plaintiffs and class members in these cases now have little or no recourse.

But the same result need not follow where plaintiffs can demonstrate, under the *Gentry* test, that enforcement of class waiver will prevent the vindication of their unwaivable statutory rights under California law.

In sum, the U.S. Supreme Court has stopped well short of this precipice. This Court should not rush in to take the leap.

CONCLUSION

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

[13] As explained in *Cooper v. QC Fin, Servs., Inc.*, 503 F.Supp.2d 1266, 1287-88 (D. Ariz. 2006), the placement of class waivers within arbitration clauses is far from happenstance. *Id.* Rather, a combination of terms requiring arbitration of disputes and barring class arbitration constitutes a concerted industry strategy devised to exploit and manipulate FAA jurisprudence to insulate the drafter from exposure to liability.

Dated: May 9, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.2024(c)(1).)

I, the undersigned appellate counsel, certify that the application consists of 1132 words and the brief consists of 7649 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word 2010 computer program used to prepare the brief.

Dated: May 9, 2013

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PROOF OF SERVICE

I, the undersigned, declare as follows: I am employed in the City and County of San Francisco, State of California; I am over the age of eighteen years and not a party to the above entitled action; my business address is: 555 Montgomery Street, Suite 1206, San Francisco, CA. On the date indicated below, I served the following document(s):

APPLICATION OF TIMOTHY SANDQUIST, INDIVIDUALLY AND ON BEHALF OF A PROPOSED CLASS OF SIMILARLY-SITUATED EMPLOYEES, AND AARP, EQUAL RIGHTS ADVOCATES AND THE IMPACT FUND FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF APPELLANT ARSHAVIR ISKANIAN

on the following courts and parties, through their attorneys of record, named below, and addressed as follows:

The Honorable Tani Cantil Sakauye, Chief Justice and Honorable Associate Justices Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	**California Supreme Court** (14 Copies)
California Court of Appeal Second Appellate District, Div. 7 300 S. Spring Street North Tower, 2nd Floor Los Angeles, CA 90013 Telephone: (213) 830-7000	**California Court of Appeal** (1 Copy)
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(X) BY HAND DELIVERY: I instructed Ace Attorney Service, Inc. to deposit the said documents to the California Supreme Court at the addresses listed above.
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( ) BY EMAIL: I emailed the said documents.
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( ) BY PERSONAL SERVICE: I caused the said document(s) to be personally served on the attorneys identified above at the above address on this date.
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 in San Francisco, California.

_____
Selene Hakobyan