Case No. **S204032**

Case No. **S204032**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,

Plaintiff and Appellant,

vs.

CLS TRANSPORTATION LOS ANGELES, LLC,

Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO, NO. B235158.
LOS ANGELES SUPERIOR COURT, HON. ROBERT HESS, DEPT. 24, BC356521.

AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

ERIKA C. FRANK
Erika.Frank@CalChamber.com
State Bar No. 221218
1215 K Street, Suite 1400
Sacramento, CA 95814
Tel.: (916) 444-6670
Fax.: (916) 444-6685

General Counsel
The California Chamber
of Commerce

*__FRED J. HIESTAND__
Fhiestand@aol.com
State Bar No. 44241
2001 P Street, Suite 110
Sacramento, CA 95811
Tel.: (916) 448-5100
Fax.: (916) 442-8644

General Counsel
The Civil Justice Association
of California

Counsel for *Amici Curiae*

Prometheus Press * Sacramento, CA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes, Rules and Statutes

Articles, Texts and Miscellaneous

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

vs.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CalChamber) welcome the opportunity to address as friends of the court[1] the important public interest issue this case presents:

> **Does the Federal Arbitration Act (FAA) require enforcement of a pre-dispute employment arbitration agreement where the parties to it waive their statutory right to judicially prosecute representative claims under California's Private Attorney General Act (PAGA)?**

CJAC is a 35-year-old non-profit organization representing hundreds of business, professional associations and local government groups. The principal purpose of CJAC is to educate the public about ways to make our civil liability laws more fair, certain and economical. Toward this end CJAC has participated in the

[1] CJAC and CalChamber ask, by separate application lodged with this brief, for the court's permission to accept the amici curiae brief for filing.

legislative, initiative and judicial processes to shape laws determining who gets relief or paid money, how much, what kind, and from whom when the conduct of some is alleged to occasion harm to others. The scope and application of voluntary binding arbitration agreements has figured prominently in our efforts because "the informality of arbitral procedure . . . enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* (1985) 473 U.S. 614, 649 (*Mitsubishi*), the self-same goals of CJAC.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For more than 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

Amici believe resolution of the issue in this case will determine the future viability of private contractual, pre-dispute employment arbitration agreements, an existential "to be or not to be" for arbitration in the employment law context. Today such agreements are commonplace, the result of rapid growth in the past two decades aided by judicial opinions striking down numerous attempts to invalidate such agreements by exempting various claims from the FAA's expansive reach. In 1995,

for example, the U.S. General Accounting Office (GAO) found that only 10% of employers were using arbitration for employment disputes. U.S. GEN. ACCOUNTING OFFICE, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995). Just two years later, that number rose to 19%. U.S. GEN. ACCOUNTING OFFICE, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997).

In the consumer contract context, the growth is even more pronounced. One survey indicated that 35.4% of sampled businesses used arbitration clauses in their consumer contracts. Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience* (2004) 67 *LAW & CONTEMP. PROBS.* 55, 62-64. This is particularly prevalent in the financial industry, rising to 69.2%. *Id.* The scope of the arbitration clauses in this survey varied, but 30.8% precluded class actions (*id.* at 65) – a provision whose enforceability was an open question up until *At&T Mobility, LLC v. Concepcion* (2011) 131 S. Ct. 1740 (*Concepcion*) upheld under the FAA (9 U.S.C. § 1 *et seq.*) the use of an arbitration clause that contained a class action waiver. By 2008 an empirical study found mandatory arbitration clauses in 92.9% of employment contracts and 76.9% of consumer contracts. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* (2008) 41 *U. MICH. J.L. REFORM* 871, 886.

If plaintiffs succeed with the relief they seek from the court in this case, the present ubiquitous nature of employment pre-dispute arbitration agreements will likely unravel quickly, first in California and then in other states where interests hostile to

arbitration can sway legislatures and governors to enact PAGA[2] like laws. These statutory claims will stand as a major exception to arbitration, one large enough to swallow the now well-recognized rule that pre-dispute employment arbitration agreements are to be enforced "according to their terms." *Concepcion, supra*, 131 S. Ct. at 1752-1753. This result will condemn our courts (at a time of severe budget contraints) to further congestion and the people of this state to the ills attendant thereto: longer time periods to resolve disputes, increased costs, and greater uncertainties and complexities that accompany litigation.

SUMMARY OF ARGUMENT

The FAA was enacted to reverse longstanding judicial hostility to arbitration agreements and place them upon the same footing as other contracts. It requires enforcement of arbitration agreements according to their terms for any activity within the broad reach of the commerce clause unless Congress expressly and clearly specifies an exception to matters coming within its ambit. State laws that impinge on the enforcement of arbitration agreements or treat them differently from other contracts conflict with and are preempted by the FAA. This includes state statutes that facially, or as interpreted, bar submission of certain subjects to arbitration because the parties to the agreement, as here, waive their rights to prosecute their claims on a class or representative basis.

In this case, the parties mutually agreed to resolve all future disputes between them regarding employment by arbitration, waiving their rights to do so on a "class"

[2] PAGA of 2004 (Lab. Code § 2698 *et seq*.) allows an aggrieved employee to bring an action to recover civil penalties for Labor Code violations on his or her own behalf and on behalf of current or former employees.

or "representative" basis. This is a permissible waiver that cannot, consistent with the FAA, be overridden by state statutes that confer on the parties a right to pursue claims in the form of "class" or "representative" actions. When, as here, state law prohibits outright the arbitration of a particular type of claim, that bar is displaced by the FAA.

LEGAL ANALYSIS

I. THE FAA REQUIRES ENFORCEMENT OF AN EMPLOYMENT ARBITRATION AGREEMENT WHEN, AS HERE, THE EMPLOYER AND EMPLOYEE WAIVE THEIR PROCEDURAL RIGHTS TO PROSECUTE IN COURT ANY CLAIMS THEY MAY HAVE AGAINST EACH OTHER AS "CLASS" OR "REPRESENTATIVE" ACTIONS.

Concepcion is "key" to understanding the scope of the FAA and its preemptive sweep over state laws like PAGA that can be read to interfere with enforcement of an arbitration agreement's terms.

Concepcion reversed the holding in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which provided that clauses were *per se* unconscionable and unenforceable under California law if (1) the agreement "predictably involve[s] small amounts of damages," (2) "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," (3) and "the waiver becomes in practice the exemption of the party from responsibility." *Discover Bank, supra*, 36 Cal.4th at 162-163. In striking down this rule that, at least on its face, applied equally to litigation and arbitration contracts containing class action waivers, the Court not only invoked the specter of "judicial hostility towards arbitration" that prompted enactment of the FAA in 1925, but implied that California was a likely culprit of its resurgence. *Concepcion*, 131 S. Ct. at

1747 ("[I]t is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (citing Steven A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act* (2006) 3 *HASTINGS BUS. L.J.* 39, 54, 66; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability* (2004) 52 *BUFFALO L. REV.* 185, 186-87)).

The 5-4 majority opinion in *Concepcion* reasoned that the *Discover Bank* rule "would have a disproportionate impact on arbitration agreements" even though it purported to apply to contracts generally. *Concepcion*, 131 S. Ct. at 1747. California's interpretation of its unconscionability law conflicted with, and was preempted by, the FAA's express language that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *Concepcion* explained that the triggering conditions of the *Discover Bank* rule imposed "no effective limit on its application" and thus "set forth a state policy placing bilateral arbitration categorically off-limits for certain consumer fraud cases, upon the mere *ex post* demand by any consumer." 131 S. Ct. at 1750. *Concepcion* reasoned this state policy preference "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. The inconsistency occurs from use of state law (i.e., statutory and common law on unconscionability of contracts) to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives

of Congress . . .," and is therefore preempted by the FAA even if it may be "desirable for [other] reasons." *Id.* at 1750, 1753.

While recognizing its ruling could deprive plaintiffs of the only practical means of recovering small amounts from large defendants – i.e., the class action mechanism – *Concepcion* nonetheless concluded that even an adhesive contract providing for a class action waiver is enforceable. *Discover Bank* could not stand because it effectively required a specific form of procedure (class arbitration) for a certain category of arbitration agreements (i.e., those involving consumers) in violation of the FAA.

A. The FAA is at Odds with *Gentry v. Superior Court* upon which Plaintiff Relies for the Erroneous Proposition that Waiver of a Statutory Right to Prosecute a "Representative" Action Cannot be Sanctioned by the FAA.

Case law before and since *Concepcion* recognizes under the FAA (1) a federal policy favoring broad enforceability of arbitration clauses and (2) a rule of construction favoring the arbitration of claims related to the scope of the agreement to arbitrate. These opinions undercut plaintiff's argument that there is a principled distinction between the applicability of *Concepcion's* reasoning to consumer as opposed to employment arbitration agreements and as to state "statutory" rights in contrast to state "unconscionability" law. Both of these arguments are based on the asserted viability of *Gentry v. Superior Court* (2007) 42 Cal.4th 443 and both are wrong as a matter of law and logic.

We begin with the questionable contention that *Gentry*, which invalidated arbitration agreements with class waivers because class actions were deemed necessary to vindicate unwaivable statutory rights, is still good law. *Gentry's* holding mirrors and

was announced shortly after *Discover Bank*. According to *Gentry*, when it comes to claimed violations of statutory rights, "if [a court] concludes . . . that a class arbitration [or class action] is likely to be a significantly more effective practical means of vindicating . . . [statutory] rights . . . than individual litigation or arbitration . . . it must invalidate the class arbitration waiver . . .." *Gentry*, 42 Cal.4th at 463.

Applying the rule to a claimed violation of California's overtime pay law, *Gentry* reasoned that: (1) the case concerned an unwaivable statutory right; (2) awards under the statute tended to be modest (with an average award more than $6,000), cases could be complicated to prove, and, even with reasonable attorney's fees awarded by statute, arbitration was less efficient; (3) class actions shielded workers from retaliation; and (4) class actions functioned as a notice system –few people would otherwise know their rights had been violated.

This rationale echoes that of *Discover Bank*, which *Concepcion* found wanting and in conflict with the language and purpose of the FAA. Just like *Discover Bank, Gentry* purports to be applying a general doctrine – where necessary to effectively vindicate statutory rights, states may condition the enforcement of arbitration agreements on the availability of class proceedings. Just like *Discover Bank*, that rule, in practice, treats arbitration agreements differently from contracts in general.

Gentry's analysis shows the same hostility to pre-dispute employment arbitration agreements that *Discover Bank* exhibited toward pre-dispute consumer arbitration agreements, the very vice, as *Concepcion* underscores, the FAA is intended to prevent. The *Discover Bank* rule required that claims be "predictably small," which the Supreme Court called a "toothless and malleable" standard that allowed courts to conclude that

a claim for $4,000, for example, was "sufficiently small." *Concepcion, supra*, 131 S. Ct. at 1750. The average claim of the type at issue in *Gentry* was more than $6,000. 42 Cal.4th at 458. Still, the court accepted the possibility it would be unrecoverable absent class proceedings. Furthermore, *Gentry* cited with approval a California appellate decision that even $37,000 would not provide enough incentive for an individual to pursue a claim absent a class action. *Id.* The *Concepcion* majority rejected this same argument--that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Concepcion*, 131 S. Ct. at 1753. Regardless, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

Though the majority opinion in *Concepcion* does not cite or discuss *Gentry*, its reasoning is so completely at odds with that opinion's reasoning that it's safe to conclude there's nothing left to *Gentry*; its intellectual underpinning has been eviscerated by *Concepcion*. Even Justice Breyer in dissent implicitly acknowledged this by referring to *Gentry* as representing the mere "application of a more general [unconscionability] principle" than *Discover Bank*. *Concepcion*, 131 S.Ct. at 1757.

Nor is there any practical or principled difference between waiver of a class action and waiver of a representative action under PAGA. In fact and in law, "[a] class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties." *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434. Both devices for obtaining relief are procedural, not substantive. Hence, the waiver of the class action mechanism in

an arbitration agreement authorized by the FAA as limned by *Concepcion* applies *a fortiori* to waiver of the "representative" PAGA action involved in this case.

The FAA requires a plaintiff employee's PAGA claims be subject to arbitration where the parties have, as here, signed an arbitration agreement to that effect. *Perry v. Thomas* (1987) 482 U.S. 483, for instance, held that § 229 of the California Labor Code, which provided that actions for the collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate," was unconstitutional because it was preempted by the FAA. *Id.* at 484. Class proceedings are not necessary to ensure that individual claimants pursue their own remedies under PAGA. See discussion on this point in Respondent's Answer Brief on the Merits, pp. 20-22. PAGA actions prosecuted in court serve a dual purpose: relief for the individual plaintiff and furtherance of California's law enforcement goals by deputizing employees to enforce California labor law. But California cannot condition the enforceability of arbitration agreements on the availability of class or representative proceedings, even to serve desirable state goals. Insofar as PAGA requires California to do so, the FAA preempts it.

Now it is true that *Gentry* concerned an arbitration agreement covering employment disputes and *Concepcion* an arbitration agreement for resolving consumer disputes; but that is of no legal significance. The whole point of the FAA is to prevent discrimination against arbitration agreements, to not allow the law to single out and treat differently one category of arbitration agreement from another, or to treat arbitration agreements in general differently from other contracts. That the non-discrimination rule of the FAA applies equally to pre-dispute employment along with

all other arbitration agreements (unless expressly exempted by Congress) is clear from *Circuit City Stores v. Adams, Inc.* (2001) 532 U.S. 105. *Circuit City* addresses whether and to what extent the FAA applies to disputes arising under employment contracts. Section 1 of the FAA excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The question for the Court was how broadly to read the exempted "class of workers engaged in foreign or interstate commerce" –whether it should be construed narrowly to exempt only arbitration agreements of workers engaged in transportation or broadly to exempt effectively all employment arbitration agreements. *Circuit City*, 532 U.S. at 109.

Employing a thorough textual analysis, *Circuit City* held that "the text of the FAA forecloses the construction of § 1 . . . which would exclude all employment contracts from the FAA." *Id.* at 119. The Court reasoned that the residual "class of workers" term must be controlled and defined by reference to the enumerated categories of workers that precede it – "seamen" and "railroad employees" – and so the exemption can apply only narrowly to "contracts of employment of transportation workers." *Id.* Thus, the FAA and its "healthy regard" (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26) for the enforceability of pre-dispute arbitration agreements governs the broad swath of employment contracts.[3]

[3] The proposed Arbitration Fairness Act seeks to amend the FAA and effectively overrule *Circuit City*. Its most recent incarnation states in relevant part: "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute." S. 987, 112th Cong. § 402 (2011). Plaintiff would have this court achieve by judicial decision (and contrary to the Supremacy clause) what Congress has thus far declined to do by legislation.

That the class action mechanism may be desirable to vindicate a statutory interest, rather than to conform to judge-made rules on "unconscionability," is of no importance when it comes to the enforcement of arbitration agreements in which the parties waive these rights; both are impediments applied uniquely to arbitration and hence forbidden by the FAA. Indeed, *Mitsubishi, supra*, 473 U.S. 614 long ago settled the applicability of pre-dispute arbitration to a waiver of judicially enforceable statutory rights. In that case the Court addressed the scope of a pre-dispute arbitration agreement between Mitsubishi, a Japanese automobile manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican distributor. *Id.* at 616-17. Their agreement stipulated that all future disputes, controversies, or differences between the parties under their distribution contract would be resolved through arbitration in Japan, in accordance with the rules of the Japan Commercial Arbitration Association. *Id.* at 617. When a dispute over shipments arose, Mitsubishi filed suit in federal court in Puerto Rico and moved to compel arbitration under the FAA and the terms of the parties' arbitration agreement. *Id.* at 617-19; see also 9 U.S.C. § 4. Soler then counterclaimed, alleging, among other things, antitrust violations under the Sherman Antitrust Act. *Mitsubishi*, 473 U.S. at 619-20. The question was whether a statutory claim brought by Soler under the Sherman Act could be compelled into arbitration via the FAA. *Id.* at 624-25.

Relying on the "liberal federal policy favoring arbitration agreements," the Court held that, as a general rule, arbitration agreements must be enforced for all claims, including those based on statutory rights. *Id.* As a guiding principle, the Court reasoned, Congress's preeminent concern in passing the FAA was "to enforce private

agreements into which parties had entered," (*id.*; quoting *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221) and so agreements to arbitrate must be "rigorously enforce[d]" (*id.* at 626) with "any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration." *Id.*; quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25. *Mitsubishi* holds that short of Congressional intent deriving from text or legislative history to the contrary, statutory claims can properly be resolved in arbitration because, "[h]aving made the bargain to arbitrate, the party should be held to it." *Mitsubishi*, 473 U.S. at 628.

B. Numerous Opinions Decided After *Concepcion* Confirm the FAA's Broad Preemptive Sweep over State Laws that are Hostile to or Discriminate Against Agreements to Arbitrate Future Disputes.

CompuCredit Corp. v. Greenwood (2012) 132 S. Ct. 665 (*CompuCredit*) upholds the enforceability of a consumer arbitration agreement when the claims at issue derive from the Credit Repair Organization Act (CROA). 15 U.S.C. §§1679-1679j. The CROA mandates that credit repair organizations provide customers with a written statement advising them of their "right to sue" a credit repair organization that violates the CROA. *Id.* §1679c (a). The Court found this disclosure provision – the only provision in the CROA mentioning a "right to sue" – did not evince a congressional intent to bar application of the FAA: First, the Court held that the disclosure provision did not establish the right to bring an action in a judicial forum, but merely the "the right to receive the statement." *CompuCredit*, 132 S. Ct. at 670. Second, the Court determined that if Congress had intended to bar application of the FAA in this context, "it would have done so in a manner less obtuse." *Id.* at 672. Noting the "clarity" with which Congress has restricted the use of arbitration in some

statutory contexts, *CompuCredit* holds that a legislative provision that merely references or contemplates judicial enforcement does not suffice to establish a "congressional command" to override the FAA. As one scholar explained about *CompuCredit*: "It seems that many courts are relying on [it] . . . to find that a federal statute will not be found to override an arbitration agreement under the FAA unless such a congressional intent can be shown . . . in the statute's language or legislative history." Austin Leland Fleishour, *"Horton [Helps] a Who"? Playing Linguistic Hopscotch with the NLRB and Discussing Implications for Employees' Section 7 Rights* (2013) 80 *TENN. L. REV.* 449, 468.

In *Marmet Health Care Center, Inc. v. Brown* (2012) 132 S.Ct. 1201 (per curiam), the Court held that, under the FAA, an arbitration agreement between a nursing home and a patient's family member was enforceable in a suit against the nursing home for personal injury or wrongful death despite the state court's conclusion that arbitration of such claims was against that state's statutorily expressed public policy. *Id.* at 1203-04. Because the public policy of West Virginia prohibited "outright the arbitration of a particular type of claim" – personal injury and wrongful death claims – that policy was "displaced by the FAA." *Id.* at 1203; quoting *Concepcion,* 131 S.Ct. at 1747. Plaintiffs' argument that certain statutory claims they assert are outside of arbitration is essentially the argument made by the plaintiffs and rejected in *Marmet*.

Similarly, in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 132 S.Ct. 496 the Court granted review, vacated the California Supreme Court's decision and remanded for reconsideration the question of whether state public policy *can* require state administrative adjudicatory procedures inconsistent with the FAA even if those procedures may be otherwise desirable under state public policy.

Kilgore v. KeyBank, N.A. (9th Cir. Cal.) 2013 WL 1458876 (*Kilgore*) holds that California's *Broughton-Cruz* rule[4] prohibiting arbitration of claims for public injunctive relief, does not apply where the relief sought for a statutory violation affects only a "small" class and "where there is no real prospective benefit to the public at large from the relief sought." *Kilgore* arose out of loans secured by two students of a helicopter vocational school. They sued to enjoin a lender from engaging in false and deceptive practices in violation of California's Unfair Competition Law (UCL). The notes they signed provided for binding arbitration and stated there shall be "no authority for any claims to be arbitrated on a class action basis." *Id.* The students petitioned a district court to compel arbitration; and the court denied their motion on the ground that *Broughton-Cruz* prohibited arbitration of injunctive relief claims under the UCL. The Ninth Circuit reversed and ordered the claims to arbitration, concluding that, "even assuming the continued viability of the *Broughton-Cruz* rule, plaintiffs' claims do not fall within its purview." *Id.*

Additional support for the preemptive sweep of the FAA is found in *Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, which involves a challenge to a district court ruling holding a class action waiver in a consumer arbitration agreement to be substantively unconscionable under Washington law. The claimant in that case argued the district court's ruling was correct, relying on the Second Circuit's most recent decision in *In re American Express Merchants Litigation* (2d Cir. 2012) 667 F.3d. 204 (*AMEX*). The claimant also argued that *Concepcion* was distinguishable. But the Ninth

---

[4] *Broughton v. Cigna Health Plans of Cal.* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303.

Circuit disagreed, finding instead that it was bound by the "broadly written" ruling in *Concepcion*. The court distinguished *AMEX* in a footnote on the ground it involved "not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so." 673 F.3d at 1159; emphasis original. While acknowledging that concern is "a primary policy rationale for class actions," *Coneff* stated that according to *Concepcion*, "such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Id.*

Coneff relied on *Concepcion's* acknowledgement that "individualized proceedings are an inherent and necessary element of arbitration." *Id.* at 1158. See also *Quilloin v. Tenet Healthsys* (3rd Cir. 2012) 673 F.3d 221, 233 (Pa. law prohibiting class action waivers "surely preempted by C*oncepcion*"). The Ninth Circuit agreed with the Eleventh Circuit's conclusion that evidence of small value claims going unprosecuted as a result of a class action waiver "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*." *Coneff*, *supra*, 673 F.3d at 1160. Thus, it expressly rejected the notion that an implied exception must be read into the *Concepcion* rule to permit state laws to "invalidate class-action waivers when such waivers preclude the effective vindication of statutory rights." *Id.* at 1158. *Coneff* is noteworthy because it makes clear that *Concepcion* not only overruled the *Discover Bank* rule, it also overruled decisions based on *Discover Bank*. This logically includes the decision in *Gentry, supra,* 42 Cal.4th 443.

CONCLUSION

For all the reasons aforementioned, the judgment of the Court of Appeal should be affirmed.

Dated: May 13, 2013

Respectfully submitted,

*Fred J. Hiestand
Civil Justice Association of California

Erika C. Frank
The California Chamber of Commerce

Counsel for *Amici Curiae*

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 4,700 words.

Date: May 13, 2013

Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2001 P Street, Suite 110, Sacramento, CA 95811.

On May 13, 2013, I served the foregoing document(s) described as: *Amici Curiae* Brief of the California Chamber of Commerce and the Civil Justice Association of California in *Iskanian v. CLS Transportation Los Angeles, LLC*, S204032 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

Glenn A. Danas, Esq.
Ryan H. Wu, Esq.
Raul Perez, Esq.
Katherine W. Kehr, Esq.
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
Attorneys for Plaintiff/Appellant

Scott L. Nelson, Esq.
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Attorney for Plaintiff/Appellant

David F. Faustman, Esq.
Yesenia M. Gallegos, Esq.
Cristina Armstrong, Esq.
Namal Tantula, Esq.
Ruwani N. Munaweera, Esq.
Fox Rothschild LLP
1800 Century Park East, Suite 300
Los Angeles, CA 90067
Attorneys for Defendant/Respondent

Leo V. Leyva, Esq.
Cole, Schotz, Meisel, Forman
& Leonard, P.A.
Court Plaza North
25 Main Street
Hackensack, NJ 07601
Attorney for Defendant/Respondent

Clerk, Court of Appeal
Second Appellate District, Div. Two
300 S. Spring Street
North Tower, 2nd Floor
Los Angeles, CA 90013
Appellate Court

The Honorable Robert Hess
Judge, Department 24
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012
Trial Court

[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 13th day of May 2013 at Sacramento, California.

David Cooper