IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S204032

ARSHAVIR ISKANIAN,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION LOS ANGELES, LLC,
Defendant and Respondent.

After an Opinion by the Court of Appeal,
Second Appellate District, Division Two
(Case No. B235158)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC356521, Honorable Robert Hess, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT, CLS TRANSPORTATION LOS ANGELES, LLC

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendant/Respondent CLS Transportation Los Angeles, LLC. Amicus is familiar with the issues and scope of their presentation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, in this Court and the United States Supreme Court. *See, e.g.*, *Sanchez v. Valencia Holding*, Cal. S. Ct. docket no. S199119; *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443 (2007); *D.R. Horton v. N.L.R.B.*, Fifth Cir. Ct. App. docket no. 12-60031; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds*

Int'l Corp., 130 S. Ct. 1758 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008).

BRIEF AMICUS CURIAE

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) permits invalidation of arbitration contracts only upon the same grounds that any other contract, unrelated to arbitration, could be invalidated. 9 U.S.C. § 2. Courts look to state law to determine those grounds, but the FAA preempts any state law defenses that apply only to arbitration contracts, derive their meaning from the fact that an arbitration contract is at issue, or work as a practical matter to disfavor arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-47 (2011). For these reasons, *Concepcion* overruled *Discover Bank v. Sup. Ct.*, 36 Cal. 4th 148 (2005), which improperly singled out arbitration contracts for particular judicial hostility and thus ran afoul of the FAA.

Plaintiff in this case seeks to narrow *Concepcion*, essentially to its specific facts involving consumer contracts. The language of *Concepcion*, however, cannot be so constrained. Because *Concepcion* is based on fundamental principles of federal substantive arbitration law and preemption of conflicting state statutes, policies, and court decisions, it significantly undercuts the reasoning of this Court in both *Armendariz v. Foundation Health Psychcare Svcs. Inc.*, 24 Cal. 4th 83 (2000), and *Gentry v. Superior Court*

(Circuit City Stores, Inc.), 42 Cal. 4th 443 (2007). The proposed distinctions that *Armendariz* was based on "public policy" and *Gentry* involved an employment contract and claimed alleged violations of state labor laws do not alter the overarching holdings of *Concepcion*, flatly forbidding state courts to treat contracts containing arbitration clauses differently, and adversely, compared to other types of contracts.

Fortunately, contracts by which employees agree to resolve their labor disputes in bilateral arbitration provide a just mechanism for prompt, less expensive decisions. Because arbitral decision making favors employees to the same or better degree than court proceedings, at a far reduced cost in both time and money to both parties, employees may well prefer to arbitrate their disputes. It is not the function of the courts to deny employees that choice.

For the reasons set forth below, the decision of the Court of Appeal should be affirmed.

ARGUMENT

I

GENTRY CANNOT SURVIVE *CONCEPCION*

A. *Gentry* Relied on *Armendariz*, a Now-questionable Precedent in Light of *Concepcion*

Iskanian argues that *Gentry* is not the progeny of the overruled *Discover Bank* opinion, but rather derives from *Armendariz v. Foundation Health Psychcare Svcs. Inc.*, 24 Cal. 4th 83, which forbade arbitration of nonwaivable

statutory claims if the arbitral forum is "not adequate." Appellant's Opening Brief on the Merits (AOB) at 6. While that portion of *Armendariz* describing the application of the unconscionability doctrine to contracts in general may survive *Concepcion*, the portion of the decision that sets "categorical, *per se* requirements specific to arbitration clauses" must be considered abrogated. In *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020 (S.D. Tex. 2012), the district court applied California law to an employee's challenge to his employment contract's arbitration clause and considered whether *Armendariz* remained viable after *Concepcion*. The court described *Armendariz* as "couch[ing]" its requirements "in terms of unconscionability," but this posture could not mask the policy reasons for the holding in that case, which derived solely from the fact that an arbitration agreement was at issue. *Id.* at 1033. For this reason, the *James* court held that "[t]o the extent *Armendariz* precludes arbitration in any employment dispute if the employee is required to bear *any type* of expense not present in litigation, it appears preempted" by the Federal Arbitration Act. *Id.*

Additionally, in *Hendricks v. AT&T Mobility, LLC*, 823 F. Supp. 2d 1015, 1021 (N.D. Cal. 2011), district court Judge Breyer acknowledged that *Concepcion* does not discuss *Armendariz* by name, but finds that the Supreme Court was not "indifferent" to the issues presented by *Armendariz*. Judge Breyer noted that the dissent in *Concepcion* particularly called out the majority

for the potential effect of the decision on plaintiffs with small monetary claims, *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting), to which the majority explicitly responded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.[1] *Hendricks*, 823 F. Supp. 2d at 1021. Ultimately, the court found the arbitration agreement enforceable because it was neither unconscionable nor violated public policy under what remains of *Armendariz*. *Id.* at 1022-23.

Armendariz is also clouded by its adoption of the mutuality test, requiring that arbitration agreements must contain a "modicum of bilaterality." *Armendariz*, 24 Cal. 4th at 117. Since *Armendariz*, California courts routinely invalidated arbitration provisions because the provisions lacked mutuality. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 50-51 (2006);[2] *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to*

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[1] *See also Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011) ("If the *Concepcion* majority had intended to allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a rule—one would expect it to have drawn attention to such a significant point in response to the dissent.").

[2] *Concepcion* cited this article approvingly for the proposition that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." 131 S. Ct. at 1747.

Mandatory Arbitration Clauses in Employment Agreements, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."). This aspect of *Armendariz* was explicitly adopted in *Discover Bank* to strike down class-arbitration waivers. *See Discover Bank*, 36 Cal. 4th at 161 ("[C]lass action or arbitration waivers are indisputably one-sided. 'Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.'") (citation omitted).

This Court in *Gentry* did the same thing, relying on what it perceived as the one-sided nature of the contract in striking down Circuit City's class-arbitration waiver. 42 Cal. 4th at 470-72. Although some language in *Armendariz* suggests that lack of mutuality can be justified by "business realities," *Armendariz*, 24 Cal. 4th at 117, lower California courts never identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54 (citation omitted). *See also* Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 J. Disp. Resol. 591, 602-04

(2008) (The supposed "business realities" exception to the mutuality test, which uses terminology associated with general contract law, but which has been factually impossible to successfully invoke, provides another illustration of how California courts hold arbitration agreements to a unique standard.). The *Armendariz* mutuality test thus disadvantages arbitration contracts by making it significantly easier to challenge them as unconscionable.

This approach cannot stand in light of *Concepcion*, which was the culmination of a long line of Supreme Court cases forbidding "threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). In fact, on this point, other court decisions prior to *Concepcion* recognized that the California approach stood in conflict with federal requirements and therefore rejected a mutuality requirement for arbitration agreements. *See, e.g., McNaughton v. United Healthcare Servs. Inc.*, 728 So. 2d 592, 599 (Ala.), *cert. denied*, 528 U.S. 818 (1999) (A mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore "flies in the face of *Doctor's Associates*."). *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("substantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate"); *In*

re Pate, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.") (italics in original).[3]

The *Armendariz* mutuality test stands on particularly shaky ground because California courts do not demand mutuality for individual contractual provisions outside the context of arbitration. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 672 n.14 (1988) ("A contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit

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[3] *See also State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) ("There is no reason to create a different mutuality rule in arbitration cases. Both parties to this contract exchanged consideration in this sale of a home. The contract will not be invalidated for lack of mutuality of obligation of the arbitration clause."); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) ("[T]he agreement is not unconscionable because, even though the arbitration clause lacks mutuality of obligation, the underlying contract for the sale of Dell computers is supported by adequate consideration."); *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004); *Walther v. Sovereign Bank*, 386 Md. 412, 433 (2005); *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228, 233 (Tex. 2008).

his employment. 'If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged, or "mutuality of obligation." ' ") (citations omitted); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary).

Thus, California's "mutuality" approach singles out contracts containing arbitration clauses for adverse treatment. Under the *Armendariz* mutuality test, courts may rely on their own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief. *Gentry* took this even a step further, speculating that unidentified class members *other* than the plaintiff might find it difficult to assert their rights. *Gentry*, 42 Cal. 4th at 461 ("Some workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws. Even English-speaking or better educated employees may not be aware of the nuances of overtime laws with their sometimes complex classifications of exempt and nonexempt employees.") (citation omitted).

For these reasons, even if *Gentry* is found to rely more on *Armendariz* than on *Discover Bank*, *Gentry*'s hostility to arbitration contracts in the employment context cannot stand in light of contrary precedent in *Concepcion*.

B. *Gentry* Relied on *Discover Bank*, a Now-overruled Precedent

Iskanian's effort to distance *Gentry* from *Discover Bank* could succeed only with the exercise of willful blindness. Beyond *Gentry*'s repeated references to and reliance on *Discover Bank*, the structure and analysis of *Gentry* also recalls *Discover Bank*. Like *Discover Bank*, *Gentry* announced a multi-factor test to determine whether an arbitral forum was acceptable to resolve statutory claims. *Compare Discover Bank*, 36 Cal. 4th at 161-63, *with Gentry*, 42 Cal. 4th at 457-62. And like *Discover Bank*, this Court disclaimed any intent to impose a categorical rule prohibiting arbitration of statutory claims, *compare Discover Bank*, 36 Cal. 4th at 162, *with Gentry*, 42 Cal. 4th at 462, even though, in practice, lower courts interpreted both cases to prohibit arbitration of consumer and employment claims, respectively.

The District Court for Northern California expressly considered the exact argument that Plaintiff makes in this case, that *Gentry* rests on different policy concerns, stemming from employees' statutory rights, that were not addressed in *Concepcion*. *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012). Reflecting on the broad language in *Concepcion*, 131 S. Ct. at 1746, the district court could find "no principled basis to distinguish between the *Discover Bank* rule and the rule in *Gentry*." *Jasso*, 879 F. Supp. at 1044. Comparing the two cases, the court explained, "*Discover Bank* and *Gentry* each looked to the modest size of individuals' potential recovery,

unequal knowledge and bargaining power in the contractual relationship, and 'other real world obstacles' to vindication of the individuals' rights." *Id.* The court found that the potential for retaliation (a significant concern expressed in *Gentry*) was "equally important" as preventing fraud and willful injury to consumers; therefore, "[t]he absence of discussion in *Concepcion* concerning employer retaliation as one of the 'real world obstacles' to vindication of individuals' rights does not appear, standing alone, to permit a departure from *Concepcion*'s broad statement that the FAA prohibits state-law created barriers to arbitration." *Id. See also id.* at 1049 (holding that *Concepcion* abrogates *Gentry*'s holding that would allow a plaintiff to avoid enforcement of an arbitration agreement containing a class action waiver).

In *Truly Nolen of America v. Sup. Ct.*, 208 Cal. App. 4th 487 (2012), the Court of Appeal read *Concepcion* the same way as the *Jasso* court: "Although *Gentry* and *Discover Bank* were founded on different theoretical grounds because *Discover Bank* was based on an unconscionability analysis and *Gentry* was based on the *Armendariz* public policy rationale, *Concepcion*'s holding was unrelated to the fact that *Discover Bank* was a particular application of California's unconscionability analysis." *Id.* at 506. For this reason, the court found that *Concepcion* "implicitly disapproved the reasoning" of *Gentry*. *Id.* at 507. Respectful of state court hierarchy, the appellate court determined it must nonetheless apply the *Gentry* rule until this

Court officially overrules the case. *Id.* However, because of the Supreme Court's specific rulings disapproving of class arbitration (*see Stolt-Nielsen*, 130 S. Ct. at 1775; *Concepcion*, 131 S. Ct. at 1750-51), the *Truly Nolen* court held that even if some portion of the *Gentry* analysis survives, plaintiffs must offer "specific, individualized, and precise" evidence to comply with the factual analysis. *Truly Nolen*, 208 Cal. App. 4th at 511.

As a practical matter, California lower courts applying *Discover Bank* and *Gentry* prior to *Concepcion* rarely found an arbitration agreement that satisfied this Court's multi-part tests. A Westlaw search of California appellate cases postdating *Gentry* (August 30, 2007) and predating *Concepcion* (April 27, 2011) revealed eight cases striking down an arbitration agreement and only one upholding the contract. *See Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011); *Fisher v. DCH Temecula Imports LLC*, 187 Cal. App. 4th 601 (2010); *Young Seok Suh v. Sup. Ct.*, 181 Cal. App. 4th 1504 (2010); *Pellegrino v. Robert Half Intern., Inc.*, 181 Cal. App. 4th 713 (2010); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447 (2009); *Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal. App. 4th 154 (2009); *Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277 (2009); *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138 (2007). *Cf. Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 978, 988 (2010) (the only published decision during this time period upholding an arbitration clause in the employment contract of a

highly compensated corporate counsel). Justices of this Court have acknowledged this phenomenon. *See Gentry*, 42 Cal. 4th at 476 n.2 (Baxter, J., dissenting, with Justices Chin and Corrigan concurring) ("The majority denies that class action waivers in arbitration agreements are *necessarily* invalid in suits to vindicate overtime-wage rights, but that is the practical effect of the majority's holding.").

C. The Supremacy Clause Requires California Courts to Comply with the FAA and Supreme Court Precedent Interpreting that Federal Law

The time has come for the California courts to make their peace with the Supremacy Clause. *See Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) ("[T]his court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so.") (citation omitted); *Gentry*, 42 Cal. 4th at 473 (Baxter, J., dissenting) (Noting this court's "continuing effort to limit and restrict the terms of private arbitration agreements, which enjoy special protection under both state and federal law.").[4]

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[4] *See also James*, 851 F. Supp. 2d at 1036-37 (applying California law; noting that some California courts, even post-*Concepcion*, continue to find arbitration forum-selection clauses unenforceable as unconscionable, while applying a far less stringent analysis to forum-selection clauses applicable to litigation).

Since 1984, California courts have been expressing their distrust and disapproval of arbitration, only to have the United States Supreme Court step in to reverse. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 7 (1984) (reversing this Court's holding that the state Franchise Investment Law required judicial resolution rather than arbitral resolution and noting that "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (reversing California Court of Appeal and holding that the Federal Arbitration Act preempts a state labor law authorizing wage collection actions regardless of an agreement to arbitrate: "[u]nder the Supremacy Clause, the state statute must give way"); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (reversing California Court of Appeal and holding that the Federal Arbitration Act's protection of an arbitration agreement vesting jurisdiction over all disputes in an arbitral tribunal supersedes state laws lodging dispute resolution jurisdiction in a different judicial or administrative forum); *Concepcion*, 131 S. Ct. at 1748 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). *See also Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating this Court's decision

forbidding waiver of a *Berman* wage hearing prior to arbitration for reconsideration in light of *Concepcion*).[5]

Arbitration decisions issued by the United States Supreme Court in the past few years consistently uphold private arbitration agreements against the creative and malleable theories adopted by state courts to defeat those agreements. And the Court appears to be losing patience with state courts that defy the Court's rulings, subjecting them to pointed, harsh, public rebukes. In *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (citations omitted), the Court chastised the Oklahoma Supreme Court with summary reversal:

> [A state] [s]upreme [c]ourt must abide by the FAA, which is "the supreme Law of the Land," U. S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." Our cases hold that the FAA forecloses precisely this type of "judicial hostility towards arbitration."

The West Virginia Supreme Court suffered a similarly sharp reproval when the Court summarily reversed its decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012). The state court had carved out a "public

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[5] *Cf. Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 470 (1989) (affirming the California Court of Appeal's holding that an arbitration contract that agrees to be governed by the law of California may incorporate a provision of the California Arbitration Act allowing a court to stay arbitration pending resolution of related litigation).

policy" exception to enforcement of arbitration agreements if the matter involved personal injury or wrongful death causes of action. The Supreme Court's irritation was clear: "The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court. . . . [The FAA's] text includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.'" *Id.* at 1203 (citation omitted).[6]

The decision below correctly interpreted the scope of *Concepcion* and that case's effect on *Gentry*, namely, that the "sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-reaching effect of the FAA, as expressed in *Concepcion*." *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal. App. 4th 949, 960 (2012). The decision should be affirmed.

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[6] Iskanian argues that the Supreme Court's refusal to summarily vacate *In re American Express Merchants' Litigation*, 681 F.3d 139 (2d Cir.), *cert. granted,* 133 S. Ct. 594 (2012), choosing instead to set it for briefing and argument, means that *Concepcion* could not have decided whether "class-action bans that prevent vindication of substantive rights are enforceable." Reply Brief at 5 n.4. There is no Supremacy Clause issue in *American Express* because the Court is considering in that case the intersection of two *federal* laws: the Federal Arbitration Act and the federal Sherman and Clayton Acts. *American Express Co. v. Italian Colors Rest.*, Brief for Petitioners at 6-7, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_pet.authcheckdam.pdf (last visited Apr. 24, 2013).

II

INDIVIDUAL ARBITRATION OF WORKPLACE GRIEVANCES OFFERS JUST RESULTS

The Federal Arbitration Act directs courts to place arbitration agreements on equal footing with other contracts, and it "does not require parties to arbitrate when they have not agreed to do so." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002). Meanwhile, people do not have any fundamental right to work for a specific employer. *See Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 549 (1981) (upholding mandatory retirement for university professors in part because "there is no fundamental right to work for a particular employer, public or private"). Thus, in looking for a job, applicants will consider the various perceived benefits and burdens of each particular employment opportunity.

Courts must view the availability of arbitral remedies neutrally, but certainly individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov & Beverly A. Aloisio, *Arbitration of Employment Disputes Before and after Circuit City*, 17 Lab. Law. 327, 343 & n.151 (2001) (noting questions of bias where employers are repeat players in arbitration, and further noting that unions also are repeat players, representing workers under

collective bargaining agreements); *see also* Thomas J. Stipanowich, *The Multi-door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (Reporting study of construction industry arbitration, that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall.") (internal citations omitted). In this way, an arbitration requirement is no different than many other job requirements that impact individual preferences, and even legally protected rights.[7] Potential workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.[8]

Suspicion against an arbitral forum is unwarranted, just because arbitration operates under procedures that differ from court rules. *14 Penn*

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[7] Such trade-offs in employment may include whether to accept late-night or weekend shifts (*Sanchez v. Unemployment Ins. Appeals Bd.*, 20 Cal. 3d 55, 69-70 (1977) (restaurant required servers to work on Saturdays); *Singleton v. U.S. Gypsum Co.*, 140 Cal. App. 4th 1547, 1551 (2006) (maintenance mechanic works the graveyard shift)); a dress code (*I.N.S. v. Federal Labor Relations Authority*, 855 F.2d 1454, 1464 (9th Cir. 1988) (I.N.S. requires employees to wear uniforms and union insignia pins (or any other adornment) are forbidden)); or extensive travel requirements (*Goicoechea v. Mountain States Tel. and Tel. Co.*, 700 F.2d 559, 560 (9th Cir. 1983) (company could fire cable splicer who refused to comply with requirement of extensive travel)).

[8] The State of California facilitates such comparisons by providing a wealth of career opportunity information online. *See* State of California, Employment Development Department *Labor Market Info*, http://www.labormarketinfo.edd.ca.gov/cgi/career/?PAGEID=3 (last visited Apr. 29, 2013).

Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. What little empirical work has been done suggests that arbitrators decide cases much as judges do. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).

In fact, studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system." Burton, 2006 J. Disp. Res. at 480-81 n.87 (citation omitted). *See also* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (discussing a survey of employment arbitrations where "[e]mployees won more often in arbitration than similar plaintiffs in court"); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005)

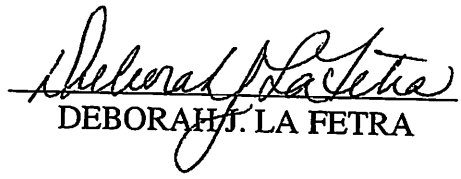
(finding that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower). Thus, some employees may affirmatively prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system). Under these circumstances, arbitration of employment disputes on an individual basis both upholds the freedom of contract, and serves justice as to the underlying dispute as well.

CONCLUSION

The decision below should be affirmed.

DATED: May 9, 2012.

Respectfully submitted,



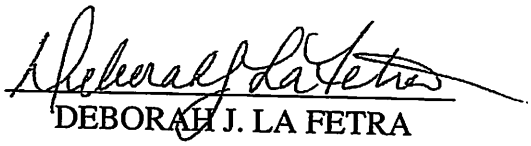
DEBORAH J. LA FETRA

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT, CLS TRANSPORTATION LOS ANGELES, LLC, is proportionately spaced, has a typeface of 13 points or more, and contains 4,409 words.

DATED: May 9, 2013.



DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On May 9, 2013, true copies of APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT, CLS TRANSPORTATION LOS ANGELES, LLC, were placed in envelopes addressed to:

David F. Faustman
Yesenia M. Gallegos
Namal Tantula
Charles Zuver
FOX ROTHSCHILD LLP
1800 Century Park East, Suite 300
Los Angeles, California 90067
Attorneys for Respondent CLS Transportation Los Angeles, LLP

Marc Primo
Glenn A. Danas
Ryan H. Wu
INITIATIVE LEGAL GROUP
1800 Century Park East, Second Floor
Los Angeles, California 90067
Attorneys for Petitioner Arshavir Iskanian

The Honorable Robert Hess
Department 24
c/o Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, California 90012

California Court of Appeal
Second Appellate District, Division Two
200 South Spring Street
North Tower, Second Floor
Los Angeles, California 90013

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of May, 2013, at Sacramento, California.

SUZANNE M. MACDONALD