

No. 14-

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IN THE  
**Supreme Court of the United States**

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CLS TRANSPORTATION LOS ANGELES, LLC,

*Petitioner,*

*v.*

ARSHAVIR ISKANIAN,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF CALIFORNIA

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**PETITION FOR A WRIT OF CERTIORARI**

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DAVID F. FAUSTMAN

*Counsel of Record*

YESENIA GALLEGOS

CRISTINA ARMSTRONG

FOX ROTHSCHILD LLP

1800 Century Park East, Suite 300

Los Angeles, California 90067

(310) 598-4150

dfaustman@foxrothschild.com

LEO V. LEYVA

COLE, SCHOTZ, MEISEL,

FORMAN & LEONARD, P.A.

Court Plaza North

25 Main Street

Hackensack, New Jersey 07601

(646) 563-8930

*Attorneys for Petitioner*

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705469



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(800) 274-3321 • (800) 359-6859

**QUESTION PRESENTED**

Is an employee's waiver in an arbitration agreement of a collective or "representative action" under the California Private Attorneys General Act, Cal. Labor Code § 2698 *et seq.*, so distinguishable from a "class action" waiver that it is immune from the otherwise preemptive effect of the Federal Arbitration Act, 9 U.S. Code § 1, *et seq.*, as held by this Court in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)?

**PARTIES TO THE PROCEEDING**

Petitioner CLS Transportation Los Angeles, LLC is the defendant in the trial court, and was the respondent in the California Court of Appeal, Second District, Division Two and in the California Supreme Court. Respondent Arshavir Iskanian is the plaintiff in the trial court, and was the appellant in the California Court of Appeal and in the California Supreme Court.

**CORPORATE DISCLOSURE STATEMENT**

Petitioner CLS Transportation Los Angeles, LLC states that there is no publicly traded corporation that owns 10% or more of its stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner CLS Transportation Los Angeles, LLC respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

### OPINIONS BELOW

The June 23, 2014 opinion of the California Supreme Court is reported at 59 Cal.4th 348, 327 P.3d 129, 173 Cal. Rptr.3d 289 (App., 12a – 97a.)

That opinion reversed and remanded the decision of the California Court of Appeal, Second District, Division Two, issued on June 4, 2012, reported at 142 Cal.Rptr.3d 372, and previously published at 206 Cal.App.4th 949. (App., 98a – 127a.)

The June 13, 2011 Order of the California Superior Court, County of Los Angeles, Case Number BC356521/BC381065, granting Petitioner's motion for renewal of its prior motion for order compelling arbitration, dismissing class claims, and staying action pending the outcome of arbitration, was not reported.

### JURISDICTION

The opinion of the California Supreme Court was filed on June 23, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), which provides for review by this Court of final judgments or decrees on issues of Constitutional law rendered by the highest court of a state in which a decision could be had. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Article I, Section 8, Clause 3, of the United States Constitution (“Commerce Clause”) provides in part:

The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states . . . .

Article VI, Clause 2, of the United States Constitution (“Supremacy Clause”) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The California Private Attorneys General Act (“PAGA”), Cal. Labor Code § 2698, *et seq.*, is set forth in the appendix to this petition. (App., 128a - 138a.)

## INTRODUCTION

The Legislature and courts of California have a long and notable history of ignoring the preemptive effect of the FAA. From time to time over the past thirty years, this Court has been called upon to remind California that the Commerce Clause, the Supremacy Clause and the FAA require that arbitration agreements must be enforced “according to their terms”. See for example, *Southland v. Keating*, 465 U.S. 1 (1984), *Perry v. Thomas*, 482 U.S. 483 (1987), *Preston v. Ferrer*, 552 U.S. 346 (2008), and most recently *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (“*Concepcion*”).

In 2002, the California Legislature enacted PAGA to create a private right of action for employees to sue their employers for various violations of the California Labor Code and to collect civil penalties to be shared with the state. PAGA permits an employee to bring a “representative action” on behalf of himself and other employees, similar to a class action, and to recover attorney’s fees and costs. These PAGA cases can involve millions of dollars in potential damages and fees.

In 2007, a limousine driver named Arshavir Iskanian (“Iskanian” or “Respondent”) sued his employer, CLS



Transportation Los Angeles, LLC (“CLS” or “Petitioner”), for alleged wage and hour violations under the California Labor Code. He initially pleaded a traditional “class action,” and later added a “representative action” under PAGA. But Iskanian had signed an arbitration agreement specifically waiving any participation in a “class action” or a “representative action.” Based upon this Court’s decision in *Concepcion*, the trial court dismissed the class action and the PAGA representative action, and compelled Iskanian’s individual case to arbitration. A three-justice panel of the California Court of Appeal unanimously affirmed the decision of the trial court. These judges saw no principled distinction between the purported class action and the alleged PAGA representative action for purposes of federal preemption under the FAA.

The California Supreme Court, however, while purporting to acquiesce in *Concepcion* and the more recent *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2034 (2013) (“*American Express*”), strained to distinguish the PAGA claim from the traditional class action. The Court held that while state law prohibiting waiver of a class action in an arbitration agreement was preempted by the FAA, the PAGA representative action was somehow “special” and exempt from the preemptive effect of the FAA:

[PAGA] authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state. . . . [W]e conclude that an arbitration agreement

requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.

(App., 13a.)

The California Supreme Court thus reasoned that a PAGA representative action was somehow different from a class action because the individual is acting as a “proxy” for the state, relieving him of his contractual obligation to arbitrate individually. Thus, the state need only “deputize” an employee to sue his employer in order to avoid the FAA.

This result is manifestly incorrect, and is simply another attempt to insulate a parochial state statute from preemption and enforcement of an arbitration agreement according to its terms. It is, in the words of the Ninth Circuit Court of Appeals, yet another “end run” around the FAA. *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013). Indeed, one federal District Court in California has refused to recognize the legitimacy of the California Court's opinion on such an important issue of federal constitutional law. *Fardig v. Hobby Lobby Stores, Inc.*, No. SAC V 14-00561 JVS (ANx) (C.D. Cal. Aug. 11, 2014) (App., 1a – 11a.)

Doubtlessly, the divide between California's state courts and federal courts can only deepen, throwing the enforceability of existing and yet to be implemented arbitration agreements into doubt. Further, the "state proxy" distinction approved by the California Supreme Court will serve as a template for further legislation both in California and other states that would undermine the reach of the FAA.

Petitioner respectfully suggests that the import of this Court's decisions in *Concepcion* and *American Express* has not been fully implemented by the California Supreme Court, and requests that this Court accept *Iskanian v. CLS Transportation Los Angeles, LLC* for consideration. Specifically, Petitioner seeks a reversal of the portion of the holding in the decision below that exempts a waiver of PAGA representative actions in employment arbitration agreements from FAA preemption.

### **STATEMENT OF THE CASE**

Petitioner CLS provides limousine and other transportation services. Respondent Iskanian worked as a chauffeur for CLS for 17 months, from March 8, 2004 through August 2, 2005.

#### **A. Respondent Signed an Arbitration Agreement Waiving His Participation in Class and Representative Actions.**

In December 2004, Respondent signed a Proprietary Information and Arbitration Policy/Agreement (the "Arbitration Agreement") in conjunction with a settlement agreement in which he received \$1,350.00. Respondent agreed not to file any complaint against CLS in state

court. Instead, he agreed to arbitrate all disputes and specifically promised not to file a “class action” or a “representative action”. Petitioner and Respondent agreed to arbitrate “any and all claims” arising out of Petitioner’s employment. The Arbitration Agreement provided for a neutral arbitrator, reasonable discovery, a written award, and judicial review of the award. Respondent was provided an opportunity to consult counsel before signing. The Arbitration Agreement also stated that Petitioner would pay the arbitrator’s fees, costs, and any expenses that were unique to arbitration. Further, the Arbitration Agreement expressly stated that it “shall be governed by and construed and enforced pursuant to the Federal Arbitration Act ... and not individual state laws regarding enforcement of arbitration agreements.” Finally, it contained a class and representative action waiver, which read:

Except as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that *class action and representative action* procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/ Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert *class action or representative action* claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person. (App., 14a.) (emphasis added)

Respondent signed the Arbitration Agreement. After briefing and a hearing on the matter, the trial court enforced the Arbitration Agreement in accordance with its terms.

**B. Petitioner Sought to Compel Arbitration of Respondent’s Individual Claims in Response to a Purported Class Action Filed by Respondent.**

On August 4, 2006, Respondent filed a Class Action Complaint against Petitioner in the California Superior Court for the County of Los Angeles, case number BC356521, alleging various wage and hour claims. On February 9, 2007, Petitioner filed a motion to compel Respondent to arbitrate his claims on an individual basis. The trial court granted the motion. Respondent appealed this decision. While the appeal was pending, the California Supreme Court decided *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) (“*Gentry*”), which held that class action waivers in arbitration agreements were unenforceable under California law if “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.” 165 P.3d at 568.

**C. *Gentry* Required Respondent to Litigate in State Court.**

On May 27, 2008, the Court of Appeal directed the trial court to “reconsider [the order compelling arbitration] in light of *Gentry*”. Petitioner conceded, and Respondent agreed, that Petitioner’s motion to compel arbitration would not prevail under the test set forth in *Gentry*.

Meanwhile, on November 21, 2007, Respondent filed a separate, representative action pursuant to PAGA alleging violations of the California Labor Code (“PAGA Complaint”), California Superior Court for the County of Los Angeles, case number BC381065. On August 28, 2008, the trial court consolidated Respondent’s first Complaint with his PAGA Complaint. On September 15, 2008, Respondent filed a Consolidated First Amended Complaint (“Consolidated Complaint”) including the PAGA claim. The Consolidated Complaint became the operative complaint in this action.

**D. In 2011, *Gentry* Was Implicitly Overruled By *Concepcion*.**

On April 27, 2011, in *Concepcion*, this Court held that class action waivers in arbitration agreements are enforceable under the FAA. *Concepcion* explicitly overruled *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the decision upon which *Gentry* was based, and ruled that arbitration agreements must be enforced “according to their terms.” *Concepcion*, 131 S. Ct. at 1745-46, 1753.

In response to *Concepcion*, on May 16, 2011, Petitioner immediately filed a renewed motion to compel individual arbitration on the bases that the class and representative action waiver in its Arbitration Agreement was valid, and that the FAA preempted the *Gentry* holding pursuant to *Concepcion*.

On June 13, 2011, the trial court properly granted Petitioner’s renewed motion to compel arbitration. Respondent appealed the trial court’s decision. The

California Court of Appeal unanimously affirmed the trial court, finding the class and PAGA representative action waiver was effective.

### **E. The Opinion of the Court of Appeal**

On appeal, Respondent contended that the representative PAGA claims were not arbitrable. The Court of Appeal evaluated the legislative history of the statute, as well as other courts' interpretations, and concluded that the class and PAGA representative action waiver was enforceable. On the PAGA issue, the Court of Appeal explained:

We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that the United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.

In *Southland Corp. v. Keating*, *supra*, 465 U.S. at pages 10-11, the United States Supreme Court overruled the California Supreme Court's holding that claims brought under the Franchise Investment Law required judicial consideration and were not arbitrable. The United States Supreme Court held: "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.*" (*Id.* at p. 10, italics added.) The

Court further clarified the reach of the FAA in *Concepcion* by holding: “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” (*Concepcion, supra*, 131 S. Ct. at p. 1747.)

Iskanian argues that a PAGA action can only effectively benefit the public if it takes place in a judicial forum, outside of arbitration. Iskanian could be correct, but his point is irrelevant. Under *Southland Corp. v. Keating, supra*, 465 U.S. 1, and *Concepcion, supra*, 131 S.Ct. 1740, any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA.

(App., 118a – 119a.)

The Court of Appeal cited the Ninth Circuit Court of Appeals decision in *Kilgore v. KeyBank, N.A.*, 673 F.3d 947 (9th Cir. 2012), for additional support, explaining:

In *Kilgore*, the plaintiffs brought a class action alleging [Unfair Competition]. The district court declined to enforce arbitration agreements between the plaintiffs and defendants. The Ninth Circuit Court of Appeals reversed . . . . The court held that “the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right



to a judicial forum—and thus whether that statutory claim falls outside the FAA’s reach—applies only to *federal*, not state, statutes.” (*Kilgore, supra*, 673 F.3d at p. 962.) The court observed that some members of the United States Supreme Court had expressed the view that section 2 of the FAA should be interpreted in a manner that would not prevent states from prohibiting arbitration on public policy grounds, but that view did not prevail. (673 F.3d at p. 962.) “We read the Supreme Court’s decisions on FAA preemption to mean that, other than the savings clause, the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to keep that *federal* claim out of arbitration proceedings . . . .” (*Ibid.*)

This reasoning is directly applicable here. Following *Concepcion*, the public policy reasons underpinning PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.

(App., 120a.)

The Court of Appeal, thus, unanimously agreed with Petitioner that the PAGA representative claim was preempted.

## **F. The Opinion of the California Supreme Court**

On the PAGA issue, the California Supreme Court reversed and remanded to the Court of Appeal.

Notwithstanding the FAA and Supremacy Clause, the California Supreme Court determined that waiver of a PAGA representative action in an arbitration agreement was “contrary to public policy and unenforceable as a matter of state law”. (App., 56a.)

The majority determined that PAGA was a non-waivable statutory right that fell outside the reach of FAA preemption and the reasoning of *Concepcion*. It said that a PAGA claim lies outside the FAA’s coverage because it is not a private dispute between an employer and an employee arising out of their contractual relationship, but rather a “dispute between an employer and the state . . . .” (App., 57a.) The majority likened a PAGA representative action to a “qui tam action” (that is supposedly not waivable), and divined that Congress did not intend for the FAA to cover qui tam cases. (App., 52a – 53a, 58a.) The majority also suggested that this Court’s decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), somehow supported the notion that FAA preemption did not apply to waivers of PAGA representative actions. (App., 60a – 61a.)

In concurrence, Justice Ming W. Chin disagreed with the majority’s analysis of FAA preemption.<sup>1</sup> Justice Chin disputed the majority’s underlying premise that a PAGA action was not a private dispute, because “a person may not bring a PAGA action unless he or she is ‘an aggrieved employee’ (§ 2699, subd. (a)), i.e., a person ‘who was

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1. Justice Chin ultimately determined, mistakenly, that a PAGA representative action could not be waived insofar as it forbids an employee from asserting PAGA in any forum. This is incorrect because the holdings below allowed Respondent to bring his PAGA case “representing” the state in his individual capacity in arbitration. The majority did not rule otherwise.

employed by’ the alleged Labor Code violator and ‘against whom’ at least one of the alleged violations ‘was committed (§ 2699, subd. (c)).’ (App., 77a – 78a.) Justice Chin further explained that “[u]nder the majority’s view that PAGA claims ‘lie[] outside the FAA’s coverage’ because they are not disputes between employers and employees ‘arising out of their contractual relationship’ . . . the state may, without constraint by the FAA, simply ban arbitration of PAGA claims and declare agreements to arbitrate such claims unenforceable. I do not subscribe to that view, for which the majority offers no case law support.” (App., 78a.) Justice Chin also quarreled with the majority’s analysis of *Waffle House*, explaining that it “actually *does* suggest that the FAA preempts the majority’s rule.” (App., 79a) (internal citation omitted). He stated:

The question there was whether, under the FAA, an agreement between an employer and an employee to arbitrate employment related disputes precluded the Equal Employment Opportunity Commission (EEOC), which was not “a party to” the arbitration agreement and had never “agreed to arbitrate its claims,” from pursuing victim-specific relief in a judicial enforcement action. (*Waffle House, supra*, at p. 294.) The court said “no,” explaining that nothing in the FAA “place[s] any restriction on a nonparty’s choice of a judicial forum” (*Waffle House, supra*, at p. 289) or requires a “nonparty” to arbitrate claims it has not agreed to arbitrate (*id.* at p. 294). Because Iskanian is a party to the arbitration agreement in this case, this holding is inapposite. What is apposite in *Waffle House* is the court’s statement that

the FAA “ensures the enforceability of private agreements to arbitrate.” (*Waffle House, supra*, 534 U.S. at p. 289.) This statement, which simply reiterates what the court has said “on numerous occasions” (*Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.* (2010) 559 U.S. 662, 682 [176 L. Ed. 2d 605, 130 S. Ct. 1758]), casts considerable doubt on the majority’s view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable.

(App., 79a.)

The concurring opinion thus demonstrates that the majority’s analysis of PAGA is fatally flawed.

### **WHY THE PETITION SHOULD BE GRANTED**

California purports to have created a statute, whereby an employee can sue an employer in civil court, that is off limits to arbitration agreements and immune from the preemptive sweep of the FAA. While the California Supreme Court’s majority opinion purports to acquiesce in this Court’s decisions in *Concepcion* and *American Express*, it goes on to create an exception for PAGA that swallows the rule of FAA preemption. It creates a rule where, in order to avoid FAA preemption, all a state need do is “deputize” its citizens to sue private parties notwithstanding valid arbitration agreements to the contrary. This Court should grant certiorari and reverse the California Supreme Court on this point.

**A. The FAA Preempts California Law That Purports to Render the Waiver of a PAGA Representative Action Unenforceable.**

The notable errors in the majority opinion are cogently set out in the concurring opinion of Justice Chin. He takes issue with the reasoning “for which the majority offers no case law support.” (App., 78a.) He finds that the majority has adopted an incorrect and “novel theory...that renders the FAA completely inapplicable to PAGA claims.” (*Id.*)

The notion that a PAGA action cannot be contravened by a private arbitration agreement because it was established for a so-called “public reason” is contrary to well-established law. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (finding the California Franchise law preempted by the FAA); *Perry v. Thomas*, 482 U.S. 483, 490-491 (1987) (finding the California Labor Code Section 229 preempted by the FAA); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (finding the California Talent Agencies Act preempted by the FAA). “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Concepcion*, 131 S. Ct. at 1747 (holding that the waiver of a class action, a statutory procedure that presumably benefits the public, is enforceable); *see also Kilgore v. Keybank Nat’l Assn.* 673 F.3d 947, 962 (9th Cir. 2012) (“[T]he very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so.”) Arguably, anything a state legislature does is supposedly for a public reason. Such is not enough to avoid scrutiny under the FAA.

The notion that the Arbitration Agreement eliminates an employee's ability to bring a PAGA claim in any forum is unsupported. PAGA, by itself, does not confer any right on Respondent. There is no such thing as a "violation of PAGA". The civil penalties available under PAGA are for violations of other substantive sections of the Labor Code, and are discretionary. Cal. Labor Code § 2699(e)(2). Rather, the "substantive rights" conferred on Respondent are found in the underlying Labor Code provisions at issue. The California Supreme Court itself has held that the "Labor Code Private Attorney General Act of 2004 *does not create property or any other substantive rights.*" *Amalgamated Transit Union v. Super. Ct.*, 209 P.3d 937, 943 (Cal. 2009) (emphasis added). PAGA is simply one of several ways by which an employee may seek to enforce that substantive right. *See Amaral v. Cintas Corp.*, 2, 163 Cal.App.4th 1157, 1199 (Cal. Ct. App. 2008) ("PAGA did not impose new or different liabilities on defendants based on their past conduct. . . . It merely changed the procedural rules governing *who* has authority to sue for certain penalties."). Indeed, by its own terms, PAGA is "an alternative" to the prosecution of a Labor Code violation by "the Labor and Workforce Development Agency ("LWDA"), or any of its departments, divisions, commissions, boards, agencies or employees." Cal. Labor Code § 2699(a).

Moreover, an employee has no entitlement or obligation to bring a PAGA representative action. "[L]abor law enforcement agencies were to retain primacy over private enforcement efforts." *Arias v. Super. Ct.*, 209 P.3d 923, 929-30 (Cal. 2009). An aggrieved employee must provide written notice to the LWDA before he or she can file a PAGA representative action, and thereafter he or she

can only file a representative action if the LWDA declines to investigate or if the LWDA fails to respond to the notice in a timely manner, Cal. Labor Code § 2699.3, and if no other employee files first. If, however, the employee is permitted to file a PAGA action, the employee retains all prosecutorial discretion in how the action proceeds and is not limited by the state.

In addition, arbitration does not limit an employee's individual recovery of penalties under PAGA. The California Supreme Court did not hold otherwise. In fact, approximately 60 former members of the previously certified class in this case filed individual arbitrations seeking recovery of individual PAGA penalties. As one federal court explained:

[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims “increase[] risks to defendants” by aggregating the claims of many employees. *See [Concepcion, 131 S.Ct.] at 1752.* Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would “go uncorrected” given the “absence of multilayered review.” *See id.* Just as “[a]rbitration is poorly suited to the higher stakes of class litigation,” it is also poorly suited to the higher stakes of a collective PAGA action. *See id. . . . AT&T v. Concepcion* makes clear, however, that the state cannot impose such a

requirement because it would be inconsistent with the FAA. *See Concepcion*, 131 S.Ct. at 1753.

*Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011).

The fact that Respondent must split any recovered penalties with the State does not change this analysis. PAGA's statutory language does not require representation of other aggrieved employees to recover civil penalties. Cal. Labor Code § 2699(a) (indicating that Penalties under relevant Labor Code provisions “*may . . .* be recovered by an aggrieved employee on behalf of himself or herself and other current or former employees” (emphasis added)). This analysis is supported further by the statute's legislative history. *See, e.g.*, Assembly Committee on Judiciary, Labor Code Private Attorneys General Act of 2004, Date of Hearing June 26, 2003, available online at: [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0751-0800/sb\\_796\\_cfa\\_20030626\\_110301\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_796_cfa_20030626_110301_asm_comm.html) (“[P]rivate suits for Labor Code violations could be brought only by an employee or former employee of the alleged violator against whom the alleged violation was committed. This action *could* also include fellow employees also harmed by the alleged violation.” (emphasis added)). Further, even the title of Section 2699 of the Labor Code reads “Actions brought by *an aggrieved employee or on behalf of self or other current or former employees.*” Cal. Labor Code § 2699 (emphasis added). It follows that an aggrieved individual can seek civil penalties under PAGA for himself or herself regardless of the existence of other current or former employees. Otherwise, the majority opinion leads to the absurd result that part of the case



is arbitrated while the PAGA representative claims for civil penalties is separately litigated. This destroys the value intended by the parties in agreeing to arbitrate, and directly conflicts with the purpose of the FAA.

**B. There is No Principled Difference between a Class Action and a Representative Action under PAGA.**

PAGA is a tool to enforce substantive law. PAGA does not contain any substantive right, and there is nothing in the language of PAGA that precludes a waiver of representative actions in employment agreements. Under *Concepcion*, the FAA applies to waivers of collective or representative actions under PAGA no less than to waivers of class actions. There is simply no principled distinction between a PAGA representative action and a class action. “Class actions and representative actions are quite similar. Both are essentially equitable in nature. They permit persons to sue on behalf of others.” *Weil*, Cal. Prac. Guide: Civil Procedure Before Trial § 14:1.

A PAGA representative action and a class action are nearly identical in their nature. They are both initiated for the benefit of a specific group of aggrieved individuals, and both provide for the possibility of an incentive award for the representative and his or her counsel. *Concepcion* held that one can permissibly waive such a procedural right, as the California Supreme Court conceded. Notably, the waiver clause upheld in *Concepcion* specifically included “any purported class *and representative proceeding*”. *Concepcion*, 131 S. Ct. at 1744, n. 2 (emphasis added). The case made no distinction between representative actions and class actions. The language of Respondent’s Arbitration Agreement here is virtually identical to

the clause upheld in *Concepcion*. Moreover, the clause in *Discover Bank*, which was at issue in *Concepcion*, is similar. It precluded both sides from participating in classwide arbitration, consolidating claims, or arbitrating claims “as a representative or member of a class or in a private attorney general capacity.” *Discover Bank*, 113 P.3d at 1103.

When scrutinized, the supposed differences between PAGA and class actions are immaterial. In both “class” actions and PAGA representative actions: (1) the named plaintiff receives a premium payment (*see, e.g., Clark v. American Residential Services LLC*, 175 Cal.App.4th 785, 804 (Cal. Ct. App. 2009) (indicating that in a class action, the named plaintiff is entitled to an “incentive or enhancement award”); Cal. Labor Code § 2699(i) (explaining that 25% of the recovery goes to the named plaintiff in a PAGA action)); (2) this payment is meant to enhance compliance with the law (*see, e.g., Clark*, 175 Cal. App.4th at 804 (stating that incentive award is to induce the plaintiff to file a class action); *Dunlap v. Super. Ct.*, 142 Cal.App.4th 330, 336-337 (Cal. Ct. App. 2006) (explaining that PAGA was adopted to enhance the enforcement abilities of the Labor Commissioner)); (3) the attorneys are entitled to fees (*see, e.g., Garabedian v. Los Angeles Cellular Telephone Co.*, 118 Cal.App.4th 123, 129 (Cal. Ct. App. 2004) (indicating that attorneys’ fees should be fair in a class action); Cal. Labor Code § 2699(g)(1) (stating that prevailing employee is entitled to attorneys’ fees)); (4) any settlement requires court approval (Cal. Rules of Court 3.769(a); Cal. Labor Code § 2699(1)); and (5) the “aggrieved party” is the employee.

### C. The Qui Tam Analogy is a False Analogy.

The California Supreme Court followed the erroneous reasoning of an unpublished District Court opinion, brought to its attention in the Consolidated Answer to Amicus Curiae Briefs. *Cunningham v. Leslie's Poolmart, Inc.*, No. 13-2122 CAS (CWs), 2013 WL 3233211 (C.D. Cal. June 25, 2013). The *Cunningham* case erroneously held that PAGA cannot be waived because PAGA is somehow “different” from a class action and more analogous to a qui tam action. The California Supreme Court incorrectly agreed that a PAGA action is “a type of qui tam action” that cannot be waived in an arbitration agreement because “a law established for a public reason cannot be contravened by a private agreement”, and that “an employee’s right to bring a PAGA action is [therefore] unwaivable”. (App., 52a – 54a.) Presumably, all state statutes are established for a “public reason.” This Court, however, has never waived from finding such laws invalid where they prevent arbitration and frustrate the FAA. *See, e.g., Southland*, 465 U.S. 1 (California Franchise law), *Perry*, 482 U.S. 483 (California Labor Code); *Preston*, 552 U.S. 346 (California Talent Agency Act).

PAGA and qui tam actions are fundamentally different. The purpose of PAGA is to protect employees, whereas the purpose of a qui tam action is to remedy an injury inflicted on government itself. *Compare, e.g., Caliber Bodyworks Inc. v. Super. Ct.*, 134 Cal.App.4th 365, 375 (Cal. Ct. App. 2005) (stating that PAGA “is necessary to achieve maximum compliance with state labor laws.”) *with People ex rel. Allstate Insurance v. Weitzman*, 107 Cal.App.4th 534, 561, 566 (Cal. Ct. App. 2003) (explaining that qui tam actions are to prosecute fraudulent claims

made against the government). Similarly, the aggrieved party in a PAGA action is the employee who may have an employment contract and arbitration agreement, whereas the victim in a qui tam action is the government. *Compare* Cal. Labor Code § 2699(a) (stating that an aggrieved employee may file a PAGA action) *with Weitzman*, 107 Cal.App.4th at 561, 566 (noting that the “government is the direct victim” in a qui tam action). Likewise, the real party in interest in a PAGA action is the employee whereas the real party in interest in a qui tam action *is the government*. *Compare Dunlap*, 142 Cal.App.4th at 337 (“[T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties “*on behalf of himself or herself and other current or former employees . . . as an alternative to enforcement by the LWDA.*” (emphasis added)) *with United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996) (noting that the government “is always the real party in interest”). Further, the judiciary maintains the primary responsibility over a PAGA action, whereas such control may be retained by the executive branch in a qui tam action. *Compare Echavez v. Abercrombie and Fitch Co., Inc.*, No. CV 11-9754 GAF (PJWx), 2012 WL 2861348 (C.D. Cal. Mar. 12, 2012), \*6 (indicating that judiciary maintains control over a PAGA action) *with U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754 (9th Cir. 1993) (stating that the government can take “primary responsibility for prosecuting the action”). Finally, PAGA penalties are derived from violations directed at separate individuals, whereas a qui tam penalty represents an undivided amount of damages to the government.

In any event, qui tam actions can be prospectively released. For example, in *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 231 (9th Cir. 1997), the federal court dismissed the qui tam action because plaintiff had already executed a release that encompassed “any future *qui tam* claims.” 104 F.3d at 231, 233; *see U.S. v. Swords to Plowshares*, 242 F.3d 385, 385 (9th Cir. 2000) (indicating that future qui tam action was waived in the settlement and release of a prior action). Just as a qui tam action can be waived, so too can a PAGA representative action be waived without impermissibly giving up a “substantive right.”

Thus, the attempt to insulate the waiver of a PAGA representative action from the reach of the FAA by characterizing it as a qui tam action is pure sophistry.

#### **D. Congress Did Not Exempt State Qui Tam Actions From The FAA**

The majority opinion disregards its own conclusion that PAGA “*does not create property or any other substantive rights*” and “*is simply a procedural statute.*” *Amalgamated Transit*, 209 P.3d at 943 (emphasis added). Instead, the Court incorrectly determined that PAGA is “substantive” in nature because it is akin to a qui tam action. Regardless of any superficial resemblance between a qui tam and PAGA action, the issue is whether Congress allowed for a PAGA exception to the FAA. In this regard, the California Supreme Court misallocated the burden. The issue is not whether the FAA was “concerned with limiting [the] scope [of qui tam actions]” (App., 58a), but instead is whether the FAA carves qui tam actions from its reach. “The burden is on the party opposing arbitration

. . . to show that Congress intended to preclude a waiver of judicial remedies.” *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987); *see also Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (stating that an arbitration agreement must be enforced “unless the FAA’s mandate has been ‘overridden by a contrary congressional command’”).

In a per curiam decision, this Court in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (“*Marmet*”), struck down West Virginia’s prohibition against pre-dispute agreements to arbitrate personal injury and wrongful death claims against nursing homes. The Court explained that the absence of any reference to such claims in the FAA establishes that it is preempted: “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. It ‘reflects an emphatic federal policy in favor of arbitral dispute resolution.’” *Id.* at 1203 (emphasis added). Here, there is no exception in the FAA for PAGA waivers. Moreover, nothing in the FAA carves out an exception where a state decides that an individual who signed an agreement to arbitrate, limiting his personal ability to bring PAGA actions, is really acting as the state instead of himself. No amount of legislative legerdemain changes the unalterable fact that an individual, Mr. Iskanian, signed an agreement governed by the FAA that prevents him from bringing a PAGA representative action.

### **E. Federal Courts Disagree with the California Supreme Court.**

Regardless of whether a state statute “benefits the public,” it will be preempted by the FAA if it contravenes the prevailing law that arbitration agreements are to be enforced according to their terms. *Concepcion*, 131 S. Ct. at 1747. Federal courts in California agree with this approach. *See, e.g., Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1180 (S.D. Cal. 2011) (“[Plaintiff’s] PAGA claim is arbitrable, and the arbitration agreement’s provision barring him from bringing that claim on behalf of other employees is enforceable.”); *Valle v. Lowe’s HIW, Inc.*, No. 11-1489 SC, 2011 WL 3667441 (N.D. Cal. Aug. 22, 2011) at \*6 (“[T]o the extent that Plaintiffs argue that no PAGA claim is arbitrable, the court rejects this argument as unsupported by the law. Plaintiffs’ PAGA claim is a state-law claim, and states may not exempt claims from the FAA.”); *Nelson v. AT&T Mobility LLC*, No. C10-4802, 2011 WL 3651153 (N.D. Cal. Aug. 18, 2011) at \*4 (“*Concepcion* preempts California law holding PAGA claim inarbitrable.”). The Ninth Circuit has embraced a broad interpretation of *Concepcion*, stating:

We interpret *Concepcion*’s holding to be broader than a restriction on the use of unconscionability to end-run FAA preemption. We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA. We find support for this reading from the illustration in *Concepcion* involving a case “finding unconscionable

*or unenforceable as against public policy* consumer arbitration agreements that fail to provide for judicially monitored discovery.” 131 S.Ct. at 1747 (emphasis added). Other courts have read *Concepcion* in a similar way. See, e.g., *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341 JSW, 2011 WL 2566449, at \*2 (N.D. Cal. June 27, 2011) (“In the wake of new Supreme Court precedent” the court was “compelled to enforce the . . . arbitration provisions[.]”); *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338 (NLH)(KMW), 2011 WL 2490939, at \*6-7 (D.N.J. June 22, 2011) (“[N]otwithstanding [state law], the Court is bound by [*Concepcion*.]”); see also *Muriithi*, 712 F.3d at 180 (noting that “*Concepcion* sweeps . . . broadly” to preempt generally applicable contract defenses that “target[] the existence of an agreement to arbitrate as the basis for invalidating that agreement”).

*Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (footnote omitted).

In fact, federal courts continue to assert that FAA preemption applies, declining to follow the decision of the California Supreme Court. In *Fardig v. Hobby Lobby Stores, Inc.*, No. SAC V 14-00561 JVS (ANx) (C.D. Cal. Aug. 11, 2014) (App., 1a – 11a.), the District Court for the Central District of California explained:

Preemption is an issue of federal law. The Court is not bound by a state court’s interpretation of federal law, but rather must examine for itself



whether the state rule is consistent with the structure and purpose of the federal rule. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 960 (9th Cir. 2012) (holding that California rule permitting citizens to bring injunctive relief claims on behalf of the public was preempted by the FAA). Therefore, *Iskanian's* contrary reading of whether the PAGA waiver rule is preempted does not bind this Court. . . .

Unlike in *Waffle House*, where it was the EEOC actually bringing the suit, in this case Plaintiffs are the named parties, even if they stand in the shoes of a California agency. Moreover, it is Plaintiffs who would control the litigation. Finally, the *Iskanian* decision offers no persuasive answer to the Court's concerns, articulated in its prior order, regarding the aggregation of civil penalties and determining whether labor laws were violated as to other employees.

Even in light of *Iskanian*, the Court continues to hold that the rule making PAGA claim waivers unenforceable is preempted by the FAA. There is nothing in *Iskanian* that should persuade the Court otherwise, and the Court is not bound by the California Supreme Court's understanding of federal law.

(App., 9a – 10a.)

Thus, the *Iskanian* decision, (App., 12a – 97a), already has led to an internal conflict within the most populous state, with one federal court in California already rejecting *Iskanian's* PAGA carve-out from FAA preemption.

**F. *Iskanian* will Encourage Other States to Disregard the FAA.**

By creating a legal fiction, that an individual party to an arbitration agreement may avoid his or her contractual obligations because he or she stands in the state's shoes, *Iskanian* holds that California may disregard the FAA and United States Supreme Court precedent. PAGA, as applied here, is nothing more than a state-created rule, based on state policy, establishing a "scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748. Under *Concepcion*, this cannot stand.

The underlying decision creates a dangerous precedent, as it provides other states with a playbook for yet another arbitration end run. Using *Marmet* as but one example, perhaps now West Virginia may "deputize" individuals to bring "private attorney general actions" against nursing homes on behalf of other aggrieved residents, with arbitration agreements being written out of the law as a result. It is not hard to come up with other examples that chip away at the FAA so that in the end there is little left.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID F. FAUSTMAN

*Counsel of Record*

YESENIA GALLEGOS

CRISTINA ARMSTRONG

FOX ROTHSCHILD LLP

1800 Century Park East, Suite 300

Los Angeles, California 90067

(310) 598-4150

dfaustman@foxrothschild.com

LEO V. LEYVA

COLE, SCHOTZ, MEISEL,

FORMAN & LEONARD, P.A.

Court Plaza North

25 Main Street

Hackensack, New Jersey 07601

(646) 563-8930

*Attorneys for Petitioner*

## **APPENDIX**

**APPENDIX A — CIVIL MINUTES - GENERAL  
OF THE UNITED STATES DISTRICT COURT,  
CENTRAL DISTRICT OF CALIFORNIA,  
FILED AUGUST 11, 2014**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-00561 JVS(ANx)

Date August 11, 2014

Title Jeremy Fardig, et al. v. Hobby Lobby Stores Inc.

Present: The Honorable James V. Selna

Karla J. Tunis  
Deputy Clerk

Sharon Seffens  
Court Reporter

Attorneys Present for Plaintiffs:  
Matthew Bainer

Attorneys Present for Defendants:  
Cheryl Orr/Philippe Lebel

**Proceedings: Plaintiff's Motion for Reconsideration  
(Fld 6-24-14)**

**Cause called and counsel make their appearances.  
The Court's tentative ruling is issued. Counsel make**

*Appendix A*

**their arguments. The Court DENIES the plaintiff's motion and rules in accordance with the tentative ruling as follows:**

Plaintiffs Jeremy Fardig (“Fardig”), Jeremy Wright (“Wright”), and Christian Bolin (“Bolin”) (collectively, “Plaintiffs”) move this Court for reconsideration of its June 13, 2014 Order granting Defendant Hobby Lobby Stores, Inc.’s (“Hobby Lobby”) motion to stay all proceedings and compel arbitration. (Mot., Docket No. 21.) Hobby Lobby opposes the motion. (Opp’n, Docket No. 22.) Plaintiffs have replied. (Reply, Docket No. 25.)

For the following reasons, the Court DENIES the motion for reconsideration.

## **I. Background**

The factual background to this case is familiar to the parties and to the Court.

This putative class action arises out of the employment relationship between Plaintiffs and Hobby Lobby. Fardig, Wright, and Bolin were all employed as non-exempt assistant managers at one or more of Hobby Lobby’s California retail stores between 2012 and 2013.<sup>1</sup> (Shatara Decl. Ex. A (“Compl.”) ¶¶ 11, 13, 15, Docket No. 7.) As a condition of their employment, Plaintiffs each signed a

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1. Fardig, Wright, and Bolin voluntarily terminated their employment with Hobby Lobby on October 23, 2013, November 16, 2013, and October 23, 2013, respectively. (Mumm Decl. Ex. G-I, Docket No. 11-1.)

*Appendix A*

copy of Hobby Lobby's Mutual Arbitration Agreement ("Arbitration Agreement" or "Agreement").<sup>2</sup> (Mumm Decl. Ex. A–C.)

Under the terms of the Agreements signed by Plaintiffs, Plaintiffs and Hobby Lobby mutually agreed to arbitrate all disputes arising from Plaintiffs' employment.<sup>3</sup> (Id.) The Agreements provide:

Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit . . . that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company . . . that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company . . . shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed.

(Id.) The Arbitration Agreements further state that "Employee and Company are mutually agreeing to

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2. Fardig, Wright, and Bolin also signed substantially similar arbitration agreements as part of their applications to work for Hobby Lobby. (Mumm Decl. Ex. D-F.)

3. The Agreements do exempt "claims for benefits under unemployment compensation laws or workers' compensation laws" and reserve the rights of the parties to "file claims with federal, state, or municipal government agencies." (*Id.*) These exceptions are inapplicable to the present case.

*Appendix A*

submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.” (Id.)

Notably, the Agreements provide for the waiver of class, collective, and joint claims:

The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party.

(Id.)

Plaintiffs filed this action in Orange County Superior Court on February 18, 2014. (Compl.) The Complaint alleges violations of various provisions of the California Labor Code and California Business Professions Code section 17200. (Id. ¶¶ 32–76.) Plaintiffs assert these claims on behalf of a putative class of non-exempt managerial employees employed by Hobby Lobby and a putative class of non-exempt retail employees employed by Hobby Lobby. (Id. ¶ 24.) Hobby Lobby removed the action to this Court on April 10, 2014. (Not. of Removal, Docket No. 1.)

On June 13, 2014, the Court granted Hobby Lobby’s motion to compel the arbitration of Plaintiffs’ claims on an individual basis pursuant to the Arbitration Agreements and stayed all proceedings pending completion of the arbitration. (Order, Docket No. 19.) The Court



*Appendix A*

rejected Plaintiffs' argument that the Agreements were unconscionable for, among other things, including a waiver of Plaintiffs' rights to pursue Private Attorney General Act ("PAGA") claims on a representative basis. The Court reasoned, in line with the majority of federal district courts to have confronted the issue, that holding that the waiver of representative PAGA claims rendered an arbitration agreement unenforceable would frustrate the purposes of the Federal Arbitration Act ("FAA"). (*Id.* at 9–11.) Should such a waiver be unenforceable under California law, that law would be preempted as an obstacle to the FAA's objectives. (*Id.*)

Plaintiffs seek reconsideration of that Order.

**II. Legal Standard**

"[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). In the Central District, Local Rule 7-18 governs motions for reconsideration:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision,

*Appendix A*

or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.<sup>4</sup>

L.R. 7-18. The Court has discretion in determining whether to grant a motion for reconsideration. See Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003) (“Whether or not to grant reconsideration is committed to the sound discretion of the court.”).

### III. Discussion

The sole issue on which Plaintiffs seek reconsideration is the Court’s conclusion that the Agreements are not substantively unconscionable for containing a waiver of the right to bring collective claims under the Private Attorney General Act, Cal. Lab. Code § 2699, et seq. (Mot. at 2–4.)

PAGA is a provision of the California Labor Code that permits plaintiffs to bring representative claims on behalf of other aggrieved employees for an employer’s

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4. See also School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (providing that reconsideration is appropriate if the movant demonstrates clear error, manifest injustice, newly discovered evidence, or an intervening change in controlling law).

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violation of the California Labor Code for the purpose of collecting civil penalties. Cal. Lab. Code § 2699, et seq. PAGA essentially deputizes aggrieved employees and permits them to seek penalties for labor law violations “that could otherwise only be assessed by California’s Labor and Workforce Development Agency.” Cunningham v. Leslie’s Poolmart, Inc., 2013 WL 3233211, at \*5 (C.D. Cal. June 25, 2013).

In its prior Order, the Court held that PAGA claims appeared to be arbitrable on an individual basis, and that even if a waiver of the right to bring representative PAGA claims was unenforceable under California law, any conclusion that such unenforceability rendered the Agreements unconscionable was preempted due to the burdens it would place on accomplishing the FAA’s goals of respecting arbitration agreements wherever possible. (Order at 9–11.) In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011), the Supreme Court held that the FAA preempted the California state-law rule finding that class action waivers in a consumer arbitration agreement were unconscionable. Moreover, the Concepcion Court made clear that any state-law rule standing as an obstacle to the accomplishment of the FAA’s objectives of enforcing arbitration agreements according to their terms to allow for efficient procedures tailored to the specific dispute was preempted. Id. at 1748. The Court followed the majority of district court opinions to address the issue in holding that allowing the prosecution of representative PAGA claims, where such claims have been waived in an arbitration agreement, would slow the dispute resolution process, in opposition to the FAA’s goals. See, e.g., Parvataneni v.

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E\*Trade Financial Corp., 967 F. Supp. 2d 1298, 1304–05 (N.D. Cal. 2013); Miguel v. JPMorgan Chase Bank, N.A., 2013 WL 452418, at \*9 (C.D. Cal. Feb. 5, 2013); Morvant v. P.F. Chang’s China Bistro, Inc., 870 F. Supp. 2d 831, 845–46 (N.D. Cal. 2012); Quevedo v. Macy’s, Inc., 798 F. Supp. 2d 1122, 1140–42 (C.D. Cal. 2011); Grabowski v. Robinson, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011).

Ten days after the Court issued its prior Order, the California Supreme Court addressed the issue of whether PAGA claims are arbitrable and whether the FAA preempts any rule rendering PAGA waivers unenforceable. See Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348 (2014). In Iskanian, the court held definitively that as a matter of California law, an employee’s right to bring a representative PAGA claim cannot be waived and any purported waiver in an arbitration agreement is unenforceable as a matter of state law. Id. at 383–84.

The California Supreme Court acknowledged that such a rule could be preempted if it stood in the way of the FAA’s objectives, but reasoned that the FAA was aimed only at ensuring the efficient resolution of private disputes, while PAGA actions involved disputes between an employer and the state Labor and Workforce Development Agency. Id. at 384. The Court noted that in all but one case, the U.S. Supreme Court’s cases interpreting the FAA involved disputes only involving the parties’ own rights and obligations, rather than those of a public enforcement agency. See id. at 385–86. The one case facing different circumstances held that the Equal Employment Opportunity Commission (“EEOC”) was not

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barred by an arbitration agreement because the EEOC was not a party to the agreement, could prosecute the claim without the employee's consent, and the employee had no right to control the litigation. *Id.* at 386 (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 288–91 (2002)).

While Hobby Lobby does not contest, nor could it, that the California Supreme Court is the final authority on the interpretation of California law, it remains the case that whether or not a California rule is preempted by the FAA is a question of federal law. In their papers, Plaintiffs seem to imply that because the California Supreme Court has determined that the rule against representative PAGA claim waivers is not preempted, and that decision can only be reviewed directly by the U.S. Supreme Court, that this Court is bound by its holding on the preemption issue. (See Mot. at 4; Reply at 2–3.) But that position is emphatically false. Preemption is an issue of federal law. The Court is not bound by a state court's interpretation of federal law, but rather must examine for itself whether the state rule is consistent with the structure and purpose of the federal rule. See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 960 (9th Cir. 2012) (holding that California rule permitting citizens to bring injunctive relief claims on behalf of the public was preempted by the FAA). Therefore, Iskanian's contrary reading of whether the PAGA waiver rule is preempted does not bind this Court.

Because the Iskanian decision is not actually a change in the law—or at least not controlling law—but rather only a contrary authority whose precedential value is

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persuasive instead of binding, the Court doubts whether reconsideration is even available under Local Rule 7-18. Moreover, assuming that the Iskanian decision permits the Court to reconsider its prior Order, the Court does not believe that it erred in holding the rule against representative PAGA claim waivers preempted. Unlike in Waffle House, where it was the EEOC actually bringing the suit, in this case Plaintiffs are the named parties, even if they stand in the shoes of a California agency. Moreover, it is Plaintiffs who would control the litigation. Finally, the Iskanian decision offers no persuasive answer to the Court's concerns, articulated in its prior order, regarding the aggregation of civil penalties and determining whether labor laws were violated as to other employees.

Even in light of Iskanian, the Court continues to hold that the rule making PAGA claim waivers unenforceable is preempted by the FAA. There is nothing in Iskanian that persuades the Court otherwise, and the Court is not bound by the California Supreme Court's understanding of federal law. The Court will therefore deny reconsideration of its prior Order. Plaintiffs may bring their PAGA claims as individuals or, to the extent this is not permitted by California law, as agents of the state, provided that the relief they may obtain is limited to what they could obtain as individuals.

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**IV. Conclusion**

For the foregoing reasons, the Court DENIES the motion for reconsideration.

IT IS SO ORDERED.

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**APPENDIX B — OPINION OF THE SUPREME  
COURT OF CALIFORNIA, FILED JUNE 23, 2014**

IN THE SUPREME COURT OF CALIFORNIA

S204032

ARSHAVIR ISKANIAN,

*Plaintiff and Appellant,*

v.

CLS TRANSPORTATION LOS ANGELES, LLC,

*Defendant and Respondent.*

June 23, 2014, Filed

In this case, we again address whether the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) preempts a state law rule that restricts enforcement of terms in arbitration agreements. Here, an employee seeks to bring a class action lawsuit on behalf of himself and similarly situated employees for his employer's alleged failure to compensate its employees for, among other things, overtime and meal and rest periods. The employee had entered into an arbitration agreement that waived the right to class proceedings. The question is whether a state's refusal to enforce such a waiver on grounds of public policy or unconscionability is preempted by the FAA. We conclude that it is and that our holding to the contrary in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal. Rptr. 3d



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773, 165 P.3d 556] (*Gentry*) has been abrogated by recent United States Supreme Court precedent. We further reject the arguments that the class action waiver at issue here is unlawful under the National Labor Relations Act (29 U.S.C. § 151 et seq.) and that the employer in this case waived its right to arbitrate by withdrawing its motion to compel arbitration after *Gentry*.

The employee also sought to bring a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). This statute authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state. As explained below, we conclude that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.

Finally, we hold that the PAGA does not violate the principle of separation of powers under the California Constitution.

*Appendix B***I.**

Plaintiff Arshavir Iskanian worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS), from March 2004 to August 2005. In December 2004, Iskanian signed a “Proprietary Information and Arbitration Policy/Agreement” providing that “any and all claims” arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement provided for reasonable discovery, a written award, and judicial review of the award; costs unique to arbitration, such as the arbitrator’s fee, would be paid by CLS. The arbitration agreement also contained a class and representative action waiver that said: “[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.”

On August 4, 2006, Iskanian filed a class action complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, or pay final wages in a timely manner. In its answer to the complaint, CLS asserted among other

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defenses that all of plaintiff's claims were subject to binding arbitration. CLS moved to compel arbitration, and in March 2007, the trial court granted CLS's motion. Shortly after the trial court's order but before the Court of Appeal's decision in this matter, we decided in *Gentry* that class action waivers in employment arbitration agreements are invalid under certain circumstances. (*Gentry, supra*, 42 Cal.4th at pp. 463-464.) The Court of Appeal issued a writ of mandate directing the superior court to reconsider its ruling in light of *Gentry*.

On remand, CLS voluntarily withdrew its motion to compel arbitration, and the parties proceeded to litigate the case. On September 15, 2008, Iskanian filed a consolidated first amended complaint, alleging seven causes of action for Labor Code violations and an unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.) claim. Iskanian brought his claims as an individual and putative class representative seeking damages, and also in a representative capacity under the PAGA seeking civil penalties for Labor Code violations. After conducting discovery, Iskanian moved to certify the class, and CLS opposed the motion. On October 29, 2009, the trial court granted Iskanian's motion.

On April 27, 2011, the United States Supreme Court issued *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. \_\_\_ [179 L. Ed. 2d 742, 131 S. Ct. 1740] (*Concepcion*). *Concepcion* invalidated our decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 [30 Cal. Rptr. 3d 76, 113 P.3d 1100] (*Discover Bank*), which had restricted consumer class action waivers in arbitration agreements.

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Soon after, in May 2011, CLS renewed its motion to compel arbitration and dismiss the class claims, arguing that *Concepcion* also invalidated *Gentry*. Iskanian opposed the motion, arguing among other things that *Gentry* was still good law and, in any event, that CLS had waived its right to seek arbitration by withdrawing the original motion to compel arbitration. The trial court ruled in favor of CLS, ordering the case into individual arbitration and dismissing the class claims with prejudice.

The Court of Appeal affirmed, concluding that *Concepcion* invalidated *Gentry*. The court also declined to follow a National Labor Relations Board ruling that class action waivers in adhesive employment contracts violate the National Labor Relations Act. With respect to the PAGA claim, the court understood Iskanian to be arguing that the PAGA does not allow representative claims to be arbitrated, and it concluded that the FAA precludes states from withdrawing claims from arbitration and that PAGA claims must be argued individually, not in a representative action, according to the terms of the arbitration agreement. Finally, the court upheld the trial court's finding that CLS had not waived its right to compel arbitration. We granted review.

**II.**

We first address the validity of the class action waiver at issue here and the viability of *Gentry* in light of *Concepcion*.

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In *Discover Bank*, we held that when a class arbitration waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that 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, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.)

The high court in *Concepcion* invalidated *Discover Bank* and held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1748].) According to *Concepcion*, classwide arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” (*Id.* at p. \_\_\_ [131 S. Ct. at p. 1751].) Class arbitration also “greatly increases risks to defendants” and “is poorly suited to the higher stakes of class litigation” because of the lack of judicial review, “thus rendering arbitration unattractive” to defendants. (*Id.* at p. \_\_\_ & fn. 8 [131 S. Ct. at p. 1752 & fn. 8].) The court concluded that “[b]ecause it ‘stands as an obstacle to the accomplishment and execution of the full purposes and

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objectives of Congress,’ [citation], California’s *Discover Bank* rule is preempted by the FAA.” (*Id.* at p. \_\_\_ [131 S. Ct. at p. 1753].)

In *Gentry*, we considered a class action waiver and an arbitration agreement in an employment contract. The complaint in *Gentry* alleged that the defendant employer had systematically failed to pay overtime wages to a class of employees. Whereas *Discover Bank* concerned the application of the doctrine of unconscionability, *Gentry* focused on whether the class action waiver would “undermine the vindication of the employees’ unwaivable statutory rights” to overtime pay. (*Gentry, supra*, 42 Cal.4th at p. 450.) We concluded that a class action waiver may be unenforceable in some circumstances: “[W]hen it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members’ rights to overtime pay through individual arbitration. If it concludes, 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

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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 pp. 463-464.)

Iskanian contends that *Gentry* survives *Concepcion*. In his briefing, he argues: “The Missouri Supreme Court has interpreted *Concepcion* as holding that *Discover Bank* was preempted because ‘it required class arbitration even if class arbitration disadvantaged consumers and was unnecessary for the consumer to obtain a remedy.’ (*Brewer v. Missouri Title Loans* (Mo. 2012) 364 S.W.3d 486, 489, 494.) Similarly, a recent analysis of *Concepcion* concludes that ‘the unconscionability defense in *Concepcion* “stood as an obstacle,” for preemption purposes, because it was a categorical rule that applied to all consumer cases. 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.’ (Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion* (2012) 79 U. Chi. L. Rev. 623, 651.)”

Iskanian also contends: “*Gentry*, by contrast, ‘is not a categorical rule against class action waivers.’ [Citation.] *Gentry* explicitly disclaimed any categorical rule . . . . Unlike *Discover Bank*, which held consumer class-action bans ‘generally unconscionable’ ([*Gentry, supra*, 42 Cal.4th] at p. 453), *Gentry* held only that when a statutory right is unwaivable because of its ‘public importance,’ *id.* at p. 456, banning class actions would in ‘some circumstances’ ‘lead to a de facto waiver and would impermissibly

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interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws.' (*Id.* at p. 457.)” According to Iskanian, “[t]he Courts of Appeal have interpreted *Gentry* to require an evidentiary showing in which a plaintiff bears the burden of demonstrating, based on the *Gentry* factors, that enforcing a class-action ban would result in a waiver of substantive rights.”

Contrary to these contentions, however, the fact that *Gentry*'s rule against class waiver is stated more narrowly than *Discover Bank*'s rule does not save it from FAA preemption under *Concepcion*. The high court in *Concepcion* made clear that even if a state law rule against consumer class waivers were limited to “class proceedings [that] are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” it would still be preempted because states cannot require a procedure that interferes with fundamental attributes of arbitration “even if it is desirable for unrelated reasons.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1753]; see *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. \_\_\_, \_\_\_ & fn. 5 [186 L. Ed. 2d 417 & fn. 5, 133 S. Ct. 2304, 2312] (*Italian Colors*)). It is thus incorrect to say that the infirmity of *Discover Bank* was that it did not require a case-specific showing that the class waiver was exculpatory. *Concepcion* holds that *even if* a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA. Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers.



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In his briefing and at oral argument, Iskanian further argued that the *Gentry* rule or a modified *Gentry* rule—whereby a class waiver would be invalid if it meant a de facto waiver of rights and if the arbitration agreement failed to provide suitable alternative means for vindicating employee rights—survives *Concepcion* under our reasoning in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 [163 Cal. Rptr. 3d 269, 311 P.3d 184] (*Sonic II*). But the *Gentry* rule, whether modified or not, is not analogous to the unconscionability rule set forth in *Sonic II*.

As noted, *Gentry* held that the validity of a class waiver turns on whether “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 [whether] the disallowance of the class action will likely lead to a less comprehensive enforcement of [labor or employment] laws for the employees alleged to be affected by the employer’s violations.” (*Gentry, supra*, 42 Cal.4th at p. 463.) In other words, if individual arbitration or litigation cannot be designed to approximate the advantages of a class proceeding, then a class waiver is invalid. But *Concepcion* held that because class proceedings interfere with fundamental attributes of arbitration, a class waiver is *not* invalid even if an individual proceeding would be an ineffective means to prosecute certain claims. (See *Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1753].)

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The Berman waiver addressed in *Sonic II* is different from a class waiver. As *Sonic II* explained, a Berman waiver implicates a host of statutory protections designed to benefit employees with wage claims against their employers. (*Sonic II, supra*, 57 Cal.4th at pp. 1127-1130.) One of those protections is a special administrative hearing (a Berman hearing) that we had held unwaivable in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 [121 Cal. Rptr. 3d 58, 247 P.3d 130] (*Sonic I*). In *Sonic II*, we overruled *Sonic I* in light of *Concepcion*, reasoning that “[b]ecause a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective ‘“to achieve ‘streamlined proceedings and expeditious results’”’ and “is thus preempted by the FAA.” (*Sonic II, supra*, 57 Cal.4th at p. 1141.) Under the logic of *Sonic II*, which mirrors the logic applied to the *Gentry* rule above, it is clear that because a Berman hearing interferes with fundamental attributes of arbitration, a Berman waiver is not invalid even if the unavailability of a Berman hearing would leave employees with ineffective means to pursue wage claims against their employers.

But *Sonic II* went on to explain that “[t]he fact that the FAA preempts *Sonic I*’s rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying unconscionability analysis may not consider the value of benefits provided by the Berman statutes, *which go well beyond the hearing itself.*” (*Sonic II, supra*, 57 Cal.4th at p. 1149, italics added.) The

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Berman statutes, we observed, provide for fee shifting, mandatory undertaking, and several other protections to assist wage claimants should the wage dispute proceed to litigation. (57 Cal.4th at p. 1146.) “Many of the Berman protections are situated no differently than state laws concerning attorney fee shifting, assistance of counsel, or other rights designed to benefit one or both parties in civil litigation.” (*Id.* at p. 1150; see, e.g., Lab. Code, § 1194, subd. (a) [one-way fee shifting for plaintiffs asserting minimum wage and overtime claims].) The value of these protections does not derive from the fact that they exist in the context of a prearbitration administrative hearing. Instead, as *Sonic II* made clear, the value of these protections may be realized in “potentially many ways” through arbitration designed in a manner “consistent with its fundamental attributes.” (*Sonic II*, at p. 1149; see *ibid.* [“Our rule contemplates that arbitration, no less than an administrative hearing, can be designed to achieve speedy, informal, and affordable resolution of wage claims . . . .”].)

*Sonic II* thus established an unconscionability rule that considers whether arbitration is an effective dispute resolution mechanism for wage claimants without regard to any advantage inherent to a procedural device (a Berman hearing) that interferes with fundamental attributes of arbitration. By contrast, the *Gentry* rule considers whether individual arbitration is an effective dispute resolution mechanism for employees *by direct comparison* to the advantages of a procedural device (a class action) that interferes with fundamental attributes of arbitration. *Gentry*, unlike *Sonic II*, cannot be squared with *Concepcion*.

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In practice, *Gentry*'s rule prohibiting class waivers if "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" (*Gentry, supra*, 42 Cal.4th at p. 463) regularly resulted in invalidation of class waivers, at least prior to *Concepcion*. (See, e.g., *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 457 [93 Cal. Rptr. 3d 65]; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 170-171 [90 Cal. Rptr. 3d 818]; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1298-1299 [90 Cal. Rptr. 3d 539]; *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 148-149 [67 Cal.Rptr.3d 120]; *Jackson v. S.A.W. Entertainment Ltd.* (N.D.Cal. 2009) 629 F. Supp. 2d 1018, 1027-1028.) These results are unsurprising since it is unlikely that an individual action could be designed to approximate the inherent leverage that a class proceeding provides to employees with claims against a defendant employer. (See *Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1752].) By contrast, *Sonic II* addressed individual wage claims, not class actions, and there is no reason to think that the value of Berman protections distinct from a Berman hearing itself cannot be achieved by designing an arbitration process that is accessible, affordable, and consistent with fundamental attributes of arbitration. (See *Sonic II, supra*, 57 Cal.4th at p. 1147 ["There are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes. We see no reason to believe that the specific elements of the Berman statutes are the only way to achieve this goal

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or that employees will be unable to pursue their claims effectively without initial resort to an administrative hearing as opposed to an adequate arbitral forum.”].)

In sum, *Sonic II* recognized that the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration. But *Concepcion* held that the FAA does prevent states from mandating or promoting procedures incompatible with arbitration. The *Gentry* rule runs afoul of this latter principle. We thus conclude in light of *Concepcion* that the FAA preempts the *Gentry* rule.

**III.**

Iskanian contends that even if the FAA preempts *Gentry*, the class action waiver in this case is invalid under the National Labor Relations Act (NLRA). Iskanian adopts the position of the National Labor Relations Board (Board) in *In re D.R. Horton Inc.* (Jan. 3, 2012) 357 NLRB No. 184 [2012 WL 36274] (*Horton I*) that the NLRA generally prohibits contracts that compel employees to waive their right to participate in class proceedings to resolve wage claims. The Fifth Circuit recently refused to enforce that portion of the NLRB’s opinion. (*D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344 (*Horton II*)). We consider below the Board’s position and the Fifth Circuit’s reasons for rejecting it.

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In *Horton I*, the employee, Michael Cuda, a superintendent at D.R. Horton, Inc., claimed he had been misclassified as exempt from statutory overtime protections under the Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.). He sought to initiate a nationwide class arbitration of similarly situated superintendents working for Horton. Horton asserted that the mutual arbitration agreement (MAA) barred arbitration of collective claims. Cuda then filed an unfair labor practice charge, and the Board’s general counsel issued a complaint. The complaint alleged that Horton violated section 8(a)(1) of the NLRA by maintaining the MAA provision that said the arbitrator “may hear only Employee’s individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” (*Horton I, supra*, 357 NLRB No. 184, p. 1 [2012 WL 36274 at p. \*2].) The complaint further alleged that Horton violated NLRA section 8(a) (1) and (4) by maintaining arbitration agreements that required employees, as a condition of employment, “to submit all employment related disputes and claims to arbitration . . . , thus interfering with employee access to the [Board].” (*Horton I*, at p. 2 [2012 WL 36274 at p. \*2].) An administrative law judge agreed that the latter but not the former is an unfair labor practice.

On appeal, the Board concluded that (1) the joining together of employees to bring a class proceeding to address wage violations is a form of concerted activity

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under section 7 of the NLRA (29 U.S.C. § 157); (2) an agreement compelling an employee to waive the right to engage in that activity as a condition of employment is an unfair labor practice under section 8 of the NLRA (§ 158); and (3) this rule is not precluded by the FAA because it is consistent with the FAA's savings clause (9 U.S.C. § 2) and because the later-enacted NLRA prevails over the earlier enacted FAA to the extent there is a conflict.

The Board began its analysis with section 7 of the NLRA, which states that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.” (29 U.S.C. § 157, italics added.)

The Board commented: “It is well settled that ‘mutual aid or protection’ includes employees’ efforts to ‘improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.’ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 [57 L. Ed. 2d 428, 98 S. Ct. 2505] (1978). The Supreme Court specifically stated in *Eastex* that Section 7 ‘protects employees from retaliation by their employer when they seek to improve their working

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conditions through resort to administrative and judicial forums.’ *Id.* at 565-566. The same is equally true of resort to arbitration. [¶] The Board has long held, with uniform judicial approval, that the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.” (*Horton I, supra*, 357 NLRB No. 184, p. 2 [2012 WL 36274 at p. \*2].)

The Board then turned to section 8(a)(1) of the NLRA, which says it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” section 7. (29 U.S.C. § 158(a)(1).) The Board found, based on the previous discussion, “that the MAA expressly restricts protected activity.” (*Horton I, supra*, 357 NLRB No. 184, p. 4 [2012 WL 36274 at p. \*5].) “That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights—including, notably, agreements that employees will pursue claims against their employer only individually.” (*Ibid.*)

The Board buttressed this conclusion by reviewing a statute that preceded the NLRA, the Norris-LaGuardia Act (29 U.S.C. § 101 et seq.), which among other things limited the power of federal courts to issue injunctions enforcing “yellow dog” contracts prohibiting employees from joining labor unions. (*Horton I, supra*, 357 NLRB No. 184, p. 5 [2012 WL 36274 at p. \*7].) The types of



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activity, “whether undertaken ‘singly or in concert,’” that may not be limited by restraining orders or injunctions include “aiding any person participating or interested in any labor dispute who . . . is *prosecuting, any action or suit* in any court of the United States or of any State.’ 29 U.S.C. § 104(d) (emphasis added).” (*Id.* at pp. 5-6 [2012 WL 36274 at p. \*7], fn. omitted.) “The law has long been clear that all variations of the venerable “yellow dog contract” are invalid as a matter of law.’ *Barrow Utilities & Electric*, 308 N.L.R.B. 4, 11 fn. 5 (1992).” (*Id.* at p. 6 [2012 WL 36274 at p. \*8].)

The Board concluded its analysis by finding no conflict between the NLRA and the FAA. Relying on the FAA’s savings clause (see 9 U.S.C. § 2 [arbitration agreements are to be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract”]), the Board explained that “the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. The Supreme Court . . . has made clear that ‘[w]herever private contracts conflict with [the] functions’ of the National Labor Relations Act, ‘they obviously must yield or the Act would be reduced to a futility.’ *J. I. Case Co.* [(1944)] 321 U.S. [332,] 337 [88 L. Ed. 762, 64 S. Ct. 576]. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the Respondent solely on an individual basis” (*Horton I, supra*, 357 NLRB No. 184, p. 9 [2012 WL 36274 at p. \*11]).

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The Board also invoked the principle that arbitration agreements may not require a party to “forgo the substantive rights afforded by the statute.” (*Horton I, supra*, 357 NLRB No. 184, p. 9 [2012 WL 36724 at p. \*11], quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 [114 L. Ed. 2d 26, 111 S. Ct. 1647] (*Gilmer*)). The Board clarified that “[t]he question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. [Citation.] Rather, the issue here is whether the MAA’s categorical prohibition of joint, class, or collective federal[,] state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA.” (*Horton, supra*, 357 NLRB No. 184, p. 9 [2012 WL 36274 at p. \*12], fn. omitted.)

The Board recognized a tension between its ruling and *Concepcion*’s statements that the “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings” and that the “switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality.” (*Concepcion, supra*, 563 U.S. at pp. \_\_\_, \_\_\_ [131 S. Ct. at pp. 1748, 1751].) But in the Board’s view, “the weight of this countervailing consideration was considerably greater in the context of [*Concepcion*] than it is here for several reasons. [*Concepcion*] involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers

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and their own employees are at stake. As the Court pointed out in [*Concepcion*], such contracts of adhesion in the retail and services industries might cover ‘tens of thousands of potential claimants.’ *Id.* at 1752. The average number of employees employed by a single employer, in contrast, is 20, and most class-wide employment litigation, like the case at issue here, involves only a specific subset of an employer’s employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in [*Concepcion*]—speed, cost, informality, and risk—when the class is so limited in size. 131 S. Ct. at 1751-1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in [*Concepcion*]. Accordingly, any intrusion on the policies underlying the FAA is similarly limited.” (*Horton I, supra*, 357 NLRB No. 184, pp. 11-12 [2012 WL 36274 at p. \*15], fn. omitted.)

“Finally,” the Board said, “even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia Act. As explained above, under the Norris-LaGuardia Act, a private agreement that seeks to prohibit a ‘lawful means [of] aiding any person participating or interested in’ a lawsuit arising out of a labor dispute (as broadly defined) is unenforceable, as contrary to the public policy protecting employees’ ‘concerted activities for . . . mutual aid or protection.’ To the extent that the FAA requires giving effect to such an

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agreement, it would conflict with the Norris-LaGuardia Act. The Norris-LaGuardia Act, in turn—passed 7 years *after* the FAA,—repealed ‘[a]ll acts and parts of act[s] in conflict’ with the later statute (Section 15).” (*Horton I, supra*, 357 NLRB No. 184, p. 12 [2012 WL 36274 at p. \*16], fn. omitted.)

**B.**

In *Horton II*, the Fifth Circuit disagreed with the Board’s ruling that the class action waiver in the MAA was an unfair labor practice. The court recognized precedent holding that “ ‘the filing of a civil action by employees is protected activity . . . [and] by joining together to file the lawsuit [the employees] engaged in concerted activity.’ *127 Rest. Corp.*, 331 N.L.R.B. 269, 275-76 (2000). ‘[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is “concerted activity” under Section 7’ of the NLRA. *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011).” (*Horton II, supra*, 737 F.3d at p. 356.) However, the Fifth Circuit reasoned, “The [FAA] has equal importance in our review. Caselaw under the FAA points us in a different direction than the course taken by the Board.” (*Id.* at p. 357.)

Relying on *Concepcion*, the Fifth Circuit rejected the argument that the Board’s rule fell within the savings clause of the FAA. A rule that is neutral on its face but is “applied in a fashion that disfavors arbitration” is not a ground that exists “ ‘for the revocation of any contract” “ ‘within the meaning of the savings clause. (*Concepcion*,

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*supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1747].) The Fifth Circuit concluded that the Board’s rule, like the rule in *Discover Bank*, was not arbitration neutral. Rather, by substituting class proceedings for individual arbitration, the rule would significantly undermine arbitration’s fundamental attributes by requiring procedural formality and complexity, and by creating greater risks to defendants. (*Horton II, supra*, 737 F.3d at p. 359, citing *Concepcion, supra*, 563 U.S. at pp. \_\_\_ - \_\_\_ [131 S. Ct. at pp. 1750-1752].)

The court then considered whether “the FAA’s mandate has been ‘overridden by a contrary congressional command.’” (*CompuCredit Corp. v. Greenwood* (2012) 565 U.S. \_\_\_, \_\_\_ [181 L. Ed. 2d 586, 132 S. Ct. 665, 669]; see *Italian Colors, supra*, 570 U.S. at p. \_\_\_ [133 S. Ct. at p. 2309].) “If such a command exists, it ‘will be discoverable in the text,’ the statute’s ‘legislative history,’ or ‘an “inherent conflict” between arbitration and the [statute’s] underlying purposes.’ [Citation.] ‘[T]he relevant inquiry [remains] whether Congress . . . precluded “arbitration or other nonjudicial resolution” of claims.’” (*Horton II, supra*, 737 F.3d at p. 360, quoting *Gilmer, supra*, 500 U.S. at pp. 26, 28.) The court found that neither the NLRA’s language nor its legislative history showed any indication of prohibiting a class action waiver in an arbitration agreement. (*Horton II*, at pp. 360-361.)

Next, the Fifth Circuit considered whether there is “an inherent conflict” between the FAA and the NLRA. (*Horton II, supra*, 737 F.3d at p. 361.) It noted that NLRA policy itself “favors arbitration” and permits unions

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to waive the right of employees to litigate statutory employment claims in favor of arbitration. (*Ibid.*) The court also noted that “the right to proceed collectively cannot protect vindication of employees’ statutory rights under the ADEA or FLSA because a substantive right to proceed collectively has been foreclosed by prior decisions.” (*Ibid.*, citing *Gilmer*, *supra*, 500 U.S. at p. 32 & *Carter v. Countrywide Credit Industries, Inc.* (5th Cir. 2004) 362 F.3d 294, 298.) “The right to collective action also cannot be successfully defended on the policy ground that it provides employees with greater bargaining power. ‘Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.’ *Gilmer*, 500 U.S. at 33. The end result is that the Board’s decision creates either a right that is hollow or one premised on an already-rejected justification.” (*Horton II*, at p. 361.)

Further, the court observed that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice. [Citation.] We find limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted.” (*Horton II*, *supra*, 737 F.3d at p. 362, fn. omitted.) For the reasons above, the court held that the NLRA does not foreclose enforcement of a class action waiver in an arbitration agreement. (*Horton II*, at p. 363.)

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We agree with the Fifth Circuit that, in light of *Concepcion*, the Board's rule is not covered by the FAA's savings clause. *Concepcion* makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice. (*Concepcion, supra*, 563 U.S. at pp. \_\_\_ - \_\_\_ [131 S. Ct. at pp. 1750-1752].) Thus, if the Board's rule is not precluded by the FAA, it must be because the NLRA conflicts with and takes precedence over the FAA with respect to the enforceability of class action waivers in employment arbitration agreements. As the Fifth Circuit explained, neither the NLRA's text nor its legislative history contains a congressional command prohibiting such waivers. (*Horton II, supra*, 737 F.3d at pp. 360-361.)

We also agree that there is no inherent conflict between the FAA and the NLRA as that term is understood by the United States Supreme Court. It is significant that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." (*Horton II, supra*, 737 F.3d at p. 362.) To be sure, "the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it'" (*NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 829 [79 L. Ed. 2d 839, 104 S. Ct. 1505]), and the forms of concerted activity protected by the NLRA are not necessarily limited to those that existed when the NLRA was enacted in 1935 or reenacted in 1947.

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However, in *Italian Colors*, where the high court held that federal antitrust laws do not preclude enforcement of a class action waiver in an arbitration agreement, the high court found it significant that “[t]he Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23 . . . .” (*Italian Colors, supra*, 570 U.S. at p. \_\_\_ [133 S. Ct. at p. 2309].) Here as well, like the Fifth Circuit, “[w]e find limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted.” (*Horton II*, at p. 362, fn. omitted.)

Furthermore, as the high court stated in *Italian Colors*: “In *Gilmer, supra*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. We said that statutory permission did “not mean that individual attempts at conciliation were intended to be barred.”” (*Italian Colors, supra*, 570 U.S. at p. \_\_\_ [133 S. Ct. at p. 2311].) Thus, the high court has held that the explicit authorization of class actions in the Age Discrimination in Employment Act (see 29 U.S.C. § 626(b), referencing, for purposes of enforcement, 29 U.S.C. § 216 [providing for employee class actions as a remedy for FLSA violations]) does not bar enforcement of a class waiver in an arbitration agreement. This holding reinforces our doubt that the NLRA’s general protection of concerted activity, which makes no reference to class actions, may be construed as an implied bar to a class action waiver.



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We do not find persuasive the Board's attempt to distinguish its rule from *Discover Bank* on the basis that employment arbitration class actions tend to be smaller than consumer class actions and thus "far less cumbersome and more akin to an individual arbitration proceeding." (*Horton I, supra*, 357 NLRB No. 184, p. 12 [2012 WL 36274 at p. \*15].) Nothing in *Concepcion* suggests that its rule upholding class action waivers, which relied significantly on the incompatibility between the formality of class proceedings and the informality of arbitration (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1751]), depends on the size of the class involved. Nor does the limitation of a class action waiver to disputes between employers and employees mitigate the conflict between the Board's rule and the FAA under the reasoning of *Concepcion*.

We thus conclude, in light of the FAA's "liberal federal policy favoring arbitration" (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1745]), that sections 7 and 8 of the NLRA do not represent "a contrary congressional command" "overriding the FAA's mandate (*CompuCredit Corp. v. Greenwood, supra*, 565 U.S. at p. \_\_\_ [132 S. Ct. at p. 669]). This conclusion is consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue. (See *Sutherland v. Ernst & Young, LLP* (2d Cir. 2013) 726 F.3d 290, 297, fn. 8; *Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1053-1055; *Delock v. Securitas Security Services USA, Inc.* (E.D.Ark. 2012) 883 F. Supp. 2d 784, 789-790; *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. 2012) 870 F. Supp. 2d 831, 844-845; *Jasso*

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*v. Money Mart Express, Inc.* (N.D.Cal. 2012) 879 F. Supp. 2d 1038, 1048-1049; but see *Herrington v. Waterstone Mortgage Corp.* (W.D.Wis., Mar. 16, 2012, No. 11-cv-779-bbc) 2012 WL 1242318, p. \*5 [defendant advances no persuasive argument that the Board interpreted the NLRA incorrectly.]

Our conclusion does not mean that the NLRA imposes no limits on the enforceability of arbitration agreements. Notably, while upholding the class waiver in *Horton II*, the Fifth Circuit affirmed the Board's determination that the arbitration agreement at issue violated section 8(a) (1) and (4) of the NLRA insofar as it contained language that would lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the Board. (*Horton II, supra*, 737 F.3d at pp. 363-364.) Moreover, the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims. CLS points out that the agreement here is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to "discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims." (*Horton I, supra*, 357 NLRB No. 184, p. 6 [2012 WL 36274 at p. \*8]; cf. *Italian Colors, supra*, 570 U.S.

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at p. \_\_\_\_, fn. 4 [133 S.Ct. at p. 2311, fn. 4] [making clear that its holding applies only to class action waivers and not to provisions barring “other forms of cost sharing”].) We have no occasion to decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section 7.

**IV.**

Code of Civil Procedure section 1281.2 provides that one ground for denying a petition to compel arbitration is that “[t]he right to compel arbitration has been waived by the petitioner.” Iskanian contends that CLS waived its right to arbitration by failing to diligently pursue arbitration. We disagree.

“As our decisions explain, the term ‘waiver’ has a number of meanings in statute and case law. [Citation.] While ‘waiver’ generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to relinquish the right. [Citations.] In the arbitration context, ‘[t]he term “waiver” has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.’ [Citation.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 [8 Cal. Rptr. 3d 517, 82 P.3d 727] (*St. Agnes Medical Center*)).

“California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging

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from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the ‘bad faith’ or ‘willful misconduct’ of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]” (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426 [158 Cal. Rptr. 828, 600 P.2d 1060].) The fact that the party petitioning for arbitration has participated in litigation, short of a determination on the merits, does not by itself constitute a waiver. (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1203.)

We have said the following factors are relevant to the waiver inquiry: ““(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.”” (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196.)

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In light of the policy in favor of arbitration, “waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.” (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1195.) “Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] ‘When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s ruling.’” (*Id.* at p. 1196.)

In the present case, CLS initially filed a timely petition to compel arbitration in response to Iskanian’s complaint, which included class action claims. After the trial court granted the petition, this court issued *Gentry*, which restricted the enforceability of class waivers, and the Court of Appeal remanded the matter to the trial court to determine whether *Gentry* affected the ruling. Rather than further litigate the petition to compel arbitration, CLS withdrew the petition and proceeded to litigate the claim and resist Iskanian’s move to certify a class. The parties engaged in discovery, both as to the merits and on the class certification issue. In October of 2009, the trial court granted Iskanian’s motion to certify the class. In May of 2011, shortly after the Supreme Court filed *Concepcion*, which cast *Gentry* into doubt, CLS renewed its petition to compel arbitration. The trial court granted the petition.

CLS contends that it has never acted inconsistently with its right to arbitrate. It initially petitioned to compel

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arbitration and then abandoned arbitration only when *Gentry* made clear that further petition would be futile. It moved to compel arbitration again as soon as a change in the law made clear the motion had a chance of succeeding. In response, Iskanian contends that California law does not recognize futility as a legitimate ground for delaying the assertion of the right to arbitration and that even if there were such an exception, it should not apply here because even after *Gentry*, CLS's petition to compel arbitration had some chance of success.

This court has not explicitly recognized futility as a ground for delaying a petition to compel arbitration. (Compare *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 [delay in asserting arbitration rights excusable when prevailing “intertwining doctrine” made such an assertion futile until Supreme Court rejected the doctrine].) But futility as grounds for delaying arbitration is implicit in the general waiver principles we have endorsed. A factor relevant to the waiver inquiry is whether the party asserting arbitration has acted inconsistently with the right to arbitrate (see *St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1196) or whether a delay was “unreasonable” (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 [140 Cal. Rptr. 3d 206] (*Fletcher Jones*)). The fact that a party initially successfully moved to compel arbitration and abandoned that motion only after a change in the law made the motion highly unlikely to succeed weighs in favor of finding that the party has not waived its right to arbitrate.

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Iskanian points out that *Gentry* did not purport to invalidate all class waivers in wage and hour cases, but only in those instances when a class action or arbitration “is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration.” (*Gentry, supra*, 42 Cal.4th at p. 463.) In this case, however, neither party has ever disputed that the class action waiver at issue would not have survived *Gentry*. This case is therefore distinguishable from cases finding unexcused delay where the party asserting arbitration had some real chance of succeeding in compelling individual arbitration under extant law applicable to class waivers. (See *Fletcher Jones, supra*, 205 Cal.App.4th at p. 448 [*Discover Bank’s* holding that consumer class action waivers are prohibited in the case of small damages claims did not preclude class waiver where plaintiff sought \$ 19,000 in damages].)

Iskanian contends that because he spent three years attempting to obtain class certification, including considerable effort and expense on discovery, waiver should be found on the ground that the delay in the start of arbitration prejudiced him. We have said that “prejudice . . . is critical in waiver determinations.” (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1203.) But “[b]ecause merely participating in litigation, by itself, does not result in . . . waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.” (*Ibid.*) “Prejudice typically is found only where the petitioning party’s conduct has substantially undermined this important public policy or substantially impaired the other side’s ability to take

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advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation]." (*Id.* at p. 1204.)

Some courts have interpreted *St. Agnes Medical Center* to allow consideration of the expenditure of time and money in determining prejudice where the delay is unreasonable. In *Burton v. Cruise* (2010) 190 Cal.App.4th 939 [118 Cal. Rptr. 3d 613], for example, the court reasoned that "a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.' [Citation.] Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel." (*Id.* at p. 948.) Other courts have likewise found that unjustified delay, combined with substantial expenditure of time and money, deprived the parties of the benefits of arbitration and was sufficiently prejudicial to support a finding of waiver to arbitrate. (See, e.g., *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205 [142 Cal. Rptr. 3d 312]; *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 845-846 [133 Cal. Rptr. 3d 350]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal. App.4th 1443, 1451 [110 Cal. Rptr. 3d 104]; *Guess?, Inc. v.*



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*Superior Court* (2000) 79 Cal.App.4th 553, 558 [94 Cal. Rptr. 2d 201]; *Sobremonte v. Superior Court* (1998) 61 Cal. App.4th 980, 996 [72 Cal. Rptr. 2d 43]; but see *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197 [98 Cal. Rptr. 2d 836] [excluding time and expense from the calculus of prejudice].)

These cases, however, do not support Iskanian's position. In each of them, substantial expense and delay were caused by the *unreasonable* or *unjustified* conduct of the party seeking arbitration. In this case, the delay was reasonable in light of the state of the law at the time and Iskanian's own opposition to arbitration. Where, as here, a party promptly initiates arbitration and then abandons arbitration because it is resisted by the opposing party and foreclosed by existing law, the mere fact that the parties then proceed to engage in various forms of pretrial litigation does not compel the conclusion that the party has waived its right to arbitrate when a later change in the law permits arbitration.

Moreover, the case before us is not one where "the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration" or "where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence." (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1204.) No such prejudice has been shown here. As CLS points out, without contradiction by Iskanian, the discovery it obtained while the case was in court consisted of Iskanian's deposition and 77 pages of documents pertaining to his individual wage

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claim. Because the arbitration agreement itself provides for “reasonable discovery,” there is no indication that CLS obtained any material information through pretrial discovery that it could not have obtained through arbitral discovery.

In sum, Iskanian does not demonstrate that CLS’s delay in pursuing arbitration was unreasonable or that pretrial proceedings have resulted in cognizable prejudice. We conclude that CLS has not waived its right to arbitrate.

**V.**

As noted, the arbitration agreement requires the waiver not only of class actions but of “representative actions.” There is no dispute that the contract’s term “representative actions” covers representative actions brought under the Labor Code Private Attorneys General Act of 2004. (Lab. Code, § 2698 et seq.; all subsequent undesignated statutory references are to this code.) We must decide whether such waivers are permissible under state law and, if not, whether the FAA preempts a state law rule prohibiting such waivers.

**A.**

Before enactment of the PAGA in 2004, several statutes provided civil penalties for violations of the Labor Code. The Labor Commissioner could bring an action to obtain such penalties, with the money going into the general fund or into a fund created by the Labor and Workforce Development Agency (Agency) for educating

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employers. (See §§ 210 [civil penalties for violating various statutes related to the timing and manner in which wages are to be paid], 225.5 [civil penalties for violating various statutes related to withholding wages due]; Stats. 1983, ch. 1096.) Some Labor Code violations were criminal misdemeanors. (See §§ 215, 216, 218.)

The PAGA addressed two problems. First, the bill sponsors observed that “many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended Apr. 22, 2003, p. 5.) The solution was to enact civil penalties for Labor Code violations “significant enough to deter violations.” (*Ibid.*) For Labor Code violations for which no penalty is provided, the PAGA provides that the penalties are generally \$ 100 for each aggrieved employee per pay period for the initial violation and \$ 200 per pay period for each subsequent violation. (§ 2699, subd. (f)(2).)

The second problem was that even when statutes specified civil penalties, there was a shortage of government resources to pursue enforcement. The legislative history discussed this problem at length. Evidence gathered by the Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR) “was failing to effectively enforce labor law violations. Estimates of the size of California’s ‘underground

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economy’—businesses operating outside the state’s tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city’s garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. [¶] Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California.” (Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended July 2, 2003, p. 3.)

We summarized the Legislature’s response to this problem in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981 [95 Cal. Rptr. 3d 588, 209 P.3d 923] (*Arias*): “In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 [citations]. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. (Stats. 2003, ch. 906, § 1.)

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“Under this legislation, an ‘aggrieved employee’ may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the ‘aggrieved employees.’ (Lab. Code, § 2699, subd. (i).)

“Before bringing a civil action for statutory penalties, an employee must comply with Labor Code section 2699.3. (Lab. Code, § 2699, subd. (a).) That statute requires the employee to give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. (*Id.*, § 2699.3, subd. (a).) If the agency notifies the employee and the employer that it does not intend to investigate . . . , or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer. (*Id.*, § 2699.3, subd. (a)(2)(A).) If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the employee’s notice, the employee may commence a civil action. (*Id.*, § 2699.3, subd. (a)(2)(B).)” (*Arias, supra*, 46 Cal.4th at pp. 980-981, fn. omitted.)

In *Arias*, the defendants argued that if the PAGA were not “construed as requiring representative actions under the act to be brought as class actions,” then a defendant could be subjected to lawsuits by multiple plaintiffs raising

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a common claim, none of whom would be bound by a prior judgment in the defendant's favor because they were not parties to a prior lawsuit. (*Arias, supra*, 46 Cal.4th at p. 985.) We rejected this due process concern on the ground that “the judgment in [a PAGA representative] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” (*Ibid.*) We reached this conclusion by elucidating the legal characteristics of a PAGA representative action: “An employee plaintiff suing . . . under the [PAGA] does so as the proxy or agent of the state’s labor law enforcement agencies. . . . In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. [Citations.] . . . . Because collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy [citations], a judgment in an employee’s action under the act binds not only that employee but also the state labor law enforcement agencies.

“Because an aggrieved employee’s action under the [PAGA] functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The act authorizes a representative action only for the purpose of seeking statutory penalties for

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Labor Code violations (Lab. Code, § 2699, subs. (a), (g)), and an action to recover civil penalties ‘is fundamentally a law enforcement action designed to protect the public and not to benefit private parties’ (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 [141 Cal. Rptr. 20, 569 P.2d 125]). When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. (Rest.2d Judgments, § 41, subd. (1)(d), com. d, p. 397.) Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants’ due process concerns are to that extent unfounded.” (*Arias, supra*, 46 Cal.4th at p. 986.)

The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities. Case law has clarified the distinction “between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [PAGA] became part of the Labor Code, and a demand for ‘civil penalties,’ previously enforceable only by the state’s labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee’s daily wages

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for each day, not exceeding 30 days, that the wages are unpaid. [Citation.] Examples of the latter are section 225.5, which provides, in addition to any other penalty that may be assessed, an employer that unlawfully withholds wages in violation of certain specified provisions of the Labor Code is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of \$ 100 per employee for the initial violation and \$ 200 per employee for subsequent or willful violations, and section 256, which authorizes the Labor Commissioner to ‘impose a civil penalty in an amount not exceeding 30 days [sic] pay as waiting time under the terms of Section 203.’” (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-378 [36 Cal. Rptr. 3d 31], fns. omitted; see *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal. Rptr. 3d 880, 155 P.3d 284] [distinguishing premium pay under § 226.7 from a civil penalty in determining the applicable statute of limitations].)

A PAGA representative action is therefore a type of qui tam action. “Traditionally, the requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.” (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal. App. 3d 661, 671 [126 Cal. Rptr. 415] (*Sanders*)). The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation. The government entity on whose



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behalf the plaintiff files suit is always the real party in interest in the suit. (See *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399 [60 Cal.Rptr.3d 569].)

Although the PAGA was enacted relatively recently, the use of qui tam actions is venerable, dating back to colonial times, and several such statutes were enacted by the First Congress. (See *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 776-777 [146 L. Ed. 2d 836, 120 S. Ct. 1858].) The Federal False Claims Act, allowing individuals to share the recovery achieved by the reporting of false claims, originated during the Civil War. (See *U.S. ex rel. Marcus v. Hess* (1943) 317 U.S. 537, 539-540 [87 L. Ed. 443, 63 S. Ct. 379]; 31 U.S.C § 3730.) The qui tam plaintiff under the federal False Claims Act has standing in federal court under article III of the United States Constitution, even though the plaintiff has suffered no injury in fact, because that statute “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” (*Stevens*, at p. 773.) California has more recently authorized qui tam actions for the recovery of false claims against the state treasury. (Gov. Code, § 12652, subd. (c), added by Stats. 1987, ch. 1420, § 1, pp. 5237, 5239.) In addition, there are earlier examples of qui tam actions under California law. (See, e.g., *Sanders, supra*, 53 Cal. App. 3d at p. 671 [noting qui tam provision in Political Reform Act of 1974 (Gov. Code, § 81000 et seq.).])

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With this background, we first examine whether an employee’s right to bring a PAGA action is waivable. The unwaivability of certain statutory rights “derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: ‘All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.’ ‘Agreements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced.’ (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065 [64 Cal. Rptr. 2d 522].) Second, Civil Code section 3513 states, ‘Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.’” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (*Armendariz*).)

These statutes compel the conclusion that an employee’s right to bring a PAGA action is unwaivable. Section 2699, subdivision (a) states: “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former

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employees pursuant to the procedures specified in Section 2699.3.” As noted, the Legislature’s purpose in enacting the PAGA was to augment the limited enforcement capability of the Agency by empowering employees to enforce the Labor Code as representatives of the Agency. Thus, an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. Because such an agreement has as its “object, . . . indirectly, to exempt [the employer] from responsibility for [its] own . . . violation of law,” it is against public policy and may not be enforced. (Civ. Code, § 1668.)

Such an agreement also violates Civil Code section 3513’s injunction that “a law established for a public reason cannot be contravened by a private agreement.” (*Ibid.*) The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state’s interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations. Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. (See *Armendariz*, *supra*, 24 Cal.4th at p. 103, fn. 8 [waivers freely made after a dispute has arisen are not necessarily contrary to public policy].) But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises.

CLS argues that the arbitration agreement at issue here prohibits only representative claims, not individual

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PAGA claims for Labor Code violations that an employee suffered. Iskanian contends that the PAGA, which authorizes an aggrieved employee to file a claim “on behalf of himself or herself *and* other current or former employees” (§ 2699, subd. (a), italics added), does not permit an employee to file an individual claim. (Compare *Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124 [135 Cal. Rptr. 3d 832] [agreeing with Iskanian’s position] with *Quevedo v. Macy’s, Inc.* (C.D.Cal. 2011) 798 F. Supp. 2d 1122, 1141-1142 [an employee may bring an individual PAGA action and waive the right to bring it on behalf of other employees].) But whether or not an individual claim is permissible under the PAGA, a prohibition of *representative* claims frustrates the PAGA’s objectives. As one Court of Appeal has observed: “[A]ssuming it is authorized, a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if an individual claim has collateral estoppel effects. (*Arias, supra*, 46 Cal.4th at pp. 985-987.) Other employees would still have to assert their claims in individual proceedings.” (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502 [128 Cal. Rptr. 3d 854], fn. omitted.)

We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.

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## C.

Notwithstanding the analysis above, a state law rule, however laudable, may not be enforced if it is preempted by the FAA. As *Concepcion* made clear, a state law rule may be preempted when it “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.” (*Concepcion*, *supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1748].) We conclude that the rule against PAGA waivers does not frustrate the FAA’s objectives because, as explained below, the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency.

The FAA’s focus on private disputes finds expression in the statute’s text: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract or transaction . . .* 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, italics added.) Although the italicized language may be read to indicate that the FAA applies only to disputes about contractual rights, not statutory rights (see Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act* (2012) 46 U.Rich. L.Rev. 1005, 1037-1045), the high court has found the FAA applicable to statutory claims between parties to an arbitration agreement (see, e.g., *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 635-637 [87 L. Ed. 2d 444, 105 S. Ct. 3346]). Even so, however, the

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statutory phrase “a controversy thereafter arising out of such contract or transaction” is most naturally read to mean a dispute about the respective rights and obligations of parties in a contractual relationship.

The FAA’s focus on private disputes is further revealed in its legislative history, which shows that the FAA’s primary object was the settlement of ordinary commercial disputes. (See J. Hearings on Sen. Bill No. 1005 and H.Res. No. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., § 15, p. 29 (1924) [testimony of FAA drafter Julius Henry Cohen that the act will merely make enforceable the customs of trade associations to arbitrate disputes]; *id.* at p. 7 [testimony of Charles Bernheimer, Chairman of Com. on Arbitration, N.Y. State Chamber of Commerce, that FAA is designed to resolve “ordinary everyday trade disputes” between merchants].) There is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals. Furthermore, although *qui tam* citizen actions on behalf of the government were well established at the time the FAA was enacted (see *ante*, at p. 382), there is no mention of such actions in the legislative history and no indication that the FAA was concerned with limiting their scope. (Cf. *Concepcion, supra*, 563 U.S. at pp. \_\_\_ - \_\_\_ [131 S. Ct. at pp. 1751-1752] [noting that class arbitration was not envisioned by the Congress that enacted the FAA].)

Consistent with this understanding, the United States Supreme Court’s FAA jurisprudence—with one exception discussed below—consists entirely of disputes

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involving the parties' *own* rights and obligations, not the rights of a public enforcement agency. (See, e.g., *Italian Colors, supra*, 570 U.S. at p. \_\_\_ [133 S. Ct. at p. 2308] [class action by merchants for excessive credit card fees charged in violation of antitrust laws]; *Marmet Health Care Center v. Brown* (2012) 565 U.S. \_\_\_, \_\_\_ [182 L. Ed. 2d 42, 132 S. Ct. 1201, 1202-1203] [wrongful death action]; *Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1744] [class action suit for damages over fraudulent practices]; *Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 65 [177 L. Ed. 2d 403, 130 S. Ct. 2772, 2775] [employment discrimination suit]; *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 667 [176 L. Ed. 2d 605, 130 S. Ct. 1758] [antitrust dispute involving price fixing and supracompetitive pricing]; *Preston v. Ferrer* (2008) 552 U.S. 346, 350 [169 L. Ed. 2d 917, 128 S. Ct. 978] [action by attorney to recover fees from former client]; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443 [163 L. Ed. 2d 1038, 126 S. Ct. 1204] [class action by borrowers against lender for alleged usurious loans]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 449 [156 L. Ed. 2d 414, 123 S. Ct. 2402] [class action damages suit by borrowers against lender for violations of S.C. law]; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 683 [134 L. Ed. 2d 902, 116 S. Ct. 1652] [contract and fraud claims related to franchise agreement]; *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 478-479 [104 L. Ed. 2d 526, 109 S. Ct. 1917] [various statutory causes of actions by investors against broker over investments "turned sour"]; *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 470-471 [103 L. Ed. 2d 488, 109 S. Ct. 1248] [action for

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fraud and breach of contract]; *Perry v. Thomas* (1987) 482 U.S. 483, 484-485 [96 L. Ed. 2d 426, 107 S. Ct. 2520] [suit for breach of contract, conversion, and breach of fiduciary duty arising from employment relationship]; *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 222-223 [96 L. Ed. 2d 185, 107 S. Ct. 2332] [suit against brokerage firm by clients alleging various statutory causes of action]; *Mitsubishi Motors v. Soler Chrysler-Plymouth, supra*, 473 U.S. at pp. 619-620 [contract, defamation, and antitrust dispute between automobile companies]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 4 [79 L. Ed. 2d 1, 104 S. Ct. 852] [class action suit for fraud, breach of contract, breach of fiduciary duty, and violation of state disclosure requirements related to franchise agreement]; *Gilmer, supra*, 500 U.S. at pp. 23-24 [employment age discrimination suit]; *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 6-7 [74 L. Ed. 2d 765, 103 S. Ct. 927] [contract dispute].)

The one case in which the high court has considered the enforcement of an arbitration agreement against the government does not support CLS's contention that the FAA preempts a PAGA action. In *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 [151 L. Ed. 2d 755, 122 S. Ct. 754] (*Waffle House*), the high court held that an employment arbitration agreement governed by the FAA does not prevent the Equal Employment Opportunity Commission (EEOC) from suing an employer on behalf of an employee bound by that agreement for victim-specific relief, such as reinstatement and backpay. The court based its conclusion primarily on the fact that the EEOC was not a party to the arbitration agreement. (534 U.S. at pp. 288-289.) *Waffle*



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*House* further noted that the EEOC was not a proxy for the individual employee, that the EEOC could prosecute the action without the employee’s consent, and that the employee did not exercise control over the litigation. (*Id.* at p. 291.) Whereas *Waffle House* involved a suit by the government seeking to obtain victim-specific relief on behalf of an employee bound by the arbitration agreement, this case involves an employee bound by an arbitration agreement bringing suit on behalf of the government to obtain remedies other than victim-specific relief, i.e., civil penalties paid largely into the state treasury. Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state for such remedies.

Simply put, a PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code. Through his PAGA claim, Iskanian is seeking to recover civil penalties, 75 percent of which will go to the state’s coffers. We emphasized in *Arias* that “an action to recover civil penalties ‘is fundamentally a law enforcement action designed to protect the public and not to benefit private parties’”; that “[i]n a lawsuit brought under the [PAGA], the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies”; and that “an aggrieved employee’s action under the [PAGA] functions as a substitute for an action brought by the government

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itself.” (*Arias, supra*, 46 Cal.4th at p. 986.) The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest. (46 Cal.4th at p. 986.) It is true that “a person may not bring a PAGA action unless he or she is ‘an aggrieved employee’ (§ 2699, subd. (a))” (conc. opn. of Chin, J., *post*, at p. 395), but that does not change the character of the litigant or the dispute. As Justice Chin correctly observes, “*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.” (*Id.* at p. 394.)

Of course, any employee is free to forgo the option of pursuing a PAGA action. But it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises. (*Ante*, at pp. 382-384.) The question is whether this public policy contravenes the FAA. Nothing in the text or legislative history of the FAA nor in the Supreme Court’s construction of the statute suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in *qui tam* actions. Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state’s* interest in penalizing and deterring employers who violate California’s labor laws. In crafting the PAGA, the Legislature could have chosen to deputize citizens

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who were not employees of the defendant employer to prosecute qui tam actions. The Legislature instead chose to limit qui tam plaintiffs to willing employees who had been aggrieved by the employer in order to avoid “private plaintiff abuse.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended Apr. 22, 2003, p. 7.) This arrangement likewise does not interfere with the FAA’s policy goal.

Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under *Concepcion*, such an action could not be maintained in the face of a class waiver. Here, importantly, a PAGA litigant’s status as “the proxy or agent” of the state (*Arias, supra*, 46 Cal.4th at p. 986) is not merely semantic; it reflects a PAGA litigant’s substantive role in enforcing our labor laws on behalf of state law enforcement agencies. Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee’s right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers.

Further, the high court has emphasized that “courts should assume that “the historic police powers of the States” are not superseded “unless that was the clear

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and manifest purpose of Congress.” (*Arizona v. United States* (2012) 567 U.S. \_\_\_\_, \_\_\_\_ [183 L. Ed. 2d 351, 132 S.Ct. 2492, 2501]; see *Chamber of Commerce of United States of America v. Whiting* (2011) 563 U.S. \_\_\_\_, \_\_\_\_ [179 L. Ed. 2d 1031, 131 S.Ct. 1968, 198] [‘Our precedents “establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.” [Citation.]’].) (*Sonic II, supra*, 57 Cal.4th at p. 1154.) There is no question that the enactment and enforcement of laws concerning wages, hours, and other terms of employment is within the state’s historic police power. (See *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756 [85 L. Ed. 2d 728, 105 S. Ct. 2380] [“ ‘States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.’ “]; *Kerr’s Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326-327 [19 Cal. Rptr. 492, 369 P.2d 20].) Moreover, how a state government chooses to structure *its own* law enforcement authority lies at the heart of state sovereignty. (See *Printz v. United States* (1997) 521 U.S. 898, 928 [138 L. Ed. 2d 914, 117 S. Ct. 2365] [“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”].) We can discern in the FAA no purpose, much less a clear and manifest purpose, to curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties for Labor Code violations traditionally prosecuted by the state.

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In sum, the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances. We conclude that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution.

**D.**

CLS contends that the PAGA violates the principle of separation of powers under the California Constitution. Iskanian says this issue was not raised in CLS's answer to the petition for review and is not properly before us. Because the constitutionality of the PAGA is directly pertinent to the issue of whether a PAGA waiver is contrary to state public policy, and because the parties have had a reasonable opportunity to brief this issue, we will decide the merits of this question. (See Cal. Rules of Court, rule 8.516(b)(1), (2).)

The basis of CLS's argument is found in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 [112 Cal. Rptr. 3d 697, 235 P.3d 21] (*County of Santa Clara*). There we reconsidered our earlier holding in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 [218

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Cal. Rptr. 24, 705 P.2d 347] (*Clancy*), which appeared to categorically bar public entities from hiring private counsel on a contingent fee basis to prosecute public nuisances. In the context of a disputed injunction to close an adult bookstore, this court reasoned that private counsel acting as a public prosecutor must be “absolutely neutral” and must engage in a “delicate weighing of values” that would be upset if the prosecutor had a financial interest in the prosecution. (*Id.* at pp. 748-749.)

In *County of Santa Clara*, we clarified that *Clancy*’s “absolute prohibition on contingent-fee arrangements” applies only to cases involving a constitutional “liberty interest” or “the right of an existing business to continued operation,” and not to all public nuisance cases. (*County of Santa Clara, supra*, 50 Cal.4th at p. 56.) We recognized, as we did in *Clancy*, that contingent fee representation was appropriate in “ordinary civil cases” in which a government entity’s own economic interests were at stake. (*County of Santa Clara*, at p. 50; see *Clancy, supra*, 39 Cal.3d at p. 748.) Whereas the suit in *Clancy* was akin to a criminal prosecution, with possible criminal penalties and severe civil penalties, we said the public nuisance suit at issue in *County of Santa Clara*, which involved abatement of lead paint, fell somewhere in between an ordinary civil case and a criminal prosecution. (*County of Santa Clara*, at p. 55.) We held that for such cases, the interest in prosecutorial neutrality is sufficiently protected when private counsel, although having a pecuniary interest in litigation, is “subject to the supervision and control of government attorneys” so that “the discretionary decisions vital to an impartial prosecution are made by neutral attorneys.” (*Id.* at p. 59.)

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CLS contends that the PAGA runs afoul of our holding in *County of Santa Clara* by authorizing financially interested private citizens to prosecute claims on the state's behalf without governmental supervision. CLS further contends that because *County of Santa Clara* dealt with regulation of the legal profession, which is the province of this court, the PAGA violates the principle of separation of powers under the California Constitution. (See Cal. Const., art. III, § 3; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731-732 [147 Cal. Rptr. 631, 581 P.2d 636].) We disagree.

“[T]he separation of powers doctrine does not create an absolute or rigid division of functions.” (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068 [17 Cal. Rptr. 3d 225, 95 P.3d 459].) Rather, “[t]he substantial interrelatedness of the three branches’ actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of ‘checks and balances’ that the separation of powers doctrine is intended to serve.” (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53 [51 Cal. Rptr. 2d 837, 913 P.2d 1046].)

In considering CLS's challenge, we note that it would apply not only to the PAGA but to all qui tam actions, including California's False Claims Act (Gov. Code,

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§ 12650 et seq.), which authorizes the prosecution of claims on behalf of government entities without government supervision. (See Gov. Code, § 12652, subd. (c).) No court has applied the rule in *Clancy* or *County of Santa Clara* to such actions, and our case law contains no indication that the enactment of qui tam statutes is anything but a legitimate exercise of legislative authority. The Legislature is charged with allocating scarce budgetary resources (see *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1010-1011 [116 Cal. Rptr. 3d 480, 239 P.3d 1186]), which includes the provision of resources to the state executive branch for prosecution and law enforcement. Qui tam actions enhance the state's ability to use such scarce resources by enlisting willing citizens in the task of civil enforcement. Indeed, the choice often confronting the Legislature is not between prosecution by a financially interested private citizen and prosecution by a neutral prosecutor, but between a private citizen suit and no suit at all. As noted, the lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through the PAGA.

This legislative choice does not conflict with *County of Santa Clara*. Our holding in that case applies to circumstances in which a government entity retains a private law firm or attorney as outside counsel. A “fundamental” reason to worry about neutrality in that context is that such an attorney, like an attorney directly employed by the government, “has the vast power of the government available to him; he must refrain from abusing



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that power by failing to act evenhandedly.” (*Clancy, supra*, 39 Cal.3d at p. 746.) By contrast, a litigant who brings a qui tam action on behalf of the government generally does not have access to such power. The qui tam litigant has only his or her own resources and may incur significant cost if unsuccessful. The PAGA, by deputizing employee plaintiffs to enforce the Labor Code on behalf of the Agency, does not present the same risks of abuse as when a city or county hires outside counsel to do its bidding.

Moreover, our rule in *County of Santa Clara* involves minimal if any interference with legislative or executive functions of state or local government. The rule simply requires government entities to supervise the attorneys they choose to hire to pursue public nuisance actions. By contrast, a rule disallowing qui tam actions would significantly interfere with a legitimate exercise of legislative authority aimed at accomplishing the important public purpose of augmenting scarce government resources for civil prosecutions.

Because of these differences, *Clancy* and *County of Santa Clara* do not apply beyond the context of attorneys hired by government entities as independent contractors. There is no conflict between the rule in those cases and the PAGA. Accordingly, we reject CLS’s argument that the PAGA violates the separation of powers principle under the California Constitution.

*Appendix B***VI.**

Having concluded that CLS cannot compel the waiver of Iskanian's representative PAGA claim but that the agreement is otherwise enforceable according to its terms, we next consider how the parties will proceed. Although the arbitration agreement can be read as requiring arbitration of individual claims but not of representative PAGA claims, neither party contemplated such a bifurcation. Iskanian has sought to litigate all claims in court, while CLS has sought to arbitrate the individual claims while barring the PAGA representative claim altogether. In light of the principles above, neither party can get all that it wants. Iskanian must proceed with bilateral arbitration on his individual damages claims, and CLS must answer the representative PAGA claims in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration.

This raises a number of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2? (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 388-391 [25 Cal. Rptr. 3d 540, 107 P.3d 217] [Cal. Arbitration Act rather than FAA procedures apply to arbitrations brought in Cal. courts].) The parties have not addressed these questions and may do so on remand. The

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parties may also address CLS's contention that the PAGA claims are time-barred, as well as Iskanian's response that CLS has forfeited this contention and cannot raise it on appeal.

**CONCLUSION**

Because the Court of Appeal held that the entire arbitration agreement, including the PAGA waiver, should be enforced, we reverse the judgment and remand the cause for proceedings consistent with this opinion.

LIU, J.

WE CONCUR:      CANTIL-SAKAUYE, C.J.  
                             CORRIGAN, J.  
                             KENNARD, J.\*

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\* Retired Associated Justice of the Supreme Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*Appendix B***CONCURRING OPINION BY CHIN, J.**

I agree that the rule of *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal. Rptr. 3d 773, 165 P.3d 556] (*Gentry*), which was announced by a bare four-to-three majority of this court, is inconsistent with and invalid under the decisions of the United States Supreme Court interpreting the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). I also agree that the class action waiver in this case is not unlawful under the National Labor Relations Act (29 U.S.C. § 151 et seq.), that defendant CLS Transportation Los Angeles, LLC, did not waive its right to arbitrate, that the arbitration agreement is invalid insofar as it purports to preclude plaintiff Arshavir Iskanian from bringing in any forum a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.), and that this conclusion is not inconsistent with the FAA. However, as explained below, I do not endorse all of the majority's reasoning and discussion, including its endorsement of dicta in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 [163 Cal. Rptr. 3d 269, 311 P.3d 184] (*Sonic II*). I therefore concur in the judgment.

**I. BOTH *GENTRY*'S RULE AND *SONIC II*'S DICTA  
ARE INVALID UNDER THE FAA.**

As noted above, I agree with the majority that *Gentry*'s rule may not stand under the United States Supreme Court's construction of the FAA. Indeed, for that very reason, I joined Justice Baxter's well-reasoned dissent in *Gentry*, which explained that neither the FAA

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nor California law permits courts to “elevate a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature that voluntary individual agreements to arbitrate . . . should be enforced according to their terms.” (*Gentry, supra*, 42 Cal.4th at p. 477 (dis. opn. of Baxter, J.).)

I do not agree, however, that the approach to unconscionability a majority of this court described in dicta in *Sonic II* may “be squared” with the high court’s FAA decisions. (Maj. opn., *ante*, at p. 366.) That approach, as my dissent in *Sonic II* explained, is preempted by the FAA as the high court construed that act in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. \_\_\_\_ [179 L. Ed. 2d 742, 131 S. Ct. 1740] (*Concepcion*), *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. \_\_\_\_ [186 L. Ed. 2d 417, 133 S. Ct. 2304] (*Italian Colors*), and several other decisions. (*Sonic II, supra*, 57 Cal.4th at pp. 1184-1192 (dis. opn. of Chin, J.).) Nothing has occurred since we issued *Sonic II* to change my view.

Indeed, the majority’s discussion in this case further reveals the invalidity under federal law of *Sonic II*’s dicta. According to the majority, under that dicta, whether the arbitration procedure to which the parties have agreed is unconscionable turns not on whether it permits recovery, but on whether it is, in a court’s view, less “effective . . . for wage claimants” than a “dispute resolution mechanism” that includes the procedures and protections “the Berman statutes” prescribe. (Maj. opn., *ante*, at p. 365.) However, the high court has established that the FAA does not

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permit courts to invalidate arbitration agreements based on the view that the procedures they set forth would “weaken[] the protections afforded in the substantive law to would-be complainants.’ [Citation.]” (*Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 89-90 [148 L. Ed. 2d 373, 121 S. Ct. 513].) Consistent with this principle, in *Italian Colors*, the court recently held that an arbitration agreement may be not invalidated based on *proof* that its waiver of a *congressionally approved* mechanism—the class action—would make pursuing a federal antitrust claim prohibitively expensive. (*Italian Colors, supra*, 570 U.S. at pp. \_\_\_-\_\_\_ [133 S. Ct. at pp. 2310-2312].) A fortiori, an arbitration agreement may not be invalidated based on a court’s subjective view that the agreement’s waiver of the Berman procedures and protections would render arbitration less “effective . . . for wage claimants” than a “dispute resolution mechanism” that includes those procedures and protections. (Maj. opn., *ante*, at pp. 365-366.) According to the high court, the FAA is “a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.*” (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 [74 L. Ed. 2d 765, 103 S. Ct. 927], italics added.) To quote Justice Baxter’s dissent in *Gentry*, it does not permit courts to “elevate a mere judicial affinity for” the Berman dispute resolution mechanism “as a beneficial device for implementing the wage laws above the policy expressed by . . . Congress . . . that voluntary individual agreements to arbitrate . . . should be enforced according to their terms.” (*Gentry, supra*, 42 Cal.4th at p. 477 (dis. opn. of Baxter, J.)) I therefore do not join the

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majority opinion insofar as it suggests that the approach to unconscionability described in *Sonic II*'s dicta is valid under the FAA.

**II. THE PAGA WAIVER IS UNENFORCEABLE.**

Under PAGA, an “aggrieved employee”—i.e., “any person who was employed by” someone alleged to have violated the Labor Code “and against whom one or more of the alleged violations was committed”—may bring a civil action against the alleged violator to recover civil penalties for Labor Code violations both as to himself or herself and as to “other current or former employees.” (Lab. Code, § 2699, subds. (a), (c).)<sup>1</sup> As we have explained, an aggrieved employee’s PAGA action “is fundamentally a law enforcement action” that “substitute[s] for an action brought by the government itself.” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 [95 Cal. Rptr. 3d 588, 209 P.3d 923].) The employee-plaintiff “acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies” and seeking statutory civil penalties “that otherwise would be sought by” those agencies. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003 [95 Cal. Rptr. 3d 605, 209 P.3d 937].) By statute, 75 percent of the penalties “recovered by aggrieved employees” under PAGA goes to the Labor and Workforce Development Agency, and only 25 percent goes to “the aggrieved employees.” (§ 2699, subd. (i).) Accordingly,

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1. All further unlabeled statutory references are to the Labor Code.

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*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.

As relevant, the arbitration agreement here provides: “[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and *representative* action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or *representative* action claims against the other *in arbitration or otherwise*; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.” (Italics added.) Because, as explained above, *all* PAGA claims are representative actions, these provisions purport to preclude Iskanian from bringing a PAGA action *in any forum*. To this extent, the arbitration provision is, for reasons the majority states, invalid under California law. (Maj. opn., *ante*, at pp. 382-384.)

I agree with the majority that this conclusion is not inconsistent with the FAA, but my reasoning differs from the majority’s. Although the FAA generally requires enforcement of arbitration agreements according to their terms, the high court has recognized an exception to this requirement for “a provision in an arbitration agreement forbidding the assertion of certain statutory rights.” (*Italian Colors, supra*, 570 U.S. at p. \_\_\_ [133 S. Ct. at p. 2310]; see *Mitsubishi Motors v. Soler Chrysler-Plymouth*



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(1985) 473 U.S. 614, 637 [87 L. Ed. 2d 444, 105 S. Ct. 3346] [“so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”].) Accordingly, the conclusion that the arbitration agreement here is invalid insofar as it forbids Iskanian from asserting his statutory right under the PAGA in any forum does not run afoul of the FAA.

The majority takes a different route in finding no preemption. It first correctly observes that the FAA applies by its terms only to provisions in contracts “to settle by arbitration a controversy thereafter arising out of such contract.” (Maj. opn., *ante*, at p. 384, italics omitted, quoting 9 U.S.C. § 2.) Based on this language, the majority then declares that a PAGA claim “lies” completely “outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship.” (Maj. opn., *ante*, at p. 386.) It is, instead, merely “a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code.” (Maj. opn., *ante*, at pp. 386-384.)

For several reasons, I question the majority’s analysis. First, I disagree that a PAGA claim is not “a dispute between an employer and an employee arising out of their contractual relationship.” (Maj. opn., *ante*, at p. 386.) As noted above, a person may not bring a PAGA action unless he or she is “an aggrieved employee” (§ 2699, subd. (a)), i.e., a person “who was employed by” the alleged Labor

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Code violator and “against whom” at least one of the alleged violations “was committed” (§ 2699, subd. (c)). In other words, as the majority explains, by statute, only “employees who ha[ve] been aggrieved by the employer” may bring PAGA actions. (Maj. opn., *ante*, at p. 387.) Thus, although the scope of a PAGA action may extend beyond the contractual relationship between the plaintiff-employee and the employer—because the plaintiff may recover civil penalties for violations as to other employees—the dispute arises, first and fundamentally, out of that relationship.

Second, to find no FAA preemption in this case, we need not adopt a novel theory, devoid of case law support, that renders the FAA completely inapplicable to PAGA claims. Under the majority’s view that PAGA claims “lie[] outside the FAA’s coverage” because they are not disputes between employers and employees “arising out of their contractual relationship” (maj. opn., *ante*, at p. 386), the state may, without constraint by the FAA, simply ban arbitration of PAGA claims and declare agreements to arbitrate such claims unenforceable. I do not subscribe to that view, for which the majority offers no case law support. By contrast, as explained above, there *is* case law support—from the high court itself—for the conclusion that the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action *in any forum*. We should limit ourselves to an analysis firmly grounded in high court precedent, rather than needlessly adopt a novel theory that renders the FAA completely inapplicable.

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Third, contrary to the majority's assertion, *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 [151 L. Ed. 2d 755, 122 S. Ct. 754] (*Waffle House*), to the extent it is relevant, actually *does* "suggest[] that the FAA preempts" (maj. opn., *ante*, at p. 386) the majority's rule. The question there was whether, under the FAA, an agreement between an employer and an employee to arbitrate employment-related disputes precluded the Equal Employment Opportunity Commission (EEOC), which was not "a party to" the arbitration agreement and had never "agreed to arbitrate its claims," from pursuing victim-specific relief in a judicial enforcement action. (*Waffle House, supra*, at p. 294.) The court said "no," explaining that nothing in the FAA "place[s] any restriction on a nonparty's choice of a judicial forum" (*Waffle House, supra*, at p. 289) or requires a "nonparty" to arbitrate claims it has not agreed to arbitrate (*id.* at p. 294). Because *Iskanian* is a party to the arbitration agreement in this case, this holding is inapposite. What is apposite in *Waffle House* is the court's statement that the FAA "ensures the enforceability of private agreements to arbitrate." (*Waffle House, supra*, 534 U.S. at p. 289.) This statement, which simply reiterates what the court has said "on numerous occasions" (*Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 682 [176 L. Ed. 2d 605, 130 S. Ct. 1758]), casts considerable doubt on the majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable.

Finally, under other high court precedent, there is good reason to doubt the majority's suggestion that the

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FAA places no limit on “the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions.” (Maj. opn., *ante*, at p. 387.) When the high court recently held in *Concepcion* that the FAA prohibits courts from conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures, even if such procedures “are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” it explained: “. . . States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” (*Concepcion*, *supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1753].) In earlier decisions, the high court broadly explained that the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary” (*Moses H. Cone Hospital v. Mercury Constr. Corp.*, *supra*, 460 U.S. at p. 24, italics added), which “withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration” (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [79 L. Ed. 2d 1, 104 S. Ct. 852]). Thus, “if contracting parties agree to include” certain claims “within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration.*” (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 58 [131 L. Ed. 2d 76, 115 S. Ct. 1212], italics omitted & added.) In other words, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The

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conflicting rule is displaced by the FAA.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1747].) These binding pronouncements indicate that the FAA may, in fact, place a limit on the ability of a state, for policy reasons, to “enhance” its public enforcement capabilities by authorizing employees who have contractually agreed to arbitrate their statutory PAGA claims to ignore that agreement and pursue those claims in court as the state’s “representatives.” (Maj. opn., *ante*, at p. 388.)

However, as explained above, requiring an arbitration provision to preserve *some* forum for bringing PAGA actions does not exceed that limit. I therefore concur in the judgment.

CHIN, J.

I CONCUR:

BAXTER, J.

*Appendix B***CONCURRING AND DISSENTING OPINION  
BY WERDEGAR, J.**

I join the court’s conclusions as to Arshavir Iskanian’s Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) claims, which are not foreclosed by his employment contract or the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). I disagree with the separate holding that the mandatory class action and class arbitration waivers in Iskanian’s employment contract are lawful. Eight decades ago, Congress made clear that employees have a right to engage in collective action and that contractual clauses purporting to strip them of those rights as a condition of employment are illegal. What was true then is true today. I would reverse the Court of Appeal’s decision in its entirety.

**I.**

Employment contracts prohibiting collective action, first known as “ironclads,” date to the 19th century. (Ernst, *The Yellow-dog Contract and Liberal Reform, 1917-1932* (1989) 30 Lab. Hist. 251, 252 (*The Yellow-dog Contract*)). Confronted with collective efforts by workers to agitate for better terms and conditions of employment, employers responded by conditioning employment on the promise not to join together with fellow workers in a union. (*Lincoln Union v. Northwestern Co.* (1949) 335 U.S. 525, 534 [93 L. Ed. 212, 69 S. Ct. 251]; Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction* (1993) 11 Hofstra Lab. L.J. 97, 100.) This practice was “so obnoxious to workers that they

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gave these required agreements the name of ‘yellow dog contracts.’” (*Lincoln Union*, at p. 534.)

“Recognizing that such agreements in large part represent the superior economic position of the employer by virtue of which the theoretical freedom of an employee to refuse assent was illusory, and that such agreements therefore emptied of meaning the ‘right of collective bargaining,’” state legislatures and Congress sought to stem the practice, enacting statutes that prohibited conditioning employment on a compulsory contractual promise not to unionize. (Frankfurter & Greene, *The Labor Injunction* (1930) p. 146.) These efforts were initially unsuccessful; first state courts, and then the *Lochner*-era<sup>1</sup> United States Supreme Court, struck down the bans as an infringement on liberty of contract. (*Coppage v. Kansas* (1915) 236 U.S. 1, 9-14 [59 L. Ed. 441, 35 S. Ct. 240]; *Adair v. United States* (1908) 208 U.S. 161, 172-176 [52 L. Ed. 436, 28 S. Ct. 277, 5 Ohio L.Rep. 605]; Frankfurter & Greene, at pp. 146-148; *The Yellow-dog Contract*, *supra*, 30 Lab. Hist. at p. 252.) When the Supreme Court gave a clear imprimatur to yellow-dog contracts in *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U.S. 229 [62 L. Ed. 260, 38 S. Ct. 65], upholding an injunction against collective organizing efforts on the ground that the contracts granted employers a property right secure from union interference, the use of contractual bans on collective action blossomed. (Frankfurter & Greene, at pp. 148-149; *The Yellow-dog Contract*, at pp. 253-256.) Through

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1. *Lochner v. New York* (1905) 198 U.S. 45 [49 L. Ed. 937, 25 S. Ct. 539].

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the use of such terms, “[a]ny employer willing to compel employee acquiescence could effectively foreclose all union organizational efforts directed at his business.” (Winter, Jr., *Labor Injunctions and Judge-made Labor Law: The Contemporary Role of Norris-LaGuardia* (1960) 70 Yale L.J. 70, 72, fn. 14.)

In the 1930’s, Congress tried again to outlaw contractual bans on collective action. A bill drafted by then Professor Felix Frankfurter and others<sup>2</sup> was swiftly and overwhelmingly approved in both houses and enacted as the Norris-LaGuardia Act of 1932. (Bremner, *The Background of the Norris-La Guardia Act* (1947) 9 *The Historian* 171, 174-175.) Part 2 of the act declared as the public policy of the United States employees’ right to engage in collective activity, free from employer restraint or coercion: “Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, . . . *it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions*

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2. See Frankfurter & Greene, *The Labor Injunction*, *supra*, page 226 and footnote 61; *id.* at pages 279-288 (draft bill); Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act* (1989) 89 *Colum. L.Rev.* 789, 846-849.



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of his employment, and that *he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .*” (29 U.S.C. § 102, italics added.) Congress recognized the inability of a “single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power” to “negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor,” the necessary corrective to be “[t]he right of wage earners to organize and to act jointly in questions affecting wages [and the] conditions of labor,” and, as the solution, “specific legislative action” to preserve workers’ “freedom in association to influence the fixing of wages and working conditions.” (Sen.Rep. No. 163, 72d Cong., 1st Sess., p. 9 (1932); see generally *id.*, at pp. 9-14.) Arguing for passage, the act’s cosponsor, Senator George Norris, explained the measure was needed to end a regime in which “the laboring man . . . must singly present any grievance he has.” (Remarks of Senator Norris, Debate on Sen. No. 935, 72d Cong., 1st Sess., 75 Cong. Rec. 4504 (1932).)

To that end, part 3 of the Norris-LaGuardia Act was “designed to outlaw the so-called yellow-dog contract.” (H.R.Rep. No. 669, 72d Cong., 1st Sess., p. 6 (1932); accord, Sen.Rep. No. 163, *supra*, at pp. 15-16.) “[T]he vice of such contracts, which are becoming alarmingly widespread,” was that they rendered collective action and unions effectively impossible; “[i]ndeed, that is undoubtedly their purpose, and the purpose of the organizations of employers

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opposing” the Norris-LaGuardia Act. (H.R.Rep. No. 669, at p. 7.) If such contracts, requiring a waiver of workers’ rights of free association, were given enforcement in the courts, “collective action would be impossible so far as the employee is concerned by virtue of the necessity of signing the character of contract condemned, which prevents a man from joining with his fellows for collective action; and the statement . . . that ‘it has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work’ would become an empty statement of historical fact.” (*Ibid.*, quoting *Texas & N. O. R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570 [74 L. Ed. 1034, 50 S. Ct. 427].) Accordingly, the Norris-LaGuardia Act declared yellow dog contracts “to be contrary to the public policy of the United States” and unenforceable in any court of the United States. (29 U.S.C. § 103.)

Three years later, Congress expanded on these proscriptions in the National Labor Relations Act (commonly known as the Wagner Act after its author, Senator Robert F. Wagner). (Pub.L. No. 74-198 (July 5, 1935) 49 Stat. 449, codified as amended at 29 U.S.C. §§ 151-169.) The public policy underlying the act was the same as that motivating the Norris-LaGuardia Act: “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” (29 U.S.C. § 151.) To ensure that end, the Wagner Act granted employees, inter alia,

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“the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” (29 U.S.C. § 157 (also known as part 7).)<sup>3</sup> Employers were forbidden “to interfere with, restrain, or coerce employees in the exercise of” their right to engage in concerted, collective activity. (29 U.S.C. § 158(a)(1).) Inter alia, these provisions were a “logical and imperative extension of that section of the Norris-La Guardia Act which makes the yellow-dog contract unenforceable in the Federal courts.” (Nat. Labor Relations Act of 1935, Hearings before House Com. on Labor on H.R. No. 6288, 74th Cong., 1st Sess., p. 14 (1935), statement of Senator Wagner; accord, remarks of Senator Wagner, Debate on Sen. No. 1958, 74th Cong., 1st Sess., 79 Cong. Rec. 7570 (daily ed. May 15, 1935); see H.R.Rep. No. 1147, 74th Cong., 1st Sess., *supra*, at p. 19.)<sup>4</sup> Recognizing as clear

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3. Congress took to heart, as it had in the Norris-LaGuardia Act, Chief Justice Taft’s admonition that because a “single employee was helpless in dealing with an employer,” collective action “was essential to give laborers [the] opportunity to deal on equality with their employer.” (*Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [66 L. Ed. 189, 42 S. Ct. 72], quoted in H.R.Rep. No. 1147, 74th Cong., 1st Sess., p. 10 (1935) and H.R.Rep. No. 669, 72d Cong., 1st Sess., *supra*, at p. 7.)

4. Senator Wagner’s “intent was the intent of Congress, for unlike most other major legislation, this statute was the product of a single legislator. Although Wagner received assistance from various sources, he fully controlled the bill’s contents from introduction to final passage.” (Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner’s Promise of Democracy in the Workplace-The Blue Eagle Can Fly Again* (2005) 39 U.S.F. L.Rev. 701, 709.)

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“the legality of collective action on the part of employees in order to safeguard their proper interests,” the post-*Lochner* Supreme Court now upheld against constitutional challenge Congress’s “safeguard” of this right. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33-34 [81 L. Ed. 893, 57 S. Ct. 615].)

In the years since the Wagner Act’s passage, the Supreme Court, Courts of Appeals, and National Labor Relations Board have conclusively established that the right to engage in collective action includes the pursuit of actions in court. (*Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565-566 [57 L. Ed. 2d 428, 98 S. Ct. 2505] [the Wagner Act’s “mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . .”]; *Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661, 673 [“a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 . . .” of the Wagner Act]; *Mohave Electric Cooperative* (1998) 327 N.L.R.B. 13, 18, enforced by *Mohave Elec. Co-op., Inc. v. N.L.R.B.* (D.C. Cir. 2000) 340 U.S. App.D.C. 391, 206 F.3d 1183, 1188-1189 [same]; *Altex Ready Mixed Concrete Corp.* (1976) 223 N.L.R.B. 696, 699-700, enforced by *Altex Ready Mixed Concrete Corp. v. N.L.R.B.* (5th Cir.) 542 F.2d 295, 297 [same]; *Leviton Manufacturing Company, Inc. v. N.L.R.B.* (1st Cir. 1973) 486 F.2d 686, 689 [same].) This right extends to the filing of wage and hour class actions (*United Parcel Service, Inc.* (1980) 252 N.L.R.B. 1015, 1018, enforced by *N.L.R.B. v. United Parcel Service, Inc.* (6th Cir. 1982)

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677 F.2d 421), including wage class actions filed by former employees like Iskanian (see *Harco Trucking, LLC* (2005) 344 N.L.R.B. 478, 482). The Wagner Act thus prohibits, as an unfair labor practice, employer interference with the ability of current or former employees to join collectively in litigation.

**II.**

Today's class waivers are the descendants of last century's yellow dog contracts. (See *D.R. Horton & Cuda* (Jan. 3, 2012) 357 N.L.R.B. No. 184, p. 6.) CLS Transportation's adhesive form contract includes a clause prohibiting Iskanian, like all its employees, from pursuing class or representative suits or class arbitrations.<sup>5</sup> Thus, Iskanian may not file collectively with fellow employees a suit or an arbitration claim challenging any of CLS's employment practices or policies. Patently, the effect of the clause is to prevent employees from making common cause to enforce rights to better wages and working conditions. In this, the clause is indistinguishable from the

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5. The clause provides: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." ("Proprietary Information and Arbitration Policy/Agreement," ¶ 16(b) (Iskanian's contract).)

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yellow dog contracts prohibited by the Norris-LaGuardia and Wagner Acts. Indeed, the whole point of protecting a right to collective action is to allow employees to do precisely what CLS Transportation's clause forbids—band together as a group to peaceably assert rights against their employer.

That the class waiver is without effect necessarily follows. An employer may not by contract require an employee to renounce rights guaranteed by the Wagner Act (*Nat. Licorice Co. v. Labor Board* (1940) 309 U.S. 350, 359-361 [84 L. Ed. 799, 60 S. Ct. 569]; see *id.* at p. 364 [“employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes . . .”]), and this includes a contract clause requiring an employee to resolve disputes in individual, binding arbitration. Such a clause “is the very antithesis of collective bargaining [and] . . . impose[s] a restraint upon collective action.” (*National Labor Relations Board v. Stone* (7th Cir. 1942) 125 F.2d 752, 756; see *Barrow Utilities & Electric* (1992) 308 N.L.R.B. 4, 11, fn. 5 [“The law has long been clear that all variations of the venerable ‘yellow dog contract’ are invalid.”].) The restriction in Iskanian's contract thus directly contravenes federal statutory labor law and is invalid on its face. A contract clause that violates the Wagner Act is unenforceable. (*Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83-86 [70 L. Ed. 2d 833, 102 S. Ct. 851]; *J. I. Case Co. v. Labor Board* (1944) 321 U.S. 332, 337 [88 L.Ed. 762, 64 S.Ct. 576] [private contracts that conflict with the Wagner Act “obviously must yield or the Act would be reduced to a futility”].) Iskanian may not be

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prevented, on the basis of his contract, from proceeding with a putative class action.

**III.**

Notwithstanding this authority, CLS Transportation invokes the FAA as grounds for upholding the class waiver.

In the early part of the 20th century, merchants faced judicial hostility to predispute arbitration agreements they entered with their fellow merchants; routinely, the courts declined to enforce such agreements, relying on the common law rule that specific enforcement of agreements to arbitrate was unavailable. (H.R.Rep. No. 96, 68th Cong., 1st Sess., pp. 1-2 (1924); Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-making* (2012) 44 Loy. U. Chi. L.J. 391, 395.) In 1925, Congress enacted the FAA in response. Its purpose was to have arbitration agreements “placed upon the same footing as other contracts.” (H.R.Rep. No. 96, at p. 1.)

Section 2 of the FAA, its “primary substantive provision” (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 [74 L. Ed. 2d 765, 103 S. Ct. 927]), makes this point explicit: An arbitration agreement “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, italics added). Here, we deal with a provision—the waiver of the statutorily protected right to engage in collective action—that would be unenforceable in any contract, whether as part of an arbitration clause or otherwise. The FAA codifies a

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nondiscrimination principle; “[a]s the ‘saving clause’ in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.” (*Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404, fn. 12 [18 L. Ed. 2d 1270, 87 S. Ct. 1801].) That purpose is not upset by precluding, in arbitration clauses and employment contracts alike, mandatory class waivers forfeiting the right to engage in collective action, a right foreshadowed by section 3 of the Norris-LaGuardia Act and guaranteed by section 7 of the Wagner Act. Accordingly, there is no conflict between the FAA and the Norris-LaGuardia and Wagner Acts, nor is there anything in the FAA that would permit disregard of the substantive rights guaranteed by those later enactments.

Were one to perceive a conflict, the express text of the Norris-LaGuardia Act would resolve it. The 1932 act supersedes prior law, including any contrary provisions in the 1925 FAA: “All acts and parts of acts in conflict with the provisions of this chapter are repealed.” (29 U.S.C. § 115.) The effect of this provision, in combination with section 3 (29 U.S.C. § 103) banning yellow dog contracts and the FAA’s section 2 (9 U.S.C. § 2), subjecting arbitration agreements to the same limits as other contracts, is to render equally unenforceable contractual obligations to forswear collective action in regular employment agreements and in employment arbitration agreements.

Brief reflection on the purposes underlying the Norris-LaGuardia Act and Wagner Act demonstrates why this must be so. A strike for better wages and working conditions is core protected activity. (*Labor Board v.*



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*Erie Resistor Corp.* (1963) 373 U.S. 221, 233-235 [10 L. Ed. 2d 308, 83 S. Ct. 1139]; *Automobile Workers v. O'Brien* (1950) 339 U.S. 454, 456-457 [94 L. Ed. 978, 70 S. Ct. 781].) So too is a walkout. (*Labor Bd. v. Washington Aluminum Co.* (1962) 370 U.S. 9, 14-17 [8 L. Ed. 2d 298, 82 S. Ct. 1099]; *N.L.R.B. v. McEver Engineering, Inc.* (5th Cir. 1986) 784 F.2d 634, 639; *Vic Tanny Intern., Inc. v. N.L.R.B.* (6th Cir. 1980) 622 F.2d 237, 240-241.) But the expressly declared fundamental purpose of the Wagner Act is to minimize industrial strife. (29 U.S.C. § 151 [“[P]rotection by law of the right of employees to organize and bargain” is necessary to “promote[] the flow of commerce by removing certain recognized sources of industrial strife and unrest”]; see *Brooks v. Labor Board* (1954) 348 U.S. 96, 103 [99 L.Ed.2d 125, 75 S.Ct. 176] [“The underlying purpose of [the Wagner Act] is industrial peace.”]; Atleson, *Values and Assumptions in American Labor Law* (1983) p. 40 [“The most common argument in favor of the Wagner Act was that it would reduce industrial strife.”].) The Wagner Act “seeks, to borrow a phrase of the United States Supreme Court, ‘to make the appropriate collective action (of employees) an instrument of peace rather than of strife.’” (H.R.Rep. No. 1147, 74th Cong., 1st Sess., *supra*, at p. 9.) If a class waiver provision in an arbitration agreement were deemed enforceable, Iskanian and other employees would be protected if they elected to protest through strikes or walkouts but precluded from resolving grievances through peaceable collective action—a result precisely opposite to the reduction in industrial strife at the heart of the Wagner Act’s goals. Congress would not have favored less peaceable means over more peaceable ones.

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Alternatively, if the device of inserting a collective action ban in an arbitration clause were enough to insulate the ban from the Norris-LaGuardia and Wagner Acts' proscriptions, employers could include in every adhesive employment contract a requirement that *all* disputes and controversies, not just wage and hour claims, be resolved through arbitration and thus effectively ban the full range of collective activities Congress intended those acts to protect. Such a purported harmonizing of the various acts would gut the labor laws; the right to "collective action would be a mockery." (H.R.Rep. No. 669, 72d Cong., 1st Sess., *supra*, at p. 7.) When Congress invalidated yellow dog contracts and protected the right to engage in collective action, it could not have believed it was conveying rights enforceable only at the grace of employers, who could at their election erase them by the simple expedient of a compelled waiver inserted in an arbitration agreement.

CLS Transportation argues *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. \_\_\_ [179 L. Ed. 2d 742, 131 S. Ct. 1740] and *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. \_\_\_ [181 L. Ed. 2d. 586, 132 S. Ct. 665] save its class waiver. Neither does.

*Concepcion* considered whether as a matter of obstacle preemption the FAA foreclosed a state law unconscionability rule applicable to class waivers in consumer contracts. (*AT&T Mobility LLC v. Concepcion*, *supra*, 563 U.S. at p. \_\_\_ [131 S. Ct. at p. 1746].) It did not speak to the considerations entailed in reconciling the FAA with other coequal federal statutes. Nor did it

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address any of the particulars of Congress's subsequent labor legislation codifying employees' substantive rights to engage in collective action, rights not shared by consumers.

*CompuCredit Corp. v. Greenwood*, *supra*, 565 U.S. \_\_\_ [132 S. Ct. 665] is similarly of no assistance. There, the Supreme Court reaffirmed that to determine whether the FAA's presumption in favor of enforcing arbitration clauses applies to a given claim, one must ask whether the presumption has been "overridden by a contrary congressional command" in other federal law. (*Id.* at p. \_\_\_ [132 S. Ct. at p. 669].) The claims at issue there arose under a federal law that guaranteed consumers notice of a "'right to sue.'" (*Ibid.*, quoting 15 U.S.C. § 1679c(a).) Had Congress intended to preclude arbitration as a suitable forum under the applicable act, "it would have done so in a manner less obtuse" than one offhand reference to a right to sue. (*CompuCredit*, at p. \_\_\_ [132 S. Ct. at p. 672].) In contrast, the Norris-LaGuardia Act and Wagner Act present no similar difficulties for discerning a contrary congressional command. Such a command may be evident from "the text of the [other statute], its legislative history, or an 'inherent conflict' between arbitration and the [other statute's] underlying purposes." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 [114 L. Ed. 2d 26, 111 S. Ct. 1647].) Each such source supplies support here: the conclusion that class waivers are foreclosed arises not from inferences gleaned from a lone phrase, as in *CompuCredit*, but from the explicit text, legislative history and core purpose of the acts, all establishing the right to collective action and the illegality of compelled contractual waivers of that right. (See *ante*, pts. I. & II.)

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Refusing to enforce a National Labor Relations Board order finding a class waiver violative of the Wagner Act, a divided Fifth Circuit reached a contrary conclusion. (*D.R. Horton, Inc. v. N.L.R.B.* (5th Cir. 2013) 737 F.3d 344 (*Horton II*), declining to enforce *D.R. Horton & Cuda, supra*, 357 N.L.R.B. No. 184.) The majority’s analysis assumed a congressional command superseding the FAA could come only from “the general thrust of the [Wagner Act]—how it operates, its goal of equalizing bargaining power” (*Horton II*, at p. 360) and the “congressional intent to ‘level the playing field’ between workers and employers” (*id.* at p. 361), sources the majority found insufficient. One need not look to such generalized and abstract indications. As discussed, the FAA subordinates arbitration agreements to generally applicable bars against contract enforcement (9 U.S.C. § 2), and the Wagner Act by its text bars employers from contractually conditioning employment on waiver of the right to engage in collective action (29 U.S.C. §§ 157, 158(a)(1); see *Nat. Licorice Co. v. Labor Board, supra*, 309 U.S. at pp. 359-361).

*Horton II* also took comfort in the fact rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.), governing class actions, was not adopted until 1966. (*Horton II, supra*, 737 F.3d at p. 362.) But that the most prevalent current form of collective litigation is recent does not mean the Wagner Act at its inception did not shield from waiver the right to collective litigation in whatever manner available. Collective actions via the common law doctrine of virtual representation, based on equity principles, are of much older vintage than rule 23. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 988-989 [95 Cal. Rptr. 3d 588, 209

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P.3d 923] (conc. opn. of Werdegar, J.) “The 74th Congress knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of ‘mutual aid or protection’ as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining.’” (*Eastex, Inc. v. NLRB, supra*, 437 U.S. at p. 565.) The broad language of the Wagner Act shields concerted activity for mutual aid or protection by whatever means pursued, including through peaceable collective suits.

In the end, CLS Transportation’s argument rests on the notion that the FAA should be interpreted to operate as a super-statute, limiting the application of both past and future enactments in every particular. “[M]en may construe things after their fashion/Clean from the purpose of the things themselves.” (Shakespeare, *Julius Caesar*, act I, scene 3, lines 34-35.) So it is with this view of the FAA. The text and legislative history of the Norris-LaGuardia and Wagner Acts, passed by legislators far closer in time to the FAA than our current vantage point, show no such deference. The right of collective action they codify need not yield.

I respectfully dissent.

WERDEGAR, J.

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**APPENDIX C — OPINION OF THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT, DIVISION TWO,  
FILED JUNE 4, 2012**

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

B235158

ARSHAVIR ISKANIAN,

*Plaintiff and Appellant,*

v.

CLS TRANSPORTATION LOS ANGELES, LLC,

*Defendant and Respondent.*

APPEAL from an order of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

This is the second appeal in this case. We issued our opinion on the first appeal soon after the California Supreme Court decided *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [64 Cal. Rptr. 3d 773, 165 P.3d 556] (*Gentry*), which held that a class waiver provision in an arbitration agreement should not be enforced if “class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration.” (*Id.* at p. 450.) In our prior opinion, in light of *Gentry*, we directed the trial court to reconsider

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its order granting a motion to compel arbitration and dismissing class claims.

In this appeal, we are faced with an essentially identical order—defendant’s renewed motion to compel arbitration was granted and class claims were dismissed. The legal landscape, however, has changed. In April 2011, in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. \_\_\_ [179 L. Ed. 2d 742, 131 S. Ct. 1740] (*Concepcion*), the United States Supreme Court, reiterating the rule that the principal purpose of the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) is to ensure that arbitration agreements are enforced according to their terms, held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1748].) Applying this binding authority, we conclude that the trial court properly ordered this case to arbitration and dismissed class claims.

**FACTUAL AND PROCEDURAL BACKGROUND**

The plaintiff in this matter, Arshavir Iskanian, worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS), from March 2004 to August 2005. In December 2004, Iskanian signed a “Proprietary Information and Arbitration Policy/Agreement” (arbitration agreement) providing that “any and all claims” arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement provided for reasonable discovery, a written award, and judicial review of the award. Costs unique to arbitration,

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such as the arbitrator's fee, were to be paid by CLS. The arbitration agreement also contained a class and representative action waiver, which read: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person."

On August 4, 2006, Iskanian filed a class action complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner. In its March 2007 order granting CLS's motion to compel arbitration, the trial court found that the arbitration agreement was neither procedurally nor substantively unconscionable. *Gentry*, however, was decided soon after the trial court rendered its order, and we issued a writ of mandate directing the superior court to reconsider its ruling in light of the new authority.

Apparently, following remand, CLS voluntarily withdrew its motion to compel arbitration, making it unnecessary for the trial court to reconsider its prior order. The parties proceeded to litigate the case. On



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September 15, 2008, Iskanian filed a consolidated first amended complaint, alleging seven causes of action for Labor Code violations<sup>1</sup> and an unfair competition law claim (UCL) (Bus. & Prof. Code, § 17200 et seq.). Iskanian brought his claims as an individual, as a putative class representative, and (with respect to the Lab. Code claims) in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (the PAGA; Lab. Code, § 2698 et seq.).<sup>2</sup>

After conducting discovery, Iskanian moved to certify the class. CLS opposed the motion for class certification. By order dated October 29, 2009, the trial court granted Iskanian's motion, certifying the case as a class action.

On April 27, 2011, the United States Supreme Court decided *Concepcion*. Soon after, CLS renewed its motion to compel arbitration and dismiss the class claims, arguing that *Concepcion* was new law that overruled *Gentry v. Superior Court*, *supra*,<sup>42</sup> Cal.4th 443. CLS contended that, pursuant to *Concepcion*, enforcement of the arbitration agreement on its terms was required, and therefore the class and representative action waivers were

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1. These were Labor Code sections (1) 510 and 1198 (unpaid overtime); (2) 201 and 202 (wages not paid upon termination); (3) 226, subdivision (a) (improper wage statements); (4) 226.7 (missed rest breaks); (5) 512 and 226.7 (missed meal breaks); (6) 221 and 2800 (improper withholding of wages and nonindemnification of business expenses); and (7) 351 (confiscation of gratuities).

2. The PAGA 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.

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effective. Iskanian opposed the motion, arguing among other things that *Gentry v. Superior Court*, *supra*, 42 Cal.4th 443 was still good law and, in any event, that CLS had waived its right to seek arbitration by withdrawing the original motion. The trial court found in favor of CLS. On June 13, 2011, it entered an order requiring the parties to arbitrate their dispute and dismissing the class claims.

**DISCUSSION**

Iskanian appeals from the June 13, 2011 order. Although an order compelling arbitration ordinarily is not appealable (see *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591 [4 Cal. Rptr. 2d 343]), the order here dismissed class claims. It therefore constitutes a “death knell” for the class claims, and accordingly is appealable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288 [90 Cal. Rptr. 3d 539]; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 [122 Cal. Rptr. 3d 153, 248 P.3d 681].)

In the absence of material, conflicting extrinsic evidence, we apply our independent judgment to determine whether an arbitration agreement applies to a given controversy. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685 [132 Cal. Rptr. 2d 207].) If the trial court’s decision on arbitrability depended on resolution of disputed facts, we review the decision for substantial evidence. (*Ibid.*) The party opposing arbitration has the burden of showing that an arbitration provision is invalid. (*Franco v. Athens Disposal Co., Inc.*, *supra*, 171 Cal.App.4th at p. 1287.)

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Here, the dispute is largely a question of whether the subject arbitration agreement—including its prohibition of class and representative claims—is enforceable under the law. We therefore must independently review the applicable law to determine whether the trial court’s order was correct.

**I. The FAA and California arbitration law**

Section 2 of the FAA makes agreements to arbitrate “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.) This provision reflects a “ ‘liberal federal policy favoring arbitration,’ ... and the ‘fundamental principle that arbitration is a matter of contract ... .’ ” (*Concepcion, supra*, 563 U.S. at pp. \_\_\_\_, \_\_\_\_ [131 S.Ct. at pp. 1744, 1745], citation omitted.) Arbitration agreements, accordingly, are enforced according to their terms, in the same manner as other contracts. (*Ibid.*) Not all arbitration agreements are necessarily enforceable, however. Section 2’s “saving clause” permits revocation of an arbitration agreement if “ ‘generally applicable contract defenses, such as fraud, duress, or unconscionability’ ” apply. (*Concepcion*, at p. \_\_\_ [131 S.Ct. at p. 1746].)

California law similarly favors enforcement of arbitration agreements, save upon grounds that exist at law or in equity for the revocation of any contract, such as unconscionability. (Code Civ. Proc., § 1281; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114 [99 Cal. Rptr. 2d 745, 6 P.3d 669].) Under California law, unconscionability, in the context of

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arbitration agreements as well as contracts in general, “has both a “procedural” and a “substantive” element,’ the former focusing on ‘ “oppression” ’ or ‘ “surprise” ’ due to unequal bargaining power, the latter on ‘ “overly harsh” ’ or ‘ “one-sided” ’ results.” (24 Cal.4th at p. 114.)

**II. *Concepcion***

In *Concepcion*, *supra*, 563 U.S. \_\_\_ [131 S.Ct. 1740], the United States Supreme Court examined the validity of the “*Discover Bank* rule,” a rule enunciated in the case *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 153 [30 Cal. Rptr. 3d 76, 113 P.3d 1100] (*Discover Bank*), in which the California Supreme Court held: “at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.” Noting the deterrent effect of class actions (“ ‘ “class action is often the only effective way to halt and redress ... exploitation” ’ ”) (*id.* at p. 156), the California Supreme Court explained the reason for its holding in *Discover Bank* as follows: “[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that 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, then ... the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of

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another.’ (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (36 Cal.4th at pp. 162-163.) *Discover Bank* found that class arbitration was “workable and appropriate in some cases,” and that class arbitration could be compelled when an otherwise valid arbitration agreement contained an unconscionable class waiver provision. (*Id.* at p. 172.)

The issue before the United States Supreme Court in *Concepcion* was whether the FAA prohibited a state rule, such as the one expressed in *Discover Bank*, that conditioned “the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1744].)

*Concepcion* identified two types of state rules preempted by the FAA. The first type was relatively simple to recognize: “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1747].) The second type required a more nuanced inquiry. It occurred when a defense seemingly allowed by the FAA section 2 saving clause, such as unconscionability, was “alleged to have been applied in a fashion that disfavors arbitration.” (*Concepcion*, at p. \_\_\_ [131 S.Ct. at p. 1747].) Such a defense could run afoul of the rule “that a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state

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legislature cannot.’ ” (*Ibid.*, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9 [96 L. Ed. 2d 426, 107 S. Ct. 2520].) Accordingly, the Supreme Court held: “Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1748].)

On this basis, the *Concepcion* court found that the *Discover Bank* rule was preempted. The rule interfered with the “overarching purpose” of the FAA: “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1748].)

### III. *Gentry*

*Concepcion* expressly overturned *Discover Bank*. *Gentry*, the case which we previously directed the trial court to consider on remand, was not referenced in *Concepcion*’s majority opinion. Iskanian submits that a portion of *Gentry* was directly based on *Discover Bank* and therefore is no longer valid law. He contends, however, that *Concepcion* was limited in scope, and that *Gentry* remains good law to the extent that it prohibits arbitration agreements from “interfering with a party’s ability to vindicate statutory rights” through class action waivers.<sup>3</sup>

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3. Iskanian also argues that *Concepcion* does not apply in state courts. Citing to Justice Thomas’s dissent in *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 285-286 [130 L. Ed.

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Iskanian asserts that the trial court should have applied *Gentry* in ruling on CLS's renewed motion to compel arbitration, and that if it had done so it would not have dismissed the class claims.

As in this case, the plaintiff in *Gentry* brought a class action claim for violations of the Labor Code, even though he had entered into an arbitration agreement with class waivers. The *Gentry* court, finding that the statutory right to receive overtime pay is unwaivable, concluded that under some circumstances a class arbitration waiver "would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws," and that such a waiver was contrary to public policy. (*Gentry, supra*, 42 Cal.4th at pp. 453, 457.) The *Gentry* court laid out a four-factor test for determining whether a class waiver should be upheld: "when it is alleged that

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2d 753, 115 S. Ct. 834] (*Allied-Bruce*), Iskanian surmises that if the *Concepcion* case had reached the United States Supreme Court from state court, Justice Thomas (who provided the fifth vote) would not have found preemption. This is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court (indeed, Justice Thomas asserted that the FAA has a broader preemptive effect than found by the majority). We also note that Justice Scalia, who authored the *Concepcion* opinion, joined in Justice Thomas's dissent in *Allied-Bruce*. Furthermore, following *Concepcion*, the United States Supreme Court has granted petitions for writ of certiorari vacating judgments arising in state courts, and directing the courts to consider *Concepcion*. (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) 565 U.S. \_\_\_ [181 L. Ed. 2d 343, 132 S.Ct. 496]; *Marmet Health Care Center v. Brown* (2012) 565 U.S. \_\_\_ [182 L. Ed. 2d 42, 132 S.Ct. 1201].)

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an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the factors discussed above: the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. If it concludes, 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 p. 463.) We previously remanded the instant case to the trial court with instructions to reconsider its ruling in light of this "*Gentry* test."

Now, we find that the *Concepcion* decision conclusively invalidates the *Gentry* test. First, under *Gentry*, if a plaintiff was successful in meeting the test, the case would be decided in class arbitration (unless the plaintiff could show that the entire arbitration agreement was unconscionable, in which case the agreement would be wholly void). But *Concepcion* thoroughly rejected the concept that class arbitration procedures should



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be imposed on a party who never agreed to them. (*Concepcion, supra*, 563 U.S. at pp. \_\_\_-\_\_\_ [131 S.Ct. at pp. 1750-1751].) The *Concepcion* court held that nonconsensual class arbitration was inconsistent with the FAA because (i) it “sacrifices the principal advantage of arbitration—it’s informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”; (ii) it requires procedural formality since rules governing class arbitration “mimic the Federal Rules of Civil Procedure for class litigation”; and (iii) it “greatly increases risks to defendants,” since it lacks the multilevel review that exists in a judicial forum. (*Concepcion*, at pp. \_\_\_-\_\_\_ [131 S.Ct. at pp. 1751-1752]; see *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.* (2010) 559 U.S. \_\_\_-\_\_\_ [176 L. Ed. 2d 605, 130 S. Ct. 1758, 1775] [“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so”].) This unequivocal rejection of court-imposed class arbitration applies just as squarely to the *Gentry* test as it did to the *Discover Bank* rule.

Second, Iskanian argues that the *Gentry* rule rested primarily on a public policy rationale, and not on *Discover Bank*’s unconscionability rationale. While this point is basically correct, it does not mean that *Gentry* falls outside the reach of the *Concepcion* decision. *Gentry* expressed the following reason for its four-factor test: “[C]lass arbitration waivers cannot ... be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees’ prosecution of those claims.” (*Gentry*,

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*supra*, 42 Cal.4th at p. 464.) *Concepcion*, though, found that nothing in section 2 of the FAA “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives,” which are “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1748].) A rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms.

Third, the premise that Iskanian brought a class action to “vindicate statutory rights” is irrelevant in the wake of *Concepcion*. As the *Concepcion* court reiterated, “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct. at p. 1753].) 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*. *Concepcion*’s holding in this regard is consistent with previously established law. (See *Perry v. Thomas, supra*, 482 U.S. at p. 484 [finding that § 2 of the FAA preempts Lab. Code, § 229, which provides that actions for the collection of wages “may be maintained ‘without regard to the existence of any private agreement to arbitrate’”]; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11 [79 L. Ed. 2d 1, 104 S. Ct. 852] [holding that the Cal. Supreme Court’s interpretation of the Franchise Investment Law (Corp. Code, § 31000 et seq.)

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as requiring judicial consideration despite the terms of an arbitration agreement directly conflicted with § 2 of the FAA and violated the supremacy clause]; *Preston v. Ferrer* (2008) 552 U.S. 346, 349-350 [169 L. Ed. 2d 917, 128 S. Ct. 978] [holding, “when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA”].)

Because this matter involves analysis of the effect of a federal law, the FAA, on a state rule, we must follow the United States Supreme Court’s lead. “ ‘Decisions of the United States Supreme Court are binding not only on all of the lower federal courts [citation], but also on state courts when a federal question is involved ... .’ ” (*Elliot v. Albright* (1989) 209 Cal.App.3d 1028, 1034 [257 Cal. Rptr. 762]; see *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 221 [75 L. Ed. 983, 51 S. Ct. 453] [“The determination by this court of [a federal] question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding.”]; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 679 [254 P. 551] [“we must bow to the supremacy of the federal constitution in this matter as interpreted by the highest court of our country”].)

Accordingly, we find that the trial court here properly applied the *Concepcion* holding—and properly declined to apply the *Gentry* test—by enforcing the arbitration agreement according to its terms. The trial court correctly found that the arbitration agreement and class action waivers were effective, and ruled appropriately in

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granting the motion to compel arbitration and dismissing Iskanian's class claims.<sup>4</sup>

**IV. D. R. Horton**

After Iskanian's opening brief on appeal was filed, the National Labor Relations Board (NLRB or Board) issued a decision analyzing whether and how *Concepcion* and related authority apply to employment-related class claims. In his reply brief, Iskanian contends that this decision, *D. R. Horton* (2012) 357 NLRB No. 184 [2012 NLRB Lexis 11] (*D. R. Horton*), mandates a finding that the class waiver in the CLS arbitration agreement cannot be enforced.

In *D. R. Horton*, the NLRB held that a mandatory, employer-imposed agreement requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class or collective claims) violated the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et seq.) because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. (*D. R. Horton, supra*, 2012 NLRB Lexis at p. \*6.) Section 7 provides in part that employees shall have the right

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4. Iskanian did not contend that the arbitration agreement was unconscionable on a basis governing *all* contracts, rather than a basis premised on the uniqueness of arbitration. Our opinion, therefore, is not inconsistent with *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, 87-89 [135 Cal. Rptr. 3d 19], review granted March 21, 2012, S199119, in which Division One of this court held that an arbitration provision was unconscionable for reasons that would apply to any contract in general.

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“to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection ... .” (29 U.S.C. § 157.) The NLRB found that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by *Section 7 of the NLRA*.” (2012 NLRB Lexis at p. \*9, italics added.)

If *D. R. Horton* only involved application of the NLRA we would most likely defer to it. (See *N.L.R.B. v. Advanced Stretchforming Internat., Inc.* (9th Cir. 2000) 233 F.3d 1176, 1180 [“We defer to the Board’s interpretation of the NLRA if it is ‘reasonable and not precluded by Supreme Court precedent.’ ”]; *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 635 [17 Cal. Rptr. 3d 336] [“we, like the federal courts, defer to the statutory construction adopted by the agency responsible for enforcing the legislation”].) The *D. R. Horton* decision, however, went well beyond an analysis of the relevant sections of the NLRA. Crucially, the decision interpreted the FAA, discussing *Concepcion* and other FAA-related authority in finding that the FAA did not foreclose employee-initiated class or collective actions. (See *D. R. Horton, supra*, 2012 NLRB Lexis 11 at pp. \*32-\*55.) As the FAA is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB’s analysis. “[C]ourts do not owe deference to an agency’s interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute.” (*Association of Civilian Technicians v. F.L.R.A.* (9th Cir. 2000) 200 F.3d 590, 592; see *Hoffman Plastic Compounds, Inc. v. NLRB*

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(2002) 535 U.S. 137, 144 [152 L. Ed. 2d 271, 122 S. Ct. 1275] [“we have accordingly never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA”]; *NLRB v. Bildisco & Bildisco* (1984) 465 U.S. 513, 529, fn. 9 [79 L. Ed. 2d 482, 104 S. Ct. 1188] [“While the Board’s interpretation of the NLRA should be given some deference, the proposition that the Board’s interpretation of statutes outside its expertise is likewise to be deferred to is novel.”].)

We decline to follow *D. R. Horton*. In reiterating the general rule that arbitration agreements must be enforced according to their terms, *Concepcion* (which is binding authority) made no exception for employment-related disputes. Furthermore, the NLRB’s attempt to read into the NLRA a prohibition of class waivers is contrary to another recent United States Supreme Court decision. In *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. \_\_\_, \_\_\_ [181 L.Ed.2d 586, 132 S.Ct. 665, 668] (*CompuCredit*), the plaintiff consumers filed suit against a credit corporation and a bank, contending that they had violated the Credit Repair Organizations Act (CROA) (15 U.S.C. § 1679 et seq.).<sup>5</sup> The plaintiffs brought the matter as a class action, despite having previously agreed to resolve all disputes by binding arbitration. The Supreme Court rejected their efforts to avoid arbitration, finding that unless the FAA’s mandate has been “ ‘overridden by a contrary congressional command,’ ” agreements to

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5. *D. R. Horton* was issued on January 3, 2012. *CompuCredit* was issued on January 10, 2012.

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arbitrate must be enforced according to their terms, even when federal statutory claims are at issue. (*CompuCredit*, at p. [132 S.Ct. at p. 669], quoting *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226 [96 L. Ed. 2d 185, 107 S. Ct. 2332].) The Supreme Court held: “Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.” (*CompuCredit*, at p. 673.)

The *D. R. Horton* decision identified no “congressional command” in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. *D. R. Horton*’s holding—that employment-related class claims are “concerted activities for the purpose of collective bargaining or other mutual aid or protection” protected by section 7 of the NLRA, so that the FAA does not apply—elevates the NLRB’s interpretation of the NLRA over section 2 of the FAA. This holding does not withstand scrutiny in light of *Concepcion* and *CompuCredit*.

**V. The PAGA claims**

The arbitration agreement that Iskanian signed contains a waiver of both class claims and representative claims. In addition to bringing the case as a class action, Iskanian also brought his claims for Labor Code violations in a representative capacity under the PAGA. He contends that the claims brought pursuant to the PAGA are inarbitrable.

The PAGA authorizes an aggrieved employee to bring a civil action to recover civil penalties “on behalf of

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himself or herself and other current or former employees.” (Lab. Code, § 2699, subd. (a).) This provision has been interpreted as authorizing an aggrieved employee to recover civil penalties for the violation of his or her own rights, and “to collect civil penalties on behalf of *other current and former employees.*” (*Franco v. Athens Disposal Co., Inc., supra*, 171 Cal.App.4th at p. 1300.)

Division Three of this court has observed: “[T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties ‘on behalf of himself or herself and other current or former employees’ (§ 2699, subd. (a)), as an alternative to enforcement by the LWDA [(Labor and Workforce Development Agency)]. [¶] The Legislature declared its intent as follows: ‘(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies’ enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.’ (Stats. 2003, ch. 906, § 1, italics added.)” (*Dunlap v. Superior Court* (2006) 142 Cal. App.4th 330, 337 [47 Cal. Rptr. 3d 614].)

In summary, there is no question that the PAGA was enacted with the intent of promoting the public interest. The PAGA expressly provides for representative actions so that aggrieved employees can pursue violations that state agencies lack the funding to address. Iskanian contends



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that, given the clear intent of the Legislature to benefit the public by providing for representative actions under the PAGA, the “public right” of representative actions under the PAGA is unwaivable.

Iskanian’s view is supported by Division Five’s majority opinion in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 [128 Cal. Rptr. 3d 854] (*Brown*). *Brown* held that the *Concepcion* holding does not apply to representative actions under the PAGA, and therefore a waiver of PAGA representative actions is unenforceable under California law. (*Brown*, at p. 494.)

The claims at issue in *Brown* were similar to those here. The plaintiff sought civil penalties (on behalf of herself and others) pursuant to the PAGA for alleged Labor Code violations. The *Brown* majority noted the differences between class actions and PAGA representative actions. “The representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers that violate the Labor Code. ... ‘Restitution is not the primary object of a PAGA action, as it is in most class actions.’ [Citation.] ... Our Supreme Court has distinguished class actions from representative PAGA actions in holding that class action requirements do not apply to representative actions brought under the PAGA.”

In finding that *Concepcion* did not apply to PAGA representative claims, the *Brown* majority wrote: “[*Concepcion*] does not purport to deal with the FAA’s possible preemption of contractual efforts to eliminate

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representative private attorney general actions to enforce the Labor Code. As noted, the PAGA creates a statutory right for civil penalties for Labor Code violations ‘that otherwise would be sought by state labor law enforcement agencies.’ ... This purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to [*Concepcion*], may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations. [*Concepcion*] does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.” (*Brown, supra*, 197 Cal. App.4th at p. 500, citation omitted.)

Respectfully, we disagree with the majority’s holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that the United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.

In *Southland Corp. v. Keating, supra*, 465 U.S. at pages 10-11, the United States Supreme Court overruled the California Supreme Court’s holding that claims brought under the Franchise Investment Law required judicial consideration and were not arbitrable. The United States Supreme Court held: “In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.*” (*Id.*, italics

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added.) The court further clarified the reach of the FAA in *Concepcion* by holding: “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” (*Concepcion, supra*, 563 U.S. at p. \_\_\_ [131 S.Ct at p. 1747].)

Iskanian argues that a PAGA action can only effectively benefit the public if it takes place in a judicial forum, outside of arbitration. Iskanian could be correct, but his point is irrelevant. Under *Southland Corp. v. Keating, supra*, 465 U.S. 1, and *Concepcion, supra*, 563 U.S. \_\_\_ [131 S.Ct. 1740], any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA.

The Ninth Circuit Court of Appeals recently came to a similar conclusion in *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947 (*Kilgore*), in which it examined the continuing vitality of the California “*Broughton-Cruz* rule” in light of *Concepcion*. That rule was first expressed in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1083 [90 Cal. Rptr. 2d 334, 988 P.2d 67], which held that prohibiting the arbitration of Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.) claims for injunctive relief did not contravene the FAA because the United States Supreme Court “has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests.” The rule was extended in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 307 [133 Cal. Rptr. 2d 58, 66 P.3d 1157], to include claims for public injunctive relief under the UCL.

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In *Kilgore*, the plaintiffs brought a class action alleging UCL violations. The district court declined to enforce arbitration agreements between the plaintiffs and defendants. The Ninth Circuit Court of Appeals reversed, finding that the *Broughton-Cruz* rule was preempted by the FAA. The court held that “the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the right to a judicial forum—and thus whether that statutory claim falls outside the FAA’s reach—applies only to *federal*, not state, statutes.” (*Kilgore, supra*, 673 F.3d at p. 962.) The court observed that some members of the United States Supreme Court had expressed the view that section 2 of the FAA should be interpreted in a manner that would not prevent states from prohibiting arbitration on public policy grounds, but that view did not prevail. (673 F.3d at p. 962.) “We read the Supreme Court’s decisions on FAA preemption to mean that, other than the savings clause, the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to keep that *federal* claim out of arbitration proceedings ... .” (*Ibid.*)

This reasoning is directly applicable here. Following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.

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Therefore, giving effect to the terms of the arbitration agreement here, Iskanian may not pursue representative claims against CLS. The law prohibiting such claims applies to both Iskanian's PAGA claims<sup>6</sup> and his UCL claim.<sup>7</sup>

**VI. The trial court's finding of no waiver**

As he did in the trial court, Iskanian argues on appeal that, regardless of the effect of *Concepcion*, CLS waived the right to arbitrate by failing to pursue it. Following our prior remand, CLS voluntarily withdrew its motion

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6. Although Iskanian may not pursue a representative action, we find that he may pursue his individual PAGA claims in arbitration. Nothing in the arbitration agreement prevents Iskanian from bringing individual claims for civil penalties. We recognize that it has been held that a PAGA claim may not be pursued on an individual basis because of the language of Labor Code section 2699, subdivision (a), which allows an aggrieved employee to bring the action "on behalf of himself or herself *and* other current or former employees." (Italics added.) (See *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124 [135 Cal. Rptr. 3d 832].) We, however, read the function of the word "and" here in a different sense: its purpose is to clarify that an employee may pursue PAGA claims on behalf of others *only* if he pursues the claims on his own behalf. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141.) We do not believe that an individual PAGA action is precluded by the language of the statute.

7. Iskanian has sought only restitution and disgorgement in connection with his UCL claim, and not injunctive relief. His individual UCL claim is arbitrable. (See *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at p. 317.)

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to compel arbitration. CLS only renewed the motion after the issuance of the *Concepcion* opinion. In granting CLS's renewed motion, the trial court found that CLS had not waived its right to arbitration.<sup>8</sup>

Under both the FAA and state law, a finding of waiver is disfavored. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 [8 Cal. Rptr. 3d 517, 82 P.3d 727] (*St. Agnes*)). Any doubts regarding a waiver allegation are to be resolved in favor of arbitration. (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25 [74 L. Ed. 2d 765, 103 S. Ct. 927].) "State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver ([Code Civ. Proc.,] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes, supra*, at p. 1195.)<sup>9</sup>

There is no single test to determine whether a waiver of arbitration has occurred (*St. Agnes, supra*, 31 Cal.4th at p. 1195), though our Supreme Court has identified a number of factors that may properly be considered:

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8. The trial court was not prevented by our prior opinion from granting the renewed motion by the "law of the case" doctrine, because the doctrine applies only when no "intervening change in the law" has occurred. (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146 [142 Cal. Rptr. 676].)

9. Waiver in this context is not used in the ordinary sense of a voluntary relinquishment of a known right, but rather as shorthand for the conclusion that a contractual right to arbitration has been lost. (*St. Agnes, supra*, 31 Cal.4th at p. 1195, fn. 4.)

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“ ‘“(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.” [Citation.]” (*Id.* at p. 1196.)

In cases where the facts are undisputed, a ruling on waiver of arbitration is subject to de novo review. (See *St. Agnes, supra*, 31 Cal.4th at p. 1196.) The determination of waiver is generally a question of fact, however, in which event the trial court’s finding will be upheld if supported by substantial evidence. (*Ibid.*; *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946 [118 Cal. Rptr. 3d 613]; *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 841 [133 Cal. Rptr. 3d 350].)

Reviewing the evidence and the history of this case, we find that the trial court did not err by declining to impose the disfavored penalty of waiver. Substantial evidence supported a finding that CLS acted consistently with its right to arbitrate. CLS originally moved to compel arbitration soon after the case was filed. It likely would have been successful in that effort if not for the issuance of *Gentry* while the case was on appeal.

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Iskanian argues that despite its original attempt, CLS thereafter abandoned arbitration by withdrawing its motion to compel. CLS counters that pursuing arbitration at that point would have been futile. It concedes that Iskanian would have satisfied his burden under the *Gentry* test, and argues that prior to the *Concepcion* decision, any attempt to pursue arbitration would have been pointless. We agree with CLS that it did not act inconsistently with the right to arbitrate by failing to seek enforcement of the arbitration agreement when, as both parties agree, Iskanian would have satisfied his burden under *Gentry*. (See *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697 [defendant did not act inconsistently with the contractual right to seek arbitration by moving to compel arbitration only after an intervening change in the law].)

Under *Gentry*, even if CLS was able to have the case heard in arbitration, it would have been required to arbitrate the case on a classwide basis (see *Gentry, supra*, 42 Cal.4th at p. 463), despite the class waivers in the parties' arbitration agreement. *Concepcion* represented controlling new law, as it clarified that arbitration agreements generally must be enforced according to their terms, and it prohibited the sort of unbargained-for class arbitration that could have been compelled by application of the *Gentry* test. (*Concepcion, supra*, 563 U.S. \_\_\_\_, \_\_\_\_, \_\_\_\_-\_\_\_\_ [131 S.Ct. 1740, 1748, 1750-1751].)

In *Quevedo v. Macy's, Inc., supra*, 798 F.Supp.2d 1122, the Central District of California addressed a waiver argument nearly identical to the one at issue here. In concluding that the movant did not waive arbitration



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by failing to pursue it prior to *Concepcion*, the Central District court observed: “In light of these disadvantages of class arbitration, it is no surprise that Macy’s declined to enforce its arbitration agreement, reasonably believing that, under *Gentry*, it would have to arbitrate Quevedo’s claims on a class basis. If Macy’s waived any right, it was the right to defend against Quevedo’s class and collective claims in arbitration. Because Macy’s did not believe that it had the option to defend against Quevedo’s individual claims in arbitration, its failure to seek to enforce the arbitration agreement did not reflect any intent to forego that option.” (*Id.* at pp. 1130-1131, italics omitted.) Similarly, after *Gentry* and prior to *Concepcion*, CLS had no reasonable basis to believe that only Iskanian’s individual claims would be arbitrated. CLS, therefore, did not waive its right to arbitrate these individual claims by renewing its motion following the issuance of *Concepcion*.

Likewise, there is no basis to find that CLS unreasonably delayed in renewing its motion to compel arbitration. The issue of whether a party has sought arbitration within a reasonable time is a question of fact. (*Burton v. Cruise, supra*, 190 Cal.App.4th at p. 945.) CLS sought to compel arbitration less than three weeks after the Supreme Court rendered its decision in *Concepcion*. The trial court was certainly justified in not finding this an unreasonable delay.

Nor do we discern that Iskanian will suffer any undue prejudice by enforcement of the arbitration agreement. Merely participating in litigation does not result in waiver, and “courts will not find prejudice where the party

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opposing arbitration shows only that it incurred court costs and legal expenses.” (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) The fact that Iskanian conducted discovery and submitted extensive briefing in connection with his class certification motion is not particularly germane since, even outside the context of competing arbitration agreements, class certification is not definitively final—defendants may make successive motions to decertify. (See *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1171-1172 [122 Cal. Rptr. 3d 344].) Furthermore, although prejudice may lie when the moving party’s conduct has substantially undermined the public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution (*St. Agnes*, at p. 1204), those concerns are not present here. CLS has not sought to undermine the efficient nature of arbitration; rather, it has quickly sought arbitration when presented with the opportunity.

Moreover, we see no reason to suspect that CLS intentionally delayed seeking arbitration to gain some unfair advantage. Prejudice may occur when a party uses the judicial process to obtain discovery that it would not be able to get in arbitration. (*St. Agnes, supra*, 31 Cal.4th at p. 1204.) But that does not appear to be an issue for concern here—the parties’ arbitration agreement allows for reasonable discovery. In addition, it appears from the record that the parties have litigated very little, if any, of the merits of Iskanian’s claims. Thus, arbitration still stands as the more efficient venue for addressing the claims. (See *ibid.*)

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In sum, the evidence amply supports a finding that CLS did not waive its right to arbitration.

**DISPOSITION**

The June 13, 2011 order granting defendant's motion to compel arbitration and dismissing class claims is affirmed.

Doi Todd, J., and Chaves, J., concurred.

**APPENDIX D — LABOR CODE  
SECTION 2698-2699.5**

**LABOR CODE  
SECTION 2698-2699.5**

2698. This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

2699. (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, “person” has the same meaning as defined in Section 18.

(c) For purposes of this part, “aggrieved employee” means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, “cure” means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the

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underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole.

(e) (1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars (\$500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

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(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

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(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l) The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1

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(commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

2699.3. (a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.



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(B) If the agency intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the 158-day period prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action pursuant to Section 2699.

(C) Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.

(b) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give notice by certified mail to the Division of Occupational Safety and Health and the employer, with a copy to the

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Labor and Workforce Development Agency, of the specific provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The division shall inspect or investigate the alleged violation pursuant to the procedures specified in Division 5 (commencing with Section 6300).

(i) If the division issues a citation, the employee may not commence an action pursuant to Section 2699. The division shall notify the aggrieved employee and employer in writing within 14 calendar days of certifying that the employer has corrected the violation.

(ii) If by the end of the period for inspection or investigation provided for in Section 6317, the division fails to issue a citation and the aggrieved employee disputes that decision, the employee may challenge that decision in the superior court. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board. If the court finds that the division should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action pursuant to Section 2699.

(iii) A complaint in superior court alleging a violation of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall include therewith a copy of the notice of violation provided to the division and employer pursuant to paragraph (1).

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(iv) The superior court shall not dismiss the action for nonmaterial differences in facts or theories between those contained in the notice of violation provided to the division and employer pursuant to paragraph (1) and the complaint filed with the court.

(B) If the division fails to inspect or investigate the alleged violation as provided by Section 6309, the provisions of subdivision (c) shall apply to the determination of the alleged violation.

(3) (A) Nothing in this subdivision shall be construed to alter the authority of the division to permit long-term abatement periods or to enter into memoranda of understanding or joint agreements with employers in the case of long-term abatement issues.

(B) Nothing in this subdivision shall be construed to authorize an employee to file a notice or to commence a civil action pursuant to Section 2699 during the period that an employer has voluntarily entered into consultation with the division to ameliorate a condition in that particular worksite.

(C) An employer who has been provided notice pursuant to this section may not then enter into consultation with the division in order to avoid an action under this section.

(4) The superior court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with Section 6300) to ensure that the settlement provisions are at least as effective as

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the protections or remedies provided by state and federal law or regulation for the alleged violation. The provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on those settlement provisions, and the court shall grant the division's commentary the appropriate weight.

(c) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision other than those listed in Section 2699.5 or Division 5 (commencing with Section 6300) shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice. The employer shall give written notice by certified mail within that period of time to the aggrieved employee or representative and the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to Section 2699 may commence. If the alleged violation is not cured within the 33-day period, the employee may commence a civil action pursuant to Section 2699.

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(B) No employer may avail himself or herself of the notice and cure provisions of this subdivision more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.

(3) If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative shall provide written notice by certified mail, including specified grounds to support that dispute, to the employer and the agency. Within 17 calendar days of the postmark date of that notice, the agency shall review the actions taken by the employer to cure the alleged violation, and provide written notice of its decision by certified mail to the aggrieved employee and the employer. The agency may grant the employer three additional business days to cure the alleged violation. If the agency determines that the alleged violation has not been cured or if the agency fails to provide timely or any notification, the employee may proceed with the civil action pursuant to Section 2699. If the agency determines that the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

(d) The periods specified in this section are not counted as part of the time limited for the commencement of the civil action to recover penalties under this part.

2699.5. The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3,

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201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (1), (2), and (3) of subdivision (a) of, and subdivision (e) of, Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.7.