S204032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN, an individual,
Plaintiff and Appellant,

v.

CLS TRANSPORTATION OF LOS ANGELES,
Defendant and Respondent.

After Decision By The Court Of Appeal
Second Appellate District, Division Two
Case No. B235158

From the Superior Court
County of Los Angeles,
Judge Robert Hess
Case No. BC356521

Brief of Amici Curiae Retail Litigation Center, Inc. and California Retailers Association in Support of Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

I. Introduction and Summary of Argument

The United States Supreme Court has spoken clearly, repeatedly and unequivocally: "The overarching purpose of the [Federal Arbitration Act], evident in the text of §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____, 131 S. Ct. 1740, 1748 (2011), see also *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989); and *Stolt-Nielsen, S.A. v. Animalfeeds International Corp.*, 559 U.S. 662 (2010). The Supreme Court in *Concepcion* rejected this Court's reliance on the common law doctrine of unconscionability to invalidate an arbitration provision. *Concepcion,* 131 S. Ct. at 1750. The high Court also held, more than twenty-five years ago, that a state court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement [of the arbitration agreement] would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry v. Thomas*, 482 U.S. 483, 492 n9 (1987).

The *amici* submitting this brief are the Retail Litigation Center, Inc. ("RLC") and the California Retailers Association ("CRA"). Together these two organizations represent the retail industry nationwide, and their members employ more than 2.7 million persons within California. RLC and CRA urge this Court to end years of contentious, expensive and

unproductive litigation in California regarding the enforcement of valid arbitration agreements. That extensive and protracted litigation has benefitted very few employees. It has instead benefitted primarily the lawyers who defend arbitration agreements and those who seek to invalidate them. It is plain that the United States Supreme Court's numerous opinions, most recently *Concepcion*, are fundamentally at odds with this Court's 4-3 opinion in *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007) and several subsequent Court of Appeal decisions.

The issue before this Court is whether the United States Supreme Court's jurisprudence, including *Concepcion*, overrules this Court's decision in *Gentry*. The answer is "yes." There is no principled difference between this Court's analysis in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) and in *Gentry*. Both are based on the erroneous premise that an arbitration agreement may be ignored where some unrelated public policy makes court litigation preferable. *Discover Bank*, 36 Cal. 4th at 162-63; *Gentry*, 42 Cal. 4th at 462-64. As the U.S. Supreme Court succinctly stated, "states cannot require a procedure that is inconsistent with the [Federal Arbitration Act], even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753.

But this Court should do more than merely cure the error made in *Gentry*. The majority opinion in *Gentry* relied upon this Court's earlier opinion in *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.

4th 83 (2000). *Armendariz,* however well intentioned, had the unfortunate effect of signaling to the Courts of Appeal that they were free to invalidate arbitration agreements using an ill-defined, elastic and ever-expanding notion of "unconscionability."[1] This Court should also review the validity of *Armendariz* in light of intervening decisions from the U.S. Supreme Court.

This Court itself has on three occasions divided by a vote of 4-3 on the issue of whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA") preempts this Court's arbitration-based case law. *Little v. Auto Stiegler,* 29 Cal. 4th 1064 (2003) (Justices Brown, Baxter and Chin dissenting); *Gentry, supra,* (Justices Baxter, Chin and Corrigan dissenting); and *Sonic-Calabasas, Inc. v. Moreno,* 51 Cal. 4th 659 (2011) (Justices Baxter, Chin and Corrigan dissenting). During the years between *Armendariz* and *Sonic-Calabasas,* the U.S. Supreme Court repeatedly

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[1] See Exhibit 2 to this Brief, a list of 31 published opinions in which Courts of Appeal and/or the Ninth Circuit, subsequent to *Armendariz,* have invalidated arbitration agreements, using numerous purported indicia of "unconscionability." A 2006 Hastings Business Law Journal article reports that, as of January 2006, there were at least 114 decisions from California appellate courts considering whether an arbitration agreement was unconscionable. More than 57% of those decisions found the subject arbitration agreements to be completely or partially invalid, usually relying upon the unconscionability doctrine. Stephen A. Broome, "An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act," 3 *Hasting Bus. L.J.* 39 (2006).

rejected efforts to invalidate arbitration agreements, culminating in its decision in *Concepcion*.[2] There is no longer any doubt about the issue: a state court cannot invalidate an arbitration agreement based upon the principles that underlie the decisions in *Discover Bank* and *Gentry*.

The proper result in this case will not deny justice to any employee/plaintiff with a meritorious claim. It will merely shift the dispute to the forum where it should always have been: an arbitration agreed to between the parties. Only the long-condemned judicial hostility to arbitration could argue otherwise.

II. The *Amici*

The RLC is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. Ninety percent of RLC members have facilities in California and employ Californians. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry

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[2] See Exhibit 1 to this brief, a list of the United State Supreme Court decisions involving arbitration agreements dated after the decision of this Court in *Armendariz*, *supra*. There are a total of 20 such decisions. In none of those decisions did the high Court refuse to enforce an arbitration agreement on the grounds of unconscionability or because of a state law public policy.

perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. The RLC has filed *amicus* briefs or supporting letters in the following important labor and employment cases: *Duran v. U.S. Bank,* (California Supreme Court); *Wal-Mart Stores, Inc. v. Dukes,* (U.S. Supreme Court); *Standard Fire Insurance, etc. v. Knowles,* (U.S. Supreme Court); *University of Texas v. Nassar,* (U.S. Supreme Court); *Comcast Corp., et al. v. Behrand, et al.,* (U.S. Supreme Court); and in other cases before the Supreme Courts of Pennsylvania, Massachusetts, Missouri, several federal courts and the National Labor Relations Board.

The California Retailers Association ("CRA") is the only statewide trade association representing all segments of the retail industry including: general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drugstores, and specialty retailers such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually and employing approximately 2,776,000 people – nearly one fifth of California's total employment. Like RLC, CRA has appeared frequently as *Amicus Curiae*, filing *amicus* briefs or supporting letters in cases including: *Green v. Bank of America, N.A.,* (Ninth Circuit); *Harris v. Superior Court,* (California Supreme Court); *Silva v. See's Candies,*

(California Court of Appeal); *Balasanyan v. Nordstrom, Inc.*, (Ninth Circuit); and *Friend v. Hertz Corp.,* (U.S. Supreme Court).

III. Argument

A. The Arbitration Debate in California Has Defeated the Purpose of the Federal Arbitration Act.

For more than a decade, California courts have addressed hundreds of challenges to arbitration agreements. This Court's decision in *Armendariz*, *supra*, created a framework which was then expanded in more than 25 published Court of Appeal opinions, in addition to at least 6 published Ninth Circuit opinions and numerous other unpublished appellate opinions and trial court decisions. This Court in *Armendariz* based its ruling on what it asserted were "ordinary principles of unconscionability [that] manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 119. But "forms peculiar to the arbitration context" have never been a valid reason to refuse to enforce an arbitration agreement that is subject to the FAA, or to require the agreement to contain specific terms. The U.S. Supreme Court in *Perry v. Thomas,* held that a court could not "rely on the uniqueness of an agreement to arbitrate" to invalidate or ignore such an agreement. 482 U.S. at 492 n9.

Notwithstanding the numerous intervening decisions from the U.S. Supreme Court, after *Armendariz* California courts continued to exhibit the "judicial hostility to arbitration" that the FAA prohibits. Most recently, in

Concepcion, the U.S. Supreme Court rejected this Court's reliance in *Discover Bank* on the unconscionability doctrine, finding that the doctrine as applied was an "obstacle to the accomplishment of the FAA's objectives." *Concepcion, supra* at 1748.

The extensive, protracted litigation over arbitration agreements has not only done violence to those agreements, it has also caused an enormous waste of time, expense, and judicial resources. Ironically, as the U.S. Supreme Court has noted, the "prime objective" of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). Thirteen years of litigation over the enforceability of arbitration clauses, and numerous holdings based on a dubious application of the unconscionability doctrine, has clearly not promoted "streamlined proceedings and expeditious results." *Id.*

B. This Court's Holding In *Gentry* Is No Longer Good Law.

Both *Discover Bank* and *Gentry* are based on the theory, categorically rejected in *Concepcion*, that class action litigation is necessary, despite the existence of an arbitration agreement including a class action waiver. This is purportedly because "public policy" favors class litigation in certain contexts.[3]

The Court of Appeal, Fourth District, Division One, properly analyzed the issue before this Court:

> We agree with the majority view, and find the . . . distinction [between opinions based on unconscionability versus "unwaivable rights" or public policy] to be unpersuasive. Although *Gentry* and *Discover Bank* were founded on different theoretical grounds because *Discover Bank* was based on an unconscionability analysis and *Gentry* was based on the *Armendariz* public policy rationale [citation omitted], *Concepcion's* holding was unrelated to the fact that *Discover Bank* was a particular application of California's unconscionability analysis. *Concepcion* reaffirmed the validity of a state's general unconscionability defenses as applied to arbitration agreements, but found

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[3] *Discover Bank* even went so far as to hold that a court could compel arbitration on a class basis where the agreement itself contained no provision authorizing class-wide arbitration. *Discover Bank*, 36 Cal. 4th at 158-60. By judicially grafting class action procedures into an arbitration agreement silent on the issue, the majority in *Discover Bank* clearly treated arbitration agreements differently from other contracts. The high court in *Concepcion* specifically rejected this feature of *Discover Bank* as "a procedure that is inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1753; see also, *Stolt-Nielsen, supra* (arbitration agreement that is silent on the availability of class procedures cannot be interpreted to authorize them).

> *Discover Bank* objectionable mainly because it allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment that the class procedure would better promote the vindication of the parties' rights in certain cases. This discredited reasoning is the same rationale employed by the *Gentry* court.

Truly Nolen of America v. Superior Court, 208 Cal. App. 4th 487, 506 (2012).

After the decision in *Concepcion*, several California Courts of Appeal attempted to distinguish or ignore *Concepcion.* One Court of Appeal dismissed *Concepcion* in a footnote, stating only that "the concerns expressed [in *Concepcion*] do not preclude the outcome here." *Ajamian v. CantorC02e, L.P.*, 203 Cal. App. 4th 771, 804 n18 (2012). Another Court of Appeal decision, *Franco v. Arakelian Enterprises, Inc.*, 211 Cal. App. 4th 314 (2012), review granted, 152 Cal. Rptr. 3d 422 (2013), asserted that *Gentry* remains viable because, in that court's view, many wage and hour claims involve modest amounts such that an individual will lack the means to pursue an arbitration. *Franco*, 211 Cal. App. 4th 370-71.[4] Two Courts of Appeal declined to determine whether *Gentry* remained good law after

[4] The court in *Franco* relied upon declarations from the plaintiff's counsel which contained self serving conclusions about the supposed inability of individuals to locate attorneys to prosecute wage claims outside of the class context. The *amici* and their counsel can attest that, to the contrary, individual wage claims are prosecuted on a regular basis, both before the California Labor Commissioner (with or without counsel for the claimant) and in court. Reliance on self-serving statements of counsel is hardly a basis on which to distinguish the holding of *Concepcion.*

Concepcion. Those two courts applying the *Gentry* test, found that plaintiffs in those cases had not made a sufficient factual showing to establish that the arbitration agreements in question were unenforceable. *Brown v. Ralphs Grocery Company,* 197 Cal. App. 4th 489 (2011); *Kinecta Alternative Financial Solutions, Inc.,* 205 Cal. App. 4th 506 (2012). Yet another Court of Appeal, writing seven months after *Concepcion*, did not even so much as address *Concepcion*. *Wisdom v. AccentCare, Inc.*, 202 Cal. App. 4th 591 (2012), review granted, 139 Cal. Rptr. 3d 315 (2012).[5]

The Court of Appeal decisions in *Ajamian, Franco, Brown,* and *Wisdom*, all reflect the improper judicial hostility to arbitration long ago condemned by the United States Supreme Court.[6]

The Fourth District, Division One, properly identified the common but erroneous basis of *Discover Bank* and *Gentry*: a policy judgment that class action litigation is preferable to arbitration in some types of cases, especially where the arbitration would involve only the individual

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[5] As the Respondent's Answer Brief establishes, several federal District Courts have held that *Gentry* indeed has been overruled by *Concepcion*. See cases cited in Respondent's Answer Brief at p. 4.

[6] Less than a year ago, the high Court, in a *per curiam* opinion, summarily remanded an arbitration decision to the Supreme Court of Oklahoma, where that Court held that a judge, rather than an arbitrator, should determine the validity of noncompetition agreements in an employment contract. In summarily remanding the matter, the high court stated, "our cases hold that the FAA forecloses precisely this type of 'judicial hostility toward arbitration.'" *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012).

plaintiff's claim and not a class claim. *Discover Bank* concluded that the class action waiver is "exculpatory" where "the 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 . . ." *Discover Bank*, 36 Cal. 4th at 162-63. *Gentry,* citing *Discover Bank,* echoed this very proposition, finding that class action waivers, in the context of "wage and hour and overtime cases would have, at least frequently if not invariably, a similar exculpatory effect for several reasons, and would therefore undermine the enforcement of the statutory right to overtime pay." *Gentry,* 42 Cal. 4th at 457.[7]

Respondent's Answer Brief is correct: there is no principled distinction between *Discover Bank* and *Gentry* insofar as the basis of those holdings is concerned. The *Gentry* rationale simply cannot stand in light of

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[7] That *Gentry* was based on the same analysis as *Discover Bank*, if not the same label or rubric, is apparent from the *Gentry* majority's statement that "*Discover Bank* was an application of a more general principle: that although '[c]lass action arbitration waivers are not, in the abstract, exculpatory clauses' [citation to *Discover Bank* omitted], such a waiver can be exculpatory. . . ." *Gentry,* 42 Cal. 4th at 457. The *Gentry* majority immediately thereafter concluded that "class action waivers in wage and hour cases and overtime cases would have, at least frequently, if not invariably, a similar exculpatory effect. . ." *Id.*

Concepcion. As the Supreme Court succinctly stated in *Concepcion*, "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753 (2011).

C. The United States Supreme Court Sent A Clear Message In *Sonic-Calabasas*.

This Court's most recent ruling in this area is *Sonic-Calabasas*, *supra*. The U.S. Supreme Court vacated and remanded that decision to this Court for reconsideration in light of *Concepcion.* 132 S. Ct. 496 (2011). *Sonic-Calabasas* was argued before this Court on April 3, 2013 and the opinion has not yet issued. The message from the U.S. Supreme Court was clear: *Concepcion* applies in the employment context, not only in the consumer context. The high court found this Court's opinion in *Sonic-Calabasas* flatly inconsistent with *Concepcion* and the FAA.

D. The Appellant's Arguments Concerning "Unwaivable Rights" Are Ill Founded And Inconsistent With The FAA.

Appellant's Opening Brief on the Merits ("Opening Brief") argues repeatedly that *Gentry* survives because class or representative claims for Labor Code violations are "unwaivable rights." But this same argument was long ago rejected in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and, prior to that, in *Mitsubishi Motors Corp., supra*: "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution

in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26; citing *Mitsubishi Motors Corp.*, 473 U.S. at 628. Indeed, under *Gilmer*, even the federal law procedural right to a collective action can be overridden by an individual agreement to arbitrate. *Gilmer,* 500 U.S. at 32. The same result clearly must apply when a state law procedure is at issue.

Even the right to a jury trial can be waived in favor of arbitration, and that right is granted by the Seventh Amendment and expressly provided for by some statutes. Notwithstanding this right, *Gilmer* enforced the arbitration agreement – thereby denying the plaintiff a jury trial. 500 U.S. at 35. Because rights in the Constitution may be waived for arbitration, there is no basis to conclude that a matter of significantly lower import – the use of a particular procedure – warrants voiding an otherwise valid arbitration agreement.

Appellant further argues that *Gentry* was based on "important public policies," namely the enforcement of wage and hour laws; and that those "important public policies" somehow distinguish *Gentry's* foundation from that of *Discover Bank.* But this argument has also been rejected by the U.S. Supreme Court in *Concepcion*: regardless of whatever public policies a state may consider "important," it cannot use those policies as a basis to disregard the terms of an arbitration agreement governed by the FAA. *Concepcion*, 131 S. Ct. at 1753.

Nor does the arbitration agreement before this Court interfere with any substantive rights, unwaivable or otherwise. The appellant remains free to bring his claim individually in arbitration. Respondent's Answer Brief correctly states that, in the words of this Court, "class actions are provided only as a means to enforce substantive law." Answer Brief, p. 12; citing *Washington Mutual Bank v. Superior Court,* 24 Cal. 4th 906, 918; see also *City of San Jose v. Superior Court,* 12 Cal. 3d 4447 (1974) ("Class actions are provided only as a means to enforce substantive law"); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 332 (1980). There is no "unwaivable" right to bring a class action.

The *Gentry* majority concluded that class actions are necessary to enforce the statutory right to overtime compensation.[8] But the high court specifically rejected the same argument in *Concepcion,* 131 S. Ct. at 1753, stating that "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. [citation omitted]. But states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." The assertion in the *Gentry* majority opinion, that the unwaivable overtime

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[8] "What is at issue in this case, however, is not a 'judicial affinity for class actions' but the enforcement of unwaivable *statutory* right to overtime pay. What happens when a class action waiver significantly interferes with that right?" *Gentry*, 42 Cal. 4th at 465, n8 (emphasis in original).

rights at issue could effectively be redressed only in a class action, further ignores basic class action procedure: each member of the class has the right to *opt out* of the class. Each class member has the right to waive the mechanism supposedly essential to enforce his or her rights.

As to claims under the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698 *et seq.* ("PAGA"), that issue is discussed *infra.* However, the argument that a PAGA claim is "substantive" or "unwaivable" is even less credible than the assertion that a class action vehicle has these indicia. The PAGA confers no substantive rights at all. It authorizes a private action only if (1) the relevant state agency fails or declines to pursue the claims; and (2) the putative private plaintiff is the first such person to assert the claim. Cal. Lab. Code § 2699.3. Additionally, if a private plaintiff has the right to bring a PAGA claim, he or she must then *prove* underlying Labor Code violations as to himself or herself and/or others. Cal. Lab. Code section 2699, subd. (c) (an "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed").

Plaintiffs such as Mr. Iskanian are hardly left without a remedy. Because of the requirement in *Armendariz* (and in the rules of some of the prominent providers of alternative dispute resolution services), an individual can effectively prosecute his or her wage claim in arbitration with the employer paying the full cost of the procedure. Nor are the

remedies available to an individual inadequate. In addition to the alleged unpaid wages, the employee can recover, in arbitration, prejudgment interest (at the rate of ten percent per annum, despite today's historic low interest rates), attorneys' fees and costs, and penalties for many violations. Cal. Lab. Code §§ 203, 218.5, 1194, and the PAGA. Conversely, the U.S. Supreme Court in *Concepcion* held that it was a violation of the FAA to impose "class" arbitration, with its far higher costs and risks, on a party, particularly where the arbitration agreement itself included a class action waiver. *Concepcion*, 131 S. Ct. at 1752.

E. A Class Action Waiver In An Arbitration Agreement Bars A "Representative" Claim Under PAGA.

A state cannot exempt a PAGA claim, whether styled as a class action or a non-certified "representative" action, from an arbitration agreement subject to the FAA. The arbitration agreement must be enforced according to its terms. It is of no consequence that plaintiffs in cases under PAGA act as "private attorneys general." They are nevertheless private plaintiffs seeking private recovery and compensation for their private counsel. A plaintiff can assert a PAGA claim on behalf of him or herself and others *only* after the California Labor and Workforce Development Agency ("LWDA") *abandons* the claim to that prospective plaintiff, or fails to act in a timely fashion when the claim is tendered to the LWDA by the prospective plaintiff. Cal. Lab. Code § 2699.3. After the LWDA abandons

the claim, the private party and his or her counsel controls completely the prosecution and disposition of the suit, subject only to court review of any penalties sought in a proposed settlement (which in practice has proven in most cases to be a very cursory review). Cal. Lab. Code § 2699(l).

The Court of Appeal was correct in rejecting the position advanced by Appellant. Citing *Concepcion*, the Court of Appeal properly held, "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." *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949, 957 (2012), citing *Concepcion*, 131 S. Ct. at 1747.

Appellant's reliance on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) is misplaced. That case involved a civil enforcement action *by the EEOC itself.* The EEOC was not a party to the arbitration agreement. By contrast, this case is a private action brought by a private plaintiff who *is* a party to an arbitration agreement, after the LWDA *declined* to become a party.

Nor is it true that class action waivers in arbitration agreements will severely undercut the PAGA. This same argument was rejected by *Concepcion*, 131 S.Ct. at 1753. Individual claims under the PAGA may still be prosecuted in arbitration. Nothing prohibits the individual plaintiff from pursuing in arbitration a PAGA remedy on behalf of himself or herself alone. Respondent correctly analyzes the relevant statutory language and

legislative history of the PAGA and demonstrates that an individual claim under the PAGA is permissible. The PAGA does not confer any substantive right on anyone. It is simply, as this Court has noted, "a procedural statute." The PAGA does not "create property rights or any other substantive rights." *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 1003 (2009).

To hold that PAGA class or representative actions are not subject to arbitration would create two proceedings out of a single dispute. In fact, that is exactly what is occurring in the lower courts. Enterprising counsel for employees, when faced with an arbitration agreement, pursue the underlying Labor Code/wage and hour claims in arbitration and simultaneously file a PAGA claim in court, arguing that the PAGA claim is not arbitrable, based on *Brown v. Ralph's Grocery Co., supra*. The employer then must defend *two* claims: the underlying Labor Code violations are arbitrated while the PAGA lawsuit is pending. In the arbitration proceeding, the employee attempts to prove his or her individual Labor Code claim. But in the parallel PAGA court litigation, the employee also must prove Labor Code violations with respect to each "aggrieved employee" he or she seeks to represent. *Cardenas v. Mclane Foodservice, Inc.*, 2011 W.L. 379413, *3 (C.D. Cal. 2011); *Hibbs-Rines v. Seagate Technology, LLC,* 2009 W.L. 513496, *4 (N.D. Cal. 2009); Cal. Lab. Code section 2699, subd.(c) and subd.(f) (penalties may be recovered for "each

aggrieved employee," which is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.") This means that both the discovery and hearing on a PAGA representative claim would be extensive, and therefore time-consuming and costly. This tactic is diametrically opposed to the "prime objective" of arbitration: the prompt, cost-effective resolution of the dispute. Instead, it is a tactic designed to maximize the employer's defense costs and to coerce a settlement. Further, counsel could plead a PAGA action based on underlying Labor Code claims, and thereby avoid arbitration and render the FAA ineffective. This cannot be correct given the "liberal federal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Thus, this Court should hold that there is no "exception" for PAGA claims from a class action waiver in an arbitration agreement covered by the FAA.[9] If it were otherwise, the Legislature could avoid the effect of the FAA simply by authorizing "private attorney general" suits for recovery under other regulatory statutes, employment-related or otherwise, and by deputizing private plaintiffs and their counsel to enforce the new law.

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[9] The court should disapprove the contrary decision of a divided panel of the Second District Court of Appeal, Division Five, in *Brown v. Ralph's Grocery Co.*, 197 Cal. App. 4th 489 (2011), and other decisions that have been relied upon or cited *Brown* with approval.

F. Arbitration Is Not An Inferior Forum.

For years, those hostile to arbitration agreements, whether on the bench or as advocates, have claimed that arbitration is an "inferior" forum for various types of claims. The majority opinion in *Gentry* itself espoused that view: "Although we agree at least in theory with *Circuit City* that arbitration can be a relatively quick and inexpensive method of dispute resolution, the requirement that numerous employees suffering from the same illegal practice each separately prove the employer's wrongdoing is an inefficiency that may substantially drive up the costs of arbitration and diminish the prospect that overtime laws will be enforced." *Gentry*, 42 Cal. 4th at 459. Elsewhere, the *Gentry* majority criticized class action arbitration waivers as "placing formidable practical obstacles in the way of employees' prosecution of those [overtime] claims." *Id.* at 464.

The U.S. Supreme Court's decisions have long rejected these views. In *Gilmer*, *supra*, after stating that the purpose of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . ." the Court rejected a "host of challenges to the adequacy of arbitration procedures." *Gilmer*, 500 U.S. at 24. The Court held that such "generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of federal statutes favoring this method of resolving disputes.'" *Id.* at 30,

citing *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).[10]

The U.S. Supreme Court, in *Green Tree Financial Corp.-Ala. v. Randolph,* 531 U.S. 79 (2000) held that a party "resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." 531 U.S. at 91, citing *Gilmer* and other authority. The court in *Green Tree* held that, to bear that burden, the party objecting to arbitration would have to show a "likelihood" of incurring costs so large that they would "preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. But the California approach is the opposite: it is an *a priori* approach that *assumes* that arbitral procedures are inadequate,

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[10] Examples of the impermissible "suspicion of arbitration" referred to in *Gilmer* are found in *Armendariz* itself: This Court referred to "perceived advantages of the judicial forum for plaintiffs," and opined that, by requiring arbitration only of claims by the employee, but not of claims by the employer, "arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage." *Armendariz,* 24 Cal. 4th at 118. This Court even required an employer who wished to reserve the right to bring certain claims in court to provide a "justification" for the arrangement. *Armendariz,* 24 Cal. 4th at 117-18. But the United States Supreme Court has held that the parties may agree to limit the issues subject to arbitration. *Mitsubishi Motors Corp.,* 473 U.S. at 628. In *Armendariz,* the Court posited that the availability of discovery in court and the supposed "fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference,'" are reasons that employee/plaintiffs might prefer the judicial forum. *Armendariz,* 24 Cal. 4th at 119. Such hypothesizing is an example of the "suspicion of arbitration" that the Supreme Court rejected in *Gilmer.*

biased or otherwise insufficient to protect rights that the state considers "unwaivable."[11]

The *Armendariz* opinion itself, with its extensive discussion of assumed reasons that employers might view arbitration as a "superior" (i.e. biased) forum, demonstrates the "suspicion of arbitration" decried by the high court in *Gilmer*. Unfortunately, *Armendariz* encouraged the Courts of Appeal to expand its rationale beyond the original holding. *See Armendariz,* 24 Cal. 4th at 118-21.[12]

Armendariz had the salutary effect of generating procedural changes in arbitration practices, as reflected in now widely-used rules for arbitration of employment disputes adopted by such organizations as the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS"). See AAA, Employment Arbitration Rules and Mediation Procedures, www.ard.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_00436

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[11] The Court's majority opinion in *Little v. AutoStiegler*, 29 Cal. 4th 1064 (2003) contains another obvious acknowledgment that the *Armendariz* requirements are applicable only to arbitration agreements: "The Armendariz requirements are:. . . applications of general state law contract principles regarding the unwaivability of public rights *to the unique context of arbitration*, and accordingly are not preempted by the FAA." *Id.* at 1079 (emphasis added). However, there can be no "application" of general principles that are "unique" to the context of arbitration.

[12] *See* Exhibit 2 to this brief, summarizing numerous Court of Appeal and Ninth Circuit opinions finding a multitude of reasons to deny enforcement of arbitration agreements.

6 (last visited May 2, 2013); JAMS, JAMS Employment Arbitration Rules & Procedures, www.jamsadr.com/rules-employment-arbitration/ (last visited May 2, 2013). No one can argue credibly that arbitration is an "inferior" forum or that a claimant is unable in that forum to vindicate statutory rights, such as the Labor Code and wage/hour rights at issue here.

IV. Conclusion

Justice Baxter's dissent in *Gentry* was prescient:

> However, there is more than one way courts can show hostility to arbitration as a simpler, cheaper, and less formal alternative to litigation. They can simply refuse to enforce the parties' agreement to arbitrate. Or, more subtly, they can alter the arbitral terms to which the parties agreed and defeat the essential purposes and advantages of arbitration, by transforming that process, against the parties' express will at the time they entered the agreement, into something more and more like the court litigation arbitration is intended to avoid.

Gentry, 42 Cal. 4th 479 (Baxter, J. dissenting).

The United States Supreme Court has spoken in *Concepcion*, removing any doubt from the question. This Court should hold that *Gentry* is no longer the law, that the arbitration agreement at issue is enforceable, and affirm the Court of Appeal. But, as importantly, it should use this case as a vehicle to clear away the dense undergrowth of anti-arbitration holdings that have arisen since *Armendariz*. To do so is fundamentally necessary under the FAA and the United States Supreme Court holdings. Such clarification would benefit employees and employers alike and

remove the ongoing, unjustified cost and delay in enforcement of valid arbitration agreements.

Dated: May 10, 2013

Respectfully submitted,

JONES DAY

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RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION

CERTIFICATE OF COMPLIANCE

In accordance with California Rule of court 8.520(c)(1), counsel for Respondent hereby certifies that that **BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF RESPONDENT** is proportionately spaced, uses Time News Roman 13-point typeface, and contains 9,040 words, including footnotes and exhibits, as determined by our law firm's word processing system used to prepare this brief.

Dated: May 10, 2013

Respectfully submitted,

JONES DAY

By: George S. Howard Jr /cbs
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PROOF OF SERVICE

I, the undersigned state: I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is: . Jones Day, 555 California Street, 26th Floor, San Francisco, CA 94104-1500. On May 10, 2013, I served the foregoing document titled:

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION

on the interested parties by placing a true and correct copy thereof in envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I also declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on May 10, 2013, at San Francisco, California.

M. Landsborough

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Exhibit 1 to Brief of Amici Curiae The Retail Litigation Center, Inc. and California Retailer's Association, California Supreme Court Case No. S204032

U.S. Supreme Court Arbitration Decisions December, 2000 – Present (May 1, 2013)

1.	*Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (November 26, 2012)	The Supreme Court of Oklahoma erred when it held that the noncompetition agreements at issue in the case were null and void, because it was for the arbitrator, and not the court, to decide whether the covenants not to compete were valid as a matter of state law.
2.	*Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (February 21, 2012)	West Virginia's bar on pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes was preempted by the Federal Arbitration Act ("FAA")
3.	*CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (January 10, 2012)	A district court erred when it held that arbitration agreements that consumers signed to obtain a credit card were unenforceable under the Credit Repair Organizations Act, 15 U.S.C.S. § 1679 *et seq*. because the FAA required that the arbitration agreements be enforced according to their terms.
4.	*KPMG LLP v. Cocchi*, 132 S. Ct. 23 (November 7, 2011)	A state court erred in deciding that, because two of four claims were nonarbitrable under the subject agreement, the entire case was not subject to arbitration. There should have been discussion of the arbitrability of the other two claims. Arbitration was favored even if it meant piecemeal litigation.
5.	*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (April 27, 2011)	California's rule that class arbitration waivers in consumer contracts are unconscionable under certain circumstances is preempted by the FAA; requiring the availability of class arbitration was inconsistent with the FAA. The California rule could not be applied under the 9 U.S.C.S. § 2 saving

		clause.
6.	*Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (June 24, 2010)	Judicial, rather than arbitral, determination was required regarding when the CBA was formed and whether its arbitration clause covered the legality of a strike.
7.	*Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (June 21, 2010)	The agreement was enforceable and the agreement's validity was an issue for the arbitrator; plaintiff's claim that an arbitration agreement was unconscionable did not specifically challenge a provision that delegated to the arbitrator the authority to decide the issue.
8.	*Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (April 27, 2010)	Where an arbitration clause was silent regarding class arbitration, an arbitration panel exceeded its powers under the FAA by finding that the clause allowed class arbitration; the differences between bilateral and class arbitration are too great to presume that silence amounted to consent.
9.	*Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (May 4, 2009)	The FAA permitted an interlocutory appeal of a denial of stay under 9 U.S.C.S. § 3, without consideration of the underlying merits of the request. Non-parties to the arbitration agreement were not totally barred from § 3 relief; they could invoke § 3 if state law allowed them to enforce the agreement.
10.	*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (April 1, 2009)	A section in a CBA that clearly and unmistakably required union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 was enforceable under the FAA.
11.	*Hall St. Assocs., L.L.C. v. Mattel, Inc.*,	FAA does not permit the parties to

	552 U.S. 576 (March 25, 2008)	expand judicial review of an arbitration award. 9 U.S.C.S. §§ 10 and 11 of the FAA provide exclusive bases for the review of an arbitral award.
12.	*Preston v. Ferrer*, 552 U.S. 346 (February 20, 2008)	A provision in California's Talent Agency's Act, which vested exclusive jurisdiction of certain dispute in a state labor agency, was preempted by the FAA where the parties arbitration agreement covered the question in issue.
13.	*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (February 21, 2006)	A challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must be resolved by the arbitrator; where check cashing customers claimed that a check cashing business' contract was usurious, the arbitration clause was enforceable under the FAA.
15.	*PacifiCare Health Sys. v. Book*, 538 U.S. 401 (April 7, 2003)	Court erred in denying the defendant's motion to compel arbitration of the RICO claims, where the application of language in the arbitration agreements to plaintiffs' RICO claims was in doubt.
16.	*Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (December 10, 2002)	The issue of whether an arbitration was barred by a time limit should have been resolved by the arbitrator, because the issue did not raise a substantive question of arbitrability that required judicial resolution.
17.	*EEOC v. Waffle House, Inc.*, 534 U.S. 279 (decided January 15, 2002)	Civil enforcement action brought by the Equal Employment Opportunity Commission ("EEOC") is not precluded by an arbitration agreement between the employee who filed a charge of discrimination and his former employer; a private arbitration agreement does not prohibit

		enforcement actions by a governmental non-party.
18.	*C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (April 30, 2001)	By consenting to arbitration and to the enforcement of arbitration awards in state court, an Indian tribe had waived its sovereign immunity from suit.
19.	*Circuit City Stores v. Adams*, 532 U.S. 105 (decided March 21, 2001)	Exclusion provision in FAA did not apply to all employment contracts; the provision applied to transportation workers only.
20.	*Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (December 11, 2000)	Court's decision compelling arbitration pursuant to parties' agreement and dismissing mobile home purchaser's claims was appealable under Federal Arbitration Act. Possibility of allegedly prohibitive costs was too speculative to invalidate the arbitration agreement.

Exhibit 2 to Brief of Amici Curiae The Retail Litigation Center, Inc. and California Retailer's Association, California Supreme Court Case No. S204032

California Court of Appeals Decisions Invalidating Arbitration Agreements Post-*Armendariz*

State Court Decisions

1.	*Compton v. Superior Court*, 214 Cal. App. 4th 873 (2013)	Employment agreement was substantively unconscionable because it lacked complete mutuality.
2.	*Natalini v. Import Motors, Inc.*, 213 Cal. App. 4th 587 (2013) (review granted, deferred pending ruling in *Sanchez v. Valencia Holding Co.*, S199119 (2013 Cal. LEXIS 3995).)	Arbitration provision in consumer contract was deemed unconscionable because it lacked total mutuality.
3.	*Goodridge v. KDF Automotive Group, Inc.*, 209 Cal. App. 4th 325 (2012) (review granted, deferred pending ruling in *Sanchez v. Valencia Holding Co.*, S199119 (150 Cal. Rptr. 3d 501)).	Arbitration provision was unconscionable because it was a contract of adhesion, and contained clauses that were outside the "reasonable expectations" of the non-drafting party.
4.	*Samaniego v. Empire Today, LLC*, 205 Cal. App. 4th 1138 (2012)	Arbitration provision was procedurally unconscionable because the clause was inconspicuous and arbitration rules were not provided. The provision was deemed unconscionable because it lacked total mutuality.
5.	*Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771 (2012)	Arbitration provision was unconscionable because it was a contract of adhesion, and found substantively unconscionable because it lacked complete mutuality and required the application of New York law.
6.	*Wisdom v. AccentCare, Inc.*, 202 Cal. App. 4th 591 (2012) (review granted, 139 Cal. Rptr. 3d 315)	Arbitration provision was unconscionable because it was a contract of adhesion, and found substantively unconscionable because it lacked complete mutuality.
7.	*Sanchez v. Valencia Holding Co., LLC*,	Arbitration provision was unconscionable because it was a

	201 Cal. App. 4th 74 (2011) (review granted, 139 Cal. Rptr. 3d 2)	contract of adhesion, and lacked complete mutuality.
8.	*Zullo v. Superior Court*, 197 Cal. App. 4th 477 (2011)	Arbitration provision was unconscionable because it was a contract of adhesion – because it was contained within the employee handbook provided at time of hire and because and no arbitration rules were attached; and because it lacked complete mutuality.
9.	*Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242 (2011)	Arbitration agreement was unconscionable because it was a contract of adhesion, because it was presented on a "take it or leave it" basis; and it shortened certain statute of limitations.
10.	*Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387 (2010)	Arbitration agreement was unconscionable because it was mandatory, did not include a copy of the arbitration rules, and included fees and costs provisions that were contrary to statute.
11.	*Parada v. Superior Court*, 176 Cal. App. 4th 1554 (2009)	Arbitration clause was unconscionable because the arbitration fees were not within an investor's "reasonable expectations" and because the court did not find a justification for the clause's requirement that the arbitration be held before a panel of 3 arbitrators.
12.	*Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447 (2009)	Arbitration provision was unconscionable because it was a contract of adhesion, and lacked complete mutuality.
13.	*Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal. App. 4th 154 (2009)	Arbitration agreement was unconscionable because the class arbitration waiver was contrary to public policy and because the clause

		lacked total mutuality.
14.	*Ontiveros v. DHL Express (USA), Inc.*, 164 Cal. App. 4th 494 (2008)	Arbitration agreement was unenforceable because it was a contract of adhesion and because limitations on the discovery that could be conducted, a provision allowing the arbitrator to determine enforceability, and the fee and cost provisions were unconscionable.
15.	*Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 494 (2007)	Arbitration agreement was not enforceable because the employee received the agreement through interoffice mail, the terms were never explained, and therefore it was a contract of adhesion. The class waiver was unconscionable because of counsel's declarations that class members would have difficulty securing legal representation for individual cases, given the small sums involved, and that class actions were necessary to deter employers from misclassifying employees.
16.	*Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571 (2007)	Arbitration provision was unconscionable because it was a contract of adhesion and because the class waiver inherently lacked mutuality.
17.	*Higgins v. Superior Court*, 140 Cal. App. 4th 1238 (2006)	Arbitration clause was unconscionable because it appeared in one paragraph near the end of a lengthy, single-spaced document, was not printed in bold or in larger font, because no box for plaintiffs' initials appeared next to the arbitration provision, and because it lacked total mutuality.
18.	*Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267 (2004)	Arbitration clause was unconscionable because it lacked mutuality, required a pre-arbitration resolution procedure,

		limited the time for the employee to demand arbitration, and because there is an inherent inequality of bargaining power between an employer and employee.
19.	*Fitz v. NCR Corp.*, 118 Cal. App. 4th 702 (2004)	Arbitration provision unconscionable because of the clause's limitations on discovery (the policy limited discovery to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing).
20.	*Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107 (2004)	Arbitration provision was unconscionable because it was presented on a "take it or leave it" basis and it lacked complete mutuality.
21.	*Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (2004)	Arbitration agreement was unconscionable because the cost-sharing provision that required the employee to bear half of the costs unique to arbitration was unconscionable and the employee had no meaningful choice about arbitration, even though he was aware of the arbitration requirements when he executed the employment documents.
22.	*Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107 (2004)	Arbitration provision was unconscionable, because it was presented on a "take it or leave it" basis and it lacked mutuality.
23.	*O'Hare Municipal Resource Consultants*, 107 Cal. App. 4th 267 (2003)	Arbitration agreement was unenforceable as it lacked complete mutuality, required the employee to share costs, and included a prohibition on discovery.
24.	*Flores v. Transamerica HomeFirst, Inc.* 93 Cal. App. 4th 846 (2001)	Arbitration clause unconscionable because the arbitration agreement was imposed upon homeowners on a "take

		it or leave it" basis.
25.	*Bolter v. Superior Court*, 87 Cal. App. 4th 900 (2001)	Arbitration clauses were unconscionable because they were adhesive and the plaintiffs had limited financial means.
26.	*Pinedo v. Premium Tobacco Stores, Inc.*, 85 Cal. App. 4th 774 (2000)	Agreement to arbitrate was unconscionable because it lacked complete mutuality.

9th Circuit Court of Appeals Decisions

27.	*Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996 (Cal. 2010)	Arbitration clause was unconscionable because it contained class action and injunctive relief waivers.
28.	*Net Global Mktg. v. Dialtone, Inc.*, 217 Fed. Appx. 598 (Cal. 2007)	Arbitration agreement was unconscionable, as the arbitration provisions appeared on page 12 of a 17 page document and the agreement lacked complete mutuality.
29.	*Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (Cal. 2002)	Arbitration agreement was unconscionable because it was imposed as a condition of employment and was non-negotiable, it lacked complete mutuality, provided that arbitration costs would be shared equally by the employee and the employer, and limited the discovery available.
30.	*Circuit City Stores v. Adams*, 279 F.3d 889 (Cal. 2002)	Court of Appeals held that arbitration agreement was procedurally unconscionable because it was a contract of adhesion; it was substantively unconscionable because it unilaterally forced employees to arbitrate claims against the employer and limited the relief available to employees.

Exhibit 2 to Brief of Amici Curiae The Retail Litigation Center, Inc. and California Retailer's Association, California Supreme Court Case No. S204032

31.	*Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (Cal. 2003)	Arbitration clause was unconscionable because it was adhesive, contained cost-sharing provisions, and was lacked complete mutuality.
32.	*Ingle v. Circuit City Stores, Inc.* 328 F.3d 1165 (Cal. 2002)	Arbitration clause was unconscionable because it was adhesive, contained cost-sharing provisions, and was lacked complete mutuality.