ARBOGAST BOWEN LLP
Attorneys at Law
11400 West Olympic Boulevard • 2nd Floor • Los Angeles, California 90064
Telephone (310) 477-7200 • Fax (310) 943-2309
www.arbogastbowen.com

July 23, 2012

Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7421

Via Overnight Mail

Re: Amicus Letter in Support of Petition for Review
Iskanian v. CLS Transportation Los Angeles, LLC
Second Appellate District, Division Two, No. B235158

To the Honorable Court:

Consumer Attorneys of California ("CAOC") respectfully requests the Supreme Court of California to accept review of the Second Appellate District's published decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949 (*Iskanian*). The United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 (*Concepcion*) fundamentally altered the application of California contract law to arbitration agreements when it held that state courts cannot impose class-wide arbitration on certain consumer arbitration agreements. Since then, trial courts and courts of appeal have struggled to apply *Concepcion* consistently to cases involving class action waivers in allegedly unconscionable arbitration agreements. The *Iskanian* decision goes a step further and holds that *Concepcion* "conclusively invalidates" this Court's analysis of arbitration agreements in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*). (*Iskanian*, *supra*, 206 Cal.App.4th at p. 959.)

In addition to overturning this Court's decision in *Gentry*, the *Iskanian* decision creates a split among California's Court of Appeals by holding that a representative action waiver in an arbitration agreement can prevent a plaintiff from brining claims under the Private Attorney General Act, California Labor Code section 2698 *et seq*. (PAGA). This is in direct opposition to Division Five's opinion in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*).

Given the widespread use of arbitration agreements in employment contracts, review of *Iskanian* would provide this Court with an excellent vehicle to instruct lower courts on what effect *Concepcion* has on the *Gentry* analysis and PAGA claims. Without guidance from this Court, a growing split among state and district courts will congest the judicial system as these issues are needlessly re-litigated. Thus, CAOC respectfully requests that this Court grant Appellant's Petition for Review.

STATEMENT OF INTEREST

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries, and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in the courts and before the Legislature. This protection has often been accomplished through class actions and other representative actions under California and federal law. CAOC has previously participated as amicus curiae in significant cases involving employment law issues (e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004) and class action issues (e.g., *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 374).

As an organization that represents the plaintiffs' trial bar throughout California and that includes many attorneys who represent employees who are subject to mandatory pre-dispute arbitration agreements, CAOC has an abiding interest in the issues addressed in the *Iskanian* opinion. Pursuant to California Rule of Court section 8.500(g), CAOC respectfully requests that the Supreme Court of California grant review of the *Iskanian* decision.

DISCUSSION

Recent U.S. Supreme Court jurisprudence on arbitration agreements has created upheaval in California contract law as state and district courts determine the breadth of *Concepcion*. *Concepcion* addressed "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*Concepcion*, *supra*, 131 S.Ct. at p. 1744.) Specifically, *Concepcion* struck down California's *Discover Bank* rule, that class action waivers in certain types of consumer contracts are as a general matter unconscionable, regardless of a plaintiff's ability to vindicate his or her statutory rights. (*Id.* at p. 1753.)

Although the U.S. Supreme Court was faced solely with the *Discover Bank* rule, some courts have interpreted *Concepcion* to broadly invalidate other decisions, such as this Court's guidance on arbitration agreements in the employment context in *Gentry*, *supra*. In *Gentry*, the California Supreme Court held that a class action waiver was contrary to public policy, and thus unenforceable, when the waiver impermissibly interferes with the plaintiff's ability to vindicate statutory substantive employment rights. (*Gentry*, *supra*, 42 Cal.4th at pp. 453, 457.) Although the *Gentry* rule was based on a vindication of rights rationale, not *Discover Bank*'s unconscionability analysis, the *Iskanian* court found that both rules forced nonconsenting parties into class arbitration. (*Iskanian*, *supra*, 206 Cal.App.4th at p. 959.) "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*." (*Id.* at p. 960.) The court found that a court analyzing whether an arbitration agreement allowed the plaintiffs to vindicate their statutory rights was inconsistent with the FAA's objective of enforcing arbitration agreements according to their terms. (*Id.*)

Iskanian is not alone in ruling that *Gentry* was struck down by *Concepcion*. Several district court cases have also found that *Concepcion* effectively overrules *Gentry*. (See *Sanders v. Swift Transp. Co. of Arizona, LLC* (N.D.Cal Jan. 17, 2012) 2012 WL 523527 at *3 (finding that *Concepcion* effectively overrules *Gentry*); *Lewis v. UBS Financial Services, Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161, 1167 (finding that *Concepcion* effectively overrules *Gentry*); *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D.Cal. May 7, 2012) 2012 WL 1604851 at *7 (finding that *Concepcion* overrules *Gentry*, as it is indistinguishable from *Discover Bank*).)

Other courts have come to the opposite conclusion, and found that *Gentry* remains good law. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 510 (ruling that *Concepcion* did not overrule *Gentry*); *Plows v. Rockwell Collins, Inc.* (C.D.Cal 2011) 812 F.Supp.2d 1063, 1068-70 (acknowledging *Gentry* as valid law); *Brown*, *supra*, 197 Cal.App.4th at p. 497 (denying plaintiff's *Gentry* claim because plaintiff did not make the factual showing required by *Gentry*, and not because *Gentry* was invalidated by *Concepcion*).)

Similarly, post-*Concepcion* decisions have reached differing conclusions on an employee's ability to waive representative actions under the PAGA. The PAGA allows an employee to collect civil penalties, both on his own behalf and for other aggrieved employees. (Cal. Lab. Code, § 2699.) This private enforcement of labor laws is an essential protection for the public's benefit, given the stark realities of government underfunding and the subsequent understaffing of California's labor law enforcement agencies. (See *Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, 1301.) In *Brown*, the Second District Court of Appeal, Division Five, found that *Concepcion*'s

overturning of the *Discover Bank* rule had no bearing on private attorney general actions to enforce the Labor Code. (*Brown*, *supra*, 197 Cal.App.4th at p. 500.) The *Iskanian* decision contradicts the *Brown* decision, interpreting *Concepcion* broadly to allow waiver of the PAGA rights. (*Iskanian*, *supra*, 206 Cal.App.4th at p. 966.)

The *Iskanian* decision attempts to radically change California law by overruling this Court's decision in *Gentry* and refusing to enforce labor law through the PAGA. In doing so, it has created a clear split among state and federal courts. This split needs to be resolved. Given the number of cases that have faced these issues in the fifteen months since *Concepcion*, these issues are bound to be re-litigated until this Court rules on *Gentry*'s continued application and waivers of the PAGA. For the foregoing reasons, CAOC respectfully requests this Court review the *Iskanian* decision.

Respectfully submitted,

Dated: July 23, 2012

ARBOGAST BOWEN LLP

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DAVID M. ARBOGAST

Attorney for Amicus Curiae,
Consumer Attorneys of California

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11400 W. Olympic Blvd., 2nd Floor, Los Angeles, CA 90064.

2. That on July 23, 2012, declarant served the **REQUEST FOR REVIEW ON BEHALF OF CONSUMER ATTORNEYS OF CALIFORNIA** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of July, 2012 at Los Angeles, California.

_____

ERICKA M. ARBOGAST

Counsel for Plaintiff-Petitioner, Arshavir Iskanian

Marc Primo
Glenn A. Danas
Ryan H. Wu
INITIATIVE LEGAL GROUP APC
1800 Century Park East, 2nd Floor
Los Angeles, CA 90067

Counsel for Defendant-Respondent, CLS Transportation Los Angeles, LLC

Yesenia Gallegos
David Faustman
FOX ROTHSCHILD LLP
1800 Century Park East, Suite 300
Los Angeles, CA 90067

Courtesy Copies

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

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street, Fifth Floor, North Tower
Los Angeles, CA 90013

Clerk for the Hon. Robert Hess
Stanley Mosk Courthouse, Dept. 24
111 North Hill Street
Los Angeles, CA 90012

Office of the District Attorney
Appellate Division
320 W. Temple St. #540
Los Angeles, CA 90012