No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG LLP, ET AL.,

Petitioners,

v.

STEPHEN MORRIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Employers Group, a California non-profit organization, is one of the nation's oldest and largest human-resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group also provides live helpline assistance, online resources and tools, and in-company human-resources consulting services and support to its members. As part of its mission, the Employers Group seeks to enhance the stability, predictability, and fairness of the laws and decisions regulating employment relationships. The Employers Groups thus has a direct interest in the correct interpretation and application of both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).[1]

[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of the Employers Group's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

SUMMARY OF ARGUMENT

As petitioners have explained, this case squarely presents an acknowledged circuit split on an important and frequently recurring issue of federal law. That alone is reason enough to grant the petition. Beyond that, however, review is also urgently needed because the decision below is part of an intensifying trend of precisely the type of "judicial hostility to arbitration" that the FAA was enacted to combat. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012). In recent years, this trend has manifested itself in lower courts devising ever more creative ways of distorting or outright defying this Court's precedents in order to impede the enforcement of arbitration agreements "according to their terms." *Id.* at 669. Here, the Ninth Circuit continued that disturbing trend by following a decision of the Seventh Circuit that serially violates this Court's precedents and creates a circuit split on at least three important issues of federal law.

First, the decision ignored this Court's holding that the FAA protects the right of individual arbitration, and that refusing to enforce an agreement to arbitrate on an individual basis is therefore "inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Second, the decision distorted this Court's precedent by diluting the level of clarity required for a later statute such as the NLRA to displace an earlier statute such as the FAA.

Third, the decision violated this Court's teaching that an agency interpretation is not entitled to

Chevron deference if it would bring one federal statute into conflict with another.

On all three of these issues, the Ninth Circuit broke from precedent in order to evade the venerable canon against implied repeals, which prohibits interpreting a statute such as the NLRA to displace an older statute such as the FAA absent clear congressional intent. Resolving these issues is thus crucially important not only to the specific issue of arbitration as it affects the nation's employers, but also to the integrity and predictability of the law more broadly.

As between this and the other petitions currently pending on the same issue, this case is the better vehicle: It arises from California, which is ground zero for judicial hostility to arbitration; it contains a thorough dissenting opinion, which minimizes the risk of vehicle problems; and it embodies a perfectly square split with the Second Circuit, which upheld precisely the same arbitration agreement that the Ninth Circuit invalidated here.

ARGUMENT

I. Interpreting the NLRA to Displace the FAA's Protection of Individual Arbitration Conflicts With the Decisions of This Court and Other Circuits

The NLRA was enacted in 1935, and for the next 80 years "no court decision" ever "held that the Section 7 right to engage in 'concerted activities' . . . prohibited class action waivers in arbitration agreements." *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 356 (5th Cir. 2013). To the contrary, the NLRA was enacted against the backdrop of the FAA, which

affirmatively *protects* the right of individual arbitration, such that refusing to enforce an agreement to arbitrate on an individual basis is "inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. The year after *Concepcion* was decided, however, the National Labor Relations Board moved to undermine that decision by announcing a novel reinterpretation of the NLRA, which carried sweeping implications for every employer in the country: It proclaimed that, "notwithstanding the [FAA]," agreements to arbitrate on an individual basis (and waiving the right to proceed on a class or collective basis) are now prohibited in any employment contract involving interstate commerce. *In Re D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). In other words, despite the fact that individual arbitration agreements have long been a common feature of the American employment landscape, the Board suddenly declared that such agreements have been illegal for eight decades—without anybody ever noticing before.

Three circuits promptly rejected the Board's novel interpretation, but the Seventh and Ninth Circuits have now embraced it. *See* Pet. 11–14. In doing so, they have displayed an abject disregard for the venerable canon against the "implied repeal of statutes," which serves the dual values of "stability and predictability" in the law. *Hammon v. Barry*, 826 F.2d 73, 80 (D.C. Cir. 1987). Under this canon, a federal statute such as the NLRA cannot be construed to displace any part of an "earlier" statute such as the FAA unless it contains a "clearly expressed congressional intention" to effectuate the repeal. *Morton v. Mancari*, 417 U.S. 535, 550–51

(1974). This is a "relatively stringent standard," which is "rar[ely]" satisfied. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). Indeed, the canon has even greater force here, in the context of the arbitration-specific provisions of the FAA, because such "specific" provisions cannot readily be "controlled or nullified" by a more "general" statute such as the NLRA, which refers generally to "concerted activities" among a wide range of other subjects, but which says nothing about arbitration. *Morton*, 471 U.S. at 550–51.

Rather than following the canon against implied repeals, however, the Seventh and Ninth Circuits chose to evade it. In the process, they made three glaring errors that conflict with the decisions of this Court and other circuits: First, they denied that prohibiting individual arbitration agreements under the NLRA creates any conflict with the FAA. Second, they claimed that the NLRA's general reference to "concerted activities" contains the type of "clear" statement necessary to prohibit individual arbitration agreements. And third, they concluded that the Board's interpretation of the NLRA is entitled to controlling deference. This Court's intervention is urgently needed on all three issues.

A. Interpreting the NLRA to Prohibit Individual Arbitration Agreements Would Repeal the FAA's Protection of Individual Arbitration

In *Concepcion*, this Court squarely held that refusing to enforce an individual arbitration agreement—*i.e.*, an agreement to arbitrate on an individual basis instead of a class or collective basis—

is "inconsistent with the FAA." 563 U.S. at 344. Where the parties have agreed to arbitrate on an individual basis, the imposition of collective proceedings "interferes with fundamental attributes of arbitration." *Id.* At the same time, the Court specifically held that the FAA's savings clause does not alter this conclusion: Because the FAA's affirmative provisions *presuppose* the availability of individual arbitration, it would be "absolutely inconsistent" to read the savings clause to authorize a *ban* on individual arbitration. *Id.* at 343. In other words, the savings clause "cannot in reason be construed" to allow the imposition of class proceedings in contravention of a class waiver, because that would violate the basic principle that "the [statute] cannot be held to destroy itself." *Id.* (citation omitted).

As *Concepcion* explained, the entire "point" of the FAA is "to allow for efficient, streamlined procedures," which "reduc[e] the cost and increas[e] the speed of dispute resolution." *Id.* at 344–45. Such "streamlined procedures" are possible in individual arbitration, but "imposing *class* procedures" would "sacrifice[] 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 344, 347–48 (emphasis added). Moreover, the lack of appellate review in arbitration makes it "poorly suited to the high[] stakes of class litigation," where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* at 350. Without appellate review of a collective damages award, "the risk of an error" becomes "unacceptable," which

effectively precludes arbitration as a viable option: few if any defendants will choose to "bet the company with no effective means of review." *Id.* at 350–51. In short, giving defendants the choice of arbitrating only on a *class* basis is really no choice at all, and banning individual arbitration agreements effectively bans arbitration altogether.

For these reasons, the FAA creates a "substantive right" to enforce agreements to arbitrate on an individual basis, and "invalidating private arbitration agreements denying class adjudication, would be an abridgment . . . of [that] substantive right." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (alteration omitted). Consequently, there is a clear and direct conflict between the FAA and any rule prohibiting agreements to arbitrate on an individual basis. Indeed, in *Concepcion*, that conflict was sufficiently clear for the FAA to preempt the law of a *sovereign state*, which occurs only if there is a "clear and manifest" conflict between state and federal law. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Accordingly, there can be no doubt that interpreting the NLRA to prohibit individual arbitration agreements would equally create a "square and manifest" conflict with the FAA.

The Seventh and Ninth Circuits flatly defied *Concepcion*: The Ninth Circuit held that the Board's interpretation of the NLRA as prohibiting individual arbitration agreements creates "no inherent conflict [with] the FAA," Pet. App. 18a n.13, and the Seventh Circuit likewise found "no conflict." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016). But neither court explained how this "no conflict" theory makes any sense given *Concepcion*'s holding that

banning individual arbitration agreements is "inconsistent with the FAA." 563 U.S. at 344. No explanation is possible, other than outright defiance of *Concepcion*.

In defying *Concepcion*, the Seventh and Ninth Circuits also created a conflict with three other circuits, all of which have recognized that the FAA protects the right to enforce individual arbitration agreements, and that the NLRA cannot override this right unless it contains a "contrary congressional command." *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775–76 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) (per curiam); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–60 (5th Cir. 2013) (expressly recognizing that *Concepcion* "leads to the conclusion that the Board's rule" conflicts with the FAA, and "does not fit" within the FAA's saving clause). As a result, the decision below implicates a square circuit split over whether interpreting the NLRA to prohibit individual arbitration agreements conflicts with the FAA.

B. The NLRA Does Not Contain the Requisite Clear Indication to Repeal the FAA's Protection of Individual Arbitration

The decision below also implicates a square split over whether the NLRA contains the type of "clear" indication necessary to overturn the FAA's protection of the right to individual arbitration. The answer to that question is no, and by holding otherwise, the

Ninth Circuit contradicted multiple decisions of this Court and other circuits.

Of course, "[l]ike any statutory directive," the FAA "may be overridden by a contrary congressional command." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But in order for the FAA's protection of individual arbitration to be repealed, "the intention of the legislature . . . must be clear and manifest." *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). As this Court has repeatedly emphasized, this is a "stringent standard" that is "rar[ely]" satisfied. *Matsushita*, 516 U.S. at 381 (1996). There is no mistaking the level of clarity that this Court has required: the conflict must be "clear and manifest," *Watt v. Alaska*, 451 U.S. 259, 267 (1981), "clearly expressed," *Morton*, 417 U.S. at 551, and "irreconcilable," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("irreconcilable"); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("clear and manifest"). Under this stringent standard, this Court "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations omitted).

Importantly, the canon against implied repeal is sensitive to the order of statutory enactments, as one of its purposes is to avoid displacing "earlier" statutes, thereby lending stability to the law and protecting reliance interests. *Morton*, 417 U.S. at 550. The canon also recognizes that it is even more difficult for "specific" statutory provisions to be

"controlled or nullified" by the later enactment of more "general" provisions. *Id.* at 550–51.

In the specific context of the FAA, this Court has consistently applied the rule that subsequent statutes must speak with "clarity" in order to displace the FAA's requirement that arbitration agreements be enforced "according to [their] terms." *CompuCredit*, 132 S. Ct. at 672–73. Unless a statute contains a "contrary congressional command" that overrides the FAA, the statute must be read to comport with the FAA. *Italian Colors*, 133 S. Ct. at 2309. Thus, for example, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions." *Id.* at 2311 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Although the statute at issue in *Gilmer* (the ADEA) expressly conferred a right to collective action, it gave no indication that this was a *non-waivable* right, and thus it was not sufficiently clear to override the FAA's policy that individuals must be left free to enter agreements to arbitrate on an individual basis.

These principles are dispositive here. The NLRA easily can be read to coexist with individual arbitration agreements, and indeed that is the way everyone always *did* read the statute from its enactment in 1935 until the Board decided *D.R. Horton* in 2012.

At the outset, the NLRA does not mention the procedural mechanism of class litigation, and the term "concerted activities" can be read in any number of ways that have nothing to do with class actions.

The term most naturally refers to activities directly related to unionization and collective bargaining, which are the NLRA's clear focus. And an employee's agreement to arbitrate individually does not remotely "impede" employees' efforts to unionize, "to bargain collectively," or to engage in like activities, which is what the NLRA protects. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). The Board's contrary reading would dramatically expand the reach of the NLRA to encompass the procedural right of class litigation without any connection to bargaining activity, contrary to the way the statute has been understood for eight decades.

Moreover, even assuming the NLRA could be reinterpreted to create a novel "right" to class-action proceedings, the statute contains no clear indication that this hypothetical right would be non-waivable. Indeed, even if the right were non-waivable *outside* of arbitration, the FAA provides that class-action rights are presumptively waivable *in the specific context of arbitration agreements*. Thus, even when federal law *expressly creates* a right for plaintiffs to use a "class mechanism," the Supreme Court has "rejected th[e] proposition" that this right is "nonwaivable . . . in arbitration." *Italian Colors*, 133 S. Ct. at 2310; *see also Gilmer*, 500 U.S. at 32 ("[T]he fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). The same conclusion has even greater force here, where the NLRA does not even *mention* class-action rights, much less clearly override the FAA's specific rule that such rights can be waived in arbitration agreements. To the contrary, the NLRA

indisputably allows individual employees to opt out of class actions, and it would be anomalous to treat arbitration agreements as a disfavored *means* of opting out.

For these reasons, it is highly doubtful that the NLRA even *can* be read to prohibit agreements to arbitrate on an individual basis. But in any event, it certainly does not contain the type of "clear and manifest" indication that would be necessary to overcome the *protection* that such agreements enjoy under the FAA. *Posadas*, 296 U.S. at 503.

In holding otherwise, the decision below not only defies the decisions of this Court, but also squarely conflicts with three other circuits. On the specific question presented here, the Eighth Circuit has explained that the NLRA "falls short of the 'contrary congressional command' required to override the FAA." *Owen*, 702 F.3d at 1052–54; *Cellular Sales*, 824 F.3d at 775–76. The Second Circuit has expressly agreed, *Sutherland*, 726 F.3d at 297 n.8, as has the Fifth Circuit. The Fifth Circuit, in particular, has recognized that the "general language" of the NLRA is not a sufficiently clear "congressional command" to displace the FAA's protection of individual arbitration agreements, given that "much more explicit language has been rejected in the past." *D.R. Horton*, 737 F.3d at 360–61. The Fifth Circuit has also recognized that the NLRA cannot be read to create a non-waivable, "substantive right to proceed collectively," because any such right "has been foreclosed by prior decisions." *Id.* at 361 (citing *Gilmer*, 500 U.S. at 32). Moreover, because the NLRA was enacted "prior to the advent in 1966 of modern class action practice," it cannot easily be read to

"protect[] a right of access to a procedure that did not exist" at the time. *Id*. at 362.

In contrast to these decisions, the Ninth Circuit held in the decision below that the NLRA's general protection of "concerted activities" imposes a "clear" and "unambiguous" ban on individual arbitration agreements. Pet. App. 6a, 11a. The Ninth Circuit's decision thus implicates a square split on this issue too.

C. *Chevron* Deference Does Not Apply To Agency Interpretations That Would Repeal Prior Federal Law

As an alternative way to reach the same result, both the Ninth Circuit and the Seventh Circuit concluded that the Board is entitled to *Chevron* deference in interpreting the NLRA to prohibit individual arbitration agreements. *See Lewis*, 823 F.3d at 1153; Pet. App. 11a n.5 (stating that the Board's interpretation of the NLRA merits deference because it "is a permissible construction" of the statute). The Seventh Circuit held that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Lewis*, 823 F.3d at 1153. Then, in order to "harmonize the FAA and NLRA," the court held that "the FAA's saving clause" must be read to accommodate the Board's view of the NLRA. *Id.* at 1157–59.

This reasoning is exactly backwards because it requires the FAA *statute* to give way to an *agency interpretation*. On multiple occasions, this Court has made clear that agencies are bound to follow statutes, not the other way around. Consequently, in order to

be faithful to this Court's decisions, the Board's interpretation of the NLRA must be *constrained* by the FAA, and cannot be transformed into an authoritative basis to *displace* the FAA.

To determine whether an agency interpretation is entitled to any deference, courts must first "apply[] the normal 'tools of statutory construction'" to determine whether the agency has any latitude to construe the statute. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). *See also FCC v. NextWave Pers. Commc'ns. Inc.*, 537 U.S. 293, 304 (2003) (recognizing that interpretive rules "circumscribe[]" the realm of "permissible [agency] action" under *Chevron*). Here, the dispositive "tool of statutory construction" is the canon against implied repeals: because the NLRA contains no clear indication that the NLRA was intended to displace the FAA's protection of individual arbitration agreements, the Board is not permitted to achieve that result by administrative fiat.[2]

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[2] Other circuits, including the Ninth Circuit itself, have recognized the same basic point: Where "the presumption[] . . . against implied repeals remove[s] any potential ambiguity that an agency might otherwise resolve, *Chevron* deference has no role to play." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1075 (9th Cir. 2010). No "deference may be accorded to an agency's view" of whether "one statutory scheme supersedes the other." *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003) (citation omitted). *See also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1374 (Fed.

Applying the same logic, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

In light of these principles, each of the Second, Fifth, and Eighth Circuits have recognized that courts "owe no deference to [the Board's] reasoning" in construing the NLRA to displace the FAA by prohibiting individual arbitration agreements. *Sutherland*, 726 F.3d at 297 n.8; *D.R. Horton*, 737 F.3d at 356, 361; *Owen*, 702 F.3d at 1054. These decisions squarely conflict with the conclusion below that courts "must follow" the Board's interpretation of the NLRA. *Lewis*, 823 F.3d at 1153; Pet. App. 11a n.5.[3]

(continued…)

Cir. 2005) (Dyk, J., dissenting) (A "policy-driven interpretation under *Chevron* cannot override the clear command of a conflicting statute"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Rules of interpretation bind all interpreters, administrative agencies included.").

[3] The Seventh Circuit stated as an alternative holding that the Board's interpretation is entitled to *Chevron* deference. *Lewis*, 823 F.3d at 1153. The Ninth Circuit

Finally, the issue of *Chevron* deference makes this case particularly worthy of review because it also provides an opportunity for this Court to reaffirm the crucial importance of the major-questions doctrine in constraining the overreach of the NLRB. As this Court has long recognized, "[d]eference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (ellipsis in original); *see generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (warning against agency deference on "question[s] of deep economic and political significance"). That principle applies directly here, where the Board has attempted to revolutionize the entire field of workplace relations by suddenly reinterpreting the NLRA to prohibit individual arbitration agreements in virtually every employment relationship in the country for the first time in the 80-year history of the statute. Putting aside the inherent implausibility of such a significant prohibition lying dormant in the NLRA for eight decades without anybody noticing, such a sweeping

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(continued…)

expressly agreed with that conclusion, despite disclaiming any "need" to reach the issue. Pet. App. 11a & n.5. Moreover, as petitioners note, the Board "participated in this case before the Ninth Circuit as an amicus curiae, and would presumably continue to do so in this Court if certiorari is granted" here. Pet. 22. The circuit split on the *Chevron* issue will thus be fairly presented and fully briefed if this Court grants review.

policy change cannot and should not be imposed at the unilateral discretion of the executive branch.

II. California Employers Have an Especially Acute Interest In Combating the Growing Trend of Judicial Hostility to Arbitration

This case makes a fitting vehicle to review the question presented because, out of all the states in the union, California employers suffer uniquely from the judicial hostility to arbitration exemplified by the decision below. This hostility is reflected in, among other things, this Court's reversal of several California decisions refusing to enforce arbitration agreements under the FAA in recent years. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Concepcion*, 563 U.S. at 341 (2011); *Preston v. Ferrer,* 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating,* 465 U.S. 1 (1984); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39, 54, 66 (2006).

This Court's decision in *Concepcion* has been a special target of defiance in California. Just last year in *Imburgia*, this Court admonished a California appellate court that while "[l]ower court judges are certainly free to note their disagreement with the decisions of this Court," they may not "refus[e] to recognize [its] superior authority." 136 S. Ct. at 468. "*Concepcion* is an authoritative interpretation of [the FAA]," and, "[c]onsequently, the judges of [lower courts] must follow it." *Id.* "The fact that *Concepcion* was a closely divided case, resulting in a decision

from which four Justices dissented, has no bearing on that undisputed obligation." *Id.*

Another example of the defiance of *Concepcion* is the recent decision of the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert denied*, 135 S. Ct. 1155 (2015). In that case, the court announced a new, non-waivable right to bring "representative" actions under the California Private Attorney Generals Act (PAGA). This is a clear end-run around *Concepcion* because it authorizes private class counsel to disregard employees' agreements to arbitrate on an individual basis, and instead to seek mass awards for alleged class-wide violations of the California Labor Code. Even more distressingly, moreover, a divided panel of the Ninth Circuit recently *agreed* with *Iskanian*'s anti-arbitration holding, thus joining in the effort to undermine *Concepcion*. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). The decision below now adds yet another example of the same.

California employers have for years struggled to enforce valid arbitration agreements in the face of an ingenious array of "devices and formulas" erected by California state judges and legislators intent on ignoring this Court's jurisprudence. *Concepcion*, 563 U.S. at 342 (2011). But now, alarmingly, the Ninth Circuit appears to be getting in on the game. This is not just a problem for California, but for the entire national economy: Like the Petitioner in this case, many California-based employers do business nationwide or in multiple states, and are thus subject to differing outcomes when seeking to enforce their arbitration agreements in different circuits. Other

national and international employers also have a significant portion of their workforce in California, and thus have no choice but to contend with the anti-arbitration animus apparent in the decision below. Accordingly, *amicus* the Employers Group submits that granting review in the present case will send a much-needed message to both state and federal judges in California that this Court will continue to enforce the authority of its FAA precedents without flinching, and with a vigilant eye.

III. This Case Is the Best Vehicle to Resolve the Acknowledged Circuit Split

Compared to the other petitions now pending in *Epic* and *Murphy Oil*, Nos. 16-285 & 16-307, this case is the better vehicle to resolve the question presented for two reasons.

First, this case has a dissent. As a result, the law and facts underpinning the majority's decision have already been carefully scrutinized in Judge Ikuta's thorough dissenting opinion, thus minimizing the chance of a lurking vehicle problem. The extensive back-and-forth between the dissent and the majority help to ensure that all relevant issues have been fully ventilated, and that the majority opinion presents the best argument that can possibly be made in support of its remarkable conclusion.

Second, this case embodies the squarest possible split on the question presented, since the Second Circuit has upheld the precise same arbitration agreement that the Ninth Circuit invalidated in the decision below. *See Sutherland*, 726 F.3d at 297 n.8; Pet. 22–23. The presence of the same arbitration agreement on both sides of the split ensures that

there is a square *legal* division among the circuits, with no possible factual distinctions that could explain the different outcomes. This is particularly important since at least one member of this Court has expressed the view that the permissibility of invalidating an arbitration agreement under the FAA may turn on whether there were any "defects in the making of [the] agreement." *Concepcion*, 563 U.S. at 353. (Thomas, J., concurring). Here, the "making of [the] agreement" was the same as in *Sutherland*.

CONCLUSION

For the foregoing reasons, *amicus* supports Petitioners' petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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October 2016

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