Second Civil Case No.: B222689

In the
Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION FIVE

TERRI BROWN,

Plaintiff and Respondent,

vs.

RALPHS GROCERY COMPANY, et al.,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE RICHARD RICO, JUDGE
CASE NO. BC423782

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND RESPONDENT TERRI BROWN

Service on Attorney General and District Attorney of Los Angeles County required by BUS. & PROF. CODE § 17209 and CAL. RULES OF COURT, RULE 8.29

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

C.R.C. Rule 8.208

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: May 19, 2011

Respectfully submitted,

SPIRO MOSS LLP

By: /s/

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND RESPONDENT

TO THE HONORABLE PAUL TURNER, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF DIVISION FIVE:

The undersigned respectfully requests permission to file a brief as amicus curiae in the matter of *Brown v. Ralphs Grocery Company*, Appellate Court Case No. B222698 (hereafter, "*Brown v. Ralphs*") under Rule 8.200(c) in support of Plaintiff and Respondent Brown, on behalf of Consumer Attorneys of California ("CAOC").

I. AMICUS CURIAE

CAOC, founded in 1962, is a voluntary, non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business and employment practices, including wage and hour violations, consumer fraud, personal injuries, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under this state's wage and hour statutes and consumer protection statutes (e.g., Unfair Competition Law (Bus. & Prof. Code §§17200 et seq.)). Recently, CAOC has participated as amicus in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009); *Prachasaisoradej v. Ralphs Grocery Co.*. 42 Cal. 4th 217 (2007);

Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223 (2006); and *Elsner v. Uveges,* 34 Cal. 4th 915 (2004). CAOC has also participated as an amicus in many cases pending at the intermediate appellate level.

II. INTEREST OF AMICUS CURIAE AND NEED FOR ADDITIONAL BRIEFING

The United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) on April 27, 2011. The following week, CAOC learned of this Court's April 28, 2011 request for additional briefing in *Brown v. Ralphs*, about the potential impact of *Concepcion* on this matter. CAOC has a substantive and abiding interest in ensuring that arbitration agreements impacting entire classes of employees are correctly interpreted under both California and federal law in a manner that is not only consistent with the United States Supreme Court's most recent precedent on arbitration issues, but is also consistent with California statutory law, federal statutory law, and federal decisional authority limiting application of the Federal Arbitration Act. CAOC is concerned that the parties in *Brown v. Ralphs* have not addressed a number of potentially dispositive arguments, leaving this Court without the benefit of that discussion. As an appellate Court that may be the first to comment upon the impact of *Concepcion* in wage and hour cases in California, California's citizens will benefit from an Opinion issued by a Court presented with a complete discussion of the federal and state laws that would preclude application of the *Concepcion* holding in many wage & hour matters in California and elsewhere.

With respect to Rule 8.200(c)(3), no party or counsel for a party authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

This application is made after the Court denied, without prejudice, CAOC's prior application for failure to attach the proposed brief.

Dated: May 19, 2011

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

I. INTRODUCTION

On April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*"). In *Concepcion*, a divided five Justice majority held that the "rule" of *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), was preempted by the Federal Arbitration Act ("FAA"). This Court thereafter requested supplemental briefing to address the effect of *Concepcion* on *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), the authority relied on by the trial court when it denied Ralphs' motion to compel arbitration.

As set forth below, *Concepcion* has no effect on *Gentry*. While *Concepcion* invalidated *Discover Bank*, *Gentry* remains the law in California that both the trial court and this Court must follow. Moreover, irrespective of *Gentry*, the class action waiver in this case is not enforceable under federal law because it violates the National Labor Relations Act ("NLRA") and, under the FAA, arbitration agreements are not enforceable when arbitration does not allow for vindication of statutory rights.

As a result of *Concepcion*, state courts may no longer decline to enforce a class action waiver in a consumer contract on the grounds of unconscionability under *Discover Bank.* A class action waiver in an employment contract, however, which precludes employees from engaging in collective action to enforce statutory employment rights, is illegal and remains unenforceable under both *Gentry* and federal law. Because *Concepcion* does not affect *Gentry* or the correct result reached by the trial court, denial of Ralphs' motion to compel arbitration should be affirmed.

II. *CONCEPCION* DOES NOT SQUARELY ADDRESS OR OVERRULE *GENTRY*

A case is not authority for a proposition neither addressed nor decided. Since the Supreme Court did not squarely or expressly hold that *Gentry* is preempted, *Gentry* remains the law of the State of California, binding on this Court. *See*, *People v. Rooney*, 175 Cal. App. 3d 634, 644 (1985) (intermediate federal court rulings not binding "since the United States Supreme Court has never squarely ruled on the issue"); *People v. Landry*, 49 Cal.App.4th 785, 791 (1996) (California Supreme Court interpretation of federal law binding where "no contrary United States Supreme Court decision" on issue); *People v. Hammond*, 22 Cal.App.4th 1611, 1626, fn. 12 (1994) (granting of certiorari does not permit deviation from the holdings of the California Supreme Court).

Ralph suggests that *Concepcion* implies or necessarily dictates the conclusion that *Gentry* is preempted. This argument, however, cannot be reconciled with two countervailing principles compelling the opposite conclusion. First, the arbitration agreement asserted by Ralphs is illegal under *federal* law and cannot be enforced by this, or any other, court. Second, the reasoning in *Gentry* is consistent with the *federal* common law "vindication of statutory rights" doctrine, under which arbitration agreements are not enforceable under the FAA when arbitration does not suffice to vindicate statutory rights. Since the arbitration agreement asserted by Ralphs in this matter cannot be enforced, and this Court cannot hold that *Gentry* is overruled, the

result reached by the trial court is correct and should be affirmed.

III. CONTRACTS THAT VIOLATE FEDERAL LAW ARE NOT ENFORCEABLE

A. Formation of a Valid Contract Requires a Lawful Object

"California statutes require that a contract have 'a lawful object.'" *Kashani v. Tsann Kuen China Enter. Co., Ltd.*, 118 Cal. App. 4th 531, 541 (2004), quoting Civ. Code § 1550(3) and citing Civ. Code § 1596. Civ. Code § 1550 sets forth the four quintessential elements of a contract in California:

> Essential elements of contract. It is essential to the existence of a contract that there should be:
>
> 1. Parties capable of contracting;
>
> 2. Their consent;
>
> 3. A lawful object; and,
>
> 4. A sufficient cause or consideration.

Civ. Code § 1550. Civ. Code § 1596 clarifies that the object of a contract must be lawful at the time the contract is formed:

> Requisites of object. The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed.

Civ. Code § 1596.

Failure of any one requisite element is fatal, in part or whole, to the formation of a contract. Thus, when a contract has but one object, an unlawful one, the absence of a lawful object is fatal to the contract:

> When contract wholly void. Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

Civ. Code § 1598. The effect is slightly less severe when a contract has at least one lawful object and at least one unlawful object:

> When contract partially void. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.

Civ. Code § 1599. But, as to the unlawful object, the result is the same: the unlawful object provision is void.

California statutory law also defines "unlawful" for purposes of contract formation:

> What is unlawful. That is not lawful which is:
>
> 1. Contrary to an express provision of law;
>
> 2. Contrary to the policy of express law, though not expressly prohibited; or,
>
> 3. Otherwise contrary to good morals.

Civ. Code § 1667.

The express provisions of law capable of rendering the object of a contract unlawful come from many sources, including federal law:

> California law includes federal law. (*People ex rel. Happell v. Sischo* (1943) 23 Cal.2d 478, 491, 144 P.2d 785 [Federal law is "the supreme law of the land (U.S. Const., art. VI, sec.2) to the same extent as though expressly written into every state law"]; 6A Corbin on Contracts, *supra*, § 1374, p. 7 ["Under our Constitution, national law is also the law of every separate State"].) Thus, a violation of federal law is a violation of law for purposes of determining whether or not a contract is

unenforceable as contrary to the public policy of California.

Kashani, 118 Cal. App. 4th at 543.

The effect of a void contract or contractual provision is to render that contract or provision a nullity. An illegal contract cannot be asserted in any California court as the basis for a right to any relief. A prior decision of this Division sets forth this long-standing principle:

> California courts have stated that an illegal contract "may not serve as the foundation of any action, either in law or in equity" (*Tiedje v. Aluminum Taper Milling Co*. (1956) 46 Cal.2d 450, 453–454, 296 P.2d 554), and that when the illegality of the contract renders the bargain unenforceable, " '[t]he court will leave them [the parties] where they were when the action was begun' " (*Wells v. Comstock* (1956) 46 Cal.2d 528, 532, 297 P.2d 961; see also *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 408, 75 Cal.Rptr.2d 257, disapproved on other grounds in *Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 114 Cal.Rptr.2d 207 ["illegal contracts are void"]).

Kashani, 118 Cal. App. 4th at 541. Thus, as with any other type of contract, an arbitration agreement that is unlawful in whole or in part cannot be enforced by any court in this state.

B. A Prohibition on Class Actions Addressing Wages and Working Conditions Violates the National Labor Relations Act

Section 7 of the NLRA, which specifies a number of rights held by employees, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in ***other concerted activities*** for the purpose of collective bargaining or ***other mutual aid or protection***, and

> shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157, emphasis added. Under Section 7, it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C.A. § 158(a)(1).

The NLRB has determined, and courts have agreed, that class actions constitute a form of concerted action by employees when those suits seek to improve wages or working conditions. *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); *see also, United Parcel Service*, 252 NLRB 1015 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), *Saigon Gourmet*, 353 NLRB 1063 (2009), *Le Madri Restaurant*, 331 NLRB 269 (2000), and others. Thus, an arbitration agreement or clause that, by its express or implied terms, precludes class actions by employees to enforce wage and hour laws is unlawful pursuant to Section 7 of the NLRA. Such a ban would unlawfully prevent employees from engaging in concerted activity to improve their wages and/or working conditions. Because the object of such an arbitration agreement or clause is unlawful, it is void and unenforceable by any court.

1. Class Actions Constitute a Form of Concerted Activity for Mutual Aid and Protection Protected by the NLRA

The NRLA protects all forms of concerted activity by employees to improve wages or working conditions:

> Section 7 of the Act extends to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 thus specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Id*. at 566. The Court in *Eastex*, *supra*, underscored that the express language of Section 7 protects concerted activities for the broad purpose of "mutual aid or protection," in addition to concerted activity for "self-organization" and "collective bargaining." *Id*. at 565.

52nd St. Hotel Associates, 321 NLRB 624, 633 (1996).

The broad rights conferred by Section 7 encompass pursuit of civil lawsuits. "It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith." *In Re 127 Rest. Corp*., 331 NLRB 269, 275 (2000), citing *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975) and *Host International*, 290 NLRB 442, 443 (1988). As stated by the NLRB in *Trinity:*

> In regard to the Section 7 rights of employees filing civil actions against their employer, the Board in *Leviton Manufacturing Company, Inc*., reiterated the applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith.

Trinity, 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978).

Suits under the Fair Labor Standards Act, which allows "collective" actions by employees, are one type of concerted activity recognized as protected by the NLRA:

> The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is protected, concerted activity under Section 7 of the Act. See, e.g., *Moss Planing Mill Co*., 103 NLRB 414, 418-419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953); *Poultrymen's Service Corp*., 41 NLRB 444, 462-463 (1942), enfd. 138

> F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co*., 55 NLRB 798, 799 (1944), enfd. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Triangle Tool & Engineering*, 226 NLRB 1354, 1357 fn. 5 (1976); *Joseph De Rario, DMD, P.A*., 283 NLRB 592, 594 (1987); and *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

52nd St. Hotel Associates, 321 NLRB at 633.

For the purposes of Section 7, class actions are no different than collective actions under the FLSA. *Harco Trucking, LLC and Scott Wood*, 344 NLRB 478 (2005) illustrates how pursuing a class action lawsuit on behalf of other employees, just like a FLSA action, constitutes protected activity under the NLRA.

Scott Wood was employed by Harco as a low-bed truck driver. He was laid off on December 24, 2002. In March 2003 he filed a lawsuit against Harco in California Superior Court over a violation of California wage laws. In 2003 the complaint was amended as a class action on behalf of the named Plaintiff and similarly situated drivers employed by Harco. When Harco was rehiring, Wood applied for a job. He was told that he could expect to be re-employed until the lawsuit was resolved. The ALJ found that the respondent violated Section 8(a)(1) of the NLRA by refusing to hire Wood because he engaged in the protected concerted activity of filing and maintaining the class action lawsuit against Harco. The Board agreed:

> [W]e agree with the Judge's finding that the Respondent violated Section 8(a) (1) by refusing to hire Scott Wood because he engaged in protected concerted activities.

Harco Trucking, 344 NLRB at 479; *see also*, *Trinity Trucking*, 221 NLRB at 365 and *Host International*, 290 NLRB at 443.

The CONCLUSIONS OF LAW Section of the ALJ decision in *Harco Trucking*,

adopted in full by the Board, makes clear that the filing of a class action lawsuit, even by one single employee, constitutes protective activity under the NLRA:

> 2. Scott Wood was engaged in protected concerted activities within the meaning of Section 7 of the Act in filing and maintaining a class action lawsuit, on behalf of himself and his co-workers against his former employer.

Harco Trucking, 344 NLRB at 483.

Harco Trucking is but one in a long line of decisions, over many decades, finding that class and collective actions constitute concerted activity protected by the NLRA. In *Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000), the NLRB found that an employer unlawfully discharged employees for engaging in Section 7 activity, including filing a lawsuit in federal court on behalf of other employees, alleging violations of federal *and* state labor laws. In *Mohave Electric Cooperative*, 327 NLRB 13 (1998), enfd. 206 F.3d 1183 (D.C. Cir. 2000), the NLRB determined that two employees were engaged in protected concerted activity when, pursuant to a common concern for workplace safety, they both petitioned for injunctive relief against harassment. In *Novotel New York*, 321 NLRB 624, 633-636 (1996), the NLRB found that an opt-in class action lawsuit alleging employer violations of the Fair Labor Standards Act was protected concerted activity. In *Host International*, 290 NLRB 442, 442-443, 445 (1988), the NLRB found that an employee's filing of a civil federal court lawsuit concertedly with other employees, claiming that their employer had physically assaulted, searched, detained and interrogated them in violation of their constitutional and statutory rights, constituted Section 7 activity. In *United Parcel*

Service, 252 NLRB 1015, 1018, 1022, fn.26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), the NLRB found that the employer violated the Act by discharging an employee for filing a class action lawsuit regarding rest breaks. In *Saigon Gourmet*, 353 NLRB 1063, 1064 (2009), the Board found that concertedly asserting wage and hour claims is protected concerted activity. The overwhelming body of NLRB decisions leaves no doubt that class actions constitute a form of concerted action by employees to improve wages or working conditions.

The foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests on a collective basis. A mandatory arbitration agreement that prohibits all class, collective and/or joint employee efforts to obtain redress for violation of employment law necessarily inhibits protected concerted activity in violation of Section 7 of the NLRA.

2. A Contract That Interferes with Concerted Activity in Violation of the NLRA Is Void

Despite the lack of a statutory code of federal contract law, unlawful contracts that violate federal law cannot be enforced as a matter of federal common law:

> There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it...." *Id.*, at 654, 19 S.Ct., at 845.
>
> "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id.*, at 669, 19 S.Ct., at 851.

> The rule was confirmed in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Id.*, at 262, 29 S.Ct., at 292.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-78, 102 S. Ct. 851, 856 (1982). *See also, California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable").

Indeed, even the most blatant violation of a contract does not allow enforcement of an unlawful contract contrary to the law:

> The Court cannot enforce the parties' subcontract, even though CLS through Barbara Moore, its principal officer, has blatantly violated the terms and conditions of the subcontract with MGC, for it is plainly contrary to law. *See Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288, 290 (1st Cir.1993); *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 790 (4th Cir.1987). The Court further finds that MGC is barred from injunctive relief by the doctrine of unclean hands.

> *See Johnson v. Yellow Cab Transit Co*., 321 U.S. 383, 387, 64 S.Ct. 622, 88 L.Ed. 814 (1944) ("[A] federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law."); *United States v. Felici*, 208 F.3d 667, 670-71 (8th Cir.2000) ("The doctrine of unclean hands is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.").

Morris-Griffin Corp. v. C & L Serv. Corp., 731 F. Supp. 2d 488, 489-90 (E.D. Va. 2010).

Because justice cannot countenance violation of the law, an illegality defense to enforcing a contract cannot be waived. "[P]arties cannot be estopped from relying on defenses based on considerations of public policy, such as illegal contracts." *Joe A. Freitas & Sons v. Food Packers etc. & Warehousemen*, 164 Cal. App. 3d 1210, 1219 (1985), citing *Black v. Cutter Laboratories*, 43 Cal. 2d 788, 806 (1955).

The foregoing principles of federal common law apply to arbitration agreements. For example, in *U-Haul Company of California, Inc*., 347 NLRB 375, 377-78 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007), the employer violated the NLRA by maintaining a mandatory arbitration policy that would reasonably be construed as prohibiting an employee from filing an unfair labor practice charge with the Board. The NLRB explained why even an implied suggestion that the arbitration provision supplanted rights under the NLRA was unlawful:

> [T]he breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims

recognized by Federal law that are covered by the policy.

U-Haul Co. of California, 347 NLRB at 377.

The rule that contractual provisions are void when they are illegal is so fundamental that a court may invalidate a contract on the grounds of illegality even when the court would otherwise lack jurisdiction over the activity giving rise to the dispute. With respect to activity subject to Sections 7 or 8 of the NLRA, courts normally defer to the exclusive competence of the NLRB. However, when enforcement of a contract would countenance a violation of federal law, that rule of deference to the NLRB does not apply:

> As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). *See also Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165-166, 98 L.Ed. 228 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 853, 92 L.Ed. 1187 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83-84, 102 S. Ct. 851, 859-60 (1982).

In other words, because the courts cannot be used as tools to enforce illegal contracts, they must be able to refuse to enforce private agreements that have an unlawful object. In *Kaiser*, the Supreme Court succinctly explained why the primary jurisdiction of the NLRB yields to the judicial obligation to abstain from enforcement

of illegal agreements:

> While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86, 102 S. Ct. 851, 861 (1982).

States, too, may determine whether enforcement of a contractual provision would violate the NLRA:

> Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel,* 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield,* 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 199 (Ind. Ct. App. 1987). To find otherwise would effectuate an intolerable abuse of state courts. Parties to contracts could assert unlawful contractual positions in state courts and bar those courts from recognizing illegality under the NLRA. Such a result would be abhorrent to preservation of the robust, employee-protective goals of the NLRA.

"The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."[1] *Barrow Utilities & Elec. Co-Op.*, 308 NLRB

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[1] "Yellow dog contracts" are contracts requiring an employee or prospective employee to agree not to join or become a member of a labor organization as a condition of getting or keeping a job. Arbitration agreements that bar an employee from engaging in the concerted activity of participating in a class action as a condition of getting or keeping a job deserve no less a rule of absolute invalidity.

4, n. 5 (1992). Like "yellow dog contracts," arbitration agreements that would expressly or implicitly ban class actions directed at the improvement of wages or working conditions are also invalid as a matter of law, illegal as violative of the NLRA.

3. There Is No Preemption Concern Where Protected Employees Defend Against Enforcement of an Illegal Contract

Ralphs may contend that a state court has no jurisdiction to declare a contract illegal under the NLRA or that the NLRA preempts any attempt by a state court to determine whether a contract violates the NLRA. If Ralphs were to make any such arguments, Ralphs would be wrong.

a) The Primary Jurisdiction of the NLRB Is Not Jeopardized When a Court Declines to Enforce a Contract that Violates the NLRA

The NLRB is vested with primary jurisdiction to rule upon affirmative claims of unfair labor practices under the NLRA and where a plaintiffs asserts, in the first, instance, that the employer committed an unfair labor practice claim, the NLRB's primary jurisdiction over that claim is well established. But the primary jurisdiction of the NLRB has well recognized limits. One such limit, discussed above, exists where a court is asked to enforce an illegal contract provision.

> It is, of course, the Board, not the courts, which has primary jurisdiction to determine what is and is not an unfair labor practice, and to provide affirmative remedies. *See San Diego Building Trades Council*

> *v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). Nonetheless, as the federal courts may not enforce a contractual provision that violates section 8 of the Act, they may be obliged at times, in the course of resolving a contract dispute, to decide whether or not such a violation exists. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86, 102 S.Ct. 851, 860, 70 L.Ed.2d 833 (1982).

Courier-Citizen Co. v. Boston Electrotypers Union No. 11, Int'l Printing & Graphic Communications Union of N. Am., 702 F.2d 273, 276 n. 6 (1st Cir. 1983).

As explained by a court of appeal in a sister state, a more general limit exists where there is little likelihood of creating conflicting rules of substantive law:

> The general rule of primary jurisdiction, however, has not been given a broad mechanical application to bar all suits or defenses that arise in labor relations cases from being decided by the courts. *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 188-89, 98 S.Ct. 1745, 1753, 56 L.Ed.2d 209, 220. The doctrine is limited to its primary justification which is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose." *Vaca v. Sipes* (1967), 386 U.S. 171, 180-81, 87 S.Ct. 903, 912, 17 L.Ed.2d 842, 852; *see also, Kaiser Steel Corp. v. Mullins* (1982), 455 U.S. 72, 83-84, 102 S.Ct. 851, 859-60, 70 L.Ed.2d 833, 843-44; *Sears, Roebuck and Co.,* 436 U.S. at 188-89, 98 S.Ct. at 1752-53, 56 L.Ed.2d at 219-20; *William E. Arnold Co. v. Carpenters District Council* (1974), 417 U.S. 12, 16, 94 S.Ct. 1069, 1072, 40 L.Ed.2d 620, 625. Therefore, unless the Congressional intent of keeping the area of labor relations uniform is placed in jeopardy, the doctrine is inapplicable.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 198 (Ind. Ct. App. 1987). *Commc'n Workers of Am., Local 5900* describes the approach for determining whether the doctrine of primary jurisdiction applies:

> The critical inquiry in applying the doctrine of primary jurisdiction is whether the controversy presented to the state court is identical with that which could be presented to the NLRB. *Belknap Inc. v. Hale* (1983), 463 U.S. 491, 510, 103 S.Ct. 3172, 3183, 77 L.Ed.2d 798, 814. Also, the rule

> in *Garmon* is relaxed "when the state court can ascertain the actual legal significance under federal labor law by reference to compelling precedent applied to essentially undisputed facts." *Garmon,* 359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783. Thus, when the uniformity of federal labor law is not jeopardized, the courts may resolve a dispute even though it arguably is covered by sections 7 and 8 of the NLRA. *Sears, Roebuck and Co.,* 436 U.S. at 188-89, 98 S.Ct. at 1753, 56 L.Ed.2d at 220.

Commc'n Workers of Am., Local 5900, 512 N.E.2d at 199.

In this matter, uniformity of federal labor law is not jeopardized if Ralphs' arbitration agreement is not enforced by the trial court due to its unlawful impact on concerted activity by employees. As was the case in *Commc'n Workers of Am., Local 5900*, "the current suit is not identical to one that could be brought before the NLRB." The lawsuit against Ralphs does not assert a cause of action claiming that Ralphs engaged in any kind of unfair labor practice under the NLRA. Rather, at any time, Plaintiff could assert an illegality defense against the attempt by Ralphs to enforce an arbitration agreement with an illegal object. The trial court is fully empowered to render that determination without impinging upon the NLRB's primary jurisdiction. *Kaiser Steel*, 455 U.S. at 83-84. Indeed, the trial court is obligated to make that determination:

> Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel,* 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield,* 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d at 199.

b) **Conventional Preemption Analysis Confirms that Employees Can Assert Illegality of an Arbitration Agreement as a Defense in Court**

Pursuant to the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law can preempt and displace state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption. *See*, *e.g*., *Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713 (1983); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491, 107 S.Ct. 805 (1987). Express preemption occurs when Congress enacts an explicit statutory command that displaces state law. *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 382, 112 S.Ct. 2031 (1992). Absent an explicit statement of preemption, courts may still infer preemption based on field or conflict preemption, both of which require courts to imply Congress' intent from the statute's structure and purpose. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65, 123 S.Ct. 518, 527 (2002); *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403 (1990).

Where express preemption is not found, field preemption exists "'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.'" *Petitioning Creditors v. Matsco, Inc. (In re Cybernetic Servs., Inc.)*, 252 F.3d 1039, 1045-46 (9th Cir.2001), quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146 (1947). Finally, if Congress has not occupied the field, courts may infer

preemption if there is an "actual conflict" between federal and state law. Conflict preemption is found only where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210 (1963), or, more amibiguously, where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399 (1941); *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 899, 120 S.Ct. 1913 (2000). For example, in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), the Court found that application of California's Consumer Legal Remedies Act and California's contractual law of unconscionability did not stand as obstacles to the purpose and objective of Congress when it enacted sections 201(b) and 202(a) of the Federal Communications Act:

> After examining the structure, history, and purpose of these provisions, as well as the statute as a whole, *Gade*, 505 U.S. at 98, 112 S.Ct. 2374; *Ouellette*, 479 U.S. at 493, 107 S.Ct. 805, we hold that neither the Consumer Legal Remedies Act ("CLRA") nor California's unconscionability law "stands as an obstacle to the accomplishment and execution" of the full purposes and objectives of Congress in enacting §§ 201(b) and 202(a) of the Communications Act.

Ting, 319 F.3d at 1137.

The NLRA does not explicitly provide for preemption, so courts must look to Congressional intent. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747, 105 S.Ct. 2380, 2393 (1985). Generally speaking, " ' "courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." ' " *Metropolitan Life*, 471 U.S. at 747–748,

105 S.Ct. at 2393, quoting *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904, 1910 (1985), quoting *Malone v. White Motor Corp*., 435 U.S. 497, 504, 98 S.Ct. 1185, 1190 (1978). In *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959), the Supreme Court enunciated the *Garmon* rule of preemption, which protects the exclusive jurisdiction of the NLRB over unfair labor practices:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by s 7 of the National Labor Relations Act, or constitute an unfair labor practice under s 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Hotel & Rest. Employees etc. Union v. Anaheim Operating, Inc., 82 Cal. App. 3d 737, 746-47 (1978), quoting *Garmon*, 359 U.S. at 244. "However, the court recognized two exceptions to this general rule: it would 'not . . . (withdraw) from the States (the) power to regulate (1) where the activity regulated was a merely peripheral concern of the Labor Management Relations Act(,)' and (2) 'where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" *Hotel & Rest. Employees etc. Union v. Anaheim Operating, Inc*., 82 Cal. App. 3d at 747, quoting *Garmon*, 359 U.S. at 243-244.

Under the *Garmon* test, the mere refusal to recognize an illegal contract provision does not constitute an attempted state regulation of unfair labor practices:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in

> *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 98 S. Ct. 1745, 1757-58 (1978), citing *Garmon*. Pointing out to a trial court that an arbitration agreement with an illegal object is void and cannot be enforced is distinct from the filing of an unfair labor practice charge with the Board accusing the employer of affirmative misconduct. Moreover, it is incumbent upon a court to determine whether or not a contract a party seeks to enforce has an unlawful object to ensure that judicial authority is not misused for an unlawful purpose. Enforcing a contract that would interfere with employee rights under the NLRA would constitute abuse of the judicial process that a trial court must avoid.

Ultimately, the justification for preemption based on primary jurisdiction only exists when a party asserts a claim before a court that could have been asserted before the NLRB. *Sears* describes how this basis for preemption fails when the parties are not simply diverting claims from the NLRB to a court:

> The primary-jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. Such a Board determination could have been obtained only if the Union had filed an unfair labor practice charge alleging that Sears had interfered with the Union's § 7 right to engage in peaceful picketing on Sears' property. By demanding that the Union remove its pickets from the store's property, Sears in fact pursued a course of action which gave the

> Union the opportunity to file such a charge. But the Union's response to Sears' demand foreclosed the possibility of having the accommodation of § 7 and property rights made by the Labor Board; instead of filing a charge with the Board, the Union advised Sears that the pickets would only depart under compulsion of legal process.

Sears, 436 U.S. at 201-02, 98 S. Ct. at 1759-60.

Here, Plaintiff did not file or assert any kind of unfair labor practice charge against Ralphs by filing a civil lawsuit for various state law wage and hour violations in the Superior Court. Moreover, Ralphs has not asserted that Plaintiff engaged in any unfair labor practice. Rather, Ralphs seeks to enforce an arbitration agreement to preclude Plaintiff from having claims heard in court, and a defense to enforcement of the arbitration agreement is that the arbitration agreement is illegal because it violates federal law. The illegality defense against enforcement of an arbitration agreement is not coextensive with any unfair labor practice claims that were or could have been raised before the NLRB.

This Court can readily conclude that the arbitration agreement at issue is illegal with no concern that doing so will create a risk of prohibiting of protected conduct:

> Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.

Sears, 436 U.S. at 207, 98 S. Ct. at 1762-63. Rather, a finding of illegality under the NLRA will ensure that protected conduct is, in fact, protected. A ruling that safeguards the rights of employees to engage in concerted activity is consistent with the policies of the NLRA and every decision confirming that class and collective

actions intended to improve wages and working conditions are forms of protected, concerted activity.

IV. ARBITRATION AGREEMENTS ARE NOT ENFORCEABLE UNDER THE FAA WHEN ARBITRATION DOES NOT SUFFICE TO VINDICATE STATUTORY RIGHTS

The Supreme Court has made clear that agreements requiring arbitration of statutory rights, unlike common like rights, are only enforceable if the arbitral forum provides an effective vehicle for vindicating the statutory rights at issue. "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' *Mitsubishi*, *supra*, 473 U.S., at 637, 105 S.Ct., at 3359." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S. Ct. 1647, 1653 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985). Following the limit imposed by the Supreme Court on enforcement of arbitration agreements under the FAA, federal courts have often refused to enforce arbitration provisions that would preclude adequate vindication of statutory rights:

> Although federal policy strongly favors arbitration as an alternative means of dispute resolution, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the arbitration of a statutory claim will be compelled only if that claim can be effectively vindicated in the arbitral forum. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125 (2d

> Cir.2010). Otherwise, the statute's "remedial and deterrent function" would be circumvented, *Mitsubishi Motors Corp*., 473 U.S. at 637, and the arbitral forum would "lose[ ] its claim as a valid alternative to traditional litigation." *Kristian v. Comcast* Corp., 446 F.3d 25, 37 (1st Cir.2006)."

Sutherland v. Ernst & Young LLP, 2011 WL 838900, at 2 (S.D.N.Y. Mar. 3, 2011).

In *Sutherland*, the court refused to enforce a class action waiver in an employment agreement because the practical effect of the class action waiver could provide *de facto* immunity from *federal* labor laws, including the FLSA:

> Enforcement of the class waiver provision in this case would effectively ban all proceedings by Sutherland against E & Y. She will be unable to pursue her claims, even if they are meritorious. As a result, E & Y would enjoy de facto immunity from liability for alleged violations of the labor laws. The legislative purposes in enacting such laws—including, for example, combating "labor conditions detrimental to the maintenance of the minimum standard of living" FLSA § 2(a), 29 U.S.C. § 202(a), and assuring workers "additional pay to compensate them for the burden of a workweek beyond" 40 hours per week, *In re Novartis Wage and Hour Litig. Litig*. 611 F.3d 141, 150 (2d Cir.2010)—would go unfulfilled.

Sutherland, 2011 WL 838900 at 6.

On numerous occasions, federal courts have found to be unenforceable, under the FAA, arbitration agreements where arbitration did not sufficiently allow for the vindication of statutory rights. For example, in *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), the D.C. Circuit refused to enforce an arbitration agreement that did not allow for vindication of rights under Title VII:

> The beneficiaries of public statutes are entitled to the rights and protections provided by the law. Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination. *See Gardner–Denver*, 415 U.S. at 51, 94 S.Ct. at 1021 ("[T]here can be no

> prospective waiver of an employee's rights under Title VII.... Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.... [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII.”). Any such condition of employment would violate Title VII, regardless of whether or not the agreement was viewed as a contract of adhesion. Thus, in a subsequent suit by the employee raising a viable claim of racial discrimination or sexual harassment, it would be no defense that the employee had signed a contract giving up her right to be free from discrimination.

Cole v. Burns Int'l Sec. Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

Collective bargaining agreements that did not guarantee an adequate neutral forum for vindicating statutory rights have likewise been found to be unenforceable:

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. *Gilmer*, 500 U.S. at 28, 111 S.Ct. 1647, 114 L.Ed.2d 26. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.... Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.

de Souza Silva v. Pioneer Janitorial Services, Inc., 2011 WL 832503 (D. Mass. Mar. 3, 2011) (arbitration agreement not enforceable because union possessed sole authority to decide whether or not to pursue arbitration of employee’s claim).

The limits on enforcing arbitration agreements under the FAA stem from the need to protect the public from denigration of their statutory rights. With respect to enforcement of antitrust laws, for example, the Supreme Court has stated that “in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action,” an agreement which confers even

"a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865 (1955). Other federal courts have similarly recognized that permitting corporations to exculpate themselves from their obligations under federal law should not be permitted. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.").

Like federal antitrust laws, state wage and hour laws are a matter of substantial public interest calling for "vigilant enforcement." *Gentry*, in effect, merely applies the "vindication of statutory rights" doctrine firmly embedded into federal common law to rights under state law. In other words, the rationale followed by many federal courts determining that arbitration agreements could not be enforced under the FAA – because they did not allow for statutory rights to be vindicated – is the same rationale that was followed by *Gentry*. As a practical matter, *Gentry* does not differ from any federal court decision – clearly unaffected by *Concepcion* – invalidating a class action waiver or other substantive arbitration provision under the FAA.

To be sure, the flaw in the arbitration procedure in this case is a class action waiver, which was also the subject of *Concepcion*. But, *Concepcion* did not address the impact of a class action waiver in the context of statutory rights, and a determination that a class action is needed to vindicate statutory rights is perfectly consistent with federal common law. The Supreme Court has repeatedly recognized that the class action device is the only economically rational alternative when a large

group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S.Ct. 2140 (1974).

As the Court later observed, " '[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.' " *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231 (1997); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 549 F.3d 137, 144 (2d Cir. 2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred."); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004) ("[T]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.").

In the final analysis, there is no conflict between *Gentry* and federal common law. Under both, an arbitration agreement that precludes effective vindication of statutory rights is unenforceable. Since *Concepcion* does not disturb the long standing "vindication of statutory rights doctrine" applicable to the enforcement of arbitration agreements under the FAA, it has no impact on *Gentry*.

V. CONCLUSION

Concepcion has no effect on *Gentry*. Whether under *Gentry* or under federal common law, the arbitration agreement sought to be enforced by Ralphs is not enforceable and the trial court's order denying the motion to compel arbitration should be affirmed. This Court should not countenance the enforcement of illegal contracts and should not undermine the rights of employees to adequately vindicate their statutory rights.

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Respectfully submitted,

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By: /s/

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