No. 16-1110

IN THE

# Supreme Court of the United States

BLOOMINGDALE'S, INC.,

*Petitioner,*

v.

NANCY VITOLO,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EDWARD F. BERBARIE
*Counsel of Record*
ROBERT F. FRIEDMAN
LITTLER MENDELSON, P.C
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201-2931
(214) 880-8100
eberbarie@littler.com

April 14, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

## BRIEF OF THE NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF AMICUS CURIAE[1]

The National Retail Federation ("NRF") is the world's largest retail trade association, representing retailers throughout the United States ranging from the largest department stores to the smallest sole proprietors, including apparel, specialty, discount, online, independent, and grocery retailers, chain and local restaurants, and service establishments, among others. NRF advocates for its members on a broad range of matters, including labor and employment issues. NRF also files briefs as amicus curiae in cases of importance, such as this one. The organization is comprised of employers with operations across the United States utilizing predispute arbitration agreements with class, collective, and representative action waivers[2] in the employment context.

---

[1] Counsel of record for all parties received timely notice of the intent of the amicus curiae to file this brief. S. Ct. Rule 37.2(a). The parties' written consent to the filing of this brief is attached. Further, the amicus curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission. *See* S. Ct. Rule 37.6.

[2] NRF uses the term "class action waiver" or "class waiver" throughout this brief as a short hand to describe a provision in an arbitration agreement that prohibits class actions under Rule 23 of the Federal Rules of Civil Procedure and collective actions under 29 U.S.C. § 216(b), and any other type of aggregate litigation allowed under federal or state procedure. NRF uses the term "representative PAGA waiver" and "PAGA waiver" throughout

The Ninth Circuit's ruling in this case deprives employees and employers in the state of California of the efficiency and benefits of the bilateral arbitration procedures for which they bargained and paves the road for other states to enact similar statutory schemes to circumvent the mandates of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). This case presents an ideal vehicle for this Court's review, as it will give the Court an opportunity to reaffirm its well-established jurisprudence elevating the FAA over states' public policy concerns, uphold parties' arbitration agreements as written in accordance with the FAA's objectives, and reject states' continued attempts to invoke "public policy" to displace the FAA.

NRF has an interest in ensuring that arbitration agreements entered into between employers and employees are enforced according to their terms, as required by the FAA, and that its members do not lose the efficiency and benefits of the bilateral arbitration procedures for which they bargained. NRF has numerous members with business operations in California who utilize FAA-governed arbitration agreements containing PAGA waivers, which have now been rendered unenforceable contrary to the previous pronouncements of this Court. For multistate employers, including many of NRF's members, the FAA provides a uniform basis for enforcing arbitration agreements based on its preemptive power, which has now been eroded by the Ninth Circuit's ruling in this case and the

---

this brief as a shorthand to describe a provision in an arbitration agreement that prohibits representative actions under California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698-2699.5. The purpose of class waivers *and* representative PAGA waivers is to allow parties to engage only in bilateral arbitration.

decisions in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (Cal. 2014) ("*Iskanian*") and *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015) ("*Sakkab*"). The issue at stake is therefore one of significant importance to both employers and employees who rely on the substantial benefits of bilateral arbitration in resolving workplace disputes. Accordingly, NRF has a direct and substantial interest in the outcome of this case, and submits this brief to emphasize the importance of this issue to employers across the country.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ("*Concepcion*"), this Court held that the FAA preempts state law rules, whether judicially or legislatively created, that impose obstacles to the enforcement of the FAA or frustrate the purpose of FAA-governed arbitration agreements. In *Concepcion*, this Court explained that the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." 563 U.S. at 344. *Concepcion* further teaches that (1) "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," (2) the FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and (3) "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 343, 345-46, 351.

In 2014, however, the California Supreme Court held that an employee's pre-dispute agreement to waive his right to bring a representative claim under California's Labor Code Private Attorneys General Act of 2004, Cal. Labor Code §§ 2698-2699.5 ("PAGA") is "contrary to public policy and unenforceable as a matter of state law." *Iskanian*, 59 Cal. 4th at 384. Further, the *Iskanian* court held that neither this Court's precedent nor the FAA preempt its "public policy" prohibiting waiver of representative PAGA claims because the FAA was only intended to cover private disputes, whereas a PAGA action, so the California court declared, is actually a dispute between an employer and the State. *Id.* at 384, 388-89. This, *in fact*, is not true but instead relies on a state-created legal fiction. A PAGA action is not brought by the State of California. It is brought by a private individual who, in this case, as a private individual became party to an arbitration agreement forbidding class and "private attorney general" actions. In September of 2015, the Ninth Circuit, in *Sakkab*, agreed with the "*Iskanian* rule." *Sakkab* settled after the Ninth Circuit issued its decision, however, and was never presented to this Court for review. *See* Order, Doc. 48, *Sakkab v. Luxottica Retail N. Am., Inc.*, No. 3:12-cv-00436 (S.D. Cal. June 14, 2016). The Ninth Circuit in this case relied on the rulings in *Iskanian* and *Sakkab* in reaching its decision, which makes this case an ideal vehicle for reviewing California's public policy invalidating representative PAGA action waivers.

The FAA requires that contracts be enforced as written. There is nothing in the FAA authorizing states to extinguish a promise made by an individual to bring claims solely as an individual based on a *post hoc* analysis recasting that individual as not an individual at all but instead the state itself. It is not

difficult to imagine other states using the California roadmap to thwart the FAA's objectives. The FAA therefore preempts California's rule invalidating representative PAGA waivers because the rule squarely conflicts with the FAA's objectives and this Court's FAA jurisprudence. The *Iskanian* rule is not a generally applicable contract defense and cannot serve as a basis for invalidating an employee's agreement to arbitrate her PAGA claim on an individual basis. Moreover, California cannot impose policy preferences and representative procedures on arbitration agreements requiring individual arbitration simply by recharacterizing a party to the agreement as a "private attorney general," a legal fiction if there ever was one. Because the *Iskanian* rule is incompatible with the FAA's purposes and objectives, NRF urges the Court to grant certiorari.

## ARGUMENT

### I. THE PROLIFERATION OF PAGA CLAIMS IN RECENT YEARS ILLUSTRATES THE *ISKANIAN* RULE'S DESTABILIZING CONSEQUENCES.

The holdings in *Iskanian* and *Sakkab* have already had destabilizing consequences, as evidenced by the recent explosion in PAGA actions. California's Labor and Workforce Development Agency ("LWDA") and the related agencies it oversees, including the Department of Industrial Relations ("DIR"), are responsible for enforcing California's Labor Code. The Labor Code allows an employee to recover improperly withheld wages from an employer either through an administrative proceeding with the LWDA or through a private legal action. Legislative Analyst's Office, The 2016-17 Budget: Labor Code Private Attorneys

General Act Resources (Mar. 25, 2016), *available at* http://www.lao.ca.gov/Publications/Report/3403.

Following the *Iskanian* decision, PAGA actions have become an increasingly attractive and popular vehicle for plaintiffs to circumvent class action requirements and sidestep employees' arbitration agreements. *See* Jamin S. Sonderstrom, *The Unintended Consequences of 'PAGA-Only' Lawsuits*, Law360 (Apr. 8, 2016). According to the DIR, the number of PAGA notices filed with the LWDA increased from 4,430 PAGA notices in 2010 to 6,307 PAGA notices in 2014. Dep't of Indus. Relations, State of California Budget Change Proposal 1 (submitted Jan. 7, 2016), http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf ("Budget Change Proposal"). And the volume of PAGA notices is now estimated to be "as high as 635 notices per month." *Id.* at 2. Yet, according to the DIR, less than 1% of all PAGA cases are actually reviewed or investigated by the LWDA. *Id.*

This recent explosion in PAGA actions, coupled with the LWDA's inability to manage this rapidly expanding workload, is only expected to increase as California courts continue invalidating representative PAGA action waivers. In its recent Budget Change Proposal, the DIR noted a commitment "to reducing unnecessary litigation" and asserted that an increased budget was "needed to stabilize and improve the handling of PAGA cases[.]" *Id.* The DIR further acknowledged that "review and investigation of PAGA claims [is] quiet rare, and usually occur only because a case has been called to the LWDA's attention through some other means besides the PAGA notice." *Id* at 1.

## II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS AND DETER STATES' REPEATED ATTEMPTS TO MANUFACTURE PUBLIC POLICY EXCEPTIONS TO THE FAA IN CONTRAVENTION OF THIS COURT'S WELL-ESTABLISHED FAA PRECEDENT.

Section 2 of the FAA mandates that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "both a liberal federal policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations and quotations omitted). "In line with these principles, courts must place arbitration agreements on equal footing with other contracts" and "enforce them according to their terms." *Id.* (internal citations and quotations omitted). This Court has strongly endorsed the enforcement of arbitration agreements, emphasizing that "consistent with [the FAA's] text, courts must rigorously enforce arbitration agreements according to their terms . . . including terms that specify *with whom* the parties choose to arbitrate their disputes . . . and the rules under which that arbitration will be conducted." *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (emphasis in original) (internal citations and quotations omitted).

### A. States Cannot Manufacture "Public Policy" Exceptions to the FAA by Mischaracterizing Them as "Generally Applicable" Contract Defenses.

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the FAA preempts all otherwise applicable or

conflicting state laws. *Preston v. Ferrer*, 552 U.S. 346, 356-57 (2008); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)) ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it."); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting Section 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration.").

This Court emphasized in *Concepcion* that "[a]lthough § 2's savings clause preserves *generally applicable* contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343 (emphasis added). Thus, under section 2 of the FAA, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). But "a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot." *Concepcion*, 563 U.S. at 341.

California's state and federal courts are refusing to enforce representative PAGA waivers on the grounds that *Iskanian* prohibits pre-dispute waivers of representative PAGA claims and, pursuant to *Iskanian* and *Sakkab*, the FAA does not preempt the *Iskanian* rule. In *Iskanian*, the California Supreme

Court held that under California law, an agreement by an employee to waive the right to bring a representative PAGA action "is contrary to public policy" and unenforceable. 59 Cal. 4th at 384. In *Sakkab*, the Ninth Circuit found that the *Iskanian* rule was a "generally applicable" state contract defense preserved by § 2 of the FAA's savings clause as a ground for the revocation of "*any contract*," reasoning that the rule "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement. 803 F.3d at 432, 433. *Sakkab* failed, however, to identify a particular "generally applicable contract" defense grounding its decision.

*Iskanian* and *Sakkab's* attempt to invent a public policy exception to the FAA disguised as a generally applicable state contract defense flouts this Court's well-established FAA precedent. The *Iskanian* rule is not a "generally applicable" state contract defense that establishes grounds for the revocation of "any contract." *Iskanian* does not even place *pre*-dispute representative PAGA waivers on equal footing with *post*-dispute representative PAGA waivers. In *Iskanian*, the court conceded that "any employee is free to forgo the option of pursuing a PAGA claim," but nonetheless held that "it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises." *Id.* at 387. But the *Iskanian* court's holding ignores the language of the FAA, which makes no distinction between pre or post-dispute controversies and expressly applies to both. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in

writing to submit to arbitration *an existing controversy* arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable . . . [.]" 9 U.S.C. § 2 (emphasis added). The *Iskanian* court's distinction between pre-dispute and post-dispute waivers is irreconcilable with the FAA.

If an employee may form a contract to forego seeking PAGA penalties after a dispute arises, then where in the law of contract is that same employee forbidden to make the same commitment before a dispute arises? The *Iskanian* rule eliminates an employee's freedom of contract, even though "there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores*, *Inc. v. Adams*, 532 U.S. 105, 122-123 (2001). Thus, far from a "generally applicable" contract defense establishing grounds for the revocation of "any contract," the *Iskanian* rule does not even establish grounds for the revocation of a *post*-dispute agreement to waive representative PAGA claims.

Moreover, if an employee has the right to release her PAGA claim in a class action settlement without alleging any claims for PAGA penalties or allocating any portion of the settlement to payment of PAGA penalties or to the state, no "generally applicable" contract defense should prohibit the employee from waiving the same right to bring a representative claim for PAGA penalties in a pre-dispute arbitration agreement. *Iskanian* identifies no "generally applicable" contract defense supporting differential treatment for pre-dispute and post-dispute representative PAGA action waivers. A more likely explanation for *Iskanian's* unequal treatment of pre-dispute and post-dispute

waivers is the very same "judicial hostility to arbitration" that the FAA was enacted to prevent. *Concepcion*, 536 U.S. at 339.

*Iskanian's* determination that pre-dispute representative PAGA action waivers are unenforceable is also arbitration-specific—the rule does not appear to apply equally to contracts in other contexts. The California Supreme Court cited no contract cases outside the arbitration context in which a contract was nullified based on a party voluntarily deciding to forgo his or her right to take an action that he or she is under no legal obligation to perform (such as filing a representative PAGA claim). Likewise, there are no "generally applicable" contract defenses that explain why a party cannot choose to waive his or her right to bring a claim on behalf of a third party, even when that third party is the government, in other non-arbitration contexts.

The *Iskanian* court also emphasized that PAGA was "established for a public reason" and reasoned that "agreements requiring the waiver of PAGA rights would harm the state's interest in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." 59 Cal. 4th at 383. But, to the extent *Iskanian* implies that state "public policy" can preempt the FAA whenever the FAA would undermine state public policy, this notion lacks support in this Court's FAA jurisprudence. The FAA does not contain any effective-vindication exception for state law claims. Rather, as the dissent in *Italian Colors* noted, "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objects. If the state rule does so . . . the Supremacy Clause

requires its validation." 133 S. Ct. at 2320 (Kagan, J., dissenting).

Even in the *federal* context, this Court has considered and rejected arguments that the public interest in enforcement of a *federal* statute creating rights for private citizens akin to those of a "private attorney general" necessarily precludes submission of a federal claim to arbitration. *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614, 635-37 (1985) (public interest in enforcement of a federal antitrust statute under which a plaintiff's rights were "likened to a private attorney-general who protects the public's interest" did not preclude submission of a federal antitrust claim arising out of an international commercial transaction to arbitration); *Shearson/Am. Exp.*, *Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (applying *Mitsubishi* and noting "[t]he private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) ("the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration"). As this Court recognized in *Mitsubishi*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614, 628 (1985).

### B. States Cannot Evade the FAA and this Court's FAA Jurisprudence By Labeling a Private Plaintiff a "Private Attorney General."

In *Concepcion*, this Court held that representative arbitration, to the extent it is manufactured by the California legislature and courts rather than consensual, is inconsistent with the FAA. *See Concepcion*, 563 U.S. 333. However, the court in *Iskanian* read *Concepcion* too narrowly and held that while class waivers are enforceable in mandatory pre-dispute arbitration agreements, representative PAGA action waivers are not. The court in *Iskanian* also concluded, without citing any basis grounded in this Court's precedent, that "the rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state [LWDA]." 59 Cal. 4th at 384. *Iskanian* also erroneously concludes that a PAGA claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [LWDA] or aggrieved employees—that the employer has violated the Labor Code." *Id.* at 386-87.

The Ninth Circuit reached the same conclusion in *Sakkab*, emphasizing that "a PAGA action is a form of qui tam action." 803 F.3d at 439. This Court should grant review to correct the Ninth Circuit's misunderstanding of the FAA and this Court's FAA jurisprudence.

1. *A representative PAGA action is merely a class action dressed up as a government-enforcement action.*

*Iskanian* and *Sakkab* go to great lengths to characterize representative PAGA actions as being so unique and distinct from Rule 23 class actions that *Concepcion* is inapplicable. But representative PAGA actions are similar to class actions in several material respects. First, *Iskanian* and *Sakkab* ignore a crucial similarity between class actions and representative actions – *waivers* of class actions *and* representative actions are intended to limit arbitration to only those claims arising between the parties to the agreement and prevent the parties from raising claims on behalf of others in arbitration. And PAGA claims, like class claims, are "brought by an aggrieved employee on behalf of himself or herself" and "other current or former employees" who are not parties to the action. Cal. Lab. Code § 2699(a). Moreover, PAGA, like a class action, allows plaintiffs to aggregate monetary claims on behalf of named *and* absent employees, which can, and often do, add up to present the same high stakes present in class actions. *Id.* § 2699(g)(1). Finally, in a PAGA case, much like a class action, the absent employees are bound by any judgment. *Iskanian*, 59 Cal. 4th at 380.

Government enforcement actions, like the EEOC's lawsuit in *E.E.O.C. v. Waffle House*, *Inc.*, 534 U.S. 279 (2002), are easily distinguishable from PAGA actions. PAGA incentivizes private individuals to bring PAGA claims by allowing them to keep 25% of any civil penalties collected. Cal. Lab. Code § 2699(i). Consequently, PAGA claims are, in practice, driven by a potential award of civil penalties and attorney's fees rather than by a general effort to enforce the public's

interest. Private plaintiffs should not be expected to exercise the same prosecutorial judgment as a government agency when investigating and bringing claims on their own behalf. And in PAGA actions, unlike a government enforcement action, there are no government representatives involved who are advocating on behalf of the state and its public interests.

The LWDA plays only a very limited role in PAGA lawsuits. Less than 1% of all PAGA cases are reviewed or investigated and, until very recently, PAGA litigants were not required to notify the agency of any settlement. *See* Budget Change Proposal, *supra*, at 2-3.[3] According to the DIR, although PAGA requires the court to review and approve any settlement involving PAGA penalties, most judges have no particular expertise in labor law "and must rely upon the knowledge and representations of counsel, both of whom are interested in having the settlement approved. There is no assurance that settlements are in fact fair to all the affected employees or the state." *Id.* at 3.

Finally, in the *federal* context, this Court has expressly recognized that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Gilmer*, 500 U.S. at 28-29. A plaintiff asserting PAGA claims brings the action "on behalf of *himself*" and "other current or former employees," *not* the State. Cal. Lab. Code § 2699(a) (emphasis added). Thus, although a PAGA action is purportedly brought on behalf of

---

[3] PAGA was recently amended to require only that any proposed settlement must be submitted to the LWDA at the same time as it is submitted to the court. American Bar Association Flash, *New Developments in PAGA Enforcement and Settlements* (Nov.-Dec. 2016), *available at* https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/2016/nov-dec2016/paga.html.

the State, it still represents a claim belonging to an "aggrieved employee" himself.

But the *Iskanian* rule, if allowed to stand, would allow states to simply attach civil penalties, or otherwise attempt to intertwine some purported state action, to any claim in any context in order to evade the FAA. And there are no clear limits on *where* courts would draw the line in determining whether a state is sufficiently involved in a particular action and has standing such that a representative action waiver is unenforceable. Any state hostile to arbitration can use the California PAGA statute as a template, creating a mile-wide exception to the FAA, something a state court or legislature may not do.

States could, for example, enact laws allowing aggrieved employees to bring an action "on behalf of the state," recover 99% of the penalties collected, and remit only the remaining 1% to the state. Giving plaintiff's class action counsel an option to avoid arbitration by pursuing a PAGA look-alike claim is not a farfetched speculation, as the dramatic increase in PAGA suits has been well documented, as noted above. *Iskanian* reopens the door, thought closed in *Concepcion*, to state public policies supplanting the FAA. Allowing such a "device and formula" would indisputably frustrate the FAA's purposes and contravene this Court's FAA jurisprudence. *Concepcion*, 563 U.S. at 342.

2. *This Court's interpretation of the FAA in Concepcion is the law of the United States and governs all types of arbitration agreements.*

*Concepcion* requires courts to enforce arbitration agreements *according to their terms*. Thus, mere

technical differences between the nature of Rule 23 class actions and representative PAGA actions simply do not allow state courts to ignore the express terms of arbitration agreements requiring individual arbitration. Likewise, a state cannot evade the FAA simply by calling a private party to an arbitration agreement a "private attorney general." When Respondent Nancy Vitolo promised to arbitrate disputes on an individual basis only, she was no more acting as the State of California than she would have been entering into any other contract. The FAA does not indulge a state-created legal fiction that allows parties to end-run their commitments. Because the *Iskanian* rule *requires* representative litigation of PAGA claims irrespective of the terms of any particular arbitration agreement, *Iskanian* directly contravenes this Court's decision in *Concepcion*. 563 U.S. at 344 ("Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

Absolutely nothing supports *Iskanian's* argument that the FAA somehow distinguishes between private disputes and *state* statutory claims that are purportedly designed to protect a state's public interest. As this Court has repeatedly clarified, the FAA is largely unconcerned with state public interests, no matter how compelling. The FAA trumps any state public policy that conflicts with the federal policy in favor of arbitration grounded in the FAA. And the FAA contains no "effective vindication" exception for state-law claims. Finally, any attempt to analogize this case to *E.E.O.C. v. Waffle House*, *Inc.*, 534 U.S. 279 (2002), a case that presents the inverse scenario, is unconvincing and inapposite. In *Waffle House*, this Court considered whether "an agreement between an employer and an employee to arbitrate employment-related disputes

bars the Equal Employment Opportunity Commission (EEOC) from pursuing "victim-specific relief" in an enforcement action under Title I of the Americans With Disabilities Act. 534 U.S. at 282. Thus, in *Waffle House*, this Court addressed whether a federal government agency (the EEOC), which was not a party to an arbitration agreement, was nonetheless subject to an arbitration agreement between Waffle House and an individual who was not a party to the case. 534 U.S. at 283.

*Waffle House* instructs that the "FAA does not mention enforcement *by public agencies*; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a *nonparty's* choice of a judicial forum." *Id.* at 289 (emphasis added). Accordingly, this Court held that the "statute clearly makes the EEOC the master of its own case" and the FAA "does not require parties to arbitrate when they have not agreed to do so." *Id.* at 291, 293-94. In contrast, the party to the arbitration agreement in this case is the exact same private party that filed and is controlling the litigation. This Court should grant certiorari to correct the Ninth Circuit's misplaced reliance on *Iskanian* and *Sakkab,* both of which irreconcilably conflict with this Court's FAA jurisprudence.

## CONCLUSION

California's departure from this Court's FAA jurisprudence creates uncertainty and unpredictability and provides a model for other enterprising states seeking to evade the FAA and emasculate arbitration agreements. Thus, for the foregoing reasons and the

reasons stated in the petition, NRF respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

EDWARD F. BERBARIE
*Counsel of Record*
ROBERT F. FRIEDMAN
LITTLER MENDELSON, P.C
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201-2931
(214) 880-8100
eberbarie@littler.com

April 14, 2017