No. 16-1110

In the

Supreme Court of the United States

BLOOMINGDALE'S, INC.,

Petitioner,

v.

NANCY VITOLO,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law rule that prohibits enforcement of a predispute arbitration agreement with respect to a state statutory claim unless the agreement allows the claimant to pursue representative relief on behalf of all similarly-situated individuals.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

Federal Statute

State Statutes

TABLE OF AUTHORITIES—Continued

Page

Rules of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.

Founded in 1973, PLF is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court and the California Supreme Court involving the Federal Arbitration Act (FAA) and contractual arbitration in general. Of particular relevance to this case, PLF participated in key cases relevant to determining whether California's Private Attorney General Act (PAGA) (a bounty hunter statute for alleged Labor Code violations) is exempted from the FAA's requirement that arbitration contracts stand on an equal footing as other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), and *Sakkab v. Luxxotica Retail North America, Inc.*, 803 F.3d 425

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party 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 other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(9th Cir. 2015), *petition for reh'g en banc denied* Feb. 2, 2016. PLF believes that the freedom of contract underlies and enhances constitutional rights and promotes a strong economy.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Nancy Vitolo was employed by Bloomingdale's for six weeks in 2008. At the beginning of her employment, Vitolo signed an agreement to resolve any workplace disputes using the store's four-step dispute resolution program that includes individual arbitration. She agreed to arbitrate "all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment whether arising under federal, state or local decisional or statutory law." Pet. App. 9a. Vitolo had 30 days to opt out of this agreement and she did not exercise that option. Pet. for Writ of Cert. at 9 n.3 (citing ER 522, 527-28).

Notwithstanding her arbitration agreement, Vitolo sued in federal district court alleging several Labor Code violations. Such a suit would have been barred by the doctrine developed in *AT&T Mobility v. Concepcion*, and several federal and state courts between in the period of time between *Concepcion* and *Iskanian* upheld this exact agreement. She later amended her complaint to tack on a PAGA claim. Pet. for Writ of Cert. at 10; Pet. App. 28a. When Bloomingdale's moved to compel arbitration, the district court granted the motion. In the arbitration, Vitolo lost on the merits of all her claims. She did not move to vacate the award so the district court entered

judgment for the company and dismissed the case. Pet. App. 3a.

As Vitolo's case proceeded, the California Supreme Court decided that employees could not waive PAGA representative actions in favor of individual arbitration of disputes in *Iskanian*, 59 Cal. 4th at 383, and the Ninth Circuit adopted the *Iskanian* rule in *Sakkab v. Luxxotica Retail*, 803 F.3d at 431. Based on those decisions, Vitolo appealed the district court's dismissal. The Ninth Circuit panel issued a one-paragraph memorandum opinion vacating the district court's judgment in favor of Bloomingdale's and remanded the case for litigation of the representative PAGA claims. Pet. App. 1a-2a.[2]

This case squarely presents the issue of whether the *Iskanian* rule (adopted and applied by the Ninth Circuit) is preempted by the Federal Arbitration Act and the substantive federal law of arbitration, as developed in *Concepcion*. As shown below, the PAGA exception created by *Iskanian* is rapidly invalidating countless otherwise-enforceable contracts. As one California appellate court flatly announced, "PAGA claims are not subject to private arbitration agreements." *Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal. App. 4th 651, 657 (2015) (citing *Iskanian*). At the time of the *Iskanian* decision, the damage was restricted to contracts interpreted under California law. With the Ninth Circuit's persistent application of the *Iskanian* rule in this case and others, the problem has now spread across the entire Western United

[2] In addition to *Iskanian* and *Sakkab*, the Ninth Circuit order relied on *Perez v. U-Haul Co. of California*, 3 Cal. App. 5th 408 (2016), which adopts and applies the reasoning and result of *Iskanian*. *Id.* at 421-23.

States and threatens contracts nationwide.[3] As it has been forced to do so many times in the past, this Court remains the only body able to restore the freedom of contract undermined by decisions of the California Supreme Court and Ninth Circuit. The petition should be granted.

REASONS FOR GRANTING THE PETITION

I

ONLY THIS COURT CAN HALT THE CALIFORNIA SUPREME COURT'S CONTINUED DEFIANCE OF FEDERAL LAW

Since 1984, this Court has been reversing California legal doctrines—whether implemented by the California state courts or the Ninth Circuit Court of Appeals—that reflect judicial hostility toward arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 7 (1984) (reversing the California Supreme Court's holding that the state Franchise Investment Law required judicial resolution rather than arbitral resolution because "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (reversing California Court of Appeal decision that the FAA preempts a state labor law authorizing wage collection actions regardless of an agreement to

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[3] *See* Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016) (PAGA claims have increased over 200% since 2000, and over 400% since 2004).

arbitrate: "[U]nder the Supremacy Clause, the state statute must give way."); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (reversing California Court of Appeal and holding that the FAA's protection of an arbitration agreement vesting jurisdiction over all disputes in an arbitral tribunal supersedes state laws lodging dispute resolution jurisdiction in a different judicial or administrative forum); *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. 973 (2011) (vacating California Supreme Court decision that categorically forbade waiver of an administrative wage hearing prior to arbitration, for reconsideration in light of *Concepcion*); *see also Concepcion*, 563 U.S. at 351 (invalidating California's *Discover Bank* rule because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"); *MHN Gov't Serv. Inc. v. Zaborowski*, *cert. granted*, 136 S. Ct. 27 (2015) (question presented was whether California's unique arbitration-only severability rule is preempted by the FAA), *cert. dismissed*, 136 S. Ct. 1539 (2016) (settlement). In short, "[t]he [California] courts consistently reach results [in cases involving the FAA] that the Supreme Court takes the time to overturn." Lyra Haas, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1455 (2014).

The latest in this series of rebukes came in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015), in which this Court reversed a California appellate decision that failed to treat arbitration contracts on an equal footing with all other contracts. The *DIRECTV* Court concluded that the case was governed by "present well-established law," *id.*, sounding a cautionary note that California law must not continue

to ignore, evade, and otherwise purport to distinguish away the FAA and the federal substantive law of arbitration, both of which serve to protect the freedom of contract.

The freedom to make and enforce contracts reflects a fundamental element of free choice and must be protected for that reason. *See* U.S. Const. art. I, § 10; *see also, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit." (citation and quotation marks omitted)); *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). Consistent with these principles, the FAA reflects both a "liberal federal policy favoring arbitration agreements" and the "fundamental principle that arbitration is a matter of contract."[4]

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[4] There is no statute in California, or any other state, that *requires* parties to a transaction to arbitrate disputes. Moreover, in this case, Vitolo's contract contained an opt-out provision that enabled her to opt out of the arbitration contract within 30 days. Pet. for Writ of Cert. at 9 n.3 (citing ER 522, 527-28). She freely chose to remain bound to the arbitration provisions, and that freedom deserves protection by this Court. *See Lamour v. Uber Tech.*, No. 1:16-CIV-21449, 2017 WL 878712, at *14 (S.D. Fla. (continued...)

Concepcion, 563 U.S. at 339; *see also KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." (internal quotation omitted)); *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (*en banc*) ("The FAA was intended to 'overcome an anachronistic judicial hostility to agreements to arbitrate . . . .'") (citation omitted). This includes arbitral resolution of state statutory claims. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Feeney v. Dell Inc.*, 466 Mass. 1001, 1003 (2013) ("[T]he analysis the Court set forth in *Concepcion* (and reinforced in [*Italian Colors*]) applies without regard to whether the claim sought to be vindicated arises under Federal or State law.").

Despite some states' "power struggle of Shakespearean magnitude . . . to preserve their own

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[4] (...continued)
Mar. 1, 2017) ("[B]ecause the Arbitration Provision was freely accepted by Plaintiff when he had sufficient time to consider it and the unfettered right to reject it, there can be no finding of procedural unconscionability and no finding of unconscionability under Florida law."); *Honig v. Comcast of Ga., LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008) ("[Plaintiff's] ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements." (citing cases)). Even California acknowledges that someone who has a meaningful opportunity to opt out of a contract and fails to do so is understood to consent to the terms of the contract. *Gentry v. Superior Court*, 42 Cal. 4th 443, 468 (2007), *abrogated on other grounds*, *AT&T Mobility v. Concepcion*, 563 U.S. 333; *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) ("When, as here, inaction is indistinguishable from overt acceptance, we may conclude that the parties have come to agreement.").

laws and public policy,"[5] this Court plainly requires both state and federal courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (citations omitted); 9 U.S.C. § 2. Thus, the FAA's preemptive effect extends to grounds that generally exist "at law or in equity for the revocation of any contract[]" when those grounds "have been applied in a fashion *that disfavors arbitration*." *Concepcion*, 563 U.S. at 341 (emphasis added). Courts may not fashion contract law principles that "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

This is "a principle of rigorous equality." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119-20 (1st Cir. 1989) ("[N]o state may simply subject arbitration to individuated regulation in the same manner as it might subject some other unprotected contractual device (say, a prescriptive period or exculpatory clause contained within a private contract)."). *See also Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012) (overturning a state's "public policy" exception to enforcement of arbitration agreements if the matter involved personal injury or wrongful death causes of action); *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (reversing a state court decision which struck down a noncompete agreement that contained an arbitration provision, and reminding the state court that "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law" (citation omitted)). *Concepcion* specifically

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[5] Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1147 (2015).

invalidated California's *Discover Bank* rule because, as a practical matter, the state's courts applied the unconscionability doctrine in a way that disproportionately undermined arbitration agreements. 563 U.S. at 343-44. Here, too, the decision below singles out claims brought under California's Private Attorney General Act—and, by extension, any statute that authorizes citizen enforcement so long as the state gets a cut of the money—as too special to be resolved in arbitration.[6] The Ninth Circuit's decision, applying California law, invalidates arbitration contracts for reasons unique to the arbitration itself, and cannot stand in light of *Concepcion*.

II

THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER A STATE PUBLIC POLICY OBJECTIVE OF DEPUTIZING LABOR CODE ENFORCERS OVERRIDES CONGRESSIONAL INTENT TO PROTECT ARBITRATION CONTRACTS

PAGA representative actions ostensibly are intended to solve the state's problem of under-enforcement of Labor Code violations by permitting individuals to step into the shoes of the government and sue on its behalf. *Sakkab*, 803 F.3d at 429-30; *Iskanian*, 59 Cal. 4th at 359; Cal. Lab. Code § 2699(a). By leveraging the state's failure to enforce its own laws into a means to evade the congressional mandate of the

[6] Courts also deem PAGA representative claims too unique to come under the Class Action Fairness Act. *See Castro v. ABM Indus.*, No. 15-CV-01947-YGR, 2015 WL 6954894 (N.D. Cal. Nov. 10, 2015), *cert. of appealability denied* (9th Cir. 15-80197) (Feb. 24, 2016), *cert. denied*, 137 S. Ct. 82 (2016).

Federal Arbitration Act, the *Iskanian* court and the Ninth Circuit in this case carve out an unlimitable means to defeat congressional intent. The FAA is not concerned with California's budget priorities and creates no exception for employment-related disputes that include a proxy claim.[7]

PAGA may be the most wide-ranging statutory authorization for employees to bring representative actions against employers, but it is hardly unique, adding to the importance of this case. Many states authorize employees to bring representative actions to enforce aspects of statutory requirements in labor and employment law. Examples within the Ninth Circuit include Wash. Rev. Code Ann. § 49.78.330(2) (authorizing representative actions to enforce family leave provisions); Idaho Code Ann. § 44-1704(2) (employee may bring representative action alleging violation of the prohibition against discriminatory wages based on sex); Nev. Rev. Stat. Ann. § 613.490(2)(b) (employees may bring representative actions against employers to enforce statute delineating permitted use of lie detectors); Nev. Rev.

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[7] The California Supreme Court recognized the serious policy concerns generated by outsourcing defense of the laws in *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 57, *cert. denied*, 562 U.S. 1169 (2011) (noting that private attorneys prosecuting actions on behalf of the government are "not subject to the same stringent conflict-of-interest rules" and the "bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done"). *See also* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 177 (2012) (comparing "entrepreneurial enforcers" to class action attorneys in that both are subject to criticism for advancing their own interests above the interests of clients or the public good).

Stat. Ann. § 613.590(2)(b) (allowing representative action to enforce prohibitions on employer use of employee consumer credit reports); Or. Rev. Stat. § 652.230(3) (authorizing representative action for unpaid wages and liquidated damages); and 4 N. Mar. I. Code § 9244(a) (representative action authorized for employees to enforce Northern Mariana Islands Minimum Wage and Hour Act).[8]

Employers generally cannot insure against fines and penalties imposed for violation of these types of statutes, placing additional risk on individual officers and managers. Goodman, 56 Santa Clara L. Rev. at 446 (citing Marc B. Heath, *Employers Practice Liability Insurance: A Practical Guide*, 25-DEC Vt. B.J. 51, 52 (1999)). Increased risk results in a strong compulsion to settle even unmeritorious claims. *Id.* (citing Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 371-72 (1991)). *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("[T]he suit is exceedingly unlikely to be tried. . . . The case [is] so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.").

The Ninth Circuit Court of Appeals is a highly influential court and its decision in this case may well influence other courts' consideration of FAA preemption of similar statutes across the county. If the decision below stands, arbitration contracts agreeing to informal resolution of disputes that could be brought

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[8] http://www.cnmilaw.org/pdf/cmc_section/T4/9244.pdf.

under other "deputizing" state laws are at risk. Many states "deputize" their citizens to bring lawsuits to enforce state labor laws like those at issue in this case. For example, Illinois permits employees to sue on their own behalf and on behalf of others for any violation of the state Wage Payment and Collection Act. *See* 820 Ill. Comp. Stat. 115/11; *Rekhi v. Wildwood Industries, Inc.*, 816 F. Supp. 1308, 1311 (C.D. Ill. 1992) (In addition to past wages, employees may litigate recovery of statutory penalties.). The state also authorizes employees to sue to enforce the Illinois Minimum Wage Law, and provides for civil penalties to be paid directly to the state. *See* 820 Ill. Comp. Stat. 105/12. *See also* Mass. Gen. Laws Ann. ch. 149, § 150 (permitting representative action for any lost wages or other benefits); *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 611, 618 (Minn. 2008) (Minnesota Fair Labor Standards Act (MFLSA)—Minn. Stat. § 177.27—and Minnesota Payment of Wages Act (MPWA)—Minn. Stat. § 181.101—can be enforced by the Commissioner of Labor or through civil actions with MFLSA civil penalties payable to the state and MPWA penalties payable to the employees); *Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 185 P.3d 446, 449 (Or. 2008) (Or. Rev. Stat. § 653.055 provides private right of action to pursue claims that employer failed to provide paid rest breaks); Okla. Stat. tit. 40, § 165.9(A) (employee can sue to enforce labor law on behalf of self and others); N.M. Stat. Ann. § 50-4-26 (authorizing representative action to prosecute Minimum Wage Act violations); Md. Lab. & Empl. Code § 3-307(a)(2) (permitting representative action to recover wages and liquidated damages in sex discrimination cases); *German v. Wisconsin Dep't of Transp., Div. of State Patrol*, 235 Wis. 2d 576, 585, 596

(2000) (employees authorized by Wis. Stat. § 109.03(5) to enforce administrative wage regulations).

The PAGA exception is especially broad because the state may deputize proxies far beyond the employment context. For example, a wide range of laws deputize consumers to enforce laws "on behalf of the state." *See Schlueter v. Latek*, 683 F.3d 350, 356 (7th Cir. 2012) ("private attorney general theory of liability," akin to "bounty-hunting," exists in numerous statutes). Like employment law, consumer protection statutes abound that permit private enforcement of laws that prohibit false or misleading advertisements, and other unfair trade practices. Arbitration contracts are as prevalent in the consumer context as they are in the workplace. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2012) (Arbitration clauses in consumer contracts are "no rarity."). Indeed, *every* state has authorized some form of a private cause of action to enforce its consumer protection laws.[9] Rebecca Eschler Russell, *Unlawful Versus Unfair: A Comparative Analysis of Oregon's and Connecticut's Statutes Encouraging Private Attorneys General to Protect Consumers*, 47 Willamette L. Rev. 673, 675 (2011). Like PAGA, many of these laws in other states were

[9] In the Ninth Circuit, *see, e.g.*, Or. Rev. Stat. § 646.638(8) (authorizing class action to challenge unlawful trade practices); Alaska Stat. § 45.50.531 (permitting civil action with portion of punitive damages payable to state). *See also*, Tenn. Code §§ 47-18-1509(b), 47-18-1510(b) (any individual may sue on behalf of others to enforce consumer protection laws with civil penalties payable to the general fund); La. Rev. Stat. § 45:817(B)-(C) (same); Kan. Stat. § 50-634 (individual may sue to obtain declaratory and injunctive relief, civil penalties, or damages, or may sue in a class to obtain declaratory and injunctive relief); Conn. Gen. Stat. § 42-110g(b) (authorizing class actions for damages under unfair trade practices law).

enacted in response to large numbers of complaints and a lack of governmental resources to investigate them. *Id. See also* Joseph Thomas Moldovan, Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook. L. Rev. 509, 519 n.33 (1982) (New York's private attorney general law permits representative actions meant to bolster public enforcement efforts.).

The expanding statutory authorization of representative actions makes the decision below, which ignores the overriding similarities between traditional class actions and representative private attorney general actions for the purpose of rendering disputes unarbitrable, all the more important. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 671-72 (1986) (using "class action" and "private attorney general" interchangeably); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2148 (2004) (A private attorney general is a "class action attorney who pursues representative litigation on behalf of a group of private citizens" and whose "role is often authorized by the class action rules enabling representative litigation and by common law or statutory rules authorizing fee shifting."). Both types of actions are brought by individuals on behalf of others similarly situated and aid in the enforcement of public laws. *Id.* at 2147. The only material difference is that PAGA's representative action permits litigants to obtain civil penalties

payable, in part, to the state.[10] *See* Goodman, 56 Santa Clara L. Rev. at 416, 420 (PAGA claims "seemingly parallel the class action model" and "potentially functions as a 'back-door' route to a class action lawsuit.").

The exemption created by *Iskanian*, approved by the Ninth Circuit in *Sakkab*, and applied in this case works to invalidate the most common arbitration agreements that would otherwise cover employment and consumer claims. States are thus encouraged to create private causes of action in order to avoid the FAA, in violation of the Supremacy Clause.

III

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ESTABLISHED IN *CONCEPCION*

State legislatures cannot accomplish through implicit means what this Court and the FAA forbid them to do explicitly. States are explicitly forbidden to enact laws that "prohibit[] outright the arbitration of a particular type of claim." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (citation omitted). If states circumvent the FAA by enacting nonwaivable statutory remedies, thereby setting aside a particular class of claims for judicial resolution instead of allowing parties to agree to arbitral resolution of those claims, the result is the same as what this Court has clearly declared unacceptable:

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[10] Despite the similarities, the California Supreme Court ruled that PAGA representative actions need not meet the standard class certification requirements of California Code of Civil Procedure § 382. *Arias v. Superior Court*, 46 Cal. 4th 969, 981-88 (2009).

undercutting the FAA in violation of the Supremacy Clause. *See* Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. Cal. L. Rev. 433, 460 (2003); Bonaccorso, 67 Stan. L. Rev. at 1170 ("[I]f state courts freely disregarded Supreme Court decisions, the Supremacy Clause would be rendered meaningless."). That, in fact, was precisely the holding of *Perry v. Thomas*, 482 U.S. 483, 491 (1987), which held a section of the California Labor Code that required a judicial forum for the resolution of wage disputes to be in "unmistakable conflict" with the FAA and, "under the Supremacy Clause, . . . must give way."

By forbidding employers and employees from arbitrating "proxy" claims, the Ninth Circuit decision in this case ignores *Concepcion*'s holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 563 U.S. at 341. As Judge N.R. Smith succinctly explained in his dissent to the panel decision in *Sakkab*:

> The majority cannot distinguish the present case from the principles outlined in *Concepcion*. *Concepcion* dealt with a state rule that prohibited class-action waivers in arbitration agreements. The present case involves a state rule that prohibits representative action waivers in arbitration agreements. ¶ The *Discover Bank* rule and the *Iskanian* rule are sufficiently analogous to guide our decision.

803 F.3d at 442 (N.R. Smith, J., dissenting).

At bottom, PAGA claims are derivative of other statutes, which otherwise are fully arbitrable. *See, e.g.*, *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1147-48 (2011) (PAGA claim entirely derivative of other causes of action alleged in the complaint); *Elliot v. Spherion Pac. Work, LLC*, 572 F. Supp. 2d 1169, 1181-82 (C.D. Cal. 2008) (PAGA claim wholly dependent on other causes of action). The decision below, elevating this derivative procedure above that of Congress's command that courts uphold arbitration contracts unless they violate principles of contract law applicable to *all contracts*, serves only to circumvent the FAA. California's state policy of offloading certain law enforcement activities to volunteers cannot be permitted to thwart federal law commanding that courts uphold the freedom of employers and employees to contract for informal resolution of disputes.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: April, 2017.

Respectfully submitted,

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