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 *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER BLOOMINGDALE'S, INC.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center based in Washington, D.C., with supporters nationwide. WLF defends and promotes free enterprise, freedom of contract, individual and business civil liberties, limited government, and the rule of law. WLF regularly appears as *amicus curiae* before this and other courts to support the rights of parties to enter into binding arbitration agreements as an expedient, inexpensive, and efficient alternative to civil litigation. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). Also, WLF's publishing arm frequently produces articles and other educational materials related to arbitration. *See, e.g.*, Mark C. Morril, *Party Autonomy Reigns Supreme: Arbitration & Class Actions in the High Court's October 2012 Term*, WLF Legal Backgrounder (Sept. 13, 2013) http://goo.gl/fqCjOr.

The Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements strictly according to their terms. This case is another in a long line of decisions refusing to follow the FAA's directive

[1] This brief was authored by *amicus curiae* and its counsel, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae* and its counsel has made any monetary contribution to the preparation or submission of this brief. More than ten days prior to the due date, *amicus curiae* notified the parties of its intention to file this brief. All parties provided written consent to the filing of this brief. Correspondence indicating the parties' consent is being submitted with this brief.

requiring arbitration contracts to be enforced as written.

The Ninth Circuit's decision, relying on California law, declined to enforce the representative-action waiver in the parties' arbitration agreement based on policy concerns for the vindication of state law. Its refusal to do so flouts the Supremacy Clause of the United States Constitution and conflicts with this Court's precedent and lower court decisions holding that the FAA preempts such restrictions.

WLF seeks uniform application of the FAA nationwide to ensure that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, and cost-effectively. The Ninth Circuit's decision thwarts this goal. WLF has a significant interest in whether the underlying state law is preempted by the FAA, much as the FAA has negated many other rules evincing California courts' hostility to arbitration.

SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013) (citations omitted). Since the FAA's enactment, this judicial hostility has continued to manifest itself through "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements as

written. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation omitted).

One such device is an inappropriately broad interpretation of the FAA's "saving clause," which permits courts to invalidate arbitration provisions on grounds that would apply equally to all contracts. *Id.* at 339-44. Some courts invoke this clause to cloak a hostility to arbitration by declaring that arbitration procedures need not be enforced based on policy concerns for the vindication of state statutes.

California courts in particular have a long-standing history of hostility to arbitration. *See id.* at 342. Time and again, this Court has had to eliminate barriers to arbitration imposed by California's legislature and courts. *See, e.g., Imburgia*, 136 S. Ct. at 465-71; *Concepcion*, 563 U.S. at 337-51; *Preston v. Ferrer*, 552 U.S. 346, 349-63 (2008); *Perry v. Thomas*, 482 U.S. 483, 488-93 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984).

Concepcion is illustrative since it made clear that courts cannot refuse to enforce agreements to arbitrate state statutory claims based on a vindication rationale, even where California law characterizes this rationale as a "public policy" defense to enforceability. Many lower courts have faithfully followed this directive, holding that the FAA prevents them from sidestepping arbitration agreements based on policy concerns for the vindication of state law. In contrast, California courts and the Ninth Circuit have regularly disregarded *Concepcion* and its progeny, creating a conflict in the law. The Ninth Circuit's opinion here exacerbates this conflict. It is the latest in a series of

decisions that erroneously refuse to enforce provisions governing the arbitration of state statutory claims pursuant to a vindication rationale. This Court should grant certiorari to resolve this split of authority.

Even absent this conflict, review is warranted because the California rule underlying the Ninth Circuit's decision threatens to eviscerate the uniform application of the FAA nationwide. *Concepcion* and its progeny held that the FAA requires enforcement of a type of representative-action waiver—*i.e.*, a class-action waiver. The Ninth Circuit's decision exempts from this directive representative actions that operate in many respects just like class actions and impose much the same burdens. In effect, California courts and the Ninth Circuit divide the United States into jurisdictions that obey the FAA's mandate compelling the enforcement of representative-action waivers and those that do not.

This Court should grant certiorari to resolve this conflict and the threat it poses to the FAA's uniform application.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW EXACERBATES A SPLIT OF AUTHORITY OVER THE LAW GOVERNING AGREEMENTS TO ARBITRATE STATE STATUTORY CLAIMS.

A. Before *Concepcion*, California courts and the Ninth Circuit departed from this Court's precedent by permitting the invalidation of arbitration provisions based on policy concerns for the vindication of state law.

The FAA "mandates enforcement of agreements to arbitrate statutory claims." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Decades ago, however, this Court in dictum suggested that arbitration agreements might be invalidated where they operated "as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

This dictum became known as the "'effective vindication' exception" to the FAA. *Italian Colors*, 133 S. Ct. at 2310 (citation omitted). This exception was not derived from the language of the FAA, *id.*, but instead from the possibility that another federal statute might evince Congress's intent to exempt certain federal statutory rights from arbitration, *Mitsubishi Motors*, 473 U.S. at 627-28. Since the

FAA's mandate "may be overridden by a contrary congressional command," the Court signaled this command could be deduced "from an inherent conflict between arbitration" and a federal statute. *McMahon*, 482 U.S. at 226-27.

The Court has never actually applied this effective vindication dictum to invalidate an arbitration agreement. *Italian Colors*, 133 S. Ct. at 2310. Nor has it suggested this dictum could justify the invalidation of an agreement to arbitrate state-law claims. Nonetheless, before *Concepcion*, the California Supreme Court developed the vindication defense into a basis for refusing to enforce agreements to arbitrate state statutory claims.

The first such case, *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1083, 988 P.2d 67, 79 (1999), applied this vindication principle to state statutory claims to prevent "the vitiation through arbitration of the substantive rights afforded by" state law. Subsequently, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 90, 6 P.3d 699, 674 (2000), reaffirmed that state statutory claims are arbitrable only "*if* the arbitration permits [a plaintiff] to vindicate his or her statutory rights." Citing *Broughton* and federal cases discussing the vindication of congressionally conferred rights, *Armendariz* grounded this defense to arbitration in California public policy and concluded it was not preempted by the FAA based on a vindication rationale. *Id.* at 90-91, 98-103, 6 P.3d at 677, 679-82.

Thereafter, the California Supreme Court consistently invoked this state-law vindication

principle to invalidate agreements to arbitrate state statutory claims. *See, e.g.*, *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1076-81, 63 P.3d 979, 987-90 (2003); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-173, 113 P.3d 1100, 1108-17 (2005); *Gentry v. Superior Court*, 42 Cal. 4th 443, 456-63, 465, 165 P.3d 556, 563-69 (2007). The court insisted that this state-law vindication rationale was not preempted by the FAA because it was based on California's generally applicable policy against exculpatory contracts and therefore preserved from preemption by the FAA's saving clause. *See, e.g.*, *Little*, 29 Cal. 4th at 1076-77, 1079-80, 63 P.3d at 987, 988-89; *Discover Bank*, 36 Cal. 4th at 160-67, 113 P.3d at 1108-13; *Gentry*, 42 Cal. 4th at 456-65 & n.8, 165 P.3d at 563-70 & n.8.

The Ninth Circuit, following the California Supreme Court's lead, likewise held that arbitration agreements need not be enforced as written where the agreed-upon arbitration procedures failed to vindicate California statutory rights. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1149-52 (9th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170-77 (9th Cir. 2003); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1284-93 (9th Cir. 2006) (en banc).

By extending the vindication rationale to the enforcement of agreements to arbitrate *state-law* claims, the Ninth Circuit and California courts failed to appreciate that this Court's effective vindication dictum was based on the special interplay between the FAA and subsequent *congressional* mandates—*i.e.*, that Congress may overrule or modify earlier federal statutes. *See Mitsubishi Motors*, 473 U.S. at 627-28, 637 n.19; *McMahon*, 482 U.S. at 226-27, 238-42.

Judicial concern for "effective vindication" and "inherent conflict[s]" between laws are "two sides of the same coin," both resting on the principle that other *federal* laws and the FAA "stand on equal footing." *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013).

In contrast, under the Supremacy Clause, state laws and the FAA are not of "equivalent dignity"; the FAA is supreme. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503-04 (2012) (per curiam). State law "must give way" to the FAA. *Perry*, 482 U.S. at 491.

B. *Concepcion* and its progeny held that the FAA preempts state-law defenses to the enforcement of arbitration agreements that are predicated on concerns for the vindication of state law.

Concepcion confirmed that, under the FAA, parties may agree "to arbitrate according to *specific rules*" and courts must "enforce [those agreements] *according to their terms*." *Concepcion*, 563 U.S. at 339, 344 (emphases added). Congress tempered this mandate by including in the FAA a saving clause that preserves from preemption generally applicable state-law contract defenses. 9 U.S.C. § 2 (2012). But the FAA preempts even a contract defense that is "generally applicable" if it "'stands as an obstacle to the accomplishment and execution of the full purposes'" of the FAA. *Concepcion*, 563 U.S. at 340-42, 352 (citation omitted).

Concepcion held that the FAA preempted *Discover Bank*'s unconscionability standard. *Id.* at 339-40, 352. In *Discover Bank*, after the plaintiff filed a class action asserting state-law claims, the defendant sought to compel individual arbitration pursuant to an agreement containing a class-action waiver. *Discover Bank*, 36 Cal. 4th at 153-54, 113 P.3d at 1103-04. The California Supreme Court held that such waivers contravened public policy and were therefore unconscionable because "class actions and arbitrations" are "often inextricably linked to the vindication" of state law. *Id.* at 155, 160-61, 174, 113 P.3d at 1104-05, 1108-09, 1118. *Discover Bank* reasoned that the FAA did not preempt this defense because representative-action waivers "may operate effectively as exculpatory contract clauses" in violation of California's public policy. *Id.* at 160-66, 113 P.3d at 1108-12.

Like the plaintiff in *Discover Bank*, the plaintiffs in *Concepcion* brought a class action alleging violations of state laws. *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *1 (S.D. Cal. Aug. 11, 2008). They seized on *Discover Bank*'s vindication rationale to evade FAA preemption, arguing that the FAA did not preempt *Discover Bank* because it was based on California's generally applicable "policy against exculpation." *Concepcion*, 563 U.S. at 339-44. The Ninth Circuit agreed, emphasizing that representative proceedings are "'inextricably linked to the vindication of substantive rights'" under California law. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854-59 & n.4 (9th Cir. 2009) (citation omitted).

Concepcion rejected this argument, holding that where courts deem arbitration provisions to be "unconscionable or unenforceable" based on "public policy disapproval of exculpatory agreements," such state-law contract defenses "[i]n practice ... have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. *Concepcion*, 563 U.S. at 341-42. *Concepcion* therefore held that state laws invalidating arbitration procedures (like representative-action waivers) based on public policies concerned with the vindication of state law are preempted by the FAA. *Id.* at 341-44.

Italian Colors reaffirmed this holding. The Second Circuit had held that an arbitration agreement's class-action waiver was unenforceable under the FAA's vindication exception because "the cost of plaintiffs' individually arbitrating" their federal antitrust claims "would be prohibitive." *In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 217-19 (2d Cir. 2012). The Second Circuit distinguished *Concepcion* on the ground that it had not addressed a vindication analysis. *Id.* at 212-13.

In reversing, this Court held that *Concepcion* "all but resolves this case" and expressly rejected Justice Kagan's dissenting view that *Concepcion* did not involve the vindication rationale. *Italian Colors*, 133 S. Ct. at 2310-13 & n.5. While Justice Kagan disagreed with the majority's view that *Concepcion* addressed a vindication analysis, even she acknowledged that the FAA has "no earthly interest (quite the contrary) in vindicating [state] law. Our effective-vindication rule comes into play only when

the FAA is alleged to conflict with another *federal* law." *Id.* at 2320 (Kagan, J., dissenting).

Indeed, this Court has repeatedly emphasized that it meant what it said in *Concepcion* about the FAA's preemption of state-law defenses predicated on public policy. *See Nitro-Lift*, 133 S. Ct. at 501-04 (holding FAA preempted Oklahoma public policy requiring court rather than arbitrator to decide enforceability of covenants not to compete); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-34 (2012) (per curiam) (vacating determination that arbitration agreement was unconscionable where finding was influenced by state public policy).

Furthermore, since *Concepcion*, many lower courts have held that the FAA prohibits courts from refusing to enforce agreements to arbitrate state statutory claims based on concerns for the vindication of state law. *See, e.g.*, *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122 (Nev. 2015); *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167 (10th Cir. 2014); *Ferguson*, 733 F.3d at 934-37; *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So.3d 1176, 1186-88 (Fla. 2013).

C. After *Concepcion*, California courts and the Ninth Circuit have continued to resist the FAA's preemptive effect based on a vindication rationale.

In contravention of this Court's precedent, and in conflict with lower courts applying this precedent,

California courts and the Ninth Circuit have continued to resist this authoritative interpretation of the FAA.

For example, in a case that was remanded for reconsideration in light of *Concepcion*, the California Supreme Court addressed whether an employee could "vindicate his right to recover unpaid wages" under state law and, specifically, "whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable ... and, if so, whether such a rule would be preempted by the FAA." *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic*), 57 Cal. 4th 1109, 1142, 311 P.3d 184, 200 (2013). *Sonic* held that courts assessing the enforceability of an arbitration agreement may consider whether arbitration procedures fail to include certain state-law protections, thereby failing to "provide an employee with an accessible and affordable arbitrable forum for resolving wage disputes." *Id.* at 1146, 311 P.3d at 203.

Citing the California Supreme Court's discussion of the vindication of state law in *Armendariz*, *Sonic* maintained that the FAA allows courts to refuse to enforce arbitration agreements that do not afford procedural benefits that plaintiffs would receive outside arbitration, reasoning that such procedures help "vindicate" state statutory rights. *Id.* at 1150-52, 1155, 311 P.3d at 206-09. Subsequently, the California Supreme Court reaffirmed that arbitration provisions may be unenforceable if they "'contravene the [state's] public interest or public policy,'" and held such a rule is not preempted by the FAA. *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 906-08, 911-13, 920-21,

353 P.3d 741, 745-46, 748-50, 755-56 (2015) (citation omitted).

Most recently, the California Supreme Court held that an arbitration agreement's class-action waiver violated California public policy and was therefore unenforceable where it prevented the plaintiff from seeking injunctive relief on behalf of others under state statutes, since this waiver "would seriously compromise" state law. *McGill v. Citibank, N.A.*, No. S224086, ___ P.3d ___, 2017 WL 1279700 at *1, *4, *7-10 (Cal. Apr. 6, 2017). The court insisted this rule was not preempted by the FAA, citing *Mitsubishi Motors*' effective vindication dictum concerning congressionally conferred rights as well as *Italian Colors*' subsequent qualification about the scope of this dictum as applied to *federal* statutes. *Id.* at *8-10.

Similarly, the Ninth Circuit recently applied California law to hold that an arbitration agreement was unenforceable because (among other reasons) it included a "costs-and-fee-shifting clause" that supposedly thwarted employees' "vindication of their [state] statutory rights ...." *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463 (9th Cir. 2014). This Court granted review, 136 S. Ct. 27 (2015), but later dismissed certiorari following a settlement, *see* 136 S. Ct. 1539 (2016).

D. This Court should grant certiorari because this case widens the growing split of authority over whether *Concepcion* precludes state and federal courts nationwide from invalidating arbitration provisions based on policy concerns for the vindication of state law.

The parties here entered into an agreement to arbitrate employment-related disputes that precluded such claims from proceeding on a representative basis. *See* Pet. App. 4a-5a. Consequently, when Respondent filed this wage-and-hour lawsuit as a representative action, invoking both class-action procedures and California's Private Attorneys General Act (PAGA), the district court granted Petitioner's motion to compel arbitration. *See* Pet. App. 4a-6a, 28a-62a. The Ninth Circuit reversed based on the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129 (2014), and the Ninth Circuit's adoption of *Iskanian* in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). The *Iskanian/Sakkab* rule is little more than another effort by California courts and the Ninth Circuit to circumvent the FAA's mandate based on policy concerns for the vindication of state law.

Iskanian addressed the enforceability of a provision in an arbitration agreement that waived an employee's right to invoke a representative action under PAGA. PAGA permits employees to bring a representative action "'on behalf of himself or herself and other current or former employees' to recover civil penalties" for wage-related violations of California's

Labor Code—penalties that were previously recoverable solely by the state's Labor Commissioner. *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 1003, 209 P.3d 937, 943-44 (2009) (citation omitted). PAGA "does not create property rights or any other substantive rights. Nor does it impose any legal obligations. It is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." *Id.*

According to the California Supreme Court, a PAGA representative action is "a type of *qui tam* action" resembling a *qui tam* claim brought under the federal False Claims Act (FCA), in that the named plaintiff is a proxy for the state. *Iskanian*, 59 Cal. 4th at 380-82, 327 P.3d at 146-48. *Iskanian* held that an arbitration agreement's PAGA representative-action waiver is unenforceable as a matter of "public policy" because (like the class-action waiver in *Discover Bank*) it violated California's policy against exculpatory contracts by frustrating the enforcement of state statutes. *Id.* at 382-84, 327 P.3d at 148-49. *Iskanian* further concluded that the FAA did not preempt this rule because the rule's "sole purpose is to vindicate" the enforcement of this state law rather than to interfere with arbitration. *Id.* at 384-89, 327 P.3d at 149-53.

In *Sakkab*, the Ninth Circuit agreed that the FAA did not preempt the *Iskanian* rule. *See* Pet. App. 69a-91a. Following an analysis virtually identical to that employed by the pre-*Concepcion* cases that produced the preempted *Discover Bank* rule, *Sakkab* held that: (1) *Iskanian*'s rule is predicated on

California's policy against exculpatory contracts since PAGA representative-action waivers frustrate the enforcement of state statutes; (2) the rule is therefore a generally applicable contract defense that is preserved from FAA preemption; and (3) the rule does not conflict with the FAA since the "'sole purpose'" of the underlying state policy "'is to vindicate'" the enforcement of state statutes via a *qui tam* representative action. *See* Pet. App. 72a-77a, 89a-91a (citation omitted).

Sakkab claimed that it was not relying on the vindication rationale to save the *Iskanian* rule from FAA preemption, stating that the vindication rationale applies only to *federal* laws. *See* Pet. App. 78a-79a n.9. But this claim was belied by *Sakkab*'s determination that the FAA did not preempt the *Iskanian* rule because it is based on a state public policy against exculpation that seeks to vindicate the enforcement of state law. *See* Pet. App. 72a-73a, 89a-91a; *see also* Pet. 23-25 (explaining that *Sakkab* effectively relied on an improper vindication rationale to save *Iskanian* from FAA preemption); Pet. App. 109a-110a (Smith, N.R., J., dissenting) (explaining that California's policy concerns cannot save *Iskanian* from preemption and Ninth Circuit's contrary conclusion "strays" toward inapplicable vindication defense). While the Ninth Circuit in *Sakkab* apparently saw a profound distinction between the vindication of state law by an individual and the vindication of the same law by a proxy of the state, *see* Pet. App. 82a-83a, 90a, this is a distinction without a difference under the FAA.

That California law seeks to shield PAGA representative actions in an effort to vindicate

California's enforcement of state wage-and-hour statutes does not change the fact that California's policy concerns cannot override the FAA's mandate requiring arbitration agreements—including provisions that waive procedures allowing representative proceedings—to be enforced according to their terms. *See Concepcion*, 563 U.S. at 341-44. As even the dissent recognized in *Italian Colors*, "*state* law ... could not possibly implicate the effective-vindication rule" because the FAA has "no earthly interest (quite the contrary) in vindicating that law." *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

Both *Iskanian* and *Sakkab* claim support from *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002). But their reliance is misplaced.

Waffle House considered "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing" certain relief in its own enforcement action. *Id.* at 282. *Waffle House* concluded that the arbitration agreement there could not limit EEOC's authority to sue because of provisions in the statutory scheme vesting EEOC with this authority. *Id.* at 285-98. *Waffle House* deemed it particularly significant that this scheme authorized EEOC to bring its own lawsuit irrespective of the employee's actions and made "EEOC the master of its own case," vesting it with the sole authority to decide which claims to raise, in which forum to sue, and whether to sue in the public interest or seek "make-whole relief for the employee." *Id.* at 287-88, 291-92, 295-96 & n.10. But *Waffle House*

stressed that, had the employee instead been in control of such details, the arbitration agreement could have limited EEOC's lawsuit. *See id.* at 291.

That is precisely what PAGA permits. *See* Pet. 25-27. Under PAGA: (1) it is the employee (not an agency) who brings the lawsuit "personally and on behalf of other current or former employees" to recover civil penalties for "Labor Code violations"; (2) the employee is entitled to keep a substantial percentage of whatever penalties are recovered; (3) the employee has discretion to decide whether to seek class certification in state court; (4) the employee decides whether to settle and for what amount (subject to court approval); and (5) the employee's actions in the lawsuit are binding on both "the state labor law enforcement agencies" and "any aggrieved employee not a party to the proceeding." *Arias v. Superior Court*, 46 Cal. 4th 969, 980-81, 985-86, 209 P.3d 923, 929-30, 933-34 (2009); Cal. Lab. Code § 2699(l)(2) (West 2011 & Supp. 2017). Given these differences, a PAGA lawsuit "is much more akin to a private action between private parties" than it is to an EEOC action. *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1082-83 (N.D. Cal. 2015).

In *Sakkab*, the Ninth Circuit claimed that if the FAA were to preempt *Iskanian*, the FAA's reach would have grown so broad as to render the FAA's "saving clause wholly 'ineffectual.'" Pet. App. 80a (citation omitted). Not so. The saving clause continues to exempt from preemption defenses that apply equally to all contracts and are not "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 339-44. For example, the existence of duress, fraud, or other

irregularities in contract formation (for example, an unreadable font size) can defeat enforcement of an arbitration agreement, just as it can defeat a contract to paint a house or repair a car. *See id.* at 339, 347 n.6.

But if the saving clause "means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'" *Id.* at 352-53 (Thomas, J., concurring). "[J]ust as the FAA preempts a state statute that is predicated on the view that arbitration is an inferior means of vindicating [state] rights," it likewise preempts state rules that frustrate the enforcement of arbitration agreements based on this same policy concern. *Patton*, 741 F.3d at 1167.

Indeed, California courts have acknowledged that California contract defenses predicated on a "vindication" policy "specifically concern arbitration agreements" and are "unique [to the] context of arbitration." *E.g.*, *Little*, 29 Cal. 4th at 1079, 63 P.3d at 989. This state rule must give way under the FAA because the saving clause does not preserve from preemption "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue," given that courts "may not 'rely on the uniqueness of an agreement to arbitrate'" as a defense to arbitration. *Concepcion*, 563 U.S. at 333, 341 (citation omitted).

Iskanian and *Sakkab* deemed it significant that the California Supreme Court has characterized PAGA actions as *qui tam* lawsuits resembling federal FCA claims. *Iskanian*, 59 Cal. 4th at 382, 327 P.3d at 148;

Pet. App. 90a-91a. But this characterization only reinforces the need for this Court's review because lower courts nationwide are divided over whether the FAA requires the enforcement of agreements to arbitrate FCA claims. *See, e.g.*, *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 381 (4th Cir. 2008) (FCA claim arbitrable under FAA); *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at *6-7 (S.D. Ohio Jan. 31, 2013) (same); *Winston v. Academi Training Ctr., Inc.*, No. 1:21-cv-767, 2013 WL 989999, at *1-2 (E.D. Va. Mar. 13, 2013) (FCA claim not arbitrable under FAA); *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 645-47 (N.D. Ohio 2000) (same).

Moreover, even assuming plaintiffs cannot be compelled to arbitrate federal FCA claims, that would make no difference to whether courts must enforce agreements to arbitrate state-law claims that are supposedly a type of *qui tam* claim. Even if a vindication defense applicable exclusively to "*federal* statutory rights" precludes the arbitration of FCA claims, as some courts have found, *see, e.g., Winston*, 2013 WL 989999, at *2 (emphasis added), the FAA preempts equivalent state-law defenses that are predicated on a policy concern for the vindication of *state* law, *see Concepcion*, 563 U.S. at 341-52; *see also, e.g., Tallman*, 359 P.3d at 122 (holding that FAA compels enforcement of representative-action waivers "even when requiring individual arbitration hampers effective vindication" of state law).

Recent California appellate decisions further confirm the need for review. In *Sakkab*, the Ninth Circuit sought to temper *Iskanian*'s rule by holding

that plaintiffs could be compelled to arbitrate PAGA actions, albeit on a representative basis—thereby eviscerating the arbitration agreement's representative-action waiver. *See* Pet. App. 83a-84a. This fig leaf does not save *Iskanian* from preemption because PAGA representative proceedings cannot be squared with the FAA for the same reasons that class proceedings ran afoul of the FAA in *Concepcion*. Pet. 15-23. Recent California Court of Appeal decisions strip away even *Sakkab*'s fig leaf, holding that employees' pre-dispute arbitration agreements with employers can *never* compel them to arbitrate PAGA claims under *any* circumstances because the agreements do not bind the state. *Tanguilig v. Bloomingdale's, Inc.*, 5 Cal. App. 5th 665, 676-80, 210 Cal. Rptr. 3d 352, 358-62 (2016); *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439, 444-449, ___ Cal. Rptr. 3d ___ (Mar. 7, 2017). These decisions expand the split of authority since they effectively render an entire category of claims (PAGA claims) inarbitrable, in contravention of this Court's precedent. *See Concepcion*, 563 U.S. at 341 ("When state law prohibits outright the arbitration of a particular type of claim," this law "is displaced by the FAA.").

This Court should grant certiorari to resolve the split of authority fostered by *Iskanian*'s rule.[2]

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[2] This Court's decision to grant review in *Epic Systems Corp. v. Lewis*, no. 16-285, *Ernst & Young LLP v. Morris*, no. 16-300, and *NLRB v. Murphy Oil USA, Inc.*, no. 16-307, in no way lessens the need for review here. Those cases concern the unrelated interplay between the FAA and federal labor law, (continued...)

II. REVIEW IS ALSO NECESSARY TO ENSURE THE FAA IS UNIFORMLY APPLIED NATIONWIDE.

The FAA "establish[ed] a uniform federal law over contracts which fall within its scope." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). Consequently, even absent the aforementioned split of authority, this Court should grant certiorari because *Iskanian* and *Sakkab* impair the uniform application of the FAA.

Concepcion held that an arbitration agreement's class-action waiver is enforceable notwithstanding state law to the contrary. *Concepcion*, 563 U.S. at 339-52. Thus, courts nationwide have enforced class-action waivers in arbitration agreements even when they disagreed with *Concepcion*. *E.g.*, *Feeney v. Dell Inc.*, 466 Mass. 1001, 1002-03, 993 N.E.2d 329, 330-31 (2013).

PAGA representative actions behave like class actions in all but name, imposing virtually indistinguishable burdens, involving the same immense stakes, and inefficiently bogging down litigation with similar, time-consuming adjudication of individualized issues. *See* Pet. 16-21; Pet. App. 100a-109a (Smith, N.R., J., dissenting). Yet, whereas *Concepcion* compels courts throughout the country to

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(…continued)
rather than the split of authority over whether the FAA requires courts to enforce arbitration agreements notwithstanding policy concerns for the vindication of state law.

enforce class-action waivers, California courts' sleight-of-hand in denominating a PAGA representative action as a type of *qui tam* claim wrongly allows California courts and the Ninth Circuit to sidestep *Concepcion*'s mandate.

In short, *Iskanian* and *Sakkab* create a special rule immunizing PAGA representative actions from *Concepcion*. The impact of this disparity should come as no surprise: California plaintiffs are increasingly asserting PAGA representative claims to circumvent *Concepcion* and the FAA, and commentators are urging other jurisdictions to adopt similar laws to perpetuate this practice. *See* Pet. 32-35. Indeed, the new trend is for California employees to file PAGA-only lawsuits, *see, e.g.*, Jamin S. Soderstrom, *The Unintended Consequences of 'PAGA-Only' Lawsuits*, Law360 (Apr. 8, 2016), http://goo.gl/ssFT9n; Erin Coe, *Calif. Cos. Face More PAGA Suits As Iskanian Rule Stands*, Law360 (June 1, 2015), http://goo.gl/JRhRYH, thereby effectively nullifying *Concepcion*'s directive for employment disputes in California, *see, e.g.*, *Tanguilig*, 5 Cal. App. 5th at 672-73, 676-80, 210 Cal. Rptr. 3d at 355-56, 358-62 (refusing to enforce representative-action waiver in PAGA-only lawsuit). Even if *Iskanian*'s and *Sakkab*'s impact were limited solely to PAGA representative actions brought by California workers, *Iskanian* and *Sakkab* could blow a gaping hole through the FAA's uniform application, given that California workers make up a significant percentage of the American workforce. *See* Pet. 34.

But there is no reason to believe *Iskanian* and *Sakkab* will remain confined to PAGA representative actions or to California. In a different arbitration

appeal before the California Supreme Court, the same counsel who represents Respondent here maintained that "*Iskanian*'s reasoning applies with equal force" to *any* laws that "have a 'public statutory purpose that transcends private interests.'" Respondent's Opening Brief on the Merits at 19-21, *McGill v. Citibank, N.A.*, ___ P.3d ___ (2017) (No. S224086), 2015 WL 5779462 (citation omitted); *accord* Respondent's Reply Brief on the Merits at 2, 19-25, *McGill v. Citibank, N.A.*, ___ P.3d ___ (2017) (No. S224086), 2015 WL 9434722. In response, the court held that arbitration provisions are unenforceable as contrary to public policy whenever they "would seriously compromise" state laws enacted "primarily 'for the benefit of the general public,'" and—citing this Court's effective vindication dictum concerning *federal* law—determined this rule was not preempted by the FAA. *McGill*, 2017 WL 1279700 at *1, *7-10 (citation omitted); *see also* Matthew Blake, *Consumers win in state high court*, L.A. Daily J., Apr. 7, 2017, at 1, 3 (indicating plaintiffs' attorneys view *McGill* as broadly benefiting workers and consumers because, much like *Iskanian*, it thwarts representative-action waivers).

This consideration further confirms that *Iskanian* and *Sakkab* threaten to swallow *Concepcion*'s rule nationwide since a broad swath of statutory claims, both state and federal, arising from a wide range of employment, consumer, and other disputes, could potentially satisfy such an amorphous "public" rights standard. *See, e.g.*, *Hoover v. Am. Income Life Ins. Co.*, 206 Cal. App. 4th 1193, 1198 n.2, 142 Cal. Rptr. 3d 312, 316 n.2 (2012); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082-83 (9th Cir. 2007); *Scott v.*

Cingular Wireless, 160 Wash.2d 843, 851-59, 161 P.3d 1000, 1005-09 (2007); *Nagrampa*, 469 F.3d at 1292-93; *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467-68, 1475-88 (D.C. Cir. 1997).

For years, California state and federal courts have resisted this Court's broad interpretation of the FAA's mandate, repeatedly developing new devices to impede the enforcement of arbitration agreements after each of the many instances where this Court has struck down California's anti-arbitration rules. *Iskanian* and *Sakkab*, and the Ninth Circuit's reliance on them here, are but the latest examples of this recalcitrance. Absent review by this Court, *Iskanian*, *Sakkab*, and their progeny threaten to metastasize until they eviscerate *Concepcion* and the FAA itself.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, the petition should be granted. Furthermore, the Ninth Circuit's decision is so clearly erroneous under *Concepcion* and *Italian Colors* that this Court should summarily reverse it.

Respectfully submitted,

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