

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 *AMICUS CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF PETITIONER**

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for Amicus Curiae
Equal Employment Advisory
Council

April 2017

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**BRIEF AMICUS CURIAE OF THE
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The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.¹

¹ 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. All parties have consented to the filing of this brief. No counsel for a 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.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of EEAC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination and other workplace protection laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many of them thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class or representative action waiver provisions designed primarily to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation. The issues presented in this case thus are extremely important to the nationwide employer constituency that EEAC represents.

Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their future conduct will be judged. Accordingly, such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 1047 (2009); *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *MHN Gov’t. Svcs., Inc. v. Zaborowski*, 136 S. Ct. 1539 (2016); and *Epic Sys. Corp. v. Lewis*, cert. granted (U.S. Jan. 13, 2017) (No. 16-285). EEAC is thus deeply familiar with the issues presented in this case and is well-situated to brief the Court on the significant importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Nancy Vitolo worked for Petitioner Bloomingdale's, Inc. from July 31 to September 15, 2008. Pet. App. 4a. As a condition of her employment, she was required to sign an agreement to resolve any work-related disputes (including federal, state, and local statutory claims) via binding, individual arbitration. Pet. App. 4a-5a. In August 2009, Vitolo filed a putative class action in state court on behalf of herself and other current and former employees claiming violations of the California Labor Code and Unfair Competition Law. Pet. App. 27a-62a.

After Bloomingdale's removed the action to federal court, Vitolo amended her complaint to add a state Private Attorneys General Act (PAGA) claim based on the alleged labor code violations. On Bloomingdale's motion, the trial court ordered Vitolo into individual arbitration, rejecting her contention that representative PAGA actions cannot be waived, i.e., are not subject to individual arbitration. Pet. App. 4a-6a. An arbitration award was entered in Bloomingdale's favor, and the district court dismissed the case in September 2014. Pet. App. 3a.

Vitolo appealed, arguing that under the California Supreme Court's ruling in *Iskanian v. CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), and the Ninth Circuit's decision in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), the arbitration agreement was not enforceable as to her PAGA claims; she did not appeal the arbitrator's findings as to the alleged labor code violations. Pet. App. 1a-2a. In a one-paragraph, unpublished decision, the Ninth Circuit vacated the district court's ruling and remanded for trial on the representative PAGA

claims. *Id.* Bloomingdale's filed a Petition for a Writ of Certiorari with this Court on March 9, 2017.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Relying on a state rule derived from *Iskanian v. CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), the Ninth Circuit below refused to enforce an arbitration agreement as written because it contained a representative action waiver. In *Iskanian*, the California Supreme Court held that such a waiver impermissibly prevents employees subject to arbitration from bringing a representative action under the state's Private Attorneys General Act (PAGA), Cal. Lab. Code §§ 2698 *et seq.*, in violation of state public policy and therefore is invalid.

The Ninth Circuit subsequently held in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), that the *Iskanian* rule is one of general applicability and thus is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as interpreted by this Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). To the contrary, the *Iskanian* rule cannot be reconciled with *Concepcion* and directly conflicts with the FAA, which expresses a federal policy – reaffirmed repeatedly in this Court's decades of FAA jurisprudence – favoring the arbitration of private disputes in accordance with the terms agreed upon by the parties. Accordingly, the petition should be granted and the decision below reversed.

Agreements to arbitrate *must* be enforced as written, even if doing so would require the plaintiff to proceed individually, rather than as part of a larger class. In *Concepcion*, this Court invalidated a California state law (the “*Discover Bank* rule”) that

effectively imposed more stringent enforceability standards on arbitration agreements containing class waivers than applied to contracts generally. Yet under *Iskanian*, plaintiffs are free to bypass a valid bilateral arbitration agreement as to any claim that is subject to arbitration but which also may implicate the state's PAGA.

To the extent that it impermissibly conflicts with the federal policy favoring enforcement of arbitration agreements as written – and *disfavoring* rules that interfere with arbitration's "fundamental attributes" – the *Iskanian* rule applied by the court below is functionally indistinguishable from the *Discover Bank* rule invalidated in *Concepcion*.

California courts, driven by a persistent, irrational hostility to arbitration, continue to devise creative means of curtailing enforcement of arbitration agreements in the employment and other contexts. The *Iskanian* rule is an especially significant example. EEAC's members report that enterprising plaintiffs and their attorneys increasingly have begun filing "PAGA-only" actions in an obvious effort to circumvent valid arbitration agreements. This dramatic increase in post-*Concepcion* PAGA litigation has placed a significant burden on California employers and the courts, thus defeating the primary benefits and advantages of individual arbitration.

In particular, the California public policy endorsed by the Ninth Circuit below makes it extremely difficult to enforce class and representative claim waivers contained in employment arbitration agreements, and thus undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes. Not only does it impose the very cost burdens and procedural

complexities that both employers and employees, by agreeing to arbitrate, sought to avoid, but it also undermines uniform application of multistate employers' ADR procedures.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE A DIRECT CONFLICT WITH THIS COURT'S DECISION IN *CONCEPCION* ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

State rules that encourage courts to invalidate written arbitration agreements in a manner that is inconsistent with the parties' intent and expectations create a chilling effect on employers' efforts to establish uniform dispute resolution programs, which in turn undermine the policy objectives underlying federal arbitration law. The failure to enforce arbitration agreements as written in California means that employers and employees will be deprived of the many well-established benefits afforded by an arbitral forum, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (citation omitted), and forced instead into a severely overburdened court system. Review of the decision below is essential to ensure full and faithful application of federal arbitration principles, as reinforced repeatedly by this Court.

A. California’s *Iskanian* Rule Categorically Precludes Waiver Of An Entire Class Of Representative State Law Claims, In Direct Contravention Of The FAA And This Court’s Longstanding Precedents, Including *Concepcion*

In a one-paragraph, unpublished Memorandum decision, the Ninth Circuit below vacated an order compelling individual arbitration of Respondent’s representative action on the ground that arbitration of such claims is inconsistent with state law, as interpreted by the California Supreme Court in *Iskanian v. CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014). *Iskanian* categorically prohibits, for public policy reasons, the enforcement of a class or representative action waiver as to any claim brought under the state’s Private Attorneys General Act. Because the so-called “*Iskanian* rule” conflicts directly with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and represents an impermissible departure from this Court’s decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and longstanding FAA jurisprudence, review and reversal of the decision below is warranted.

1. Under The FAA, Arbitration Agreements Are To Be Enforced In Accordance With Their Terms

The FAA “declares as a matter of federal law that arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2); see also *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). FAA Section 2 is the “primary substantive

provision” of the Act, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), which this Court has described as “reflecting both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’” *Concepcion*, 563 U.S. at 339 (citations omitted); see also *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

This Court has said “on numerous occasions that the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (citations omitted). See also *Concepcion*, 563 U.S. at 344 (“The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,’ a concern which ‘requires that [courts] rigorously enforce agreements to arbitrate’”) (citation omitted). Accordingly, “‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

2. Mandating The Availability Of Class Procedures For Certain Types Of Claims On Policy Grounds Where There Exists No Contractual Basis For Doing So Cannot Be Reconciled With This Court's Reasoning In *Concepcion*

In *Concepcion*, this Court invalidated a California state law (the “*Discover Bank*” rule) that effectively imposed more stringent enforceability standards on arbitration agreements containing class waivers than applied to contracts generally. There, the Court considered whether the “FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.” 563 U.S. at 336. Answering in the affirmative, it held that efforts to impose class arbitration on parties who have not expressly agreed to such procedures “interferes with fundamental attributes of arbitration” – including lower costs, speedier resolution, and less formality than judicial proceedings – and “thus creates a scheme inconsistent with the FAA.” *Id.* at 344. Such a rule, the Court found, also undermines the FAA’s expectation that agreements to arbitrate be enforced in accordance with their terms.

Indeed, *Concepcion* confirms that where the parties to an arbitration agreement have expressly waived the availability of certain procedures, such as class or representative arbitration, the FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218

(1985) (citations omitted). Accordingly, agreements to arbitrate on an individual basis must be enforced to the extent required to effectuate the FAA’s policy goals and objectives. Indeed, “*Concepcion*’s pro-arbitration policy is so strong that it virtually forecloses state regulation of mandatory arbitration clauses in consumer or employment contracts.” Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. Mich. J.L. Reform 1203, 1218 (2013).

Despite *Concepcion*, the California Supreme Court in *Iskanian* refused to enforce a waiver contained in a mandatory arbitration agreement that would have prevented the plaintiff from bringing a representative action under the state’s Private Attorneys General Act (PAGA), Cal. Lab. Code §§ 2698 *et seq.*² It observed that PAGA was enacted in an effort to supplement state agency labor law enforcement efforts constrained by resource limitations. In that regard, the court explained, the statute “was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state’s interests in enforcing the Labor Code,” 327 P.3d at 149, by disabling “one of the primary mechanisms” for ensuring compliance. *Id.* It thus held that “where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.” *Id.*

² PAGA authorizes any “aggrieved” employee to sue in a representative capacity for civil penalties resulting from violation by the individual’s employer of certain specified labor code provisions. Cal. Lab. Code § 2699.3.

**B. Any Purported “Conflict” Between
California State Law And The FAA
Must Be Resolved In Favor Of
Arbitration**

“Congress intended the FAA to apply in state courts, and to pre-empt state antiarbitration laws to the contrary.” *Circuit City Stores*, 532 U.S. at 122. As this Court observed in *Southland Corp. v. Keating*:

[W]hen Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ... we reaffirmed our view that the Arbitration Act “creates a body of federal substantive law” and expressly stated what was implicit in *Prima Paint*, i.e., the substantive law the Act created was applicable in state and federal court.

465 U.S. 1, 12 (1984). Thus, in establishing in the FAA a federal public policy favoring arbitration, Congress “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Id.* at 10.

Remarkably, California courts have largely disregarded those principles, creating and maintaining entire bodies of case law (both prior to and since *Concepcion*) designed to restrict the enforcement of arbitration agreements in various context. *See, e.g., McGill v. Citibank, N.A.*, __ P.3d __, 2017 WL 1279700 (Cal. Apr. 6, 2017); *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *as recognized in Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014); *Discover Bank v. Superior Court*, 113 P.3d 1100

(Cal. 2005), *overruled by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003), *superseded by statute*, Federal Arbitration Act, 9 U.S.C. §§ 1-16, *as recognized in Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (2000), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), *superseded by statute*, Federal Arbitration Act, 9 U.S.C. §§ 1-16, *as recognized in Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013).

In *Iskanian*, for instance, the California Supreme Court sought to justify the conclusion that its prohibition on PAGA waivers was not inconsistent with the FAA by asserting that the FAA seeks to preserve arbitration only of *private* disputes, and PAGA actions brought on the state's behalf are, essentially, *public* enforcement actions. 327 P.3d at 385. As this Court observed over 35 years ago, however,

the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration.

Gilmer v. Interstate / Johnson Lane Corp., 500 U.S. 20, 28-29 (1991).

Furthermore, under the Supremacy Clause of the U.S. Constitution, state rules that conflict with federal law are invalid, and must yield. Thus, because the

FAA “is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act ..., the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ([T]he Judges in every State shall be bound’ by ‘the Laws of the United States’).” *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); see also *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013) (“[A]s bluntly stated by Justice Kagan in her dissent in *Italian Colors*, ‘We have no earthly interest (quite the contrary) in vindicating’ a state law”) (citation omitted). For that reason, *Iskanian*’s reliance on public policy considerations to justify declaring representative PAGA actions categorically unwaivable is unfounded. Indeed, to the extent that the *Iskanian* rule is based in part on a desire to supplement underfunded state enforcement activity by private action, its rationale already has been rejected by this Court in a related context. See *Italian Colors*, 133 S. Ct. at 2312 (“Truth to tell, our decision in *AT&T Mobility* all but resolves this case. ... We specifically rejected [there] the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system’”) (citation and footnote omitted).

Regrettably, the California courts have exhibited little interest in federal preemption principles, at least insofar as binding arbitration is concerned.

[E]specially in the context of employment arbitration agreements, the California courts have remained undeterred by the mere Supremacy Clause in their efforts to protect the public interest and the interest of workers. Specifically, they have prohibited whole categories of employment claims from arbitration imposed by the employer as a condition of employment. Indeed,

in a jurisprudence that has been characterized by its creativity if not willful blindness to U.S. Supreme Court precedents, the California Supreme Court has created a series of ... doctrines each of which from its inception has been of dubious validity from a preemption standpoint.

E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 16-17 (2015) (footnote omitted). If for no other reason, this Court should grant the petition to confirm that federal law *always* preempts conflicting state law, no matter how laudable the state's underlying goals and intents.

II. ISKANIAN REFLECTS A PERVASIVE, UNFOUNDED HOSTILITY TO ARBITRATION THAT CALIFORNIA COURTS AND LEGISLATORS WILL CONTINUE TO EXHIBIT, TO THE DETRIMENT OF EMPLOYERS AND EMPLOYEES ALIKE, UNLESS AND UNTIL ADMONISHED DIRECTLY BY THIS COURT

A. Absent Action By This Court, California's Persistent Hostility To Arbitration Is Likely To Continue Unabated

Fundamentally, the policy expressed in *Iskanian* reflects the state court's persistent hostility to employment arbitration, which runs counter to the strong federal policy favoring it as an effective and efficient means of resolving private disputes. This Court has reaffirmed repeatedly that a principal congressional objective in enacting the FAA was to curb "widespread judicial hostility to arbitration

agreements.” *Concepcion*, 563 U.S. at 339; *see also Gilmer*, 500 U.S. at 24; *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). Indeed, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Mitsubishi*, 473 U.S. at 626-27. And yet California courts remain deeply suspicious of arbitration and seek to invalidate agreements to arbitrate seemingly at every opportunity.

Without an appropriate course-correction by this Court, California invariably will continue (as it has done not only in the years since *Concepcion* was decided, but also for decades prior thereto) to enforce rules meant to curtail enforcement of arbitration agreements, especially those containing waivers of class or representative actions, out of an antiquated mistrust of arbitration as a legitimate means of dispute resolution. California’s *Iskanian* rule is an especially significant example, but there are more.

In 2015, for instance, the California state legislature passed a measure that would have categorically prohibited the use of predispute arbitration agreements as a condition of employment. A.B. 465 (Cal. 2015). It provided:

Any waiver of any legal right, penalty, remedy, forum, or procedure for a violation of [the Labor Code] that is required as a condition of employment shall be deemed involuntary, unconscionable, against public policy, and unenforceable... This section shall apply to any agreement to waive any legal right, penalty, remedy, forum or

procedure for a violation of the code, including an agreement to accept private arbitration

Id. (§ 2(d),(f)).³ California Governor Edmund G. (“Jerry”) Brown Jr. vetoed the bill, calling it out for what it was: an unapologetic attempt, in direct contravention of the FAA, to “outlaw the use of mandatory arbitration agreements as a condition of employment, making California the only state in the country to have this particular prohibition.” Edmund G. Brown Jr., *A.B. 465 Veto Message* (Oct. 11, 2015).⁴ He expressed the view that such a “blanket ban” on predispute arbitration is a “far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act (“FAA”).” *Id.* In addition, he said:

Recent decisions by both the California and United States Supreme Courts have found that state policies which unduly impede arbitration are invalid. Indeed, the U.S. Supreme Court is currently considering two more cases arising out of California courts involving preemption of state arbitration policies under the FAA. Before enacting a law as broad as this, and one that will surely result in years of costly litigation and legal uncertainty, I would prefer to see the outcome of those cases.

*Id.*⁵

³ Available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0451-0500/ab_465_bill_20150831_enrolled.pdf.

⁴ Available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0451-0500/ab_465_vt_20151011.html.

⁵ The two Supreme Court cases referenced above appear to be *CarMax Auto Superstores Cal., LLC v. Areso* (2015) (*cert. denied*) and *MHN Government Services, Inc. v. Zaborowski*, 136 S. Ct. 1539 (2016) (*cert. dismissed*).

**B. Arbitration Of Employment Disputes
Benefits Both Employees And
Employers**

The sort of outmoded hostility exhibited by California lawmakers to bilateral employment arbitration is particularly misplaced, given the mutual benefits and advantages it offers. From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.⁶

In addition to increasing the costs, adjudicating claims on a class-wide basis brings a level of complexity that undermines many of the core advantages of arbitration. Among other things:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the

⁶ Furthermore, despite the *Iskanian* court's contrary suggestion, an individual's waiver of representative PAGA claims will not affect the ability of other private parties not subject to arbitration agreements or public enforcement agencies to pursue representative relief. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (allowing Equal Employment Opportunity Commission to seek victim-specific relief in court – whether on behalf of an individual or an entire class – even when employees have signed an arbitration agreement).

often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured ... rather than consensual, is inconsistent with the FAA.

Concepcion, 563 U.S. at 348.

Perhaps even more so than other types of claims, class-wide arbitration of employment disputes “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Stolt-Nielsen*, 559 U.S. at 685. As this Court pointed out in *Stolt-Nielsen*:

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure ... no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. ... And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id. at 686 (citations omitted).

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing an arbitration to proceed on a class-wide basis where the parties have agreed not to do so

defeats most, if not all, of those aims. Besides the statutory mandate that arbitration agreements be enforced according to their terms, “for parties to employment contracts ... there are real benefits to the enforcement of arbitration agreements.” *Circuit City Stores*, 532 U.S. at 122-23. As this Court observed over a decade ago:

We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Id. at 123 (citation omitted).

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

April 2017