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

RESPONDENT'S BRIEF IN OPPOSITION

GLENN A. DANAS
CAPSTONE LAW APC
1875 Century Park East
Suite 1000
Los Angeles, CA 90067
(310) 556-4811

MONICA BALDERRAMA
INITIATIVE LEGAL GROUP APC
1801 Century Park East
Suite 2500
Los Angeles, CA 90067
(310) 556-5637

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent

May 2017

QUESTION PRESENTED

Whether the Federal Arbitration Act requires enforcement of agreements waiving employees' rights to assert representative claims under California's Private Attorneys General Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes and Rules:

Other:

INTRODUCTION

California's distinctive Private Attorneys General Act (PAGA), Cal. Lab. Code §§ 2698 *et seq.*, allows an employee aggrieved by a violation of California's labor laws to bring a form of *qui tam* action on the state's behalf to recover civil penalties payable mostly to the state and partly to the plaintiff and other victims. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), the California Supreme Court held that an arbitration clause may not prospectively waive an employee's entitlement to bring PAGA claims in some forum, and that the Federal Arbitration Act (FAA) does not require enforcement of such waivers. The United States Court of Appeals for the Ninth Circuit agreed in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (2015), that the FAA does not preempt *Iskanian*'s holding that the right to bring a PAGA claim is not waivable. This Court denied certiorari not only in *Iskanian*, but also in at least three later cases challenging its holding.

Bloomingdale's is the latest petitioner to ask this Court to decide whether the FAA requires enforcement of agreements waiving employees' entitlement to bring claims as representatives of the state under PAGA. That question, on which there is no split of state or federal appellate authority, does not merit review now any more than it did on the four earlier occasions when the Court denied petitions presenting it. Indeed, the absence of conflict is even more evident now than it was then.

Nor is there any more basis now than then for asserting that the FAA requires enforcement of agreements that do not purport to require arbitration of

PAGA claims, but to *waive* them altogether. This Court has never held that an arbitration agreement can be used to waive the right to bring a particular type of claim under either federal or state law. As the Court has repeatedly stated, the FAA makes agreements to arbitrate enforceable—not agreements that prohibit assertion of claims in any forum. The Court has never remotely suggested that the FAA requires enforcement of a waiver of a private party's ability to pursue a *qui tam* recovery on behalf of a state when the waiver is contained in an agreement that requires arbitration of other claims. The attempt by Bloomingdale's and its amici to transform the FAA into a vehicle for eliminating undesired liabilities under state law does not merit this Court's attention.

Bloomingdale's also overlooks substantial reasons why this case would be a poor choice for review even if the PAGA waiver question might otherwise eventually merit consideration by this Court. The decision below is an unpublished, interlocutory ruling vacating an order dismissing the plaintiff's claims. It does not definitively resolve whether the PAGA claims can proceed. It remands for further consideration of the intervening decisions in *Iskanian* and *Sakkab*, as well as an intermediate California appellate court decision bearing on a distinct issue: whether the plaintiff has standing to pursue a PAGA action and how that question should be resolved. The latter issue has not yet been determined, and its resolution could have a significant bearing on whether the waiver issue Bloomingdale's raises will ultimately need to be decided in this case.

STATEMENT

1. The Private Attorneys General Act

PAGA provides a unique enforcement method for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share going to the individual plaintiffs and other employees. Before PAGA's enactment in 2003, only the state could obtain such penalties. *See Iskanian*, 327 P.3d at 145–46. PAGA authorizes an "aggrieved employee" to recover penalties for Labor Code violations committed against herself and other employees in a representative civil action. Cal. Lab. Code § 2699(g). Penalties recovered under PAGA "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code …; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

"A PAGA representative action is … a type of *qui tam* action." *Iskanian*, 327 P.3d at 148. PAGA actions differ from classic *qui tam* actions in that "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Id.* Still, because PAGA aims to deter and punish Labor Code violations rather than compensate individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id.* Every PAGA action, whether implicating violations involving one or a thousand employees, is a "representative" action on behalf of the state. *Id.* at 151.

Before filing a PAGA action, an employee must give notice of the claimed violations to the employer

and the California Labor and Workforce Development Agency. Cal. Lab. Code § 2699.3(a)(1). The agency authorizes the employee to sue on the state's behalf if it fails to respond within 65 days, responds that it does not intend to investigate, or investigates and does not issue a citation within 185 days. *Id.* §§ 2699.3(a)(2), 2699(h).

PAGA actions need not be prosecuted as class actions and are commonly maintained by individual plaintiffs. *See Arias v. Super. Ct.*, 209 P.3d 923, 929–34 (Cal. 2009). They require neither class certification nor notice to other employees. *See id.* Other employees are bound by a PAGA adjudication *only* with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Id.* at 933. A PAGA judgment's effect rests not on the principles that make class action judgments binding on class members, *see Smith v. Bayer Corp.*, 564 U.S. 299, 312–13 (2011), but on a very different basis: "When a government agency is authorized to bring an action … a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party." *Arias*, 209 P.3d at 934 (citing Restatement (2d) of Judgments § 41(1)(d), cmt. d (1982)).

PAGA's creation of a right of action in which an individual may recover penalties for the state reflected the legislature's determination that "adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys gen-

eral, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." *Id.* at 929–30. Thus, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." *Id.* at 933.

In short, a PAGA action is not a class action. It is "representative" in that the plaintiff represents the state's interest in imposing civil penalties for violations suffered by the plaintiff and other employees. The action "is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the labor code." *Iskanian*, 327 P.3d at 151 (emphasis in original).

2. *Iskanian*

The plaintiff in *Iskanian* filed both a putative class action and a representative claim under PAGA, based on alleged violations of California wage-and-hour laws. The defendant moved to compel arbitration under an agreement that barred both class actions and representative actions. The plaintiff argued that the class-action ban was invalid under the California Supreme Court's decision in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), which had held class bans in employment arbitration agreements unenforceable in some circumstances; that the ban on class and representative actions violated federal labor laws; and that the employer had waived arbitration. The plaintiff also argued that the ban on representative actions was unenforceable because it would completely foreclose pursuit of a PAGA claim.

After a court of appeal enforced the arbitration agreement, the California Supreme Court in *Iskanian* largely affirmed but reversed in one respect. The court concluded that *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), required it to overrule *Gentry* and enforce the class-action ban. The court also held that the class-action ban did not violate federal labor laws, based largely on the reasoning of *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). And the court held that the defendant had not waived arbitration because it would have been futile to try to compel arbitration before *Concepcion*.

All seven justices, however, agreed that the agreement was unenforceable only to the extent it purported to bar the plaintiff from pursuing a PAGA claim in any forum. The court began by holding that, given the importance of PAGA in enforcing California's labor laws, employment agreements requiring employees prospectively to waive the right to bring PAGA representative actions are unenforceable under state law. The court then held that the FAA does not require enforcement of such purported waivers.

The court's five-justice majority opinion on this point rested largely on the court's state-law holding that the real party in interest under PAGA is the state, on whose behalf the PAGA plaintiff seeks penalties. As the court observed, any PAGA action is by definition a representative action on the state's behalf. *Iskanian*. 327 P.3d at 151. Thus, enforcing an employment agreement banning representative actions would prevent the state from pursuing its claim through the agent authorized by law to represent it: the PAGA plaintiff. Because "a PAGA action is a dis-

pute between an employer and the state Labor and Workforce Development Agency," *id.* at 149, and because the state is not a party to the agreement invoked to bar the claim, the court held that permitting the PAGA action to proceed would not conflict with the FAA's fundamental requirement that private arbitration agreements be enforced as between the parties, *id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Having held that a PAGA claim must be available in "some forum," *id.* at 155, the court remanded for consideration of whether the PAGA claims in *Iskanian* would be arbitrated or litigated in court.

Justices Chin and Baxter concurred in all aspects of the judgment. As to the PAGA waiver, the concurring justices relied on this Court's precedents stating that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* at 157 (quoting *American Express*, 133 S. Ct. at 2310). Based on this "analysis firmly grounded in high court precedent," the concurring justices concluded that "the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action *in any forum*." *Id.* at 158 (emphasis in original).

The employer in *Iskanian* filed a petition for certiorari claiming that the California court's holding was preempted by the FAA. This Court denied certiorari. 135 S. Ct. 1155 (2015). Several months later, the Court denied another petition for certiorari raising an FAA preemption challenge to *Iskanian*'s holding in a case where the California Supreme Court had applied *Iskanian*. *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015).

3. *Sakkab*

Later that year, in *Sakkab v. Luxottica Retail North America, Inc.*, the Ninth Circuit agreed with the California Supreme Court that the FAA does not preempt *Iskanian*'s prohibition on waivers of the right to bring PAGA representative claims. 803 F.3d at 429 (M. Smith, J.). The court held that the *Iskanian* rule falls within the FAA's savings clause, which makes agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Applying this Court's teaching that "a state contract defense must be 'generally applicable' to be preserved by § 2's saving clause," 803 F.3d at 432 (quoting *Concepcion*, 563 U.S. at 339), the court held that the *Iskanian* rule is "generally applicable" because it "place[s] arbitration agreements on equal footing with non-arbitration agreements." *Id.* *Iskanian*, the court held, "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.*

The *Sakkab* court further concluded that *Iskanian* does not conflict with the FAA's purposes. The court recognized that the FAA's fundamental purpose is to overcome judicial hostility to arbitration and that it "therefore preempts state laws prohibiting the arbitration of specific types of claims." *Id.* at 434 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012), and *Preston v. Ferrer*, 552 U.S. 346, 356–59 (2008)). *Iskanian*, however, "expresses no preference" as to whether PAGA claims "are litigated or arbitrated." *Id.* *Iskanian* "provides only that representative PAGA claims may not be waived outright" and "does not prohibit the arbitration of any type of claim." *Id.*

Nor, *Sakkab* held, does *Iskanian* "interfere[] with arbitration." *Id.* (quoting *Concepcion*, 563 U.S. at 346). In this respect, the rule prohibiting waiver of PAGA claims is quite unlike the rule at issue in *Concepcion*, under which waivers of class-action procedures were deemed unconscionable. *Concepcion* held that rule to be preempted because it "'interefere[d] with fundamental attributes of arbitration,' by imposing formal classwide arbitration procedures on the parties against their will." *Id.* at 435 (quoting *Concepcion*, 563 U.S. at 344). By contrast, "the 'fundamental[]' differences between PAGA actions and class actions" render *Concepcion*'s concerns inapplicable to the *Iskanian* rule. *Id.* (quoting *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014)).

As *Sakkab* explained, a class action is a "procedural device" in which individual claims belonging to multiple plaintiffs are adjudicated together, creating the necessity for formal procedures such as class certification, classwide notice, and opt-out rights, to protect each class member's rights with respect to his or her individual claim. *Id.* "By contrast, a PAGA action is a statutory action" in which the state, represented by the employee who brings the action "as the proxy or agent of the state's labor law enforcement agencies," litigates one-on-one against the defendant to recover penalties "measured by the number of Labor Code violations committed by the employer." *Id.* (citations omitted). Because the plaintiff is not employing a procedure for aggregating claims belonging to other employees, but is pursuing the state's claims for penalties, "there is no need to protect absent employees' due process rights in PAGA arbitrations," and "PAGA arbitrations therefore do not require the

formal procedures of class arbitrations." *Id.* at 436. Thus, "prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs." *Id.* Enforcing such a waiver would not preserve fundamental attributes of arbitration, but would "effectively … limit the penalties an employee-plaintiff may recover on behalf of the state." *Id.*

Sakkab acknowledged that the liabilities defendants incur for PAGA violations may be large, and that some defendants might hesitate to agree to arbitrate such high-stakes claims. *Id.* at 437. The court reasoned, however, that "the FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." *Id.* "Nor … would the FAA require courts to enforce a provision limiting a party's liability in such an action, even if that provision appeared in an arbitration agreement." *Id.* (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.)). The court pointed out, for example, that antitrust claims have high stakes and are complex and time-consuming to resolve, but this Court has nonetheless held them subject to arbitration, and the FAA would certainly not require enforcement of an agreement to waive antitrust claims. *Id.* at 438. Likewise, the court found nothing in the FAA that preempted a rule prohibiting parties "from opting out of the central feature of the PAGA's private enforcement scheme—the right to act as a private attorney general to recover the full measure of penalties the state could recover." *Id.* at 439.

Finally, the court observed that its conclusion was "bolstered by the PAGA's central role in enforcing

California's labor laws." *Id.* The court invoked this Court's instruction that "[i]n all pre-emption cases' we must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Here, the state exercised its "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State," *id.* (quoting *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985)), by "creating a form of qui tam action" to supplement the state's limited enforcement resources. *Id.* "The FAA," the court concluded, "was not intended to preclude states from authorizing qui tam actions to enforce state law," nor to "require courts to enforce agreements that severely limit the right to recover penalties" in such actions. *Id.* at 439–40.

After *Sakkab* was decided, this Court denied certiorari in two more cases seeking review of whether the FAA preempts *Iskanian*. *Apple Am. Group, LLC v. Salazar*, 136 S. Ct. 688 (2015); *Carmax Auto Superstores Cal., LLC v. Areso*, 136 S. Ct. 689 (2015). Not long after, the Ninth Circuit denied a petition for rehearing en banc in *Sakkab*, with no judge requesting a vote on the petition by the full court.

4. Proceedings in this case

This case began in 2009, when Nancy Vitolo, a former Bloomingdale's employee, filed an action against Bloomingdale's in a California state court for a range of labor code violations, including denial of overtime, meal breaks, and rest breaks; unlawful wage deductions; failure to pay minimum wages; untimely payment of wages; and non-compliant wage

statements. Ms. Vitolo initially brought the case as a prospective class action seeking damages for similarly situated employees. After Bloomingdale's removed the action to federal court under the Class Action Fairness Act, she amended her complaint to add a PAGA claim for penalties on behalf of the state.

Following denial of a motion for class certification, and after this Court heard oral argument in *Concepcion*, Bloomingdale's filed a motion to compel arbitration only of Ms. Vitolo's individual claims under an arbitration provision in her employment agreement. The agreement prohibited any class or collective actions, which it defined broadly to include claims brought by "representative members of a large group." Pet. App. 19a. Bloomingdale's took the position that the provision barred Ms. Vitolo from pursuing PAGA claims for statutory penalties. In response, Ms. Vitolo argued that a waiver of PAGA claims was unenforceable. In its reply, Bloomingdale's argued that the arbitration agreement barred Ms. Vitolo from asserting representative claims under PAGA both in arbitration and in court.

After this Court decided *Concepcion*, the district court granted Bloomingdale's motion to compel arbitration and stayed the case. In the fall of 2012, Ms. Vitolo filed a demand to arbitrate her individual damages claims. In early 2014, the arbitrator issued an award in favor of Bloomingdale's.

Neither party sought to vacate the award. The district court then entered judgment against Ms. Vitolo on all the claims asserted in the complaint. Ms. Vitolo appealed the judgment.

On appeal, Ms. Vitolo contended that the district court had erred in entering judgment against her on

her PAGA representative claims after compelling arbitration only of her individual, non-representative claims. That decision amounted to enforcement of an agreement waiving PAGA representative claims in violation of the then-recent decision in *Iskanian*. Bloomingdale's defended the entry of judgment on the PAGA claims on two principal grounds. First, it argued that Ms. Vitolo lacked standing under PAGA because the arbitrator's decision necessarily held that she had not been subject to any labor code violations and thus was not an "aggrieved employee." Second, it argued that *Iskanian*'s anti-waiver holding was preempted by the FAA. On the former point, Ms. Vitolo's reply brief argued that the arbitrator's decision did not establish that she had not suffered violations as defined under the Labor Code, but only that she had not incurred compensable damages.

While the appeal was pending, the Ninth Circuit decided *Sakkab*. In addition, a panel of the California Court of Appeal decided *Perez v. U-Haul Co. of California*, 207 Cal. Rptr. 3d 605 (2016), which held that when an arbitration agreement contains an invalid waiver of PAGA representative claims, the issue of PAGA standing may not be severed from the PAGA representative claims and forced into arbitration.

After hearing argument, the Ninth Circuit panel issued a unanimous, two-page, unpublished order vacating the judgment and remanding for further proceedings in light of *Iskanian*, *Sakkab*, and *Perez*. Pet. App. 1a–2a.

REASONS FOR DENYING THE WRIT

I. The procedural posture of this case makes it a poor choice for review.

Recognizing that the Court has repeatedly declined to address the question presented, Bloomingdale's asserts that this case is "a better vehicle for resolving the issue than any previous case" because when the earlier petitions were filed the issue was "still percolating in the Ninth Circuit and federal district courts." Pet. 14. In fact, the Court twice denied certiorari *after* the Ninth Circuit's decision in *Sakkab*—in *Apple American*, 136 S. Ct. 688, and *Carmax*, 136 S. Ct. 689.

Bloomingdale's also wrongly states that "the decision below squarely presents the issue because it rests entirely on the viability of the holdings in *Iskanian* and *Sakkab*." Pet. 14. That assertion misstates or misunderstands the case's posture. Although "respondent did not challenge below the enforceability of her agreement to arbitrate on any other ground," *id.*, Bloomingdale's *defended* the district court's judgment on another ground: It asserted that Ms. Vitolo lacks standing under PAGA because the arbitration award, in its view, demonstrates that she is not "aggrieved" by any Labor Code violations.

In vacating and remanding for further consideration in light not only of *Iskanian* and *Sakkab*, but also of *Perez*, the Ninth Circuit did not definitively resolve whether Ms. Vitolo's PAGA claims may proceed. The court's citations of *Iskanian* and *Sakkab* indicate that under California law and Ninth Circuit precedent, the judgment cannot be sustained on the ground that the arbitration agreement was a valid waiver of the right to bring PAGA representative

claims. But the citation of *Perez* does not dictate an outcome on standing, although it lends support to Ms. Vitolo's view that the arbitration results do not resolve that question. The district court has yet to rule on whether Ms. Vitolo's PAGA claims may proceed and, if so, what the scope of those claims may be. The court's resolution of that issue could affect whether the PAGA waiver question is ultimately case-dispositive.

That another potentially dispositive threshold issue remains undecided, and that any number of merits outcomes could obviate the need to decide the PAGA issue or better inform a decision, counsels strongly in favor of the Court's normal practice of not taking up cases in an interlocutory posture. *See Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

The matter might be different if the lower courts had refused a request to compel arbitration, because such decisions have been treated as final. But Bloomingdale's motion to compel arbitration was granted, and Bloomingdale's received the right to arbitrate all the issues it contended were arbitrable. Its argument is that the PAGA claims were contractually waived and thus subject to *dismissal*. The Ninth Circuit's remand of that issue and others for further proceedings is no more final than a similar disposition of any other request for a merits dismissal.

II. The question presented does not merit review.

A. There is no conflict among the lower courts.

Like the petitioners in *Iskanian* and the other cases in which this Court has denied certiorari on the question presented here, Bloomingdale's can point to no arguable conflict among federal appellate or state supreme courts over whether the FAA mandates enforcement of an agreement to waive PAGA claims. Nor does Bloomingdale's claim a conflict over the more general question whether the FAA preempts state laws providing that arbitration clauses may not waive state *qui tam* claims. *Iskanian* and *Sakkab* are the only relevant precedents addressing the application of *Concepcion* and *American Express* in this unusual state-law context, and their outcomes are in full agreement. This Court's denial of review in *Iskanian* made sense in the absence of any conflict on what was then a question of first impression at the appellate level. In light of the Ninth Circuit's agreement with *Iskanian* in *Sakkab*, there is still less reason to review the issue now, particularly in the context of an order that merely remanded for further consideration in light of *Iskanian* and *Sakkab*.

Bloomingdale's points out that a number of district courts in the Ninth Circuit had held, before *Sakkab*, that the FAA required enforcement of PAGA waivers contained in arbitration clauses. Pet. 22–23. Divergent district court opinions, however, provide no basis for review by this Court when the matter has been settled at the appellate level. The view of the district courts was hardly one-sided, moreover: A string of better-reasoned district court opinions antic-

ipated *Sakkab*'s holding.[1] And even district courts that declined to follow *Iskanian* before *Sakkab* conceded that decisions following *Iskanian* were "thorough and well reasoned," *Nanavati v. Adecco USA*, 99 F. Supp. 3d 1072, 1081 (N.D. Cal. 2015). Thus, one decision cited by Bloomingdale's "recognize[d]" that the argument against preemption of PAGA claims is supported by the fact that, unlike a class action waiver, which "allow[s] recovery of a statutory right on an individual basis, the waiver of a PAGA action may prevent a plaintiff from asserting a statutory right." *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1087 (E.D. Cal. 2014). Such respectful disagreement among district court judges within a circuit suggests no need for further review once the court of appeals has resolved the question.

Should other circuits or state supreme courts issue conflicting opinions either in PAGA cases arising outside California, or in cases arising under similar laws of other states, this Court may in the future find review appropriate.[2] Conversely, if such hypothetical

---

[1] *See Alvarez v. AutoZone, Inc.*, 2015 WL 13122313 (C.D. Cal. April 13, 2015); *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968 (N.D. Cal. 2015); *Hernandez v. DMSI Staffing, LLC*, 79 F. Supp. 3d 1054 (N.D. Cal. 2015), *aff'd*, __ F. App'x __, 2017 WL 631692 (9th Cir. 2017); *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211 (C.D. Cal. June 23, 2013); *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1069 (C.D. Cal. 2011); *Urbino v. Orkin Servs. of Cal.*, 882 F. Supp. 2d 1152, 1167 (C.D. Cal. 2011), *vacated on other grounds*, 726 F.3d 1118 (9th Cir. 2013).

[2] The issue may arise in cases outside the Ninth Circuit because claims governed by California law, including PAGA claims, are litigated in other state and federal courts. *See*, *e.g.*,

(*Footnote continued*)

cases lead to congruent results and reasoning, review will remain unwarranted. Meanwhile, in light of the current agreement at the appellate level over the application of preemption principles to the unusual PAGA right of action, the reasons ordinarily justifying review by this Court are absent. *See* S. Ct. R. 10(b).

B. *Iskanian* is fully consistent with this Court's precedents.

Like the petitioner in *Iskanian* and the other petitions that followed it, Bloomingdale's seeks review principally on the theory that *Iskanian* and *Sakkab* conflict with this Court's FAA jurisprudence. Indeed, Bloomingdale's asserts that both the Ninth Circuit's and the California Supreme Court's decisions "defy" this Court's holdings. Pet. 12. But both *Sakkab* and the majority and concurring decisions in *Iskanian* carefully analyze this Court's decisions. They properly distinguish the Court's holdings that arbitration agreements prohibiting class action procedures are

---

Cohen v. UBS Fin. Servs., Inc., 799 F.3d 174, 180 (2d Cir. 2015) (not reaching issue because PAGA claims time-barred); *Westerfield v. Wash. Mut. Bank*, 2007 WL 2162989, at *4 (E.D.N.Y. July 26, 2007); *In re Bank of Am. Wage & Hour Employment Litig.*, 286 F.R.D. 572, 587 (D. Kan. 2012); *Zaitzeff v. Peregrine Fin. Group, Inc.*, 2010 WL 438158, at *2–3 (N.D. Ill. Feb. 1, 2010). Private attorney general provisions in laws of other states might raise similar issues. *Cf. Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d 957, 969 (Ohio Ct. App. Sept. 25, 2014) (discussing private attorney general provisions of Ohio's consumer laws); *Zuckman v. Monster Bev. Corp.*, 958 F. Supp. 2d 293 (D.D.C. 2013) (discussing private attorney general provisions of DC's Consumer Protection Procedures Act). Thus, if Bloomingdale's positions had merit, there would be ample opportunities for a conflict in authority to arise.

enforceable from the issue presented here, which is whether an arbitration clause can be used to prohibit altogether the assertion of a particular type of claim—and one belonging to the state at that.

Bloomingdale's argues that, in resolving that distinct issue in *Iskanian* and *Sakkab*, the lower courts misapplied this Court's precedents, but such arguments "rarely" justify a grant of certiorari. S. Ct. R. 10. This case is not one of those rare instances. *Iskanian* and *Sakkab* align with this Court's FAA jurisprudence, which fully supports the view that arbitration agreements may not be used to effect outright waivers of the ability to pursue a claim on behalf of the state. Bloomingdale's variations on the arguments made in previous petitions seeking review of the *Iskanian* issue do not demonstrate otherwise.

1. *Iskanian* and *Sakkab* reflect no hostility to arbitration.

As the court in *Sakkab* pointed out, "[t]he *Iskanian* rule does not prohibit the arbitration of any type of claim." 803 F.3d at 434. It merely requires that an employment agreement cannot prospectively waive an employee's right to bring a PAGA claim "in some forum." *Iskanian*, 327 P.3d at 155; *see also id.* at 159 (Chin, J., concurring). And it "expresses no preference regarding whether individual PAGA claims are litigated or arbitrated." *Sakkab*, 803 F.3d at 434. *Sakkab* likewise emphasizes that parties are "free[] to select informal arbitration procedures" to resolve PAGA claims for penalties on behalf of the state. *Id.* at 435. The decisions thus fully comport with the principles of such cases as *Marmet Health Care Center v. Brown*, 565 U.S. 530, *Perry v. Thomas*, 482 U.S. 483 (1987), and *Shearson/American Ex-*

press, Inc. v. McMahon, 482 U.S. 220 (1987), which emphasize that the FAA preempts a "categorical rule prohibiting arbitration of a particular type of claim." *Marmet*, 565 U.S. at 533.

Although Bloomingdale's chides the *Iskanian* majority for saying at one point that PAGA claims are "outside" the FAA, and some of its amici contend that *Iskanian*'s effect is to prevent arbitration of representative claims under PAGA, Bloomingdale's itself acknowledges that *Iskanian* did not hold that PAGA claims are *nonarbitrable*. Pet. 25. In any event, Bloomingdale's is not complaining that any court denied enforcement of an agreement to *arbitrate* PAGA claims. Bloomingdale's arbitrated all the issues that it contended were arbitrable. Its position throughout this litigation has been that, under its agreement, PAGA representative claims for penalties on behalf of the state may not be arbitrated *or* litigated in court. Bloomingdale's seeks to enforce not an agreement to arbitrate claims, but to *waive* them.[3]

The rule that such a waiver is unenforceable reflects no hostility to the FAA. The FAA makes agreements to arbitrate claims enforceable on the same terms as other contracts, but says nothing about making agreements to waive claims enforceable. *See* 9 U.S.C. § 2. A rule of law that allowed claims to be waived by other types of agreements but denied enforcement of waivers incorporated in arbitration clauses might be preempted by the FAA on

---

[3] For the same reason, disagreements among some lower federal courts over whether federal *qui tam* claims may be *arbitrated*, see Pet. 28–29, are, as Bloomingdale's itself concedes, not implicated by the waiver issue here.

the ground that it placed arbitration agreements on an "unequal 'footing'" with other contracts, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), or that it "invalidate[d] [an] arbitration agreement[] under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry*, 482 U.S. at 492 n.9. As *Sakkab* correctly recognized, however, *Iskanian* provides even-handedly that an employment agreement may not forbid employees to bring PAGA actions, whether or not the prohibition is in an arbitration clause. 803 F.3d at 432–33; *see Iskanian*, 327 P.3d at 133, 148–49. That holding falls well within the principle that the FAA does not preempt state laws concerning the "enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9; *see* 9 U.S.C. § 2 (making arbitration agreements "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

Moreover, the *Iskanian* opinion, as a whole, confirms that its holding concerning PAGA does not reflect hostility toward arbitration. Significant aspects of the *Iskanian* decision unambiguously favored arbitration. Applying *Concepcion*, the court explicitly overruled its decision in *Gentry* and held class-action prohibitions in employment arbitration agreements enforceable because class actions would "interfere[] with fundamental attributes of arbitration." *Iskanian*, 327 P.3d. at 137. *Iskanian* likewise rejected a challenge to arbitral class-action bans based on federal labor laws. *Id.* at 137–43.[4] And in holding that

---

[4] If the Court were to grant review here, it would have to consider the potential application to this case of the federal la-

(*Footnote continued*)

the defendant had not waived its right to arbitrate, *Iskanian* emphasized that "[i]n light of the policy in favor of arbitration, 'waivers are not to be lightly inferred.'" *Id.* at 143 (citation omitted).

Amidst all these rulings favorable to arbitration, *Iskanian*'s unwillingness to enforce the provision barring PAGA claims reflects not hostility to arbitration, but refusal to expand *approval* of arbitration to encompass agreements that waive claims—particularly claims belonging to the state. Indeed, the court's two staunchest pro-arbitration justices, Justices Chin and Baxter,[5] agreed that the holding that "the arbitration agreement is invalid insofar as it purports to preclude plaintiff … from bringing in any forum a representative action under [PAGA] … is not inconsistent with the FAA." *Id.* at 155 (Chin, J., concurring).

2. *Iskanian* does not impose procedures incompatible with arbitration.

The heart of Bloomingdale's petition is that although the *Iskanian* rule does not facially discriminate against arbitration, it effectively imposes procedures incompatible with arbitration, as did the ban

---

bor laws' protection of collective action by workers, which is at issue in three cases to be heard in October: *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, *Epic Systems Corp. v. Lewis*, No. 16-285, and *Ernst & Young LLP v. Morris*, No. 16-300. However, if the PAGA waiver issue does not merit review, there is no need to hold this petition for those cases, because *Iskanian*'s holding that PAGA claims are non-waivable presupposed that federal labor laws do *not* prevent enforcement of arbitration agreements waiving rights to engage in concerted action.

[5] Both justices, for example, dissented in *Gentry*. *See* 165 P.3d at 575 (Baxter, J., dissenting).

on class-action waivers struck down in *Concepcion*. *Sakkab* thoroughly, and correctly, rejected that argument, and Bloomingdale's disagreement with its analysis provides no reason for granting review.

In *Concepcion*, this Court held that California's rule against consumer contracts banning class actions "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA," 563 U.S. at 344, because it effectively "allow[ed] any party to a consumer contract to demand" classwide arbitration. *Id.* at 346. The Court held that classwide arbitration conflicted with the FAA because it fundamentally changed the nature of arbitration, requiring complex and formal procedures attributable to the inclusion of absent class members. *Id.* at 346–51.

As *Sakkab* and *Iskanian* explain, no such interference results from holding PAGA claims nonwaivable. "Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." *Iskanian*, 327 P.3d at 152. Arbitration as to private rights will proceed wholly unaltered by the California Supreme Court's opinion. The employer must only leave open some forum in which a PAGA *qui tam* plaintiff may pursue the state's claims for penalties. *See id.*

Moreover, even if PAGA claims are arbitrated, the arbitration process will not be fundamentally transformed "inconsistent[ly] with the FAA." *Concepcion*, 563 U.S. at 348. Although PAGA claims seek recoveries benefiting the state and other employees, they are not class proceedings, but bilateral ones between in-

dividual plaintiffs and defendants. *See Arias*, 209 P.2d at 929–34. The due-process protections of class certification, notice, opt-out rights, and the other procedures that concerned the Court in *Concepcion*, 563 U.S. at 348–50, are not features of PAGA proceedings. *See Sakkab*, 803 F.3d at 435–36. Although PAGA claims are unique in many ways, they are pursued bilaterally, and the California Supreme Court's holding that an employment agreement must allow them to be pursued in some forum does not improperly threaten the nature of arbitration, even if the forum ultimately provided is arbitration.

Bloomingdale's does not really contest the point that the class-action procedures that troubled the Court in *Concepcion* are not involved in PAGA cases. Indeed, Bloomingdale's acknowledges that fundamental differences between class actions and PAGA actions have been recognized not only in *Iskanian* and *Sakkab*, but also in cases holding that PAGA claims are not class actions under the Class Action Fairness Act—cases in which this Court has likewise denied review and whose holdings Bloomingdale's does not contest. *See Baumann*, 747 F.3d 1117; *Castro v. ABM Indus., Inc.*, 616 F. App'x 353 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 82 (2016).

Instead, Bloomingdale's central argument is that because PAGA claims involve large liabilities and complicated facts, arbitrating them will be slower and more complicated than arbitrating simpler claims, and the high stakes may also make parties hesitant to agree to arbitrate them. Bloomingdale's argument reduces to the proposition that if a state creates claims of liability that defendants find inconvenient or otherwise undesirable to arbitrate, the FAA entitles defendants to require prospective plain-

tiffs to waive those claims altogether. Bloomingdale's policy arguments, and those of its amici, make clear that their central concern is that PAGA creates excessive liabilities for California employers, and that employers should therefore be able to use the FAA to extinguish those liabilities.

As the *Sakkab* panel pointed out, however, *Concepcion* does not suggest that the FAA's purposes require transforming it into a vehicle for preempting any state-law right of action that involves large liabilities, is legally or factually complex, or is otherwise unappealing to arbitrate. Nor has any other decision of this Court, or any state supreme court or federal court of appeals, so held. *Concepcion* only prohibits states from mandating procedures that are incompatible with arbitration, not from creating claims that parties may not want to arbitrate. *See* 803 F.3d at 437–39. The FAA has nothing to do with allowing defendants to opt out of liabilities they find objectionable. Nothing in this Court's FAA jurisprudence suggests that the interests protected by the FAA include defendants' interests in extinguishing—as opposed to arbitrating—claims against them.

3. This Court's FAA decisions do not require enforcement of agreements that bar assertion of statutory rights.

As the concurring Justices in *Iskanian* pointed out, this Court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims. The FAA makes *agreements to arbitrate claims* enforceable; it does not provide for enforcement of agreements that claims *cannot be pursued at all*. Allowing defendants to excuse themselves from forms of liability—for ex-

ample, liability for specific kinds of claims, or particular forms of penalties allowed by state law, or injunctive relief—is not the FAA's objective.

This Court's decisions enforcing arbitration agreements thus repeatedly emphasize that arbitration involves choice of forums, not waiver of claims: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Waffle House*, 534 U.S. at 295, n.10; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *McMahon*, 482 U.S. at 229–30.

An agreement to arbitrate is thus not "a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Indeed, this Court has insisted it would "condemn[] … as against public policy" an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637, n.19.

American Express strongly underscores that an arbitration agreement purporting to waive PAGA claims is unenforceable. While holding that a class-action ban in an arbitration agreement was enforceable despite its *practical* effect of making particular claims too costly for the plaintiffs, 133 S. Ct. at 2312, *American Express* reiterated that arbitration agreements may not expressly waive statutory claims and remedies. As the Court explained, the principle that an arbitration agreement may not foreclose assertion of particular claims "finds its origin in the desire to

prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (emphasis added by Court). The Court added unequivocally: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.*

The Court's statements in *American Express* strongly support *Iskanian*'s outcome. A contractual ban on PAGA actions prospectively waives the right to pursue statutory remedies and flatly forbids the assertion of statutory rights under PAGA. *American Express* reaffirms that "elimination of the right to pursue [a] remedy," *id.* at 2311, remains off-limits for an arbitration agreement.

Bloomingdale's characterizes this argument as being based on the view that an arbitration agreement must allow "effective vindication" of rights, and it contends that the "effective vindication" doctrine is inapplicable to state-law claims. Pet. 24. But *Iskanian* and *Sakkab* do not suggest that an arbitration agreement can be disregarded merely because arbitration would not be a practically "effective" means of vindicating a state-law claim. Indeed, all the justices in *Iskanian* agreed that the interest in ensuring "effective vindication" of rights could not sustain the *Gentry* decision. But the defect in an agreement waiving PAGA claims is that it "*forbids* [the plaintiff] from asserting his statutory rights under PAGA in any forum." *Iskanian*, 327 P.3d at 127 (Chin, J., concurring) (emphasis added).

The principle that the FAA does not require enforcement of agreements that *forbid* assertion of claims applies equally to state and federal claims.

The Court's decisions, including *American Express*, have repeatedly stated that arbitration clauses may not waive claims without suggesting that state-law claims differ in this respect. Indeed, in *Preston v. Ferrer*, 552 U.S. 349 (2008), this Court held that an arbitration agreement was enforceable in part because the signatory "relinquishe[d] no substantive rights … California law may accord him." *Id.* at 359.

The non-waiver principle applies to state-law claims because the FAA makes agreements to *arbitrate* claims enforceable, 9 U.S.C. § 2, but provides no authorization for enforcement of agreements to *waive* claims regardless of their source. Thus, even if federal law does not itself *bar* the enforcement of a waiver of state-law claims in an arbitration clause, *see Sakkab*, 803 F.3d at 433 n.9, nothing in the FAA *provides for enforcement* of such a waiver. The FAA therefore does not conflict with state laws disallowing waivers.

Moreover, a state-law rule that employment contracts may not waive statutory claims is a general principle of state contract law applicable both to arbitration agreements and other contracts. Thus, such a rule is saved from preemption by the FAA's provision that an arbitration clause may be denied enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Bloomingdale's cites no holding of this Court that the FAA requires enforcement of an agreement to waive, as opposed to arbitrate, a claim.[6]

---

[6] Justice Kagan's dissent in *American Express* states that procedures incompatible with arbitration cannot be imposed on arbitration agreements to make it *practical* to pursue state-law

(*Footnote continued*)

Here, Bloomingdale's ban on PAGA representative actions precludes an employee from recovering even her own personal share of the statutory penalties that PAGA entitles her to pursue, as such penalties can be obtained only in a PAGA representative action. Nothing in *American Express*, *Concepcion* or any of this Court's rulings supports such use of an arbitration agreement to prohibit assertion of a claim for relief or suggests that the FAA preempts state law precluding enforcement of such an agreement. As the concurring justices in *Iskanian* recognized, this Court's decisions strongly support the view that an agreement that "purports to preclude [plaintiffs] from bringing a PAGA action *in any forum*" is unenforceable. *Iskanian*, 327 P.3d at 158 (emphasis in original).

4. This Court's FAA decisions do not require enforcement of agreements that strip states of police power to authorize enforcement actions on their behalf.

Iskanian held—as a matter of statutory construction of a state law—that the state is the "real party in interest" in PAGA actions. 327 P.3d at 151. The lion's share of the recovery goes to the state, which is bound by the outcome. An action for statutory penalties, whether brought by state officers or a PAGA *qui tam* plaintiff, is thus fundamentally "a dispute between an employer and the *state*," acting "through its agents." *Id*. Enforcing a waiver of PAGA claims in an employer's arbitration agreement would effectively

---

claims, *see* 133 S. Ct. at 2320, but does not say that an arbitration clause may *waive* a state-law claim.

impose that waiver on a governmental body that is not party to the agreement, and prevent the state from asserting its claims through a party its legislature deemed an appropriate representative.

Bloomingdale's contends that *Iskanian* was wrong on this point because of differences between representative actions and actions brought directly by the state, and because of what Bloomingdale's contends is the incoherence of allowing employees to agree to arbitrate the state's PAGA claims but not allowing them to waive such claims altogether. Those arguments, however, miss the point. Actions in which the state is entitled to 75 percent of the recovery are certainly the state's in a very real sense, regardless of the manner in which the state has chosen to exercise control over how they are brought. And it is perfectly coherent, and consistent with the terms and purposes of the FAA, to recognize that although an employee may be able to agree to arbitrate claims that she chooses to bring on the state's behalf, she must be permitted to bring a PAGA claim *in some forum* because the state may not be bound to a *waiver* to which it did not agree. *See Iskanian*, 327 P.3d at 155.

None of this Court's decisions enforcing arbitration agreements has suggested that such an agreement can waive the right to bring a claim on behalf of a state. As *Iskanian* correctly stated, this Court's "FAA jurisprudence—with one exception …—consists entirely of disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." 327 P.3d at 150. Moreover, the "one exception," *EEOC v. Waffle House*, "does not support [the] contention that the FAA preempts a PAGA action." *Id*. at 151.

Here, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract," or that it agreed to waive its claims, and "[i]t goes without saying that a contract cannot bind a nonparty." 534 U.S. at 294. Allowing the arbitration agreement here to preclude recovery of penalties on behalf of the state would "turn[] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies," *id.* at 295—the state's recourse to *qui tam* actions to enforce its laws. As *Iskanian* observed, "[n]othing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of *qui tam* action on behalf of the state for such remedies." 327 P.3d at 151. Indeed, none of this Court's decisions suggests such preemption.

Bloomingdale's argues that *Waffle House* does not compel the outcome below because its holding was that the governmental party itself could not be required to arbitrate claims that it brought and "controlled." Pet. 26. *Waffle House*'s emphasis on the government's control, however, reflected the fact that the claims at issue sought relief inuring entirely to the individual, so control was important to the characterization of the government as a real party in interest, *see* 534 U.S. at 290–91—unlike in this case, where the state gets the great bulk of any recovery. Moreover, while it may not compel the outcome as to PAGA waivers, *Waffle House*'s rejection of the notion that an arbitration agreement can waive a nonparty's statutory remedies, *id.* at 295, provides strong support for *Iskanian's* holding. Nothing in *Waffle House* contradicts *Iskanian*.

Nor does *Iskanian* open the door to widespread circumvention of *Concepcion* by allowing states simply to relabel class actions, which seek aggregate relief

on individual rights of action, as actions on behalf of the state. When 75 percent of the recovery in an action will go directly to the state, calling the state the real party in interest "is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Iskanian*, 327 P.3d at 152.

Nothing in *Iskanian* suggests that a state could slap the same label on a private action that did not seek relief for the state simply because the action advanced some generic interest in enforcement of state law. Bloomingdale's contrary assertions ignore that the state's status as the real party in interest rests not just on an "enforcement interest in the private litigation," Pet. 29, but on the state's direct stake in the case. Indeed, *Iskanian* expressly stated that it would *not* allow a state to "deputiz[e] employee A to bring a suit for the individual damages claims of employees B, C, and D." 327 P.3d at 152. An action seeking such "victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a class action … [and] could not be maintained in the face of a class waiver." *Id.*

Bloomingdale's and its amici cite articles suggesting that similar statutes might be adopted by California and other states for other uses. But they point to no actual trend toward adoption of such statutes, let alone any statutes that merely relabel private remedies as public ones. The absence of any such examples no doubt reflects that states consider carefully whether to delegate pursuit of their claims to private parties. *Iskanian*'s holding, which is limited to instances where states have made that considered choice, threatens no end runs around the FAA.

By contrast, Bloomingdale's position would severely limit the state's ability to pursue its claims. By extracting similar agreements from all its employees, Bloomingdale's can, if its preemption argument is accepted, successfully immunize itself from liability under PAGA. Allowing employers to opt out of liability for PAGA penalties would overturn California's legislative judgment that it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations." *Arias*, 209 P.3d at 929. The arguments of Bloomingdale's and its amici openly express their desire to overturn that judgment, but the FAA provides no basis for doing so.

Holding that a federal statute aimed at enforcing agreements to resolve private disputes preempts a state's ability to assert its claims against those who violate its laws would violate fundamental preemption principles. As *Iskanian* pointed out, this Court has repeatedly held that "the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." 327 P.3d at 152 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)). Enforcing wage-and-hour laws falls squarely within those police powers, and the structure of a state's law enforcement authority is central to its sovereignty. *Id.* (citing *Metro. Life Ins. Co. v. Mass.*, 471 U.S. at 756; *Printz v. United States*, 521 U.S. 898, 928 (1997)).

The FAA evinces no manifest purpose to displace actions brought on behalf of states for statutory penalties. Its purpose is to render arbitration agreements in contracts affecting commerce enforceable as between the contracting parties. It embodies no clear purpose to go beyond enforcing agreements affecting

private interests and interfere with "*the state's* interest in penalizing and deterring employers who violate California's labor laws." *Id*. Acknowledging this point does not amount to allowing state policies to "override" the FAA. Pet. 30. Rather, it reflects that the FAA's purposes do not include allowing parties to contract out of liabilities for penalties imposed by state law, and thus do not conflict with a state's choice to grant citizens non-waivable claims to enforce those liabilities.

CONCLUSION

Bloomingdale's petition should be denied.

Respectfully submitted,

GLENN A. DANAS
CAPSTONE LAW APC
1875 Century Park East
Suite 1000
Los Angeles, CA 90067
(310) 556-4811

MONICA BALDERRAMA
INITIATIVE LEGAL
GROUP APC
1801 Century Park East
Suite 2500
Los Angeles, CA 90067
(310) 556-5637

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent

May 2017