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 SUPPLEMENTAL BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Rules:

INTRODUCTION

Respondent Nancy Vitolo submits this supplemental brief under Rule 15.8 to address the Court's decision in *Kindred Nursing Centers Limited Partnership v. Clark*, No. 16-32 (May 15, 2017). *Kindred*'s reiteration that states may not refuse to enforce arbitration agreements by applying legal rules that discriminate against arbitration does not support Bloomingdale's request for review in this case. Both the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), and the Ninth Circuit's decision in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), are fully consistent with *Kindred*. In holding that an employee's right to assert representative claims under California's Private Attorneys General Act (PAGA) may not be waived, neither decision overtly or covertly disfavors arbitration. Moreover, to whatever extent Bloomingdale's may wish to argue that *Kindred* has a bearing on the outcome of this case, it will have the opportunity to do so on remand to the district court, when the court reconsiders its dismissal order in light of the intervening decisions in *Iskanian*, *Sakkab*, and *Perez v. U-Haul Co. of California*, 207 Cal. Rptr. 3d 605 (2016).

ARGUMENT

In *Kindred*, the Supreme Court of Kentucky held, as this Court put it, that a power of attorney "could not entitle a representative to enter into an arbitration agreement without *specifically* saying so," *Kindred*, slip op. at 3, even if the general authority it granted was otherwise broad enough to encompass

agreements to arbitrate, *id*. Absent such specific authorization, the state court held, an arbitration agreement entered into by an agent was a nullity.

This Court held that Kentucky's "clear-statement rule" is preempted by the Federal Arbitration Act (FAA) because it "fails to put arbitration agreements on an equal plane with other contracts." *Id*. at 5. The Court based its holding on the principle that "[t]he FAA … preempts any state rule discriminating on its face against arbitration." *Id*. at 4. That principle, the Court held, applies equally to "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id*. at 5.

In *Kindred*, this Court held that the clear-statement rule ran afoul of this principle because it was triggered by "the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id*. The Court rejected the argument that the clear-statement rule might apply to other kinds of contracts and therefore was not arbitration-specific. The hypothetical examples of such applications of the rule, the Court found, were "utterly fanciful," and only served to "make[] clear the arbitration-specific character of the rule." *Id*. at 7. "Such a rule," the Court held, "is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id*. at 6.

The Court went on to reject the argument that a rule discriminating against arbitration agreements is permissible if it discriminates against formation rather than enforcement of agreements. The Court

found that argument contrary to "[b]oth the FAA's text and our case law interpreting it," under which "[a] rule selectively finding arbitration agreements invalid because improperly formed fares no better … than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 8.

Kindred emphasizes that it breaks no new ground: "[W]e once again 'reach a conclusion that … falls well within the confines of (and goes no further than) present well-established law.'" *Id.* at 9 (citation omitted). The Court's application of that "well-established law" in *Kindred* suggests no need for consideration of Bloomingdale's claims by this Court. *Sakkab* thoroughly discussed the precedents establishing the antidiscrimination principle relied on by the Court in *Kindred* and explained why they are fully consistent with the rule that PAGA claims are non-waivable. *See Sakkab*, 803 F.3d at 431–34. By its own account, *Kindred* does nothing to extend the reach of the precedents *Sakkab* already considered and found inapplicable to California's rule. And the formation-versus-enforcement issue discussed in *Kindred* has no relevance here.

Moreover, unlike *Kindred*, this case does not involve a refusal to compel arbitration. As *Sakkab* explained, *Iskanian* itself does not forbid or discourage arbitration of PAGA claims or any others: Instead, it holds that where, as here, an arbitration clause *excludes* PAGA claims from the scope of arbitration, it cannot *also* require that an employee waive the right to bring such claims on behalf of the state in any forum whatsoever. *See Sakkab*, 803 F.3d at 434. In this case, for example, Bloomingdale's was granted the right to arbitrate all claims that were subject to arbitration under its agreement, and was denied only the

ability to enforce a waiver of claims that were not arbitrable. *Kindred* says nothing about the enforceability of agreements that waive particular types of claims, let alone claims belonging to the state.

The *Iskanian* anti-waiver rule, moreover, does not disfavor agreements based on whether they have "the defining features of arbitration agreements." *Kindred*, slip op. at 5. *Iskanian* prohibits PAGA waivers in employment agreements regardless of whether such waivers are incorporated in arbitration clauses. *See Sakkab*, 803 F.3d at 432; *Iskanian*, 327 P.3d at 384 ("We conclude 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."). The *Iskanian* rule is not "tailor-made to arbitration agreements," *Kindred*, slip op. at 6, but to agreements *waiving* particular claims. Such waivers are in no sense a "primary characteristic of an arbitration agreement." *Id.* at 5.

Nor is it "utterly fanciful" to posit that, if PAGA waivers were permissible, they would appear outside of arbitration clauses. *Id.* at 7. It is not only likely, but inevitable, that if employers were given the power to opt out of PAGA liability through employment agreements, they would do so regardless of whether they also wished to require arbitration of other kinds of claims. Thus, the *Iskanian* rule, unlike the rule at issue in *Kindred*, cannot be said to "rely on the uniqueness of an agreement to arbitrate as [its] basis." *Id.* at 5 (citation omitted). On the contrary, allowing employers to use arbitration agreements to extract waivers of PAGA claims that cannot be obtained through other types of agreements would uniquely *favor* arbitration

agreements, an outcome the FAA neither requires nor allows.

Kindred thus adds no force to the argument for review here. And even if its analysis has some relevance to the proper disposition of this case on remand, there is no reason for this Court to take any action beyond denying the petition. The decision below already directs the district court to reconsider its dismissal order in light of the intervening precedents of *Iskanian*, *Sakkab*, and *Perez*, and Bloomingdale's is free to make any arguments it wishes as to how *Kindred* may affect their application to the circumstances of this case.

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