No. 16-1110

IN THE
Supreme Court of the United States

BLOOMINGDALE'S, INC.,
Petitioner,

v.

NANCY VITOLO,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

The members of the RLC have a strong interest in the outcome of this proceeding. Many of the RLC's members and affiliates include arbitration agreements in their employment contracts because arbitration allows all parties to resolve disputes quickly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

court. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent recitation of the federal policy favoring arbitration, many of the RLC's members have structured employment relationships with their substantial employee pools around arbitration agreements.

These agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As this Court explained in *AT&T Mobility LLC v. Concepcion*, collective resolution of claims is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristics of arbitration. 563 U.S. 333, 351 (2011).

This case concerns California's Private Attorneys General Act of 2004 ("PAGA"), which authorizes plaintiffs to bring lawsuits closely analogous to class actions—it authorizes any "aggrieved employee" to recover civil penalties on a representative basis by alleging violations of California labor law on behalf of not only himself, but also "other current or former employees." Cal. Lab. Code § 2699(a). The California Supreme Court has held that any agreement requiring arbitration of PAGA claims is unenforceable. And in the decision below, the Ninth Circuit held that California's rule is consistent with the Federal Arbitration Act.

The Ninth Circuit's decision accomplishes precisely what the FAA, as interpreted in *Concepcion*, forbids: It nullifies individualized arbitration agreements and requires arbitration of collective claims, which is "not

arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. The Ninth Circuit's decision thus invalidates thousands of individualized arbitration agreements, to the detriment of both employers and employees. This petition presents the question whether California's rule is preempted by the FAA. The members of the RLC have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that agreements requiring individualized arbitration of claims arising under the Private Attorneys General Act of 2004 ("PAGA") are unenforceable. This case presents the question of whether the FAA preempts the *Iskanian* rule.

Because both the California Supreme Court and the Ninth Circuit have held that the *Iskanian* rule complies with the FAA, there is no split on the question presented. Nevertheless, the Court should grant certiorari. The Court frequently grants certiorari in FAA preemption cases, notwithstanding the absence of a circuit split. It has done so in at least two cases involving California laws that thwarted the FAA, and has done so in several other cases involving other states' anti-arbitration laws, including a case that was argued earlier this Term.

The Court's practice of granting certiorari in FAA preemption cases despite the absence of a circuit split makes sense for at least three distinct reasons. First, FAA preemption cases address state-law rules that

seek to thwart arbitration—and such rules will typically differ from state to state. Thus, it is unusual for two different geographic circuits, addressing different state laws, to address the identical legal issue. The absence of a circuit split does not take away from the importance of the issue presented, and this Court should therefore grant review.

Second, FAA preemption cases are significant practically because they affect the enforceability of thousands of arbitration agreements simultaneously. That is especially true for FAA preemption cases in California, the Nation's largest state. California laws that restrict arbitration not only affect retailers' operations in California, but inevitably have a spillover effect on retailers' national operations. Nationwide retailers use standardized dispute resolution procedures to the extent possible so that employees are treated comparably across multiple jurisdictions and to reduce the complications of administering multiple, geographically-specific programs. The practical significance of FAA preemption cases in general—and FAA preemption cases arising from California in particular—warrants this Court's review even without a circuit split.

Third, the Court has frequently granted certiorari to review errant state-law rules that seek to circumvent this Court's FAA decisions. The *Iskanian* rule plainly seeks to circumvent *Concepcion*—as even its supporters have noted—and thus warrants this Court's review.

The Ninth Circuit's decision is not only wrong doctrinally, but it is also bad policy. The *Iskanian* rule

may lead to the end of employee arbitration in California. Just as arbitration was not designed for class actions, arbitration was not designed for collective PAGA claims. And if waivers of PAGA claims are unenforceable, employers may abandon arbitration altogether and instead make use of the elaborate discovery and cumbersome procedures of litigation, which at least provide some protections for employers, such as appellate rights.

That result would harm both employers and employees by eliminating the benefits of arbitration. Litigation's elaborate procedures may make a lawsuit too expensive for an employee to pursue—even if it could have been resolved in a cheaper arbitration. Moreover, litigation is slow, and speedy dispute resolution is important in the workplace.

Nor does the availability of PAGA claims benefit employees. A PAGA settlement may result in a lucrative settlement for a class action lawyer and a payment to the California Treasury, but employees are unlikely to benefit from such a settlement. Moreover, PAGA claims will not improve employees' working conditions, because such claims, by their nature, will be weak. California regulators have a right of first refusal to litigate PAGA claims, and are likely to exercise that right in any case in which there is a strong claim of labor-law violations. PAGA claims brought by class-action lawyers will be the claims that regulators refuse to litigate by themselves—which are likely to be weak claims that class action lawyers pursue purely to extort a nuisance settlement.

ARGUMENT

The RLC agrees fully with Petitioner's argument that the FAA preempts the rule announced in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). The RLC also agrees fully with Petitioner's argument that the Ninth Circuit's contrary holding warrants this Court's review.

Rather than reiterate Petitioner's arguments, the RLC will make two additional points in support of the petition. First, the absence of a circuit conflict should not deter the Court from granting certiorari. This Court regularly grants certiorari in FAA preemption cases even without a circuit conflict, and there are sound jurisprudential and practical justifications for this Court's practice. Those justifications apply with especially strong force to this case.

Second, the Ninth Circuit's decision creates an incentive for class action lawyers to pursue a particularly pathological form of representative litigation, to the detriment of both employers and employees. The practical harm of the Ninth Circuit's decision warrants this Court's review.

I. In Light of the Significant Jurisprudential and Economic Importance of the Question Presented, This Court Should Grant Certiorari Notwithstanding the Absence of a Circuit Split.

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court ruled that agreements requiring individualized

arbitration of claims arising under the Private Attorneys General Act of 2004 ("PAGA") were unenforceable—and that this unenforceability rule complied with the Federal Arbitration Act ("FAA"). In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), and again in the decision below, the Ninth Circuit agreed with the California Supreme Court that the *Iskanian* rule was not preempted.

Thus, there is no conflict of authority on the question presented: The California Supreme Court and the Ninth Circuit both rejected the employer's preemption argument. Nonetheless, this Court's review is warranted. The Court historically has not viewed a circuit split as a prerequisite to its review of FAA preemption cases. That practice has sensible jurisprudential and practical justifications. This case is an especially strong candidate for a grant of certiorari notwithstanding the absence of a split, in light of the economic importance of the decision below and the structural impossibility of any split developing.

This Court routinely grants certiorari in FAA preemption cases, notwithstanding the absence of a conflict of authority—almost invariably when the party seeking to enforce the arbitration agreement is the petitioner. Indeed, it has done so at least twice in the context of FAA preemption of California-specific rules. In *Concepcion*, this Court granted certiorari to consider whether the FAA preempted California's state-law rule invalidating class action waivers,

notwithstanding the absence of a split.[2] Likewise, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court granted certiorari to consider the splitless question of whether California's state-law rule concerning arbitration of disputes involving talent agents was preempted.

Other examples abound. For instance, this Term, the Court granted certiorari to consider an FAA preemption question in *Kindred Nursing Centers Limited Partnership v. Clark*, No. 16-32, even though the petition did not identify a conflict with any state supreme court or federal appellate decision; instead, the petition argued that "the decision below conflicts with the FAA and defies this Court's precedents" and "the decision below is exceptionally important."[3] This Court has also summarily reversed several state court cases that violated the FAA, despite the absence of any conflicts of authority. *See*, *e.g.*, *Nitro-Lift Techs., LLC*

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[2] At the time of the Ninth Circuit's decision in *Concepcion*, the sole other circuit to consider the issue—the Third Circuit—had held that state laws that invalidated class-action waivers were enforceable so long as they applied to both litigation and arbitration, which was the precise argument this Court ultimately rejected in *Concepcion*. *See* Petition for a Writ of Certiorari at 19, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 6617833. The *Concepcion* petition also asserted a conflict with a decision from an intermediate appellate court in Tennessee, but not with any state supreme court case. *Id.* at 21.

[3] Petition for a Writ of Certiorari at 12, 17, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 368 (2016) (No. 16-32), 2016 WL 3640709. The petition did assert a conflict with federal district court decisions. *Id.* at 18-19.

v. Howard, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLC v. Cocchi*, 565 U.S. 18 (2011) (per curiam).

The Court's practice of granting certiorari in FAA preemption cases, even in the absence of a circuit split, has sound justifications. First, FAA preemption cases, by definition, involve the application of this Court's FAA jurisprudence to a particular state's laws. Because state laws vary, different geographic circuits will rarely consider the identical FAA arbitration question. Yet the fact that different states implement their hostility to arbitration through different state laws should not insulate *all* of those state laws from this Court's review.

Second, FAA preemption decisions frequently have an outsized economic impact, even when confined to one state. Arbitration agreements are ubiquitous. They are also mostly standardized. When a large employer hires a new employee and enters into an arbitration agreement, or when a store customer enters into a consumer arbitration agreement, the terms of the arbitration agreements will typically not vary from agreement to agreement. Accordingly, a decision invalidating a single arbitration agreement will often have the effect of invalidating thousands of arbitration agreements simultaneously.

This case is a classic example of an FAA preemption case that this Court should hear, notwithstanding the absence of a circuit split. The reason there is no split—and that no split is likely to develop—is that PAGA is a California-specific statute. Now that both the

California Supreme Court and the Ninth Circuit have held that the FAA does not preempt California's rule, the issue is unlikely to arise in any other court, because any plaintiff with a PAGA claim will simply bring it in California. Thus, awaiting additional percolation would serve no purpose.

Yet, the outsized economic importance of this case justifies this Court's review. As explained in Section II, the Ninth Circuit's decision may functionally lead to the end of employee arbitration in California. Given that California is the Nation's largest state, home to about 12% of the nation's workers (Pet. 34), the practical outcome of this case could be substantial and warrants this Court's attention.

Worse, while *Iskanian* may evade judicial review outside California, *Iskanian's* effect cannot be confined to California. California law inevitably affects employers' nationwide operations. Employers use standardized intake and dispute resolution procedures. There are sound reasons for that practice: it is both efficient, and ensures that employees are treated consistently and equally across the entire company, with the same legal rights and remedies. It is both unrealistic and undesirable for employers to have one set of procedures for California and a different set of procedures for other states—especially for employers with a significant percentage of their operations in California.

Moreover, an employer faced with a PAGA claim will often be forced to settle regardless of the merit of the claim, to avoid the prospect of significant liability. Such settlements may include injunctive relief that will

inevitably affect an employer's nationwide operations. Such settlements may also include money payments that will result in the redistribution of an employer's resources from other states to California. The purpose of the FAA is to avoid such outcomes by establishing a single nationwide rule requiring arbitration agreements to be enforced.

Finally, *Iskanian* exemplifies the defiance of the FAA that has led this Court to summarily reverse so many state court decisions. Even PAGA's defenders have characterized PAGA as a way to circumvent *Concepcion* and the FAA. A Stanford Law Review Note entitled "State Court Resistance to Federal Arbitration Law," for instance, explains that "some courts have developed legal theories that, though entirely valid, effectively render the FAA moot in certain circumstances. The most prominent example of this is the application of the Private Attorneys General Act (PAGA) in California courts." Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1163 (2015). It observes that "state resistance may play an essential part in preserving states' legal autonomy," and proposes that states can "develop[] novel theories that function as valid work-arounds to preemption or by cabining the federal precedent to its facts," characterizing *Iskanian* as "representative of this approach." *Id.* at 1167-68. Likewise, a California Law Review article cites *Iskanian* as reflecting a strategy of circumventing *Concepcion*. Aaron Blumenthal, Comment, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age*

of the Inviolable Class Action Waiver, 103 Cal. L. Rev. 699 (2015). The note explains that the "key benefit of a state qui tam statute is that it bypasses any arbitration agreement in a consumer contract," while expressing concern that PAGA suits might be too similar to class actions to escape preemption and achieve the goal of circumventing *Concepcion*. *Id.* at 742; *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052, 3082 n.126 (2015) (characterizing *Iskanian* as "[o]ne exceptional, but notable, source of pushback against the Supreme Court's recent arbitration cases").

It is not the role of lower courts, to "push back," or develop strategies to "circumvent," *Concepcion*. Rather, lower courts should apply this Court's decisions faithfully. Neither *Iskanian* nor the Ninth Circuit's decisions approving it reflect the faithful application of *Concepcion*; rather, they reflect an effort to evade *Concepcion* to achieve the exact result that it sought to prevent. Granting certiorari is necessary to ensure compliance with the FAA and this Court's precedent.

II. The Ninth Circuit's Decision Effectively Abolishes Individualized Employee Arbitration Agreements, to the Detriment of Both Employers and Employees.

As noted above, the *Iskanian* rule provides that agreements requiring individualized arbitration of PAGA claims are unenforceable. As the Petition explains, the *Iskanian* rule effectively abolishes individualized employee arbitration agreements in California—employees are now guaranteed the right to

bring representative lawsuits through the vehicle of a PAGA claim.

The practical effect of the *Iskanian* rule cannot be overstated. The *Iskanian* rule may spell the end of employee arbitration in California. Employers will not agree to arbitrate claims if they face the risk of being forced into the functional equivalent of class arbitration. As the Court observed in *Concepcion*, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. at 348. Precisely the same could be said for PAGA litigation.

Further, given that a single PAGA lawsuit can lead to enormous liability, employers would be unwilling to sacrifice the elaborate discovery, cumbersome procedures, and layers of appellate review that characterize litigation in court. Consider, for instance, the historic *Wal-Mart* litigation, in which the Ninth Circuit upheld the certification of a class of 1.5 million Wal-Mart employees, only to be reversed unanimously by this Court. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). If the order certifying the class had been left intact, Wal-Mart would have faced the risk of a gargantuan damages award. There is no way a rational employer would leave such a momentous class-certification decision to a single arbitrator, subject only to exceedingly deferential judicial review. Yet PAGA permits aggregation of employee claims in the same manner—and creates the same disincentive for arbitration.

Thus, abolishing individualized employee arbitration would mean abolishing employee arbitration altogether. That would harm both employers and employees. Employers, of course, have a strong incentive to avoid PAGA claims that may lead to *in terrorem* settlements, with large sums flowing to class-action lawyers who use PAGA claims to override *Concepcion* and build war chests for further *in terrorem* litigation. But abolishing arbitration would harm employees too. Arbitration is an inexpensive and speedy way of resolving disputes. *Concepcion*, 563 at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). And both the low cost and the speed of arbitration are in employees' interests.

First, many employment cases are low-value disputes, and the cost of litigating them may well exceed the employee's expected recovery. Thus, consigning these claims to litigation will mean that employees will never be able to bring them at all. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow 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 contract.").

By contrast, arbitration is sufficiently cheap that employees can pursue all but the lowest-value claims. It is common for employers to cover the vast majority of the fee for initiating an arbitration so that arbitration can be an affordable option for its employees. For example, one of the RLC's members enters into a

standard arbitration agreement with its employees, in which it promises to pay all of the American Arbitration Association's costs and all arbitrator's fees, except for a $200 contribution from the employee—which it reimburses to the employee if the employee prevails in the arbitration. Another RLC member pays all of the cost of the arbitration service without any contribution from the employee. And while employees may be required to pay their own attorney's fees (as in litigation), those fees will be far cheaper in the arbitration context, in which the parties forego expensive discovery procedures. Thus, arbitration may be the only realistic mechanism for an employee to bring his dispute with his employer before a neutral third party. Abolishing employee arbitration would preclude employees from bringing many claims altogether. *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-July Disp. Resol. J. 9, 11 (2003) (citing empirical evidence that "lower-income employees cannot afford to take … employment-related claims to court," and "arbitration may be the sole forum for their claims").

Second, the need for speedy dispute resolution is of particular import in the employment context. Employee litigation is unique in that it pits two parties who may have an ongoing relationship against each other. An employee who is bringing claims against his employer while still on the job must also cooperate with his employer on a day-to-day basis. Especially in these cases, it is critical to adopt a dispute resolution process that preserves workplace harmony to the greatest possible extent. In the experience of the RLC's

members, the arbitration process ensures that disputes can be quickly resolved without significant workplace disruption.

Not only does litigation result in concrete harms to employees, but there is no evidence of any corresponding benefit. The available evidence shows that litigation does not result in greater recoveries for employees than arbitration. Empirical analysis has shown that employees are no more likely to prevail in litigation than in arbitration. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-Jan Disp. Resol. J. 56, 58 (2004) ("[O]ur findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court."); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998) ("Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court.").

In exchange for losing the ability to arbitrate low-value disputes, employees gain the right to be quasi-class members in PAGA suits. But for employees, that right is largely useless. PAGA authorizes a statutory penalty of $100 per employee per pay period for the first violation, and $200 per employee per pay period for subsequent violations. Cal. Lab. Code §2699(f)(2). 75% of those penalties go to the State, which means that the quasi-class members do not benefit from them at all. 25% goes to employees—but realistically, much

of that amount will be taken by class-action lawyers. There is a rich literature arguing that class actions typically are far more lucrative for class counsel than they are for the class—and that literature analyzes class actions, where *100%* of the damages award is nominally directed at the employee class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1471-72 (2005). In the PAGA context, employees are even worse off—only *25%* of the award is even nominally directed to class members. It is unlikely that any employee will ever receive a non-trivial financial benefit from a PAGA settlement.

Moreover, there is no basis to believe that the deterrent threat of PAGA claims will improve compliance with labor law or working conditions. PAGA's structure ensures that large PAGA actions will proceed precisely in the cases most likely to involve meritless claims.

Prior to filing PAGA suits, employees must give written notice to the state, and must afford the state sufficient time to decide whether it will pursue the labor-law claim on its own. Cal. Lab. Code §2699.3(a). In cases presenting genuinely serious labor-law violations, the state may elect to pursue the suit on its own, so that it may obtain the publicity arising from a successful enforcement action, and keep 100%, rather than 75%, of the proceeds.

In some cases, the state will decline to pursue a meritorious labor-law claim because the stakes will be too low to justify expending state resources pursuing an enforcement action. But in those cases, a class-action-esque PAGA claim, with all the expenses of litigation, will not be worthwhile to a class-action lawyer either.

Thus, a large PAGA claim will proceed only in cases in which two conditions are met: (1) the accused labor practice affects a sufficiently large number of employees that pursuing it is economical for a class-action lawyer, but (2) state enforcers nonetheless decide not to pursue the claim, agreeing instead to turn over enforcement of state law—and 25% of the civil penalties—to the class-action lawyer.

As a result, PAGA creates a uniquely pathological form of class action litigation. The defense bar has long contended that class-action lawyers extort settlements in low-value claims because the downside risk of losing a class action is so high. Even if a defendant believes it has a 95% chance of winning a jury trial, the 5% chance of losing may result in a judgment so enormous that the defendant has no choice but to settle.

Class-action lawyers have responded that some class actions involve genuinely meritorious claims that employees do not have the resources to bring on their own. Yet PAGA is structured to filter out those genuinely meritorious claims, because genuinely meritorious claims will be brought by state enforcers. In other words, PAGA claims are class actions at their worst. They enrich class-action lawyers and the state,

without offering employees the opportunity for a significant financial award.

The serious practical harm that the *Iskanian* rule will inflict on employers throughout California provides an additional basis for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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