Case No. 14-341

IN THE

Supreme Court of the United States

CLS TRANSPORTATION LOS ANGELES, LLC

Petitioner,

v.

ARSHAVIR ISKANIAN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

I. BRIEF OF THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS 1

II. IDENTITY AND INTEREST OF THE AMICI CURIAE 1

III. INTRODUCTION AND SUMMARY OF ARGUMENT 2

IV. ARGUMENT 6

A. The Court Should Grant Certiorari to Deter States' Efforts to Circumvent the Court's FAA Precedents 6

1. *Iskanian* Is The Latest of A Series of State Law Efforts to Manufacture Exceptions to the FAA That Have No Support in the Statute 6

2. *Iskanian* Runs Contrary to at Least Eleven Federal Decisions Holding the FAA Requires Enforcement of Agreements to Individually Arbitrate PAGA Claims 14

B. Even if True *Qui Tam* Actions Were Not Subject to the FAA, a PAGA Claim Is Not a *Qui Tam* Claim at All 18

C. Excepting PAGA Actions From the Coverage of the FAA Would Undermine the Federal Policy of Promoting Quick Resolution of Individual Claims 24

V. CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

American Express Co. v. Italian Colors Rest.
133 S. Ct. 2304 (2013 .....3, 5, 6, 9, 12

Andrade v. P.F. Chang's China Bistro, Inc.
2013 U.S. Dist. LEXIS 112759, 2013 WL 5472589 (S.D. Cal. Aug. 9, 2013) 16

AT&T Mobility LLC v. Concepcion
131 S. Ct. 1740 (2011) .....*passim*

Bright v. 99¢ Only Stores
189 Cal. App. 4th 1472 (2010) 23

Buckeye Check Cashing, Inc. v. Cardegna
126 S. Ct. 1204 (2006) 13

CompuCredit Corp. v. Greenwood
132 S. Ct. 665 (2012) 9, 12

Dean Witter Reynolds Inc. v. Byrd
105 S. Ct. 1238 (1985) 25

Doctor's Associates, Inc. v. Casarotto
116 S. Ct. 1652 (1996) 13

EEOC v. Waffle House
122 S. Ct. 754 (2002) 5, 10, 11

Fardig v. Hobby Lobby Stores, Inc.
2014 U.S. Dist. LEXIS 139359, 2014 WL 4782618 (C.D. Cal. Aug. 11, 2014) 16

Ferguson v. Corinthian Colleges, Inc.
733 F.3d 928 (9th Cir. 2013).....17

Grabowski v. Robinson
817 F. Supp. 2d 1159 (S.D. Cal. 2011).....17

Green Tree Fin. Corp. v. Randolph
121 S. Ct. 513 (2000).....13

KPMG LLP v. Cocchi
132 S. Ct. 23 (2011).....12

Luchini v. Carmax, Inc.
2012 U.S. Dist. LEXIS 102198, 2012 WL 2995483 (E.D. Cal. July 23, 2012).....17

Marmet Health Care Center, Inc. v. Brown
132 S. Ct. 1201 (2012).....4, 5, 7, 12

Miguel v. JPMorgan Chase Bank, N.A.
2013 U.S. Dist. LEXIS 16865, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013).....16

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.
105 S. Ct. 3346 (1985).....6

Morvant v. P.F. Chang's China Bistro, Inc.
870 F. Supp. 2d 831 (N.D. Cal. 2012).....17

Nitro-Lift Technologies, LLC v. Howard
133 S. Ct. 500 (2012).....7, 12

Ortiz v. Hobby Lobby Stores, Inc.
2014 U.S. Dist. LEXIS 140552 (E.D. Cal. Oct. 1, 2014).....15

PacifiCare Health Sys. v. Book
123 S. Ct. 1531 (2003).....13

*Parvataneni v. E*Trade Fin. Corp.*
967 F. Supp. 2d 1298 (N.D. Cal. 2013).....16

Penn Plaza LLC v. Pyett
129 S. Ct. 1456 (2009).....13

Perry v. Thomas
107 S. Ct. 2520 (1987).....13

Preston v. Ferrer
128 S. Ct. 978 (2008).....12

Quevedo v. Macy's, Inc.
798 F. Supp. 2d 1122 (C.D. Cal. 2011) . 16-18

Sonic-Calabasas A, Inc. v. Moreno
132 S. Ct. 496 (2011).....12

Southland Corp. v. Keating
104 S. Ct. 852 (1984).....13

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.
130 S. Ct. 1758 (2010).....12

Thurman v. Bayshore Transit Management
203 Cal. App. 4th 1112 (2012).....28

U.S. ex rel Einstein v. City of New York
129 S. Ct. 2230 (2009).....20

Valle v. Lowe's HIW, Inc.
2011 U.S. Dist. LEXIS 93639, 2011 WL 3667441 (N.D. Cal. Aug. 22, 2011) 18

Velazquez v. Sears, Roebuck & Co.
2013 U.S. Dist. LEXIS 121400, 2013 WL 4525581 (S.D. Cal. Aug. 26, 2013) 16

Statutes

31 U.S.C. § 3729 19

31 U.S.C. § 3730 20

Lab. Code § 226 ..... 23, 26

Lab. Code § 558 27

Lab. Code §§ 2699 ..... 22, 23, 26

Lab. Code § 2699.3 21

I.
BRIEF OF THE EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Employer's Group and the California Employment Law Council respectfully submit this brief as amici curiae in support of Petitioner.[1]

II.
IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici are groups that represent the interests of employers, seeking to foster the development of reasonable, equitable, and progressive rules of employment.

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It is California-based and represents nearly 3,800 employers of all sizes and in every industry, which collectively employ nearly 3 million people.

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[1] Pursuant to Rule 36.7, counsel for Amici Curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Amici provided notice 10 days before the due date of their intent to file this brief, and both Petitioner and Respondent have consented to its filing.

Amicus California Employment Law Council ("CELC") is a voluntary non-profit organization. Its membership includes approximately 70 private sector employers in the state of California who collectively employ hundreds of thousands of Californians.

Amici have a vital interest in seeking clarification and guidance from the Court regarding issues that impact employment law – including the important issue of when employment disputes may be resolved in arbitration.

III.
INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last several years, this Court has decided a series of cases under the Federal Arbitration Act ("FAA"). This Court has consistently held that arbitration agreements must be enforced according to their terms, even if state courts and legislatures have different policy preferences

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*"), the Court reversed California's judge-made doctrine that had effectively outlawed arbitration agreements in consumer contracts that did not provide for class action procedures in arbitration. The Court explained that no state-recognized public policy, even one the state viewed as more important than the FAA, could override the

FAA's preemptive effect. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) ("*Italian Colors*"), the Court held that arbitration agreements could not be invalidated merely because the financial incentive to arbitrate certain claims on an individual basis was minimal. The Court reaffirmed that the FAA requires states to enforce arbitration agreements according to their terms.

Despite the Court's decisions reaffirming the broad scope of FAA preemption, state courts and legislatures continually have sought to circumvent these decisions, reading this Court's FAA precedents narrowly and inventing purported exceptions to this Court's holdings requiring enforcement of arbitration agreements according to their terms. California is probably the single biggest offender in this regard.[2]

Such defiance by state actors has led this Court repeatedly to issue decisions reversing the states, such as

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[2] *See* Broome, An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 *Hastings Bus. L. J.* 39, 54, 66 (2006); Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 *Buffalo L. Rev.* 185, 186-187 (2004) (both cited in *Concepcion*, 131 S. Ct. at 753).

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1202-03 (2012), where the Court summarily reversed an opinion of the West Virginia Supreme Court that invalidated an arbitration agreement as unconscionable because the West Virginia Supreme Court did not believe the Court's precedents should apply to certain wrongful death claims. In reversing, this Court explained that "the [FAA]'s text includes no exception for personal-injury or wrongful-death claims [but] requires courts to enforce the bargain of the parties to arbitrate."

Iskanian is simply the latest iteration of the phenomenon of state actors refusing to heed this Court. The State of California is perhaps the prime recidivist in defying the mandates of the FAA. In *Iskanian*, the California Supreme Court forbade arbitration of employment law claims arising under California's Private Attorneys General Act ("PAGA") even though PAGA claims remedy Labor Code violations against individual employees represented by private counsel, normally commence without investigation, affirmative authorization or involvement by the State, and are fully controlled by private plaintiffs' counsel, the California Supreme Court held that employees' agreements to arbitrate these claims individually are unenforceable

because PAGA claims were held to belong to the state, which never agreed to arbitrate.

Just like the West Virginia Supreme Court in *Marmet*, the California Supreme Court in *Iskanian* thus attempted to craft an exception to FAA preemption that has no support in the text or legislative history of the FAA or in any apposite precedent. The *Iskanian* court strained to analogize the case to *EEOC v. Waffle House*, 122 S. Ct. 754 (2002) ("*Waffle House*"). But *Waffle House* merely held that where a government agency did not sign an arbitration agreement, that agency could not be forced to arbitrate claims that the government agency (and not a private person) prosecuted in court as the plaintiff. Nothing in *Waffle House* suggested that a state could thwart FAA preemption and create a class of claims advanced by individuals who had agreed to arbitrate employment-related claims so long as the state nominally has "deputized" the individuals to sue "in the name of the state."

Iskanian severely undermines this Court's precedents in *Concepcion* and *Italian Colors*. If the *Iskanian* doctrine survives, then recalcitrant states, like California, would be free to enact laws that deputize individuals to act "in the name of the state" even where the state plays no significant role in the litigation and the injury at issue is to individuals

rather than the government. Accordingly, Amici Curiae respectfully request that the Court grant certiorari and further remind the states of their duty under federal law to enforce arbitration agreements according to their terms.

IV.
ARGUMENT

A. The Court Should Grant Certiorari to Deter States' Efforts to Circumvent the Court's FAA Precedents

1. *Iskanian* Is The Latest of A Series of State Law Efforts to Manufacture Exceptions to the FAA That Have No Support in the Statute

The Court has explained in *Concepcion*, *Italian Colors*, and other precedents that the FAA was passed to "overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985). In *Concepcion*, the Court held that the FAA preempts all legislation and judge-made doctrines that interfere with the two primary goals of the FAA: "to ensur[e] that private arbitration agreements are enforced according to their terms" and "to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct at 1748. Furthermore, the Court expressly held

that states lack the power to ignore the dictates of the FAA based on what they view as a more important state public policy: "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

Despite these seemingly bright-line rules, state courts and state legislatures continue to invent exceptions to the FAA. For example, shortly after handing down *Concepcion,* the Court summarily reversed two decisions of arising from state supreme courts that attempted to limit *Concepcion* by focusing on the type of state law claim being asserted. *See Marmet*, 132 S. Ct. at 1202-03 (2012) (reversing West Virginia Supreme Court's attempt to carve out an exception for claims for "personal injury or wrongful death"); *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500, 503-04 (2012) (reversing Oklahoma Supreme Court's attempt to carve out an exception for claims challenging a covenant not to compete).

Iskanian is simply another example of a state supreme court erroneously announcing an exception to FAA preemption by reading *Concepcion* too narrowly. Even though the plaintiff in *Iskanian* signed an arbitration agreement that, by its terms, required individual arbitration of his PAGA claims, the California Supreme Court reasoned

that PAGA claims are beyond the scope of the FAA because a PAGA claim is a species of *qui tam* action brought in the name of the state, meaning "(1) that the statute exacts a penalty; (2) that part of the penalty [is] paid to the informer; and (3) that, in some way, the informer [is] authorized to bring suit to recover the penalty." *Iskanian*, 59 Cal. 4th at 382. The California Supreme Court said that a PAGA plaintiff's claim is not really the plaintiff's claim at all:

> "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It 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."

Id. at 386-87.

This reasoning is erroneous. Even if PAGA claims qualified as *qui tam* actions (which, as explained below, they do not), that would not take them outside the FAA. The California Supreme Court failed to identify any aspect of the text or legislative history of the FAA suggesting that Congress intended to exclude state *qui tam* actions from the FAA's scope. Indeed, although the California Supreme Court noted that "the use of qui tam actions is venerable,

dating back to colonial times" (*Id.* at 382) and that "qui tam citizen actions on behalf of the government were well established at the time the FAA was enacted" (*Id.* at 385), the California Supreme Court also recognized that "there is no mention of such actions in the legislative history and no indication that the FAA was concerned with limiting their scope." *Id.* at 385. In other words, there is no suggestion anywhere in the text or legislative history that Congress contemplated excluding *qui tam* actions from the FAA.

Once the California Supreme Court recognized that there is no indication that Congress ever considered a *qui tam* exception to the FAA, it should have concluded that state *qui tam* actions *are* covered by the FAA because all types of claims asserted by individuals who signed arbitration agreements covering those claims are presumably subject to the FAA unless Congress has clearly indicated to the contrary. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) ("Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."); *Italian Colors*, 133 S. Ct. at 2309 (finding antitrust claims subject to FAA because there is no indication in the FAA or the Sherman Act that Congress intended to exclude such claims). Instead, the

California Supreme Court followed the mistaken lead of the West Virginia and Oklahoma Supreme Courts (who made similar carve-out arguments based on their own perceptions of state public policy). These courts concluded that the absence of a clear indication that a type of claim was covered by the FAA meant that states were free to exclude that claim from the FAA. This was plain error.

The California Supreme Court also attempts to bolster its conclusion that PAGA actions are outside the FAA by citing this Court's 2002 *Waffle House* decision. But *Waffle House* is completely off point, as it did not address *qui tam* claims at all. In fact, it did not even involve a claim brought by a plaintiff that had signed an arbitration agreement.

As the *Waffle House* decision makes plain, the EEOC and not the employee was the actual plaintiff in the case: "After an investigation and an unsuccessful attempt to conciliate, the EEOC filed an enforcement action against respondent in the Federal District Court for the District of South Carolina . . . ." *Waffle House*, 122 S. Ct. at 283; *id.* at 284 ("the EEOC . . . filed this action in its own name."). This Court's basis for finding that the EEOC was not required to arbitrate was that the EEOC never signed an arbitration agreement and, therefore, never agreed to

arbitrate the claim at issue. More specifically, after explaining that the EEOC had the right under the ADA, with or without the consent of employees, to prosecute enforcement actions, the Court explained that the FAA did not apply, because the EEOC never agreed to arbitrate:

> "Here there is no ambiguity. ***No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims***. It goes without saying that a contract cannot bind a nonparty. Accordingly, the pro-arbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."

Id. at 294 (emphasis added).

Notably, this Court did not base its holding on the notion that ADA claims are akin to *qui tam* claims or that that the undeniably important federal public policy against disability discrimination took the EEOC's claim outside the FAA. Rather, the case turned on the mundane notion that a party cannot be required to arbitrate claims it asserted in court if it never agreed to arbitrate them in the first instance.

Other than *Waffle House* – which turned on the fact that the suing party never agreed to arbitration – every other decision of this Court in this century that addressed whether the FAA required arbitration pursuant to the terms of an

arbitration agreement has held in favor of enforcing the arbitration agreement. *See, e.g., Italian Colors*, 133 S. Ct. at 2308 (enforcing agreement individually to arbitrate federal antitrust claim); *Nitro-Lift*, 133 S. Ct. 500 (requiring arbitration of claim challenging covenant not to compete); *Marmet*, 132 S. Ct. 1201 (requiring arbitration of wrongful death action); *CompuCredit*, 132 S. Ct. 665 (requiring arbitration of claim arising under Credit Repair Organizations Act); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (reversing decision to deny arbitration as a whole when only some of the claims asserted were outside the arbitration agreement); *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (summarily reversing California Supreme Court decision refusing to enforce arbitration agreement by its terms); *Concepcion*, 131 S. Ct. 1740 (invalidating California judge-made rule refusing enforcement of arbitration agreement in consumer class action requiring individual arbitration of disputes); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) (arbitration agreement that was silent on availability of class actions had to be enforced to allow only individual arbitration); *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (requiring arbitration of dispute arising under California Talent Agencies Act despite state statute

requirement requiring action in a different forum); *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (requiring arbitration of discrimination claim per clear terms of collective bargaining agreement); *Buckeye Check Cashing, Inc. v. Cardegna,* 126 S. Ct. 1204 (2006) (requiring arbitration of action by borrowers against lender for alleged usurious loans); *PacifiCare Health Sys. v. Book*, 123 S. Ct. 1531 (2003) (compelling arbitration of RICO claims despite lack of clarity whether claims were arbitrable under the parties' agreement); *Green Tree Fin. Corporation-Alabama v. Randolph*, 121 S. Ct. 513 (2000) (requiring arbitration of mobile home owners claims under Truth in Lending Act despite contention that costs to arbitrate would be prohibitive to mobile home owners); *see also Doctor's Associates, Inc. v. Casarotto,* 116 S. Ct. 1652 (1996) (requiring arbitration pursuant to FAA despite failure to comply with state law requiring special emphasis of arbitration provision in contract); *Perry v. Thomas*, 107 S. Ct. 2520 (1987) (requiring arbitration pursuant to FAA despite California statute rendering claims not subject to arbitration); *Southland Corp. v. Keating,* 104 S. Ct. 852 (1984) (same).

In short, in *Iskanian* the California Supreme Court simply invented an exception to the FAA, just as the West Virginia Supreme Court invented a "personal

injury/wrongful death" exception and other states over the past decades have invented their own exceptions to the FAA. States have no such power, but only this Court can issue orders to stop them. Accordingly, Amici respectfully request that the Court grant certiorari to stop the California Supreme Court and other state actors from their misguided effort to invent exceptions to the FAA.[3]

2. *Iskanian* Runs Contrary to at Least Eleven Federal Decisions Holding the FAA Requires Enforcement of Agreements to Individually Arbitrate PAGA Claims

Certiorari is justified when, as here, a state supreme court's interpretation of federal law runs contrary to opinions from the federal courts of that state. The California Supreme Court has refused to find FAA preemption, a determination now binding on every California state court. In line with this Court's precedents, federal judges have taken a wholly

[3] Just this past month, the California Legislature enacted another anti-arbitration statute, AB 2617, purporting to invalidate certain arbitration agreements covering claims under the state's Ralph Civil Rights Act and the Tom Bane Civil Rights Act. The legislators said that the statute derived from "the policy of the State of California," notwithstanding admonitions from the bill's opponents that the bill was FAA-preempted.

different view, both before and after the California Supreme Court's decision.

Without this Court's review, therefore, forum shopping is inevitable (plaintiffs always will sue in state court), and identical cases will be resolved differently depending on whether removal jurisdiction exists. Moreover, additional federal decisions – such as a decision of the Ninth Circuit – will not solve the problem, because the California Supreme Court is not bound to follow the decision of any federal court of appeals. Only this Court can establish a uniform rule of federal preemption, applicable in every forum.

At least 11 federal district court decisions from within California have held that the FAA requires the enforcement of an arbitration agreement calling for individual arbitration of an employee's PAGA claims. Although several (but not all) of these decisions pre-date *Iskanian*, they considered the same issues the *Iskanian* court considered and properly concluded that enforcement of the arbitration agreement was mandated by this Court's pronouncements in *Concepcion*. *See Ortiz v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 140552, *23-24 (E.D. Cal. Oct. 1, 2014) (refusing to follow *Iskanian*: "Most federal district courts within the state" held that "a waiver of

PAGA claims is enforceable because the FAA prohibits a conclusion holding otherwise."); *Fardig v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 139359, 2014 WL 4782618 (C.D. Cal. Aug. 11, 2014)(refusing to follow *Iskanian*; "[T]he rule against representative PAGA claim waivers [is] preempted."); *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1305 (N.D. Cal. 2013) (holding that "in the wake of *Concepcion*, . . . an arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement"); *Velazquez v. Sears, Roebuck & Co.*, 2013 U.S. Dist. LEXIS 121400, 2013 WL 4525581, at *7 (S.D. Cal. Aug. 26, 2013) ("[P]ursuant to the FAA, the PAGA and class action waivers in the Agreement are enforceable."); *Andrade v. P.F. Chang's China Bistro, Inc.*, 2013 U.S. Dist. LEXIS 112759, 2013 WL 5472589, at *11 (S.D. Cal. Aug. 9, 2013) (finding the representative PAGA action waiver to be enforceable because "*Concepcion* cannot be read so narrowly as to distinguish between a waiver of a private individual right to class action and a waiver of a public right to a PAGA claim"); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865, 2013 WL 452418, at *9 (C.D. Cal. Feb. 5, 2013) (following the district court's reasoning in *Quevedo* and finding the plaintiff could arbitrate his PAGA claim

individually); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (using the Ninth Circuit's reasoning in *Kilgore v. Key Bank* to hold that "[T]he Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general"); *Luchini v. Carmax, Inc.*, 2012 U.S. Dist. LEXIS 102198, 2012 WL 2995483, at *14 (E.D. Cal. July 23, 2012) (viewing "PAGA as an obstacle to enforce of arbitration agreements governed by the FAA," and holding that "the arbitration agreement, including its class waiver, must be enforced according to its terms, despite the attributes of PAGA"); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1140-42 (C.D. Cal. 2011) (holding the PAGA action waiver enforceable and rejecting the plaintiff's argument that "sending the PAGA claim to arbitration would irreparably frustrate the purpose of PAGA and prevent [the plaintiff] from fulfilling the Legislature's mandate that he be deputized as an attorney general . . . ," because the plaintiff's claim was "plainly arbitrable to the extent that he asserts it only on his own behalf");[4] *Grabowski v. Robinson*, 817 F.

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[4] Similarly, the Ninth Circuit has held that, under *Concepcion*, the FAA preempts California's judge-created exception to FAA preemption of certain "private attorney general" claims seeking a public injunction. *Ferguson v.*

Supp. 2d 1159, 1181 (S.D. Cal. 2011) (relying on the district court's reasoning in *Quevedo* and concluding that Plaintiff's "PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable"); *Valle v. Lowe's HIW, Inc.*, 2011 U.S. Dist. LEXIS 93639, 2011 WL 3667441, at *6 (N.D. Cal. Aug. 22, 2011) (sending the plaintiffs' PAGA claims to arbitration and on an individualized basis).

In the face of this stark split between state and federal authorities on a matter of federal law, Amici respectfully request that the Court grant certiorari.

B. Even if True *Qui Tam* Actions Were Not Subject to the FAA, a PAGA Claim Is Not a *Qui Tam* Claim at All

Whatever may be the law governing FAA preemption of a true *qui tam* claim, PAGA simply is not a claim of that sort. The rationale the California Supreme Court provided for equating with a PAGA claim was that the aggrieved

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Corinthian Colleges, Inc., 733 F.3d 928, 936 (9th Cir. 2013) (holding that the state lacked the authority to craft such an exception to the FAA because it conflicted with the FAA's requirement to enforce arbitration agreements pursuant to their terms).

employee is simply a stand-in for the state, with the recovery being limited to "civil penalties" that would otherwise be recoverable by the state. *Id.* at 381-82. From this basic premise, the California Supreme Court erroneously concludes that PAGA actions do ***not*** involve "disputes involving the parties' *own* rights and obligations" but rather "the rights of a public enforcement agency." *Id.* at 385. This analysis does not withstand scrutiny.

First, the injuries to be rectified in a PAGA action are violations of the California Labor Code that harmed the employee initiating the suit and other "aggrieved employees" suffering the same injury. Indeed, only "aggrieved employees" may assert PAGA claims and 25% of any recovery is shared among employees who experienced the Labor Code violations. *Id.* at 380. The notion that the injury is to the state is simply a legal fiction that could be applied to any statutory claim – the state presumably has an interest in compliance with all of its statutes.

This legal fiction of a "state injury" contrasts with the *bona fide* governmental injury in a true *qui tam* claim, such as a claim under the False Claims Act, 31 U.S.C. § 3729. In such actions, a private party may initiate a *qui tam* civil action alleging fraud on the government if the private party notifies the government of the claim, the government

investigates, and the government then declines to prosecute the action itself. *United States ex rel Einstein v. City of New York*, 129 S. Ct. 2230, 2233 (2009). The individual relator need not have been injured at all, and indeed may even be a complete stranger to the controversy. *See id.* at 2232 (four city employees filed False Claim Act claim to challenge a practice by a city that allegedly "deprived the United States of tax revenue"). Notably, even in true *qui tam* actions, this Court has unanimously held that the government is ***not*** a party to the action once it has declined to intervene and permitted the individual to proceed with the False Claims claim on a *qui tam* basis. *Id.* at 2234 (noting that a "'party' to litigation is '[o]ne by or against whom a lawsuit is brought'"). Accordingly, it is simply not the case that the state is a party in a PAGA action. The State of California was not a party in the case below.

Second, PAGA differs from a true *qui tam* action in that the state plays almost no role in the commencement of the litigation. Under the False Claims Act, the attorney general must investigate the claims brought forward by the individual plaintiff (31 U.S.C. § 3730(a)) and the case cannot go forward as a *qui tam* action without the government's express consent. 31 U.S.C. § 3730(b)(4). These provisions

ensure that the government plays a true gatekeeper role in the litigation.

By contrast, the state plays almost no role in the commencement of a PAGA suit. PAGA allows the Labor and Workforce Development Agency an extremely limited opportunity to investigate and intervene in the action after the aggrieved employee provides written notice of an alleged violation, but the statute does not even require the LWDA to investigate. On the contrary, if the LWDA does not make an affirmative decision to investigate within 33 days, the aggrieved employee automatically has the right to proceed with the action. Lab. Code § 2699.3(a)(2). Amici have been unable to locate even one case in which the LWDA investigated an action after receiving a notice letter and proceeded with the enforcement action itself rather than simply allowing the plaintiff's counsel to do so.

Third, the state plays no oversight role in the prosecution and settlement of a PAGA suit. Once the aggrieved employee proceeds with the PAGA claim in court, the California Supreme Court has held that the aggrieved employee may unilaterally dismiss and release the PAGA claim. *Iskanian*, 59 Cal. 4th at 383 (approving PAGA "waivers freely made after a dispute has arisen").

Fourth, the state rarely sees the 75% share of the civil penalties that PAGA nominally promises. Settlements often involve no penalty recovery whatsoever, given that the only judicial oversight is to "review and approve any penalties sought." Lab. Code § 2699(l). If at the time of settlement no penalties are allocated to the state, there is nothing for the court to approve.[5]

Accordingly, if, as often happens in practice, an allegedly aggrieved employee asserts a PAGA claim purely to obtain leverage to pressure a larger settlement of non-PAGA claims, the aggrieved employee would be free to dismiss the PAGA claim entirely in exchange for other consideration. This is not just a theoretical possibility, but a routine practice in which individual plaintiffs join PAGA claims to single-plaintiff wrongful termination or discrimination claims, and then use the threat of PAGA

[5] By contrast, in a class action, which the *Iskanian* court conceded is subject to FAA preemption, a court cannot dismiss the class claims unless it takes affirmative steps to ensure that the purported class representatives is not using the class mechanism to enrich themselves at the expense of the putative class. *See* California Rule of Court 3.770 ("Requests for dismissal must be accompanied by a declaration [that] . . . must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail.").

liability to pressure a greater settlement of their individual claims that results in no penalties whatsoever for the State. There is no mechanism within PAGA to prevent such a practice.

Fifth, there is nothing significant about the fact that the recovery in PAGA is labeled a "civil penalty" rather than "damages." As the *Iskanian* court itself noted, the California Labor Code contains several provisions where private litigants can recover "statutory penalties" that are not outside the scope of FAA. *Iskanian*, 59 Cal. 4th at 380. Indeed, court have held that PAGA allows recovery of a fixed "civil penalty" even in cases where the statute already provides for a "statutory penalty." Lab. Code §§ 2699(a), 2699.5; *see Bright v. 99¢ Only Stores,* 189 Cal. App. 4th 1472, 1481 (2010) (holding civil penalty applicable to violations of "all provisions of this code except those for which a civil penalty is specifically provided.") .

For example, Labor Code Section 226(e) allows recovery of a $50 statutory penalty for each pay period where an employer fails to provide an employee with an accurate itemized wage statement, and Labor Code Sections 2699(a) and 2699.5 have been held to allow for recovery of an additional $100 "civil penalty" through PAGA for the identical underlying violation. There is no meaningful

difference between these claims, except that the state theoretically takes 75% of the civil penalty, while it takes a smaller portion of the statutory penalty through income taxation. Yet, the California Supreme Court has held that employees can agree to individual arbitration of their statutory Section 226 direct claims, but not substantively identical PAGA claims.

In sum, there is no cogent basis to treat PAGA claims different from other Labor Code claims or to exclude PAGA actions from the scope of the FAA. Private PAGA actions are plainly actions brought by individuals who control the litigation from start to finish and seek recovery for their own alleged injuries. As such, per *Concepcion*, the employees' agreements to individually arbitrate their claims must be enforced according to their terms.

C. Excepting PAGA Actions From the Coverage of the FAA Would Undermine the Federal Policy of Promoting Quick Resolution of Individual Claims

In *Concepcion*, this Court explained that a benefit of the FAA was to promote "expedited resolution of disputes." *Concepcion*, 131 S. Ct. at 1749. The rule crafted by the California Supreme Courts allowing enforcement of "class action waivers" in arbitration agreement but not "PAGA

representative action waivers" arising from the identical underlying conduct greatly undermines that rationale.

The California Supreme Court did not announce a rule that, where PAGA claims are joined with class Labor Code claims (as is a common practice), the PAGA claims are stayed until the individual arbitration of the remaining, non-PAGA claims is completed. Instead, the California Supreme Court suggested that it was an open question whether the PAGA claims and individual claims should be bifurcated, and, if so, which claims should proceed first. *Iskanian*, 59 Cal. 4th at 391-92. Furthermore, the California Supreme Court's holding that PAGA claims are outside the FAA entirely allows the state to ignore FAA precedent requiring arbitral claims to proceed immediately even if other claims are held non-arbitrable. *See Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238, 1242-43 (1985).

Accordingly, if this Court allows *Iskanian* to stand such that PAGA claims are now outside the FAA, California would be free to rule that PAGA claims must go forward in court while the arbitration of the underlying Labor Code claims is stayed. If that were the rule, then an agreement that employment disputes will be subject to individual arbitration would be supplanted by a rule that the underlying issues will be litigated in court through the PAGA mechanism while the

arbitral claims are stayed. Principles of collateral estoppel might even preclude the re-litigation of the underlying issues in arbitration – effectively depriving the parties of their contractual right to have an arbitrator resolve the dispute of the underlying Labor Code claims that were also the subject of non-arbitral PAGA claims.

The ability to use PAGA to frustrate the purpose of the FAA is illustrated by the following example. Consider an employee who has signed an arbitration agreement expressly committing to individual arbitration for any and all employment claims. She has a minor dispute, asserting that her pay check stub that says the pay is for the "week ending May 15" does not comply with Labor Code Section 226(a), which requires that the pay stub set forth "the inclusive dates of the [pay] period" (a common basis for a PAGA representative claim). If she honors her arbitration agreement, the dispute is quickly and simply resolved with little at stake since there are no damages – it is merely a technical violation if it is a violation at all. But under the holding of the California Supreme Court in *Iskanian*, she can seek PAGA penalties in court of at least $100 per pay period per aggrieved employee reaching back one year from the date she initiates her suit. Lab. Code §2699(f)(2).

Assume the employer has hundreds of employees with similar paystubs. The bargained-for quick and inexpensive resolution limited to the claims of the signatory employee has been rendered meaningless. And all this is in the context where the state has suffered no loss or damage analogous to *qui tam* fraud whatsoever.

In addition to thwarting the goals of the FAA with respect to employers and employees in the State of California, *Iskanian* provides a roadmap for states that wish to exclude claims from arbitration. Rather than try to pass statutes excluding certain claims from arbitration (which would violate the FAA), states now could simply craft statutes that purport to "deputize" employees to litigate statutory violations. Perhaps a statute could award a "civil penalty" measured by the amount of damages the employee experienced from the violation, and require the employee to pay 10-20% of the "penalty" to the state. Such a system would be practically indistinguishable from an action for damages in which the state collected the same share of recovered damages through the ordinary income tax process.

Indeed, this is not a fanciful example. At least one California appellate court has held that a civil penalty under Labor Code Section 558 may be measured by the amount of wages the employer failed to pay, with the entire "civil

penalty" going to the aggrieved employee. *Thurman v. Bayshore Transit Management*, 203 Cal. App. 4th 1112, 1145 (2012). Such a rule allows damages simply to be renamed "civil penalties" with no meaningful change in their character.

In short, *Iskanian* does not merely pose a narrow exception to the FAA for *qui tam* claims. Rather, it is a case that, if left unreviewed, would have the potential to completely undermine this Court's previous holdings under the FAA and easily circumvent the preemptive scope of the FAA. For those reasons, Amici strongly urge the Court to grant certiorari.

V.
CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, Amici respectfully request that the Court grant certiorari and reverse the California Supreme Court's holding that the FAA does not preempt the state's public policy prohibiting arbitration of PAGA claims.

Respectfully submitted,

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