No.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID E. MARTIN
MICHAEL C. CHRISTMAN
Macy's Law Department
111 Boulder Industrial Dr., 2nd Floor
Bridgeton, MO 63044
(314) 342-6719

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

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.

RULE 29.6 STATEMENT

Petitioner Bloomingdale's, Inc. is a wholly-owned subsidiary of Macy's Retail Holdings, Inc., which in turn is a wholly-owned subsidiary of Macy's, Inc., which is publicly held. No other publicly held corporation has a 10% or more ownership interest in Bloomingdale's, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bloomingdale's, Inc. (Bloomingdale's) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported, but is available at 2016 WL 6156054. The order of the district court dismissing the case following the completion of the parties' arbitration (App., *infra*, 3a) is unreported, but is available at 2014 WL 12666903. The opinion of the district court granting Bloomingdale's motion to compel arbitration (App., *infra*, 4a-6a) is unreported, but is available at 2011 WL 13162460.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2016. App., *infra*, 1a. On January 13, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 9, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

> or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

Agreements to arbitrate on an individual basis—and thereby dispensing with class procedures—are enforceable under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA). *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 352 (2011). Just last Term, this Court reiterated that the FAA "is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015).

Yet the Ninth Circuit—following the lead of the California Supreme Court—flouted this "elementary point of law." *Imburgia*, 136 S. Ct. at 468. Those courts have allowed enterprising plaintiffs to circumvent *Concepcion* by invoking California's Private Attorneys General Act of 2004 (PAGA), which authorizes an "aggrieved employee" to recover civil penalties on a representative basis by raising alleged violations of California's Labor Code as to "himself or

herself" and "other current or former employees." Cal. Labor Code § 2699(a).

The California Supreme Court endorsed this strategy for circumventing *Concepcion* in *Iskanian* v. *CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), cert. denied, 135 S. Ct. 1155 (2015). Echoing the rule from *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005)—the rule that this Court invalidated in *Concepcion*—*Iskanian* held that any arbitration agreement requiring arbitration of PAGA claims on an individualized basis and barring representative PAGA actions is unenforceable as contrary to "California's public policy." And the court went on to say that the FAA is not implicated because (in that court's view) PAGA claims belong to the State rather than the aggrieved employee. 327 P.3d at 149-53.

The Ninth Circuit then followed suit, holding *Concepcion* inapplicable to PAGA claims because, in the panel majority's view, the procedures for pursuing representative claims under PAGA do not sufficiently resemble Rule 23 class actions. *Sakkab* v. *Luxottica North Am., Inc.*, 803 F.3d 425, 433-39 (9th Cir. 2015) (App., *infra*, 74a-91a). Judge N.R. Smith vigorously dissented from that holding.

In this case, the Ninth Circuit summarily vacated the district court's decision compelling arbitration, citing both *Iskanian* and *Sakkab*. But neither justification for refusing to enforce the arbitration agreement is permissible under the FAA.

First, just as this Court explained in *Concepcion* that class procedures are incompatible with the type of arbitration that the FAA contemplates, so too representative PAGA actions are inconsistent with arbi-

tration because they present the same enormous stakes and procedural complexity that this Court held inimical to bilateral arbitration.

Second, the FAA does not permit a State to exempt private parties' arbitration agreements from the FAA simply by labeling them "private attorneys general." A *private* PAGA claim bears no resemblance to the *government* enforcement action in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002)—which the *Iskanian* court pointed to in defending its rule.

As the strongly-worded dissent in *Sakkab* put it, the majority "ignore[d] the basic precepts enunciated in *Concepcion*" and "should have applied *Concepcion* and deferred to the FAA's liberal federal policy favoring arbitration, rather than circumventing it." App., *infra*, 92a (N.R. Smith, J., dissenting). Prior to the *Sakkab* decision, the vast majority of district courts in the Ninth Circuit had agreed with the dissent's position, holding that the FAA preempts the *Iskanian* rule.

The practical consequences of the twin rulings by the Ninth Circuit and California Supreme Court are enormous. While PAGA claims were once an afterthought tacked onto putative employment class actions in California, the number of PAGA filings has skyrocketed in recent years as plaintiffs seek to evade this Court's decision in *Concepcion*. If the holdings in *Iskanian* and *Sakkab*—on which the decision below rests—are permitted to stand, representative PAGA claims will only become more common, resulting in the effective invalidation of hundreds of thousands, if not millions, of arbitration agreements that are governed by the FAA.

Moreover, while PAGA itself is unique to California, the *Iskanian*/*Sakkab* rule provides a roadmap for States and litigants to circumvent this Court's decisions interpreting and applying the FAA. And that roadmap is not limited to the employment context—States could enact copycat statutes governing other areas of law, substituting "representative actions" for class actions, and invalidating hundreds of millions of arbitration agreements.

This Court's review is therefore essential.

A. California's Private Attorneys General Act.

California's Private Attorneys General Act of 2004 (PAGA) allows a private plaintiff to seek monetary awards on a representative basis on behalf of all similarly-situated employees, without all of the safeguards that due process typically requires in class actions.

Specifically, PAGA authorizes an "aggrieved employee" to recover civil penalties for violations of California's labor laws in situations in which a state enforcement official could—but does not—bring such a claim. Cal. Labor Code § 2699(a). An aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* § 2699(c).

The employee may recover monetary penalties not only for violations that he or she allegedly suffered, but also on a representative basis for all other similarly-situated employees. See Cal. Labor Code § 2699(a); see also *id.* § 2699(g)(1). Remedies in a representative PAGA action are assessed against the employer on a "per pay period" basis for *each* "ag-

grieved employee" affected by *each* claimed violation of the California Labor Code. *Id.* § 2699(f)(2).

Specifically, PAGA authorizes a statutory penalty of $100 per aggrieved employee per pay period for the first violation, and $200 per aggrieved employee per pay period for any subsequent violation (unless the underlying provision of the Labor Code provides for a different civil penalty). *Ibid.* The employees keep 25% of any civil penalties recovered and remit the remaining 75% to the State. *Id.* § 2699(i).

Prior to filing a PAGA lawsuit, the employee must give written notice of the alleged Labor Code violation to the State's Labor and Workforce Development Agency. Cal. Labor Code § 2699.3(a). But if the agency either notifies the employee that it does not intend to investigate or simply fails to respond within 65 days, the employee is free to commence a civil action (*id.* § 2699.3(a)(2)(A)).[1] Likewise, an employee is free to commence a civil action if the agency does intend to investigate but "determines that no citation shall be issued" or fails to take any action within the prescribed time period. Cal. Labor Code § 2699.3(a)(2)(B).

Once the action is commenced, the private plaintiff controls the litigation—there is no role for the State agency. Court approval is required for settlement of a PAGA claim. See Cal. Labor Code § 2699(l)(2).

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[1] The currently operative 65-day period is the product of the June 2016 amendments to PAGA. The previous period was 33 days. See *Arias* v. *Superior Court*, 209 P.3d 923, 930 (Cal. 2009).

B. The *Iskanian* And *Sakkab* Decisions.

1. In *Iskanian*, the California Supreme Court held that agreements to arbitrate PAGA claims on an individual basis (thus waiving representative PAGA claims on behalf of others) "frustrate[] the PAGA's objectives" and are "contrary to public policy and unenforceable as a matter of state law." 327 P.3d at 149. The court invoked Section 1668 of the California Civil Code, the same provision that it previously relied upon in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), to hold that waivers of class procedures were unenforceable under California law (see *Concepcion*, 563 U.S. at 340).

The *Iskanian* court further determined that its public-policy holding was not preempted by the FAA, asserting that a private plaintiff's PAGA claims belong to the State rather than to the aggrieved employee bringing the claim. 327 P.3d at 149-53. Relying on *EEOC v. Waffle House*, 534 U.S. 279 (2002), in which this Court held a private party's arbitration agreement inapplicable because, among other things, a federal government agency was the plaintiff, the California Supreme Court "conclude[d] that California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the Labor and Workforce Development Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." *Id.* at 153.

2. Following the decision in *Iskanian*, a divided panel of the Ninth Circuit held in *Sakkab* that "the FAA does not preempt the *Iskanian* rule," and reversed the district court's order compelling arbitration of a PAGA claim. App., *infra*, 69a.

The *Sakkab* majority pointed to *Iskanian*'s reasoning, but did not defend that court's reliance on *Waffle House* nor its holding that waivers of representative PAGA claims are categorically excluded from the FAA's coverage on the theory that PAGA claims are brought on behalf of the State. Instead, the *Sakkab* majority held that "[t]he *Iskanian* rule does not conflict with [the FAA's] purposes" because, in its view, representative claims under PAGA are not sufficiently similar to Rule 23 class actions to render them incompatible with arbitration. App., *infra*, 78a-89a. The panel then "bolstered" its conclusion by reference to California public policy: "the PAGA's central role in enforcing California's labor laws" and "the deterrence scheme the legislature judged to be optimal." *Id.* at 89a-91a.

Judge N.R. Smith dissented in a comprehensive opinion, concluding that the panel majority had "essentially ignore[d] the Supreme Court's direction in *Concepcion*." App., *infra*, 92a-112a. Judge Smith observed that the California Supreme Court's rule in *Iskanian*—like the *Discover Bank* rule invalidated in *Concepcion*—"interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration." *Id.* at 99a. In particular, he noted, "[t]he *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion*: it makes the process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk." *Id.* at 100a (citing *Concepcion*, 563 U.S. at 348).

Judge Smith concluded: "Numerous state and federal courts have attempted to find creative ways

to get around the FAA. We did the same [in prior cases], and were subsequently reversed in *Concepcion*. The majority now walks that same path." App., *infra*, 112a.[2]

C. The Arbitration Agreement Between Petitioner and Respondent.

Petitioner Bloomingdale's is a retail department store with 53 locations nationwide, including 13 in California. Bloomingdale's is a wholly-owned second-tier subsidiary of Macy's, Inc. Respondent Nancy Vitolo is a former employee of Bloomingdale's.

Bloomingdale's employed Vitolo from July 31, 2008 until September 15, 2008. App., *infra*, 4a. At the beginning of her employment, Vitolo and Bloomingdale's agreed to resolve disputes via individual arbitration under the Solutions InSTORE Program. *Id.* at 4a-5a.[3]

That arbitration agreement covers any and all "employment-related legal disputes, controversies, or claims" between the parties, "whether arising under federal, state or local decisional or statutory law." App., *infra*, 9a.

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[2] The Ninth Circuit denied rehearing *en banc* in *Sakkab*, and the case subsequently settled before a petition for certiorari was filed.

[3] The Solutions InSTORE Program is Macy's and Bloomingdale's four step dispute resolution program. ER 520-521. ("ER __" refers to the Excerpts of Record in the court of appeals.) Arbitration under the Solutions InSTORE Program is a voluntary term and condition of employment; employees are permitted to opt out of arbitration within 30 days of the beginning of their employment. ER 522. It is undisputed that Vitolo did not opt out of arbitration. ER 527-528.

The parties expressly agreed to forgo all representative procedures and instead arbitrate all disputes only on an individual basis:

> The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding. Nor shall the Arbitrator have the power to hear an arbitration as a class or collective action. (A class or collective action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group).

App., *infra*, 19a. After *Concepcion* and before *Iskanian*, multiple courts had enforced the same waiver of representative actions in compelling arbitration of plaintiffs' PAGA claims on an individual basis. See *Quevedo* v. *Macy's, Inc.*, 798 F. Supp. 2d 1122 (C.D. Cal. 2011); *Teimouri* v. *Macy's, Inc.*, 2013 WL 2006815 (Cal. Ct. App. 2013).

D. Proceedings Below.

1. Respondent Vitolo filed a putative class action lawsuit in California state court in August 2009, asserting seven claims under the California Labor Code, and seeking damages for each claimed violation on behalf of herself and other current and former employees of Bloomingdale's. ER 785. Vitolo also asserted a claim under California's Unfair Competition Law on a representative basis. *Ibid*. Vitolo subsequently amended her complaint to add an eighth violation of the Labor Code. ER 815.

Bloomingdale's timely removed the lawsuit to federal court, and Vitolo again amended her complaint, seeking for the first time civil penalties under PAGA for the alleged Labor Code violations. App., *infra*, 27a-62a. Bloomingdale's moved to compel indi-

vidual arbitration pursuant to Vitolo's arbitration agreement.

2. After this Court issued its decision in *Concepcion*, the district court granted the motion to compel arbitration (App., *infra*, 4a-6a) over Vitolo's objection that representative PAGA claims could not be waived (ER 142).

Vitolo arbitrated her claims on an individual basis, which resulted in an arbitration award in Bloomingdale's favor on all of the claims. ER 55-82. After the time for Vitolo to file a motion to vacate the award had expired, the district court entered judgment in favor of Bloomingdale's and dismissed the action in September 2014. App., *infra*, 3a.

3. On appeal, as in the district court, Vitolo did not challenge the arbitrator's determination of the arbitrated Labor Code claims. Instead, relying on the intervening decisions in *Iskanian* and *Sakkab*, she claimed that the district court's order compelling arbitration must be reversed because her agreement to arbitrate on an individual basis was not enforceable with respect to representative PAGA claims.

The panel in this case, in a one-paragraph memorandum opinion, vacated the district court's judgment in favor of Bloomingdale's and remanded the case to the district court for further proceedings (*i.e.*, the litigation of Vitolo's representative PAGA claims) based on the holdings in *Iskanian*, *Sakkab*, and *Perez* v. *U-Haul Co.*, 3 Cal. App. 5th 408 (Cal. Ct. App. 2016). App., *infra*, 1a-2a.[4]

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[4] The California Court of Appeal in *Perez* reiterated *Iskanian*'s holding that "a PAGA claim lies outside the FAA's coverage" and held as a matter of California law that, under *Iskanian*, an

REASONS FOR GRANTING THE PETITION

Iskanian and *Sakkab*—applied in the decision below—defy this Court's holdings that the FAA protects the enforceability of agreements to resolve disputes through individual arbitration and dispense with class or other representative procedures inimical to bilateral arbitration.

That was the unambiguous holding of *Concepcion*, which declared that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 351. Because such a state-law rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" it "is preempted by the FAA." *Id.* at 352 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 & n.5 (2013). As this Court has reiterated, lower courts have an "undisputed obligation" to "follow this Court's holding in *Concepcion*." *Imburgia*, 136 S. Ct. at 468.

The square conflict between *Concepcion* and the holdings of the California Supreme Court in *Iskanian* and the Ninth Circuit in *Sakkab*—along with *Iskanian*'s stark inconsistency with the holding and reasoning of *Waffle House*—by themselves provide a powerful reason for granting review.

But the practical impact of these decisions provides an equally compelling justification for review. California is home to well over a tenth of the entire

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employee is not required to arbitrate any aspect of a representative PAGA claim, including whether she qualifies as an "aggrieved employee" under the statute. See 3 Cal. App. 5th at 419-23.

American workforce.[5] A significant proportion of employees have entered into arbitration agreements, and the *Iskanian*/*Sakkab* rulings mean that virtually every modern employment arbitration agreement is categorically unenforceable with respect to representative PAGA claims—whether the claim is brought in federal or in state court.

In the wake of this Court's decision in *Concepcion*, enterprising plaintiffs and their counsel have turned representative PAGA actions into the tail wagging the class action dog, resulting in an explosion of PAGA filings that effectively result in the disregard of countless arbitration agreements. This trend will only increase if *Iskanian* and *Sakkab* are allowed to stand.

Far less was needed for this Court to grant review in *Preston* v. *Ferrer*—indeed, there was neither a conflict in the lower courts nor a parallel federal court decision. And that case involved a limited, industry-specific incursion on the FAA's policy mandating the enforcement of arbitration agreements. See *Preston* v. *Ferrer*, 552 U.S. 346, 349 (2008) (arbitration of disputes between entertainers and talent agencies). Because *Iskanian* and *Sakkab* together affect virtually all employment arbitration agreements in California—regardless of the industry—those de-

[5] According to the Bureau of Labor Statistics, as of December 2016 California had an employed workforce of 18,165,400. Bureau of Labor Statistics, *California*, https://perma.cc/A2LN-YVVF. At that time, the United States employed workforce was 152,111,000. Bureau of Labor Statistics, *Employment status of the civilian population by sex and age*, https://perma.cc/Y3RH-F3EW.

cisions affect a far broader cross-section of the Nation's largest economy.

This important issue of whether the FAA preempts the *Iskanian* rule is also fully ripe for resolution, and this case is a better vehicle for resolving the issue than any previous case. When this Court denied review in *Iskanian*, see 135 S. Ct. 1155 (2015), *Sakkab* had not yet been decided, and the issue thus was still percolating in the Ninth Circuit and federal district courts.[6] Now that the Ninth Circuit has addressed the issue, there is no reason to wait for additional lower court analysis. Moreover, the decision below squarely presents the issue because it rests entirely on the viability of the holdings in *Iskanian* and *Sakkab*; respondent did not challenge below the enforceability of her agreement to arbitrate on any other ground.

The Court should address this issue, and put an end to the latest efforts of California to exalt its policy preferences over the determinations of Congress embodied in the FAA and this Court's FAA precedents.

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[6] Likewise, when this Court denied review in a subsequent state court decision, *CarMax Auto Superstores California, LLC* v. *Areso*, 136 S. Ct. 689 (2015), there was still a petition for rehearing *en banc* pending in *Sakkab*, with a potential certiorari petition to follow. Moreover, because this case, unlike *Iskanian* or *CarMax*, involves review of a federal court action, it does not implicate any disagreement among members of this Court about whether the FAA applies in state courts.

A. The *Iskanian* Rule Contravenes The FAA And Defies This Court's Precedents.

1. The FAA forbids California from requiring claims to be arbitrated on a representative basis.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *Waffle House*, 534 U.S. at 289 (quotation marks omitted). In *Concepcion*, this Court "consider[ed] whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at 336.

The Court held that state laws "[r]equiring the availability of classwide arbitration interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." 563 U.S. at 344. In "bilateral arbitration," the "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Id.* at 348 (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)).

This Court further explained why "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). "[T]he 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." *Id.* at 348. In addition, "class arbitration greatly increases risks to defendants," because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable" in light of the limited judicial review available. *Id.* at 350.

But the *Sakkab* majority held that *Concepcion*'s reasoning was limited to waivers of class actions brought under Rule 23 (or state-law equivalents); accordingly, the majority said, the FAA presents no obstacle to the *Iskanian* rule invalidating arbitration agreements that bar representative PAGA actions. App., *infra*, 78a-89a.

True, a representative PAGA action is not identical to a Rule 23 class action in all respects. See *Baumann* v. *Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1120 (9th Cir. 2014) (holding that PAGA actions are not actions "filed under [Federal] rule 23 * * * or [a] similar State statute or rule of judicial procedure" within the meaning of the Class Action Fairness Act).

But the distinctions are irrelevant under the FAA. A state-law rule conditioning enforcement of arbitration agreements on the ability to assert "representative" claims—just like the *Discover Bank* rule conditioning enforcement of arbitration agreements on the ability to assert "class" claims—transforms the parties' agreement into something that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.

Specifically, as the dissenting opinion in *Sakkab* explained in detail, "[t]he *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion*: it makes the process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk." App., *infra*, 100a (N.R. Smith, J., dissenting).[7]

First, arbitration of a representative PAGA action is inherently far slower and more costly than the bilateral arbitration contemplated by the FAA (and to which the parties agreed). App., *infra*, 100a-101a & n.4 (N.R. Smith, J., dissenting). Remedies in a representative PAGA action are assessed against the employer on a "per pay period" basis for ***each*** "aggrieved employee" affected by ***each*** claimed violation of the California Labor Code that is proven by the representative plaintiff. Cal. Labor Code § 2699(f)(2).

Thus, in contrast to a bilateral wage-and-hour dispute in which the arbitrator focuses solely on the individual circumstances of the claimant, an arbitrator presiding over a representative PAGA action "would have to make specific factual determinations regarding (1) the number of other employees affected by the labor code violations, and (2) the number of pay periods that *each* of the affected employees

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[7] The *Sakkab* majority's overly-restrictive reading of *Concepcion* also conflicts with the Second Circuit's holding that *Concepcion*'s reasoning applies to collective actions under the Fair Labor Standards Act (FLSA)—which are "opt in" and also not subject to Rule 23. *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013) ("Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context.").

worked." App., *infra*, 101a-102a (N.R. Smith, J., dissenting). "Because of the high stakes involved in these determinations, both of these issues would likely be fiercely contested by parties." *Id.* at 102a. And "[i]n arbitrations involving large companies," such as Bloomingdale's or Macy's, "the arbitrator would be required to make individual factual determinations regarding * * * hundreds or thousands of employees, none of whom are party to such arbitration." *Ibid.*

In fact, because representative PAGA claims are not subject to the commonality or predominance requirements of Rule 23 or similar state procedures, arbitration of representative PAGA claims could well produce a proceeding even slower, less efficient, and more costly than class arbitration—by requiring a burdensome and time-consuming adjudication of a huge number of individualized issues.

The difficulties that the arbitration of representative PAGA claims would entail are well illustrated by the circumstances of this case. Vitolo alleged eight causes of action under the California Labor Code, covering a gamut of allegations relating to overtime; meal and rest breaks; wage deductions; timely payment of wages; minimum wages; and noncompliant wage statements. App., *infra*, 40a-53a. The arbitrator held a three-day hearing on Vitolo's individual claims alone, authoring a comprehensive 28-page opinion that included numerous references to Vitolo's testimony about her own individual circumstances and assessed the credibility (or lack thereof) of that testimony. ER 55-82.

The record indicates that Vitolo's representative PAGA action could seek civil penalties with respect to nearly 2,000 employees for just one of the claimed violations. ER 601 (motion for class certification on

one alleged labor violation stating that the proposed class comprised 1,870 individuals). And that number could range up to nearly 9,000 for other asserted violations. See ER 600 (noting list of "8,748" non-exempt employees employed by petitioner within California during the relevant period).

Multiplying the detailed assessment engaged in by the arbitrator here by thousands of absent employees—and for each and every pay period—plainly would eviscerate the "lower costs" and "greater efficiency and speed" that arbitration is meant to achieve. *Concepcion*, 563 U.S. at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Second, for similar reasons, the procedures needed to resolve a representative PAGA arbitration will necessarily be far more complicated than those in bilateral arbitration. "In an individual arbitration, the employee already has access to all of his own employment records"; "[h]e knows how long he has been working for the employer"; and he "can easily determine how many pay periods he has been employed." App., *infra*, 104a-105a (N.R. Smith, J., dissenting). But in a representative PAGA action, "the individual employee does not have access to any of this information" for "the other potentially aggrieved employees," and the "discovery necessary to obtain these documents from the employer would be significant and substantially more complex than discovery regarding only the employee's individual claims." *Id.* at 105a.

The *Sakkab* majority brushed aside these concerns by speculating that parties *could* agree to arbitrate representative PAGA actions using procedures more informal than those required for class actions. App., *infra*, 88a-89a. But as this Court pointed out in

explaining that class arbitration "as a structural matter" includes "absent parties, necessitating additional and different procedures" (*Concepcion*, 563 U.S. at 347-48), the arbitration of representative PAGA claims likewise necessitates procedures to assess whether and to what extent absent employees were affected by the alleged Labor Code violations.

Those expansive procedures are incompatible with the streamlined proceedings that are the hallmark of individual arbitration—and therefore States may not impose such procedures on parties that have not agreed to them. *Concepcion*, 563 U.S. at 351. Just as "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA" (*id.* at 348), so too is representative arbitration to the extent it is manufactured by *Iskanian* and *Sakkab*.

Third, the arbitration of representative PAGA actions "greatly increases the risk to employers." App., *infra*, 107a (N.R. Smith, J., dissenting) (citing *Concepcion*, 563 U.S. at 350). The outsized civil penalties available in a representative PAGA action may total many millions of dollars when civil penalties are sought by reference to hundreds or thousands of potentially affected employees for pay periods extending over multiple years. As the Ninth Circuit has put it, "[e]ven a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars." *Kilby* v. *CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013); see also, *e.g.*, Complaint, *O'Bosky* v. *Starbucks Corp.*, 2015 WL 2254889, ¶ 9 (Cal. Super. Ct. 2015) (seeking to recover penalties under PAGA by reference to approximately "65,000" "aggrieved employees"). Indeed, in some PAGA cases, the fines to which an employer

could be subject are substantially *higher* than the actual damages that would have been awarded had the suit been brought as a class action. See Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016).

These outsized civil penalties pose the same "unacceptable" risk of "devastating loss" that arises "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Concepcion*, 563 U.S. at 350. Given the limited appellate review of arbitration awards, "[d]efendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would 'go uncorrected.'" *Quevedo*, 798 F. Supp. 2d at 1142 (C.D. Cal. 2011) (quoting *Concepcion*, 563 U.S. at 350); see also App., *infra*, 107a (N.R. Smith, J., dissenting) ("the concerns expressed in *Concepcion* are just as real in the present case").

Moreover, just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 563 U.S. at 349), it is equally inconceivable that Congress in 1925 contemplated the arbitration of the types of representative actions that did not exist until the modern era. PAGA was created by the California legislature nearly eighty years after the passage of the FAA.

In short, representative actions under PAGA are every bit as incompatible with the "fundamental attributes of arbitration" as the class actions at issue in *Concepcion*, and "create[] a scheme inconsistent with the FAA." 563 U.S. at 344. State law cannot demand the availability of arbitrations on a representative basis any more than it can require arbitrations on a class basis.

Finally, and for the same reason, the holding in *Sakkab*—incorporated by the decision below—cannot be defended on the theory that it (or *Iskanian*) is a "'generally applicable'" defense that applies to the waiver of representative PAGA claims in arbitration agreements and non-arbitration agreements alike (App., *infra*, 75a (quoting *Concepcion*, 563 U.S. at 339)). The same could have been said of the *Discover Bank* rule struck down in *Concepcion*, in which the respondent argued that California's public-policy rule against waivers of class procedures applied to class-arbitration *and* class litigation waivers.

As this Court explained, the FAA precludes States from invalidating arbitration provisions through "generally applicable" rules that are applied "in a fashion that disfavors arbitration" or that "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 341-43. Moreover, as the dissent in *Sakkab* pointed out, although the issue was never raised by the parties in that case, there are "serious doubts that the rule established by *Iskanian* falls into the same category as * * * common law contract defenses" such as "duress or fraud." App., *infra*, 96a n.1 (N.R. Smith, J., dissenting).

For all of these reasons, it is unsurprising that the vast majority of federal district courts that had considered the issue after *Iskanian* was decided—in nine decisions by nine different judges—had concluded that the *Iskanian* rule is preempted by the FAA.[8] In contrast, only three district judges had held

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[8] *Eubank* v. *Terminix Int'l, Inc.*, 2015 WL 4487257, at *8 (S.D. Cal. 2015); *Nanavati* v. *Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1079-83 (N.D. Cal. 2015); *Estrada* v. *CleanNet USA, Inc.*, 2015

prior to *Sakkab* that the *Iskanian* rule is not preempted by the FAA.[9]

2. Public policy objectives cannot justify a state-law rule requiring procedures inconsistent with arbitration as envisioned by the FAA.

The *Sakkab* majority rested its holding in part on "PAGA's central role in enforcing California's labor laws," asserting that representative PAGA actions reflect "the deterrence scheme [that] the [California] legislature judged to be optimal." App., *infra*, 89a-90a. The *Iskanian* court similarly justified its rule on the basis that it "vindicate[s] the Labor and Workforce Development Agency's interest in enforcing the Labor Code." 327 P.3d at 153; accord App., *infra*, 90a (quoting same).

WL 833701, at *4-5 (N.D. Cal. 2015); *Lucero* v. *Sears Holdings Mgmt. Corp.*, 2014 WL 6984220, at *4-6 (S.D. Cal. 2014); *Mill* v. *Kmart Corp.*, 2014 WL 6706017, at *6-7 (N.D. Cal. 2014); *Langston* v. *20/20 Cos.*, 2014 WL 5335734, at *6-8 (C.D. Cal. 2014); *Chico* v. *Hilton Worldwide, Inc.*, 2014 WL 5088240, at *12-13 (C.D. Cal. 2014); *Ortiz* v. *Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1083-87 (E.D. Cal. 2014); *Fardig* v. *Hobby Lobby Stores Inc.*, 2014 WL 4782618, at *3-4 (C.D. Cal. 2014).

Applying *Concepcion*, the vast majority of federal district courts had also upheld the enforceability of waivers of representative PAGA claims prior to the decision in *Iskanian*. See *Asfaw* v. *Lowe's HIW, Inc.*, 2014 WL 1928612, at *9-10 (C.D. Cal. 2014) (collecting cases).

[9] See *Valdez* v. *Terminix Int'l Co.*, 2015 WL 4342867, at *7 (C.D. Cal. 2015); *Mohamed* v. *Uber Techs., Inc.*, 2015 WL 3749716, at *23-25 (N.D. Cal. 2015); *Zenelaj* v. *Handybook Inc.*, 82 F. Supp. 3d 968, 976-79 (N.D. Cal. 2015); *Hernandez* v. *DMSI Staffing, LLC*, 79 F. Supp. 3d 1054, 1062-67 (N.D. Cal. 2015).

These statements are indistinguishable from the policy justifications advanced by the plaintiffs in *Concepcion* and rejected by this Court. The contention in *Concepcion* was that California's policy interest in the broad enforcement of its consumer protection laws justified its rule conditioning enforcement of arbitration agreements on the availability of classwide procedures. 563 U.S. at 338.

This Court could not have been more direct in holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 351; see also *American Express*, 133 S. Ct. at 2312. Thus, as the *Sakkab* dissent put it, "[a] [S]tate may not insulate causes of action by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action." App., *infra*, 111a.

Moreover, while the *Sakkab* majority purported to disclaim reliance on the "effective vindication" exception to the enforcement of arbitration agreements (App., *infra*, 78a n.9), it "stray[ed] awfully close" to invoking it "[b]y relying so heavily on state policy grounds to support its decision" (*id.* at 109a (N.R. Smith, J., dissenting)).

Whatever past disagreements the members of this Court may have had about the application of the effective-vindication exception to claims arising under *federal* law, it is clear that the FAA does not contain an effective-vindication exception for *state*-law claims. Instead, the effective-vindication exception applies only when "the FAA's mandate has been 'overridden by a contrary *congressional* command.'" *American Express*, 133 S. Ct. at 2309 (emphasis added); see also *id.* at 2320 (Kagan, J., dissenting) ("[w]e have no earthly interest (quite the contrary) in vindi-

cating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal law).

3. Iskanian*'s holding that a PAGA claim belongs to the State does not save its rule from preemption.*

The decision in *Iskanian*—also cited by the panel below—concluded that "a PAGA claim lies outside the FAA's coverage" altogether, "because it is not a dispute between an employer and an employee arising out of their contractual relationship." 327 P.3d at 151. Instead, that court said, a PAGA claim "is a dispute between an employer and the *state*"—with "aggrieved employees" serving as "agents" of the state. *Id.* (emphasis in original). Those labels, the court held, render the FAA inapplicable.

The logical consequence of determining that a PAGA claim belongs to the State would be that the employee's arbitration agreement could not encompass PAGA claims. But the *Iskanian* court instead held that the employee *could* agree to arbitrate—but could not agree to arbitrate individually and waive asserting a representative claim on behalf of similarly-situated individuals.

The California Supreme Court's description of PAGA actions is, of course, controlling as a matter of state law. But its determination that the FAA for that reason does not apply to enforcement of an employee's arbitration agreement with respect to PAGA claims is a federal-law determination, and is directly contrary to this Court's decision in *Waffle House*.

First, a PAGA claim brought by a private plaintiff bears no resemblance to the government enforcement action at issue in *Waffle House*, the case

on which *Iskanian* relied. Critical to *Waffle House*'s determination that the employee's arbitration agreement did not apply was the fact that the *government* agency *itself* was pursuing the enforcement action and controlled the litigation. See 534 U.S. at 291-94; see also *Preston*, 552 U.S. at 359 (observing that in *Waffle House*, "the Court addressed the role of an agency * * * as prosecutor, pursuing an enforcement action *in its own name*") (emphasis added).

This Court stressed that "the EEOC is in command of the process" and that the "statute clearly makes the EEOC the master of its own case." *Waffle House*, 534 U.S. at 291. By contrast, the Court explained, if the publicly accountable agency had lacked direct and exclusive control over the case—for example, "[i]f it were true that the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]"—then the employee's arbitration agreement could have barred the agency from pursuing employee-specific relief. *Ibid.*

Under PAGA—which, of course, stands for the *Private* Attorneys General Act—the plaintiff who agreed to arbitration *does* exercise unfettered control over the prosecution of the claim, subject to minimal government oversight or control. See page 6, *supra*; Cal. Labor Code § 2699.3(a). Among other things, the private PAGA plaintiff:

- controls the allegations in the complaint;
- defines the set of employees that he or she seeks to represent; and

- may settle the claims without the State's approval.[10]

Second, *Waffle House* held that the employee's arbitration agreement did not encompass the EEOC's enforcement action *at all* because the action was brought by a government agency (534 U.S. at 291-94), but *Iskanian* holds that the employee's arbitration agreement *does* apply to PAGA claims so long as they are asserted on a representative basis. 327 P.3d at 155 ("Iskanian must proceed with bilateral arbitration on his individual damages claims, and CLS must answer the representative PAGA claims in some forum."); see also App., *infra*, 91a (remanding for determination of "where Sakkab's representative PAGA claims should be resolved"); *Valdez* v. *Terminix Int'l Co.*, --- F. App'x ----, 2017 WL 836085, at *1 (9th Cir. 2017) ("*Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a [representative] PAGA claim in arbitration.").

In other words, *Iskanian* holds a representative PAGA action to be just enough the State's to prevent application of this Court's decision in *Concepcion* and enforcement of an arbitration agreement's waiver of representative actions, but not enough the State's to prevent the employee from agreeing to arbitrate the claim. That conclusion is untenable, and amounts to little more than a transparent misuse of *Waffle House* to justify the court's unwillingness to apply *Concepcion*.

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[10] Prior to the June 2016 amendments to PAGA, private litigants were not even required to notify the State of a proposed PAGA settlement. The state agency must now be given notice of a proposed settlement, but the settlement is still subject only to the court's approval. See Cal. Labor Code § 2699(l)(2).

Thus, as Justice Chin observed in his concurrence in *Iskanian*, "to the extent [*Waffle House*] is relevant," it "actually *does* suggest that the FAA preempts the majority's rule." *Iskanian*, 397 P.3d at 158 (Chin, J., concurring) (quotation marks and alterations omitted).[11] Indeed, numerous federal courts in California—prior to the Ninth Circuit's decision in *Sakkab*—had little difficulty in recognizing that a private PAGA claim was different in kind from the EEOC enforcement action at issue in *Waffle House*.[12]

Third, and relatedly, the *Iskanian* court's analogy to *qui tam* actions does not save its rationale from preemption. The analogy is flawed from the outset: In contrast to the active role the government is authorized to play in federal *qui tam* litigation (see 31 U.S.C. § 3730(b)-(c)), California has little control over the conduct of a PAGA action brought by a private plaintiff—and certainly nowhere close to what would be required to satisfy *Waffle House*. See pages 26-27, *supra*.

Moreover, in the federal context, the majority of courts have held that there is no "inherent conflict" between the False Claims Act and the FAA.[13] But

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[11] Justice Chin nonetheless concurred because, in his view, the *Iskanian* rule was permissible under the effective-vindication exception. 397 P.3d at 157. That is plainly incorrect; this Court's precedents make clear that the effective-vindication exception simply does not apply to state-law claims. See pages 24-25, *supra*.

[12] See, *e.g.*, *Nanavati*, 99 F. Supp. 3d at 1083; *Lucero*, 2014 WL 6984220, at *5; *Langston*, 2014 WL 5335734, at *7; *Fardig*, 2014 WL 4782618, at *4.

[13] See *Deck* v. *Miami Jacobs Bus. Coll. Co.*, 2013 WL 394875, at *6-7 (S.D. Ohio 2013) (collecting cases criticizing the contrary

any dispute on that score is in all events immaterial here: whether *Congress* has overridden the FAA's generally applicable rule with respect to *federal qui tam* actions is wholly irrelevant to the arbitrability of *state* PAGA claims. The "inherent conflict exception[]" to the enforcement of arbitration agreements is the flip "side[] of the same coin" as the effective vindication exception—and both "are reserved for claims brought under federal statutes." *Ferguson* v. *Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013); see also pages 24-25, *supra*.

As the dissent in *Sakkab* put it, the majority's assertion that "[t]he FAA was not intended to preclude states from authorizing qui tam actions to enforce state law" (App., *infra*, 90a-91a) is flat wrong: not only is there "no authority to support" it, but "[u]nder *Concepcion*, if a state rule authorizing a qui tam action frustrated the purposes or objectives of the FAA, that rule would certainly be preempted." *Id.* at 110a n.7 (N.R. Smith, J., dissenting).

Fourth, the *Iskanian* court acknowledged that a State may not "circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D"—conceding that such an arrangement is "tantamount to a private class action" that is incompatible with arbitration under the FAA. 327 P.3d at 152. But it failed to recognize that the calculus does not change merely because the State asserts an enforcement interest in the private litigation. *Ibid.* California's policy interests in deputizing private attorneys general to aid in the enforcement of its laws do not permit

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district court decision in *Nguyen* v. *City of Cleveland*, 121 F. Supp. 2d 643 (N.D. Ohio 2000)).

the State to render unenforceable a plaintiff's otherwise-applicable arbitration agreement. Under the Supremacy Clause, federal law overrides state policy, not the other way around.

In addition, even assuming the *Iskanian* court were correct that the State is a "real party in interest" to a PAGA claim (327 P.3d at 151), that would not mean that the State may preclude enforcement of a private plaintiff's arbitration agreement. As this Court has held in the context of a federal *qui tam* action, "real party in interest" is "a term of art" distinct from the "party" to a lawsuit; and the government's "status as a 'real party in interest' in a *qui tam* action does not automatically convert it into a 'party.'" *U.S. ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 934-35 (2009).

Vitolo, like other employees who bring private PAGA lawsuits, is undoubtedly the actual "party" to and plaintiff in her PAGA lawsuit, regardless of whether her PAGA claim belongs to her originally or was assigned to her by the State. She agreed to arbitrate *all* claims related to her employment—assigned or otherwise—on an individual basis. App., *infra*, 9a. The FAA requires that agreement to be enforced according to its terms, "notwithstanding *any state* substantive or procedural policies to the contrary." *Concepcion*, 563 U.S. at 346 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (emphasis added); see also 9 U.S.C. §§ 3-4.

Finally, the *Iskanian* court's effort to imbue PAGA claims with the State's authority by pointing out that 75% of the recovery goes to the State (see 327 P.3d at 147) both misses the point and proves far too much. It misses the point because the division of civil penalties under PAGA has nothing to do with

who is *controlling* the litigation—which *Waffle House* makes clear is the determinative factor. 534 U.S. at 291. And it proves far too much because the fact that the State obtains a portion of recovered penalties is no basis for exempting private claims from arbitration.

For instance, a number of States have enacted laws requiring that as much as 75% of a punitive-damages award won by a private plaintiff be distributed to the State or its agencies.[14] Yet this Court has long held that agreements to arbitrate punitive-damages claims are fully enforceable under the FAA. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995).

* * *

At the end of the day, the decisions in *Sakkab* and *Iskanian* are, as Judge N.R. Smith said in his *Sakkab* dissent, little more than "attempt[s] to find creative ways to get around the FAA" and this Court's precedents. App., *infra*, 112a. This Court should intervene to curb the "'judicial hostility' to arbitration agreements" that those decisions represent. *Id.* at 92a.

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[14] *E.g.*, Alaska Stat. § 09.17.020(j); Ga. Code Ann. § 51-12-5.1(e)(2); 735 Ill. Comp. Stat. Ann. 5/2-1207; Ind. Code Ann. § 34-51-3-6(c); Iowa Code Ann. § 668A.1(2)(b); Or. Rev. Stat. Ann. § 31.735(1); Utah Code Ann. § 78B-8-201(3)(a).

B. The Issue Presented Is Exceptionally Important And Impacts Countless Arbitration Agreements.

This Court's review is particularly justified because of the exceptional importance of the issue presented. That is so for several reasons.

First, a tidal wave of PAGA actions is engulfing the California courts in order to circumvent employees' arbitration agreements and this Court's holding in *Concepcion*.

Formerly, PAGA claims were brought, if at all, only on "the coattails of traditional class claims," largely because plaintiffs did not want to remit 75% of their recovery to the State. Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 1-2 (2013) (noting the "strong incentive" for plaintiffs to prefer class claims over PAGA claims because of the allocation of PAGA proceeds). Even when plaintiffs tacked on PAGA claims to complaints asserting other claims under federal and state labor law, court-approved settlements in those cases reveal that the parties agreed to allocate only a tiny fraction of the recovery to the PAGA claims.[15]

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[15] See, *e.g.*, *Franco* v. *Ruiz Food Prods., Inc.*, 2012 WL 5941801, at *2 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia* v. *Gordon Trucking, Inc.*, 2012 WL 5364575, at *7 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie* v. *Fed. Express Corp.*, 2012 WL 2930201, at *4 (C.D. Cal. 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu* v. *Wells Fargo Inv., LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) ($10,000 allocated to PAGA claim out of $6.9 million settle-

Post-*Concepcion*, however, PAGA litigation has exploded. The number of PAGA suits filed increased by 400% between 2005 and 2013—759 PAGA lawsuits were filed in 2005, but by 2013, that number had risen to 3,137. Emily Green, *An alternative to employee class actions*, L.A. Daily Journal (Apr. 16, 2014).

The cause for this rise in PAGA litigation is apparent: plaintiffs' (and their counsel's) efforts to evade arbitration in the wake of *Concepcion*. As one commentator observed, PAGA has become "a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agreements." Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://perma.cc/X3N7-LN4A.

This deluge of cases has been encouraged further by *Iskanian*: the "practical effect" of that decision has been to generate "a significant increase in the filing of claims under PAGA." Erin Coe, Iskanian *Ruling to Unleash Flood of PAGA Claims*," Law360 (June 24, 2014), https://perma.cc/5UQ7-YRXP; see also Toni Vranjes, *Doubts Raised About New California PAGA Requirements*, Society for Human Resource Management (Dec. 6, 2016), https://perma.cc/4VWK-CPLW ("Following the *Iskanian* decision, PAGA claims skyrocketed"); Freudenberger, *supra* ("The immediate impact of the *Iskanian* decision has been an increase in PAGA representative actions, especially stand-alone PAGA claims in which a single plaintiff seeks to bring an action on behalf of other

ment); see also *Nordstrom Comm'n Cases*, 186 Cal.App.4th 576, 589 (Cal. Ct. App. 2010) (upholding multimillion dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

'aggrieved employees' in California courts."). As another commentator remarked, "[t]he fact that PAGA claims cannot be waived by agreements to arbitrate" under the *Iskanian* rule "contributes heavily to the prevalence of these suits." Goodman, *supra*, at 415.

Petitioner's own experience reflects this trend: Macy's or its subsidiaries (such as Bloomingdale's) are currently facing ***eight*** representative PAGA actions in California courts[16]—despite the fact that many of these companies' current and former employees, like Vitolo here, agreed to arbitrate their disputes on an individual basis.

Moreover, although PAGA is a California-specific statute (see *Urbino* v. *Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1120 (9th Cir. 2013)), the sheer size of California's labor market means that an outsized portion of the American workforce is covered by PAGA. California today is home to about 12% of the nation's workers, meaning that over a tenth of the *entire American workforce* is affected by PAGA suits. See note 5, *supra*.

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[16] See *Nicholson* v. *Macy's West Stores, Inc.*, No. CGC-16-552371 (Cal. Super. Ct., San Francisco County); *Martin* v. *Macy's West Stores, Inc.*, No. 30-2016-00860816-CU-OE-CJC (Cal. Super. Ct., Orange County); *Covarrubias* v. *Macy's Corporate Servs., Inc.*, No. CIV537692 (Cal. Super. Ct., San Mateo County); *Gonzalez* v. *Macy's West Stores, Inc.*, No. BC608604 (Cal. Super. Ct., Los Angeles County); *Tehrani* v. *Macy's West Stores, Inc.*, No. BC591480 (Cal. Super. Ct., Los Angeles County); *Garcia* v. *Macy's West Stores, Inc.*, No. CIVDS1516007 (Cal. Super. Ct., San Bernardino County); *Tanguilig* v. *Bloomingdale's, Inc.*, No. CGC-14-541208 (Cal. Super. Ct., San Francisco County); *Blackmon* v. *Macy's West Stores, Inc.*, No. VCU266609 (Cal. Super. Ct., Tulare County).

Second, many observers hostile to arbitration have suggested that PAGA provides a model that other States should adopt in order to keep representative actions in their courts despite *Concepcion* and the federal policy favoring arbitration.

One commentator, for example, has urged other States to enact PAGA-like statutes for the specific purpose of circumventing "binding arbitration clauses." Aaron Blumenthal, *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, 744 (2015). And a law professor has described PAGA claims as a model for "private aggregate enforcement of * * * employment laws without triggering FAA preemption or vulnerability to contractual class waivers." Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203, 1208-09 (2013).

Likewise, while PAGA is limited to labor claims, the Ninth Circuit's reasoning would presumably apply with equal force if California enacted a similar statute applying to claimed violations of the state's consumer protection or unfair competition laws—or any other form of massive aggregate litigation it wanted to exempt from arbitration.

In short, this Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). If the holdings in *Iskanian* and *Sakkab* are permitted to stand, that reliance on the uniform national policy favoring arbitration (embodied by the FAA) threatens to be replaced with an uneven patchwork of "one-

off," unprincipled carve-outs from the FAA that differ from state to state.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID E. MARTIN
MICHAEL C. CHRISTMAN
Macy's Law Department
111 Boulder Industrial Dr., 2nd Floor
Bridgeton, MO 63044
(314) 342-6719

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

MARCH 2017

APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANCY VITOLO, individually, and on behalf of other members of the general public similarly situated,
Plaintiff-Appellant,
v.
BLOOMINGDALE'S, INC., an Ohio corporation,
Defendant-Appellee.

FILED OCT 24, 2016
No. 14-56706
D.C. No.
2:09-cv-07728-DSF-PJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted October 6, 2016
Pasadena, California

Before: PREGERSON, NOONAN, and PAEZ, Circuit Judges.

We vacate the district court's judgment and remand to the district court for further proceedings in light of the California Supreme Court's decision in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014), the Ninth Circuit's decision in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), and the California Court of Appeal's decision in *Perez v. U-Haul Co. of California*, No. B262029, 2016 WL 4938809 (Cal. Ct. App. Sept. 16, 2016).

VACATED AND REMANDED.

The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 09-7728 DSF (PJWx) Date 9/24/14

Title Nancy Vitolo v. Bloomingdale's, Inc.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order DISMISSING Case

The Court previously stayed this matter pending arbitration. Plaintiff has now represented that the arbitration is complete and has resulted in a defense award with no fee or cost shifting. The Court sees no reason for this matter to remain open. In the unlikely event that Defendant wishes to petition for confirmation of the arbitration award, it can do that in a separate action.

The case is DISMISSED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 09-7728 DSF (PJWx) Date 5/23/11

Title Nancy Vitolo, et al. v. Bloomingdale's, Inc.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Defendant's Motion to Compel Arbitration and Stay Civil Proceedings (Docket No. 86)

The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons noted below, the Court GRANTS the motion.

Plaintiff worked at Defendant's Century City, California store from July 2008 to September 2008. (Noeth Decl. ¶ 16.) The parties' employment agreement required Plaintiff to arbitrate "all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment . . . ." (Id. Ex. A at 17.) The agreement also provided that an arbitrator could not "consolidate

claims of different Associates into one (1) proceeding" or "hear an arbitration as a class or collective action." (Id. at 22.)

In deciding whether to compel arbitration and stay proceedings under the Federal Arbitration Act ("FAA"), a district court's role is limited to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008) (internal quotation marks omitted). The FAA "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (internal citations omitted). Arbitration agreements may "be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility LLC v. Concepcion, — S.Ct. — , 2011 WL 1561956, *5 (April 27, 2011) (internal quotation marks omitted).

In her opposition, Plaintiff argued that the arbitration agreement is unenforceable under California law pursuant to Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) and Gentry v. Superior Court, 42 Cal. 4th 443 (2007). After Plaintiff filed her opposition, the Supreme Court issued its opinion in AT&T Mobility LLC v. Concepcion, — S.Ct. — , 2011 WL 1561956 (April 27, 2011), which holds that the FAA preempts Discover Bank. Under Concepcion, Gentry is preempted by the FAA as well because its rule derives its meaning from the fact that there is an

agreement to arbitrate at issue. See Gentry, 42 Cal. 4th at 457-65.

For these reasons, the Court GRANTS Defendant's motion to compel arbitration and stay proceedings.

IT IS SO ORDERED.

APPENDIX D

Step 4 - Arbitration Rules and Procedures

Article 1 - Individuals Covered

This Plan Document applies, as of the Effective Date provided in Article 4, to the following individuals, provided that they are not covered by a collective bargaining agreement with Macy's:

a. Newly Hired Associates

All Associates hired by Macy's with a first day of employment on or after January 1, 2007.

b. Covered May Associates

Associates whose employment with Macy's relates to the merger of The MAY Department Stores Company with and into Macy's, Inc. on August 30, 2005 (the "Merger"), as defined in i and ii below:

i. Former MAY Associates continuously employed by Macy's Retail Holdings, Inc., formerly known as The MAY Department Stores Company, between August 30, 2005 and January 1, 2007

ii. Any Associate hired with a first day of employment before January 1, 2007 by a Macy's division or subsidiary or operating unit that was an affiliate of MAY before the Merger (e.g., a store, a distribution center, a call center, etc.)

"Macy's" means any division or subsidiary or operating unit or entity related to Macy's, Inc.

All Associates are automatically covered by all 4 steps of the program by taking or continuing a job with the Company. That means that all Associates agree, as a condition of employment, to arbitrate any and all disputes, including statutory and other claims, not resolved at Step 3.

However,

Arbitration is a voluntary condition of employment. Associates are given the option of excluding themselves from Step 4 arbitration within a prescribed time frame. Issues at Step 4 are decided by a professional from the American Arbitration Association in an arbitration process, rather than in a court process. Arbitration thus replaces any right you might have to go to court and try your claims before a jury. You are covered by Step 4 unless and until you exercise the option to exclude yourself from arbitration. Whether you choose to remain covered by arbitration or to exclude yourself has no negative effect on your employment.

Any Associate who experiences a break in service with the Company of sixty (60) days or less, or who transfers from one subsidiary, division or affiliated Macy's Company to another, remains covered by Arbitration, unless the Associate previously excluded himself during the prescribed time period. If the Associate becomes re-employed with the Company following a break in service greater than sixty (60) days, the Associate is treated as a new hire and is given the opportunity to elect to be excluded from arbitration during the prescribed time period.

Article 2 — Claims Subject to or Excluded from Arbitration

Except as otherwise limited, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law ("Employment-Related Claims"), shall be settled exclusively by final and binding arbitration. Arbitration is administered by the American Arbitration Association ("AAA") under these Solutions InSTORE Early Dispute Resolution Rules and Procedures and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures. Arbitration is held before a neutral, third-party Arbitrator. The Arbitrator is selected in accordance with these Solutions InSTORE Early Dispute Resolution Rules and Procedures. If there are any differences between the Solutions InSTORE Early Dispute Resolution Rules and Procedures and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures, the Solutions InSTORE Early Dispute Resolution Rules and Procedures shall apply.

Arbitration shall apply to any and all such disputes, controversies or claims whether asserted by the Associate against the Company and/or against any employee, officer, director or alleged agent of the Company. Arbitration shall also apply to any and all such civil disputes, controversies or claims asserted by the Company against the Associate.

All unasserted employment-related claims as of January 1, 2007 arising under federal, state or local statutory or common law, shall be subject to arbitration. Merely by way of example, Employment-

Related Claims include, but are not limited to, claims arising under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, including amendments to all the foregoing statutes, the Employee Polygraph Protection Act, state discrimination statutes, state statutes, and/or common law regulating employment termination, misappropriation, breach of the duty of loyalty, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation.

Claims by Associates that are required to be processed under a different procedure pursuant to the terms of an employee pension plan or employee benefit plan shall not be subject to arbitration under Step 4. Claims by Associates for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) or under the National Labor Relations Act are also not subject to Arbitration under Step 4. Statutory or common law claims made outside of the state employment insurance system alleging that the Company retaliated or discriminated against an Associate for filing a state employment insurance claim, however, shall be subject to arbitration.

Nothing in these Solutions InSTORE Early Dispute Resolution Rules and Procedures prohibits an Associate from filing at any time, a charge or complaint with a government agency such as the EEOC. However, upon receipt of a right to sue letter or similar

administrative determination, the Associate's claim becomes subject to arbitration as defined herein.

Article 3 - Dismissal/Stay of Court Proceeding

By agreeing to arbitration, the Associate and the Company agree to resolve through arbitration all claims described in or contemplated by Article 2 above. This means that neither the Associate nor the Company can file a civil lawsuit in court against the other party relating to such claims. If a party files a lawsuit in court to resolve claims subject to arbitration, both agree that the court shall dismiss the lawsuit and require the claim to be resolved through the Solutions InSTORE program.

If a party files a lawsuit in court involving claims that are, and other claims that are not, subject to arbitration under Step 4, such party shall request the court to stay litigation of the nonarbitrable claims and require that arbitration take place with respect to those claims subject to arbitration, assuming the earlier steps have been exhausted. The Arbitrator's decision on the arbitrable claims, including any determinations as to disputed factual or legal issues, shall be entitled to full force and effect in any later court lawsuit on any nonarbitrable claims.

Article 4 - Effective Date

As to any Individuals Covered (as defined in Article 1), the Solutions InSTORE program is effective January 1, 2007.

Article 5 - Time Limit to Initiate Arbitration

Arbitration must be initiated in accordance with the time limits contained in the applicable law's statute of limitations. The period of time elapsed during which the Associate pursued his or her claims under

Steps 1 -3 of this Program is added on to the applicable limitations period.

Article 6 - Commencement of Arbitration

To initiate arbitration, the Associate or Company must give written notice to the other party and/or person who is alleged to be liable in the dispute ("Claimant"). Notice to the Company must be given to the Office of Solutions InSTORE.

Notice to the Associate must be given by mailing to the Associate's last known home address.

The notice shall include a statement of the nature of the claim together with a brief description of the relevant facts, the remedies including any amount of damages being sought, and the address which the Claimant will use for the purpose of the arbitration.

Within thirty (30) days after notice of a dispute'is given, the other party shall give its response ("Respondent").The response shall state all available defenses, a brief description of relevant facts and any related counterclaims then known.

Within thirty (30) days after such counterclaims are given, the Claimant shall give Respondent a brief statement of the claimant's defenses to and relevant facts relating to the counterclaims.

Claims and counterclaims may be amended before selection of the arbitrator and thereafter with the arbitrator's consent. Notices of defenses or replies to amended claims or counterclaims shall be delivered to the other party within the thirty (30) days after the amendment.

Article 7 - Selection of an Arbitrator

Both the Company and the Associate shall participate equally in the selection of an Arbitrator to decide the arbitration. After receiving and/or filing an Arbitration Request Form, the Solutions InSTORE Program Manager shall ask the American Arbitration Association to provide the Company and the Associate a panel of seven (7) neutral arbitrators with experience deciding employment disputes.

The Company and the Associate then shall have the opportunity to review the background of the arbitrators by examining the materials provided by the American Arbitration Association. Within seven (7) calendar days after the panel composition is received, the Associate and the Company shall take turns striking unacceptable arbitrators from the panel until only one remains. The Associate and the Company will inform the American Arbitration Association of the remaining arbitrator who will decide the dispute. However, if both parties agree that the remaining arbitrator is unacceptable, a second panel will be requested from the American Arbitration Association and the selection process will begin again. If both parties agree no one on the second panel is acceptable, either party may request the American Arbitration Association to simply appoint an Arbitrator who was not on either panel.

Article 8 - Time and Place of Arbitration

The arbitration hearing shall be held at a location within fifty (50) miles of the Associate's last place of employment with the Company, unless the parties agree otherwise. The Parties and the Arbitrator shall make every effort to see that the arbitration is completed, and a decision rendered, as soon as possible.

There shall be no extensions of time or delays of an arbitration hearing except in cases where both Parties consent to the extension or delay, or where the Arbitrator finds such a delay or extension necessary to resolve a discovery dispute or other matter relevant to the arbitration.

Article 9 - Right to Representation

Both the Associate and the Company shall have the right to be represented by an attorney. If the Associate elects not to be represented by an attorney during the arbitration proceedings, the Company will not have an attorney present during the arbitration proceedings.

Article 10 - Discovery

a. Initial Disclosure

Within fourteen (14) calendar days following the appointment of an Arbitrator, the Parties shall provide each other with copies of all documents upon which they rely in support of their claims or defenses. However, the parties need not provide privileged documents that are protected from disclosure because they involve attorney-client, doctor-patient or other legally privileged or protected communications or materials. Throughout the discovery phase, each party shall provide the other party with any and all such documents relevant to any claim or defense.

Upon written request, the Associate shall be entitled to a copy of all documents (except privileged documents as described above) in the Associate's "PERSONNEL FILE'

b. Other Discovery

i. Interrogatories/Document Requests

Each party may propound one (1) set of twenty (20) interrogatories (including subparts) to the other party. Interrogatories are written questions asked by one party to the other, the recipient must answer under oath. Such interrogatories may include a request for all documents upon which the responding party relies in support of its answers to the interrogatories. Answers to interrogatories must be served within twenty-one (21) calendar days of receipt of the interrogatories.

ii. Depositions

A deposition is a statement under oath that is given by one party in response to specific questions from the other party. It is usually recorded or transcribed by a court reporter. Each party shall be entitled to take the deposition of up to three (3) relevant individuals of the party's choosing. The party taking the deposition shall be responsible for all associated costs, such as the cost of a court reporter and the cost of a transcript.

iii. Additional Discovery

Upon the request of any party and a showing of appropriate justification, the Arbitrator may permit additional relevant discovery, if the Arbitrator finds that such additional discovery is not overly burdensome, and will not unduly delay the conclusion of the arbitration.

c. Discovery Disputes

The Arbitrator shall decide all disputes related to discovery. Such decisions shall be final and binding on the parties. In ruling on discovery disputes, the arbitrator need not follow but may consult the discovery rules contained in the Federal Rules of Civil Procedure.

d. Time for Completion of Discovery

All discovery must be completed within ninety (90) calendar days after the selection of the Arbitrator, except for good cause shown as determined by the Arbitrator. In order to expedite the arbitration, the parties may initiate discovery prior to the appointment of the Arbitrator.

Article 11 - Hearing Procedure

a. Witnesses

Witnesses shall testify under oath, and the Arbitrator shall afford each party a sufficient opportunity to examine its own witnesses and cross-examine witnesses of the other party. Either party may issue subpoenas compelling the attendance of any other person necessary for the issuing party to prove its case.

i. Subpoenas

A *subpoena* is a command to an individual to appear at a certain place and time and give testimony. A *subpoena* also may require that the individual bring documents when he or she gives testimony. To the extent authorized by law, the Arbitrator shall have the authori-

ty to enforce and/or cancel such subpoenas. *Subpoenas* must be issued no less than ten (10) calendar days before the beginning of an arbitration hearing or deposition.

The party issuing the subpoena shall be responsible for the fees and expenses associated with the issuance and enforcement of the subpoena, and with the attendance of the subpoenaed witness at the arbitration hearing.

ii. Sequestration

The Arbitrator shall ensure that all witnesses who testify at the arbitration are not influenced by the testimony of other witnesses. Accordingly, unless the Arbitrator finds cause to proceed in a different fashion, the Arbitrator shall sequester all witnesses who will testify at the arbitration, however, the Arbitrator shall permit the Associate involved in the arbitration and the Company's designated representative to remain throughout the arbitration, even though they may or may not testify at the hearing.

b. Evidence

The parties may offer evidence that is relevant and material to the dispute and shall produce any and all non-privileged evidence that the Arbitrator deems necessary to a determination of the dispute. The Arbitrator need not specifically follow the Federal Rules of Evidence, although they may be consulted to resolve questions regarding the admissibility of particular matters.

c. Burden of Proof

Unless the applicable law provides otherwise, the party requesting arbitration or the party filing a counterclaim has the burden of proving a claim or claims by a preponderance of the evidence.To prevail, the party bringing the arbitration must prove that the other's conduct was a violation of applicable law.

d. Briefing

Each party shall have the opportunity to submit one (1) dispositive motion, one (1) pre-hearing brief, and one (1) post-hearing brief, which is a written statement of facts and law, in support of its position. Submission of such briefs is not required, however, briefs shall be typed and shall be limited in length to twenty (20) double-spaced pages.

e. Transcription

The parties may arrange for transcription of the arbitration by a certified reporter. The party requesting transcription shall pay for the cost of transcription.

f. Consolidation

i. Claims

The Arbitrator shall have the power to hear as many claims as a Claimant may have consistent with Article 2 of these Solutions InSTORE Early Dispute Resolution Rules and Procedures.

The Arbitrator may hear additional claims that were not mentioned in the Arbitration Request Form. To add claims, the Claimant

must notify the other party at least thirty (30) calendar days prior to a scheduled arbitration. The additional claims must be timely, under the applicable law, as of the date on which they are added. The other party must not be prejudiced in its defense by such addition.

ii. Parties

The Arbitrator shall not consolidate claims of, different Associates into one (1) proceeding. Nor shall the Arbitrator have the power to hear an arbitration as a class or collective action. (A class or collective action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group).

g. Confidentiality

All aspects of an arbitration pursuant to these Solutions InSTORE Early Dispute Resolution Rules and Procedures, including the hearing and recording of the proceeding, shall be confidential and shall not be open to the public. The only exceptions are : (i) to the extent both parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the parties: or (iii) as may otherwise be appropriate in response to a governmental agency, legal process, or as required by law.

All settlement negotiations, mediations, and any results shall be confidential.

Article 12 — Substantive Choice of Law

The Arbitrator shall apply the substantive law, including the conflicts of law, of the state in which the Associate is or was employed. For claims or defenses arising under or governed by federal law, the Arbitrator shall follow the substantive law as set forth by the United States Supreme Court. If there is no controlling United States Supreme Court authority, the Arbitrator shall follow the substantive law that would be applied by the United States Court of Appeals and the United States District Court for the District in which the Associate is or was employed.

Article 13 — Arbitrator Authority

The Arbitrator shall conduct the arbitration. The arbitrator shall have the authority to render a decision in accordance with these Solutions InSTORE Early Dispute Resolution Rules and Procedures, and in a manner designed to promote rapid and fair resolution of disputes.

The Arbitrator's authority shall be limited to deciding the case submitted by the party bringing the arbitration, Therefore, no decision by any Arbitrator shall serve as precedent in other arbitrations.

The arbitration procedure contained herein does not alter the Associate's employment status. The status remains alterable at the discretion of the Company and/or terminable at any time, at the will of either the Associate or the Company, with or without cause or prior notice. Accordingly, the Arbitrator shall have no authority to alter the Associate's employment status by, for example, requiring that the Company have "cause" to discipline or discharge an Associate. Nor may the arbitrator otherwise change the terms and conditions of employment of an Associate unless

required by federal, state or local law, or as a remedy for a violation of applicable law by the Company with respect to the Associate.

The Arbitrator shall have the power to award sanctions against a party for such party's failure to comply with these Solutions InSTORE Early Dispute Resolution Rules and Procedures or with an order of the Arbitrator.These sanctions may include assessment of costs or prohibitions of evidence. If justified by a party's wanton or willful disregard of these Solutions InSTORE Early Dispute Resolution Rules and Procedures, the Arbitrator may award the sanction of an adverse ruling in the arbitration against the party who has failed to comply.

Article 14 — Award

Within thirty (30) calendar days after the later of the close of the hearing or the receipt of post-hearing briefs, if any, the Arbitrator shall mail to the parties a written decision,The decision shall specify appropriate remedies, if any, if a violation of law is found. If the Associate's claim arises under federal or state statutory law, the award should include findings of fact and conclusions of law; otherwise, the inclusion of such findings and conclusion is at the Arbitrator's discretion.The parties to an arbitration shall be provided with a copy of the Arbitrator's award.

Article 15 - Fees and Expenses

a. Costs Other Than Attorney Fees

i. Definitions

Costs of an arbitration include the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, filing or administrative fees charged by the MA, the

cost of a reporter who transcribes the proceeding, and expenses of renting a room in which the arbitration is held. Incidental costs include such items as photocopying or the costs of producing witnesses or proof.

ii. Filing Fee/Costs of Arbitration

An Associate initiating arbitration shall pay the cost of arbitration up to a maximum of the least of one (1) day's base pay or One Hundred Twenty-Five Dollars ($125), whichever is less, Upon filing the request for arbitration, the Associate shall remit such fee. The Company shall pay the remainder of the costs of the arbitration, The Company shall pay the entire filing fee should it initiate arbitration. Except as provided below, each party shall pay its own incidental costs, including attorney's fees.

The AAA has developed guidelines for waiving administrative fees. This Plan is subject to those guidelines.

b. Reimbursement for Legal Fees or Costs

The program does not infringe on either party's right to consult with an attorney at any time. In fact, the Company will reimburse an Associate for this legal consultation and/or representation during Step 4 of the program, at a maximum benefit of Two Thousand Five Hundred Dollars ($2,500) per Associate in a rolling twelve (12) month period. If the Associate is not represented by counsel, the Company will reimburse an Associate for incidental costs up to a maximum of Five Hundred Dollars ($500) per Associate in a rolling

twelve (12) month period. The Associate will not be entitled to such reimbursement by the Company if the Arbitrator determines the arbitration claim by the Associate was frivolously filed. Any reimbursement to the Associate will occur following the conclusion of the proceedings upon submission of the Associate's bills for costs of legal services or incidental costs.

c. Shifting of Costs

If the Associate prevails in arbitration, whether or not monetary damages or remedies are awarded, the filing fee shall be refunded to the Associate. The Arbitrator may (based on the facts and circumstances) also require that the Company pay the Associate's share of the costs of arbitration and incidental costs.

Article 16 - Remedies and Damages

Upon a finding that a party has sustained its burden of persuasion in establishing a violation of applicable law, the Arbitrator shall have the same power and authority as would a judge to grant any relief, including costs and attorney's fees, that a court could grant, in conformance with applicable principles of common, decisional and statutory law in the relevant jurisdiction.

Article 17 - Settlement

The parties may settle their dispute at any time without involvement of the Arbitrator.

Article 18 — Enforceability

The arbitration agreement, the arbitration proceedings, and any award rendered pursuant to them

shall be interpreted under, enforceable in accordance with, and subject to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. regardless of the state in which the arbitration is held or the substantive law applied in the arbitration. If for any reason the Federal Arbitration Act is inapplicable to enforce this agreement, the Parties agree it will be enforced under the governing state arbitration statute(s).

Article 19 — Appeal Rights

The decision rendered by the Arbitrator shall be final and binding as to both the Associate and the Company. Either party may appeal the Arbitrator's decision to a court in accordance with the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq.

Article 20 — Severability/Conflict with Law

In the event that any of these Solutions InSTORE Early Dispute Resolution Rules and Procedures are held to be unlawful or unenforceable, the conflicting rule or procedure shall be modified automatically to comply with applicable law.

In the event of an automatic modification with respect to a particular rule or procedure, the remainder of these rules and procedures shall not be affected. An automatic modification of one of these rules or procedures shall apply only in regard to the particular jurisdiction and dispute in which the rule or procedure was determined to be in conflict with applicable law. In all other jurisdictions and disputes, these Solutions InSTORE Early Dispute Resolution Rules and Procedures shall apply in full force and effect.

Article 21 — Cancellation or Modification of Dispute Resolution Rules and Procedures or Program

The Company may alter these Solutions InSTORE Early Dispute Resolution Rules and Procedures or cancel the program in its entirety upon giving thirty (30) days written notice to Associates. If such notice is not provided to an Associate, the Solutions InSTORE Early Dispute Resolution Rules and Procedures that covered the Associate prior to the modification or cancellation shall govern.

Article 22 - Change in Control of Macy's

A change in control of the Company shall nullify and cancel the Associate's agreement to be covered by Step 4 – Arbitration, respecting any claims the Associate may have arising after such change. A change in control will be deemed to have occurred if:

i. Macy's is merged, consolidated, or reorganized into or with another corporation or other legal entity unaffiliated with Macy's, resulting in less than a majority of the combined voting power of the then-outstanding securities of the surviving or resulting corporation or entity immediately after such transaction being held in the aggregate by those who were entitled to vote in the election of directors of Macy's (the "Voting Stock") immediately prior to such transaction; or

ii. Macy's sells or otherwise transfers substantially all of its assets to another corporation or other legal entity and, as a result of such sale or transfer, less than a majority of the combined voting power of the then-

outstanding securities of such other corporation or entity immediately after such sale or transfer is held in the aggregate by the holders of Voting Stock of Macy's immediately prior to such sale or transfer,

Article 23 - Sale of Subsidiary or Division or Operating Unit

Should Macy's sell a subsidiary or division or operating unit of a subsidiary (through the sale of stock or substantially all of its assets) and such transaction includes transferring Associates to a third-party, a transferring Associate's agreement to arbitration under this program shall remain in effect as to any Employment-Related Claims arising prior to such sale but only as to claims against Macy's or its subsidiaries or divisions and shall be null and void as to any such third-party.

APPENDIX E

Miriam L. Schimmel (SBN 185089)
MSchimmel@InitiativeLegal.com
Payam Shahian (SBN 228406)
PShahian@Initiativelegal.com
Sue J. Kim (SBN 2563-92)
SKim@Initiativelegal.com
Initiative Legal Group APC
1800 Century Park East, 2nd Floor
Los Angeles, California 90067
Telephone: (310) 556-5637
Facsimile: (310) 861-9051

Attorneys for Plaintiff Nancy Vitolo
and aggrieved employees

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NANCY VITOLO, individually, and on behalf of other members of the general public similarly situated,

Plaintiff,

vs.

BLOOMINGDALE'S, INC., an Ohio corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. CV09-07728 DSF (PJWx)

CLASS ACTION AND PRIVATE ATTORNEYS GENERAL ACTION

SECOND AMENDED COMPLAINT

(1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime);

(2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums);

(3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums);

(4) Violation of California Labor Code § 221 (Unlawful Wage Deductions);

(5) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages);

(6) Violation of California Labor Code §§ 201 and 202 (Wages Not Timely Paid Upon Termination);

(7) Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment);

(8) Violation of California Labor Code § 226(a) (Non-complaint Wage Statements); and,

(9) Violation of California Business & Professions Code §§ 17200, et seq.

Jury Trial Demanded

Plaintiff, individually and on behalf of all other members of the public similarly situated, alleges as follows:

JURISDICTION AND VENUE

1. This class action is brought pursuant to California Code of Civil Procedure section 382. The monetary damages and restitution sought by Plaintiff exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. The amount in controversy for each class repre-

sentative, including claims for compensatory damages and pro rata share of attorneys' fees, is less than $75,000.

2. This Court has jurisdiction over this action pursuant to the California Constitution, Article VI, section 10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other courts." The statutes under which this action is brought do not specify any other basis for jurisdiction.

3. This Court has jurisdiction over all Defendants because, upon information and belief, each party is either a citizen of California, has sufficient minimum contacts in California, or otherwise intentionally avails itself of the California market so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

4. Venue is proper in this Court because, upon information and belief, one or more of the named Defendants reside, transact business, or have offices in this county and the acts and omissions alleged herein took place in this county.

5. California Labor Code sections 2698, et seq., The Labor Code Private Attorneys General Act (hereinafter "PAGA"), authorizes employees to sue directly for various civil penalties under the California Labor Code.

6. Plaintiff has exhausted her administrative prerequisites by timely providing notice to the California Labor and Workforce Development Agency (hereinafter "LWDA") and to Defendants, pursuant to California Labor Code section 2699.3(a), on Sep-

tember 1, 2009 and providing an amended noticed on September 9, 2009.

THE PARTIES

7. Plaintiff NANCY VITOLO is a resident of Los Angeles County in the State of California.

8. Defendant BLOOMINGDALE'S, INC. was and is, upon information and belief, an Ohio corporation doing business in California, and at all times hereinafter mentioned, an employer whose employees are engaged throughout this county, the State of California, or the various states of the United States of America.

9. Plaintiff is unaware of the true names or capacities of Defendants sued herein under the fictitious names DOES 1 through 10, but prays for leave to amend and serve such fictitiously named Defendants pursuant to California Code of Civil Procedure section 474 once their names and capacities become known.

10. Plaintiff is informed and believes, and thereon alleges, that DOES 1 through 10 are the partners, agents, owners, shareholders, managers or employees of BLOOMINGDALE'S, INC., and were acting on behalf of BLOOMINGDALE'S, INC. at all relevant times.

11. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein was performed by, or is attributable to BLOOMINGDALE'S, INC. and DOES 1 through 10 (collectively, "Defendants"), each acting as the agent for the other, with legal authority to act on the other's behalf. The acts of any and all Defend-

ants were in accordance with, and represent, the official policy of Defendants.

12. At all relevant times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, Defendants, and each of them, aided and abetted the acts and omissions of each and all the other Defendants in proximately causing the damages herein alleged.

13. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants is in some manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences, and transactions alleged herein.

CLASS ACTION ALLEGATIONS

14. Plaintiff brings this action on her own behalf, as well as on behalf of each and all other persons similarly situated, and thus, seeks class certification under California Code of Civil Procedure section 382.

15. All claims alleged herein arise under California law for which Plaintiff seeks relief authorized by California law.

16. Plaintiff's proposed Class consists of and is defined as:

> All employees of Defendants who worked in non-exempt job positions at store locations in California within four years prior to the filing of this complaint until the date of certification.

17. Plaintiff reserves the right to establish subclasses as appropriate.

18. There is a well-defined community of interest in the litigation and the class is readily ascertainable:

(a) Numerosity: The members of the class (and each subclass, if any) are so numerous that joinder of all members would be unfeasible and impractical. The membership of the entire class is unknown to Plaintiff at this time, however, the class is estimated to be greater than one-hundred (100) individuals and the identity of such membership is readily ascertainable by inspection of Defendants' employment records.

(b) Typicality: Plaintiff is qualified to, and will, fairly and adequately protect the interests of each class member with whom she has a well-defined community of interest, and Plaintiff's claims (or defenses, if any) are typical of all class members' as demonstrated herein.

(c) Adequacy: Plaintiff is qualified to, and will, fairly and adequately, protect the interests of each class member with whom she has a well-defined community of interest and typicality of claims, as demonstrated herein. Plaintiff acknowledges that she has an obligation to make known to the Court any relationship, conflicts or differences with any class member. Plaintiff's attorneys, the proposed class counsel, are versed in the rules governing class action discovery, certification, and settlement. Plaintiff has incurred, and throughout the duration of

this action, will continue to incur costs and attorneys' fees that have been, are, and will be necessarily expended for the prosecution of this action for the substantial benefit of each class member.

(d) Superiority: The nature of this action makes the use of class action adjudication superior to other methods. Class action will achieve economies of time, effort and expense as compared with separate lawsuits, and will avoid inconsistent outcomes because the same issues can be adjudicated in the same manner and at the same time for the entire class.

(e) Public Policy Considerations: Employers in the State of California violate employment and labor laws every day. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing actions because they believe their former employers might damage their future endeavors through negative references and/or other means. Class actions provide the class members who are not named in the complaint with a type of anonymity that allows for the vindication of their rights at the same time as their privacy is protected.

19. There are common questions of law and fact as to the class (and each subclass, if any) that predominate over questions affecting only individual members, including but not limited to:

(a) Whether Defendants' failure to pay wages, without abatement or reduction, in accordance with the California Labor Code, was willful;

(b) Whether Defendants required Plaintiff and class members to work over eight (8) hours per day, over twelve (12) hours per day, and/or over forty (40) hours per week and failed to pay legally required overtime compensation to Plaintiff and class members;

(c) Whether Defendants deprived Plaintiff and class members of meal periods or required Plaintiff and class members to work during meal periods without compensation;

(d) Whether Defendants deprived Plaintiff and class members of rest periods or required Plaintiff and class members to work during rest periods without compensation;

(e) Whether Defendants unlawfully collected or received from Plaintiff and class members any part of wages previously paid to Plaintiff and class members;

(f) Whether Defendants failed to pay minimum wages to Plaintiff and class members;

(g) Whether Defendants failed to pay all wages earned by Plaintiff and class members;

(h) Whether Defendants failed to timely pay all wages due to Plaintiff and class members upon their discharge or resignation;

(i) Whether Defendants complied with wage reporting as required by the California Labor Code; including but not limited to section 226;

(j) Whether Defendants' conduct was willful or reckless;

(k) Whether Defendants engaged in unfair business practices in violation of California Business & Professions Code sections 17200, et seq.; and,

(l) The appropriate amount of damages, restitution, or monetary penalties resulting from Defendants' violations of California law.

GENERAL ALLEGATIONS

20. At all relevant times set forth, Defendants employed Plaintiff and other persons in non-exempt job positions at store locations in California.

21. Defendants employed Plaintiff Nancy Vitolo as a "Sales Associate" until about September 2008 at Defendants' Los Angeles County, California business location.

22. Defendants continue to employ individuals in non-exempt job positions at store locations in California.

23. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, Defendants were advised by skilled lawyers and other professionals, employees and advisors knowledgeable

about California labor and wage law, employment and personnel practices, and about the requirements of California law.

24. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled to receive certain wages for overtime compensation and that they were not receiving certain wages for overtime compensation.

25. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled to receive all meal periods or payment of one additional hour of pay at Plaintiff's and class members' regular rate of pay when they did not receive a timely uninterrupted meal period.

26. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled to receive all rest periods or payment of one additional hour of pay at Plaintiff's and class members' regular rate of pay when a rest period was missed.

27. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled not to have to pay wages back to their employer.

28. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled to all commissions due to them, and that they did not receive all commissions due to them.

29. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have

known that Plaintiff and class members were entitled to receive at least minimum wages for compensation and that they were not receiving at least minimum wages for compensation.

30. Plaintiff is informed and believes, and thereon alleges that Defendants knew or should have known that Plaintiff and class members were entitled to receive complete and accurate wage statements in accordance with California law.

31. Plaintiff are informed and believes, and thereon alleges, that at all times herein mentioned, Defendants knew or should have known that they had a duty to compensate Plaintiff and class members, and that Defendants had the financial ability to pay such compensation but willfully, knowingly and intentionally failed to do so, and falsely represented to Plaintiff and class members that they were properly denied wages, all in order to increase Defendants' profits.

32. California Labor Code section 218 states that nothing in Article 1 of the Labor Code shall limit the right of any wage claimant to "sue directly…for any wages or penalty due to him [or her] under this article."

33. At all times herein set forth, PAGA was applicable to Plaintiffs employment by Defendants.

34. At all times herein set forth, PAGA provides that any provision of law under the California Labor Code that provides for a civil penalty to be assessed and collected by the LWDA for violation of the California Labor Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of herself and other current or

former employees pursuant to procedures outlines in California Labor Code section 2699.3.

35. Pursuant to California Labor Code section 2699, a civil action under PAGA may be brought by an "aggrieved employee," who is any person that was employed by the alleged violator and against whom one or more of the alleged violations was committed.

36. Plaintiff was employed by Defendants and the alleged violations were committed against her during her time of employment and is, therefore, an aggrieved employee.

37. Pursuant to California Labor Code section 2699(a), an aggrieved employee, including Plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under PAGA only after the following requirements have been met:

a. The aggrieved employee shall give written notice by certified mail to the LWDA and the employer (hereinafter "Employee's Notice") of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violation.

b. The LWDA shall provide notice (hereinafter "LWDA Notice") to the employer and the aggrieved employee by certified mail that it does not intend to investigate the alleged violation within thirty (30) calendar days of the postmark date of the Employee's Notice. Upon receipt of the LWDA Notice, the aggrieved employee may amend an existing complaint within sixty days of receiving the LWDA Notice that the LWDA does not intend to investigate the alleged violation, to add a cause of action pursuant to PAGA to recover civil penalties in addition to

any other penalties to which the employee may be entitled.

c. If the LWDA Notice is not provided within thirty-three (33) calendar days of the postmark date of the Employee's Notice, the aggrieved employee may amend an existing complaint within sixty days of the last day to receive the LWDA Notice that the LWDA does not intend to investigate the alleged violation, to add a cause of action pursuant to PAGA to recover civil penalties in addition to any other penalties to which the employee may be entitled.

38. On September 1, 2009, Plaintiff provided written notice by certified mail to the LWDA and to Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. On September 9, 2009, Plaintiff provided an amended written notice to the LWDA and to Defendants that included specific provisions of the California Labor Code alleged to have been violated and are pleaded in this action, including the facts and theories to support the alleged violations.

39. On November 9, 2009, the LWDA provided Plaintiff with a letter indicating it had reviewed Plaintiff's amended Employee's Notice, dated September 9, 2009, and does not intend to investigate the allegations.

40. Plaintiff has, therefore, satisfied the administrative prerequisites under California Labor Code section 2699.3(a) and may amend her existing complaint and recover civil penalties, in addition to other remedies, for violations of California Labor Code sections 510, 1198, 226.7, 512, 221, 1194, 1197, 1197.1, 201, 202, 204, and 226(a).

FIRST CAUSE OF ACTION

Violation of California Labor Code §§ 510 and 1198

(Against All Defendants)

41. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 40.

42. California Labor Code section 1198 and the applicable Industrial Welfare Commission ("IWC") Wage Order provide that it is unlawful to employ persons without compensating them at a rate of pay either time-and-one-half or two-times that person's regular rate of pay, depending on the number of hours worked by the person on a daily or weekly basis.

43. Specifically, the applicable IWC Wage Order provides that Defendants are and were required to pay Plaintiff and class members employed by Defendants, and working more than eight (8) hours in a day or more than forty (40) hours in a workweek, at the rate of time-and-one-half for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek.

44. The applicable IWC Wage Order further provides that Defendants are and were required to pay Plaintiff and class members employed by Defendants, and working more than twelve (12) hours in a day, overtime compensation at a rate of two times their regular rate of pay.

45. California Labor Code section 510 codifies the right to overtime compensation at one-and-one-half times the regular hourly rate for hours worked in excess of eight (8) hours in a day or forty (40)

hours in a week or for the first eight (8) hours worked on the seventh day of work, and to overtime compensation at twice the regular hourly rate for hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on the seventh day of work.

46. During the relevant time period, Plaintiff and class members consistently worked in excess of eight (8) hours in a day, in excess of twelve (12) hours in a day, and/or in excess of forty (40) hours in a week.

47. During the relevant time period, Defendants willfully failed to pay all overtime wages owed to Plaintiff and class members.

48. Defendants' failure to pay Plaintiff and class members the unpaid balance of overtime compensation, as required by California laws, violates the provisions of California Labor Code sections 510 and 1198, and is therefore unlawful.

49. Pursuant to California Labor Code section 1194, Plaintiff and class members are entitled to recover their unpaid overtime compensation, as well as interest, costs, and attorneys' fees.

50. Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code sections 510 and 1198.

SECOND CAUSE OF ACTION

Violation of California Labor Code §§ 226.7 and 512(a)

(Against All Defendants)

51. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 50.

52. At all relevant times, the applicable IWC Wage Order and California Labor Code sections 226.7 and 512(a) were applicable to Plaintiff's and class members' employment by Defendants.

53. At all relevant times, California Labor Code section 226.7 provides that no employer shall require an employee to work during any meal period mandated by an applicable order of the California IWC.

54. At all relevant times, the applicable IWC Wage Order and California Labor Code section 512(a) provide that an employer may not require, cause or permit an employee to work for a period of more than five (5) hours per day without providing the employee with an uninterrupted meal period of not less than thirty (30) minutes, except that if the total work period per day of the employee is not more than six (6) hours, the meal period may be waived by mutual consent of both the employer and the employee.

55. At all relevant times, the applicable IWC Wage Order and California Labor Code section 512(a) further provide that an employer may not require, cause or permit an employee to work for a period of more than ten (10) hours per day without providing the employee with a second uninterrupted meal period of not less than thirty (30) minutes, ex-

cept that if the total hours worked is not more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

56. During the relevant time period, Plaintiff and class members who were scheduled to work for a period of time no longer than six (6) hours, and who did not waive their legally-mandated meal periods by mutual consent, were required to work for periods longer than five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes.

57. During the relevant time period, Plaintiff and class members who were scheduled to work for a period of time in excess of six (6) hours were required to work for periods longer than five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes.

58. During the relevant time period, Plaintiff and class members who were scheduled to work in excess of ten (10) hours but no longer than twelve (12) hours, and who did not waive their legally-mandated meal periods by mutual consent were required to work in excess of ten (10) hours without receiving a second uninterrupted meal period of not less than thirty (30) minutes.

59. During the relevant time period, Plaintiff and class members who were scheduled to work for a period of time in excess of twelve (12) hours were required to work for periods longer than ten (10) hours without a second uninterrupted meal period of not less than thirty (30) minutes.

60. During the relevant time period, Defendants willfully required Plaintiff and class members to

work during meal periods and failed to compensate Plaintiff and class members for work performed during meal periods.

61. During the relevant time period, Defendants failed to pay Plaintiff and class members the full meal period premium due pursuant to California Labor Code section 226.7.

62. Defendants' conduct violates the applicable IWC Wage Orders and California Labor Code sections 226.7 and 512(a).

63. Pursuant to the applicable IWC Wage Order and California Labor Code section 226.7(b), Plaintiff and class members are entitled to recover from Defendants one additional hour of pay at the employees' regular hourly rate of compensation for each work day that the meal period was not provided.

64. Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code sections 226.7 and 512(a).

THIRD CAUSE OF ACTION

Violation of California Labor Code § 226.7

(Against All Defendants)

65. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 64.

66. At all relevant times herein set forth, the applicable IWC Wage Order and California Labor Code section 226.7 were applicable to Plaintiff's and class members' employment by Defendants.

67. At all relevant times, California Labor Code section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC.

68. At all relevant times, the applicable IWC Wage Order provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period" and that the "rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof' unless the total daily work time is less than three and one-half ($3^1/_2$) hours.

69. During the relevant time period, Defendants required Plaintiff and class members to work four (4) or more hours without authorizing or permitting a ten (10) minute rest period per each four (4) hour period worked.

70. During the relevant time period, Defendants willfully required Plaintiff and class members to work during rest periods and failed to compensate Plaintiff and class members for work performed during rest periods.

71. During the relevant time period, Defendants failed to pay Plaintiff and class members the full rest period premium due pursuant to California Labor Code section 226.7.

72. Defendants' conduct violates the applicable IWC Wage Orders and California Labor Code section 226.7.

73. Pursuant to the applicable IWC Wage Order and California Labor Code section 226.7(b), Plaintiff and class members are entitled to recover from Defendants one additional hour of pay at the employee's regular hourly rate of compensation for each work day that the rest period was not provided.

74. Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code section 226.7.

FOURTH CAUSE OF ACTION

Violation of California Labor Code § 221

(Against All Defendants)

75. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 74.

76. California Labor Code section 200 expressly provides that an employee's "wages" include all forms of compensation for labor, including commissions.

77. At all relevant times, California Labor Code section 221 provides that it shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

78. During the relevant time period, Defendants unlawfully deducted from the wages of Plaintiff and class members commissions previously paid and/or earned.

79. Defendants have unlawfully collected or received from Plaintiff and class members a part of wages theretofore paid by an employer to its employees.

80. Defendants' conduct as alleged herein violates California Labor Code section 221.

81. Plaintiff and class members are entitled to recover all unlawfully deducted wages, and such general and special damages as may be appropriate, as well as interest on all due and unpaid wages pursuant to California Labor Code section 218.6, accrued from the date that the wages were due and payable at the rate of interest specified in California Civil Code section 3289(b), and for such other and further relief as the Court may deem equitable and appropriate.

82. Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code section 221.

FIFTH CAUSE OF ACTION

Violation of California Labor Code §§ 1194, 1197, 1197.1

(Against All Defendants)

83. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 82.

84. At all relevant times, California Labor Code sections 1194, 1197, and 1197.1 provide that the minimum wage for employees fixed by the Industrial Welfare Commission is the minimum wage to be paid to employees, and the payment of a lesser wage than the minimum so fixed is unlawful.

85. During the relevant time period, Defendants regularly failed to any wages to Plaintiff and class members for work performed off-the-clock, as required pursuant to California Labor Code sections 1194, 1197, and 1197.1.

86. Defendants' failure to pay Plaintiff and class members the minimum wage as required violates California Labor Code sections 1194, 1197, and 1197.1. Pursuant to those sections Plaintiff and class members are entitled to recover the unpaid balance of their minimum wage compensation as well as interest, costs, and attorney's fees, and liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

87. Pursuant to California Labor Code section 1197.1, Plaintiff and class members are entitled to recover a penalty of $100.00 for the initial failure to timely pay each employee minimum wages, and $250.00 for each subsequent failure to pay each employee minimum wages.

88. Pursuant to California Labor Code section 1194.2, Plaintiff and class members are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

89. Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code sections 1194, 1197, and 1197.1.

SIXTH CAUSE OF ACTION

Violation of California Labor Code §§ 201 and 202

(Against All Defendants)

90. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 89.

91. At all times herein set forth, California Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

92. During the relevant time period, Defendants willfully failed to pay Plaintiff and class members who are no longer employed by Defendants their wages, earned and unpaid, either at the time of discharge, or within seventy-two (72) hours of their leaving Defendants' employ.

93. Defendants' failure to pay Plaintiff and those class members who are no longer employed by Defendants their wages earned and unpaid at the time of discharge, or within seventy-two (72) hours of their leaving Defendants' employ, is in violation of California Labor Code sections 201 and 202.

94. California Labor Code section 203 provides that if an employer willfully fails to pay wages owed, in accordance with sections 201 and 202, then the wages of the employee shall continue as a penalty from the due date, and at the same rate until paid or until an action is commenced; but the wages shall not continue for more than thirty (30) days.

95. Plaintiff and class members are entitled to recover from Defendants the statutory penalty wages for each day they were not paid, up to a thirty (30) day maximum pursuant to California Labor Code section 203.

SEVENTH CAUSE OF ACTION

Violation of California Labor Code § 204

(Against All Defendants)

96. Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 95.

97. At all times herein set forth, California Labor Code section 204 provides that all wages earned by any person in any employment between the 1st

and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed.

98. At all times herein set forth, California Labor Code section 204 provides that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month.

99. At all times herein set forth, California Labor Code section 204 provides that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

100.During the relevant time period, Defendants willfully failed to pay Plaintiff and class members all wages due to them, within any time period permissible by California Labor Code section 204.

101.Plaintiff and class members are entitled to recover all remedies available for violations of California Labor Code section 204.

102.Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code sections 201-204.

EIGHTH CAUSE OF ACTION

Violation of California Labor Code § 226(a)

(Against all Defendants)

103.Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 102.

104.At all material times set forth herein, California Labor Code section 226(a) provides that every employer shall furnish each of his or her employees an accurate itemized wage statement in writing showing nine pieces of information, including total hours worked, all applicable hourly rates in effect during the pay period and the corresponding number of hours at each hourly rate, and the name and address of the legal entity that is the employer.

105.Defendants have intentionally and willfully failed to provide employees with complete and accurate wage statements. The deficiencies include, among other things, the failure to include the total hours worked, the failure to include all correct applicable hourly rates and corresponding hours for work performed off-the-clock, meal period premiums and rest period premiums, and the failure to include the name and address of the legal entity that is the employer.

106.As a result of Defendants' violation of California Labor Code section 226(a), Plaintiff and class members have suffered injury and damage to their statutorily-protected rights.

107.Specifically, Plaintiff and class members have been injured by Defendants' intentional violation of California Labor Code section 226(a) because they were denied both their legal right to receive,

and their protected interest in receiving, accurate, itemized wage statements under California Labor Code section 226(a).

108.Plaintiff and class members are entitled to recover from Defendants the greater of their actual damages caused by Defendants' failure to comply with California Labor Code section 226(a), or an aggregate penalty not exceeding four thousand dollars per employee.

109.Plaintiff and class members are also entitled to injunctive relief to ensure compliance with this section, pursuant to California Labor Code section 226(g).

110.Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code section 226.

111.Pursuant to California Labor Code sections 2699(f) and (g), Plaintiff, the other class members, and all aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation, plus costs and attorney's fees, for violations of California Labor Code section 226(a).

NINTH CAUSE OF ACTION

Violation of California Business & Professions Code §§ 17200, et seq.

(Against All Defendants)

112.Plaintiff incorporates by reference and realleges as if fully stated herein the material allegations set out in paragraphs 1 through 111.

113.Defendants' conduct, as alleged herein, has been, and continues to be, unfair, unlawful, and harmful to Plaintiff, other class members, and to the general public. Plaintiff seeks to enforce important rights affecting the public interest within the meaning of Code of Civil Procedure section 1021.5.

114.Defendants' activities, as alleged herein, are violations of California law, and constitute unlawful business acts and practices in violation of California Business & Professions Code sections 17200, et seq.

115.A violation of California Business & Professions Code sections 17200, et seq. may be predicated on the violation of any state or federal law. In this instant case, Defendants' policies and practices of requiring non-exempt or hourly paid employees, including Plaintiff and class members, to work overtime without paying them proper compensation violates California Labor Code sections 510 and 1198. Additionally, Defendants' policies and practices of requiring nonexempt or hourly paid employees, including Plaintiff and class members, to work through their meal and rest periods without paying them proper compensation violate California Labor Code sections 226.7 and 512(a). Defendants' policies and practices of collecting or receiving wages previously paid to Plaintiff and class members violate California

Labor Code section 221. Defendants' policies and practices of not paying at least minimum wages violate California Labor Code sections 1194, 1197, and 1197.1. Moreover, Defendants' policies and practices of failing to timely pay wages to Plaintiff and class members violate California Labor Code sections 201, 202 and 204.

116.Plaintiff and putative class members have been personally injured by Defendants' unlawful business acts and practices as alleged herein, including but not necessarily limited to the loss of money and/or property.

117.Pursuant to California Business & Professions Code sections 17200, et seq., Plaintiff and putative class members are entitled to restitution of the wages withheld and retained by Defendants during a period that commences four years prior to the filing of this complaint; a permanent injunction requiring Defendants to pay all outstanding wages due to Plaintiff and class members; an award of attorneys' fees pursuant to California Code of Civil Procedure section 1021.5 and other applicable laws; and an award of costs.

REQUEST FOR JURY TRIAL

Plaintiff requests a trial by jury.

PRAYER FOR RELIEF

Plaintiff, and on behalf of all others similarly situated, prays for relief and judgment against Defendants, jointly and severally, as follows:

Class Certification

118.That this action be certified as a class action;

119.That Plaintiff be appointed as the representatives of the Class; and

120.That counsel for Plaintiff be appointed as Class Counsel.

As to the First Cause of Action

121.That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 510 and 1198 and applicable IWC Wage Orders by willfully failing to pay all overtime wages due to Plaintiff and class members;

122.For general unpaid wages at overtime wage rates and such general and

123.Special damages as may be appropriate;

124.For pre-judgment interest on any unpaid overtime compensation commencing from the date such amounts were due;

125.For reasonable attorneys' fees and for costs of suit incurred herein pursuant to California Labor Code section 1194(a);

126.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

127.For such other and further relief as the Court may deem equitable and appropriate.

As to the Second Cause of Action

128.That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 226.7 and 512 and applicable IWC Wage Orders by willfully failing to provide all meal periods (including second meal periods) to Plaintiff and class members;

129.That the Court make an award to the Plaintiff and class members of one (1) hour of pay at each employee's regular rate of compensation for each workday that a meal period was not provided;

130.For all actual, consequential, and incidental losses and damages, according to proof;

131.For premiums pursuant to California Labor Code section 226.7(b);

132.For pre judgment interest on any unpaid wages from the date such amounts were due;

133.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

134.For such other and further relief as the Court may deem equitable and appropriate.

As to the Third Cause of Action

135.That the Court declare, adjudge and decree that Defendants violated California Labor Code section 226.7 and applicable IWC Wage Orders by willfully failing to provide all rest periods to Plaintiff and class members;

136.That the Court make an award to the Plaintiff and class members of one (1) hour of pay at each employee's regular rate of compensation for each workday that a rest period was not provided;

137.For all actual, consequential, and incidental losses and damages, according to proof;

138.For premiums pursuant to California Labor Code section 226.7(b);

139.For pre judgment interest on any unpaid wages from the date such amounts were due;

140.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

141.For such other and further relief as the Court may deem equitable and appropriate.

As to the Fourth Cause of Action

142.That the Court declare, adjudge and decree that Defendants violated California Labor Code section 221 by willfully collecting or receiving from Plaintiff and class members wages theretofore paid to Plaintiff and class members;

143.For all actual, consequential and incidental losses and damages, according to proof;

144.For unpaid wages and such general and special damages as may be appropriate;

145.For interest on all due and unpaid wages, accrued from the date that the wages were due and payable, at the rate of interest specified in California Civil Code section 3289(b), pursuant to California Labor Code section 218.6;

146.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

147.For such other and further relief as the Court may deem equitable and appropriate.

As to the Fifth Cause of Action

148.That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 1194, 1197, and 1197.1 by willfully failing to pay minimum wages to Plaintiff and class members;

149.For general unpaid wages and such general and special damages as may be appropriate;

150.For statutory wage penalties pursuant to California Labor Code section 1197.1 for Plaintiff and class members in the amount as may be established according to proof at trial;

151.For pre judgment interest on any unpaid compensation from the date such amounts were due;

152.For reasonable attorneys' fees and for costs of suit incurred herein pursuant to California Labor Code section 1194(a);

153.For liquidated damages pursuant to California Labor Code section 1194.2;

154.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

155.For such other and further relief as the Court may deem equitable and appropriate.

As to the Sixth Cause of Action

156.That the Court declare, adjudge and decree that Defendants violated California Labor Code sections 201, 202, and 203 by willfully failing to pay all compensation owed at the time of termination of the employment of Plaintiff and other class members no longer employed by Defendants.

157.For all actual, consequential and incidental losses and damages, according to proof;

158.For statutory wage penalties pursuant to California Labor Code section 203 for Plaintiff and all other class members who have left Defendants' employ;

159.For pre-judgment interest on any unpaid wages from the date such amounts were due;

160.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

161.For such other and further relief as the Court may deem equitable and appropriate.

As to the Seventh Cause of Action

162.That the Court declare, adjudge and decree that Defendants violated California Labor Code section 204 by willfully failing to pay all compensation owed at the time required by California Labor Code section 204, to Plaintiff and class members;

163.For all actual, consequential and incidental losses and damages, according to proof;

164.For pre-judgment interest on any untimely paid compensation, from the date such amounts were due;

165.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and

166.For such other and further relief as the Court may deem equitable and appropriate.

As to the Eighth Cause of Action

167.That the Court declare, adjudge and decree that Defendants violated the record keeping provisions of California Labor Code section 226(a) and applicable IWC Wage Orders as to Plaintiff and class members, and wilfully failed to provide accurate itemized wage statements thereto;

168.For all actual, consequential and incidental losses and damages, according to proof;

169.For statutory penalties pursuant to California Labor Code section 226(e);

170.For injunctive relief to ensure compliance with this section, pursuant to California Labor Code section 226(g);

171.For all civil penalties and reasonable attorney's fees and cost of suit incurred herein pursuant to California Labor Code sections 2699(f) and (g); and,

172.For such other and further relief as the Court may deem equitable and appropriate.

As to the Ninth Cause of Action

173.That the Court declare, adjudge and decree that Defendants violated California Business and Professions Code sections 17200, et seq. by failing to provide Plaintiff and class members all overtime compensation due to them, failing to provide all meal and rest periods to Plaintiff and class members, failing to pay for all missed meal and rest periods to Plaintiff and class members, collecting or receiving wages previously paid to Plaintiff and class members, failing to pay at least minimum wages to Plaintiff and class members, and failing to pay Plaintiff's and class members' wages timely as required by California Labor Code sections 201, 202 and 204.

174.For restitution of unpaid wages to Plaintiff and all class members and pre-judgment interest from the day such amounts were due and payable;

175.For the appointment of a receiver to receive, manage and distribute any and all funds disgorged from Defendants and determined to have been

wrongfully acquired by Defendants as a result of violations of California Business & Professions Code sections 17200, et seq.;

176.For reasonable attorneys' fees and costs of suit incurred herein pursuant to California Code of Civil Procedure section 1021.5;

177.For injunctive relief to ensure compliance with this section, pursuant to California Business & Professions Code sections 17200, et seq.; and

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178.For such other and further relief as the Court may deem equitable and appropriate.

Dated: March 26, 2010 Respectfully submitted,

Initiative Legal Group APC

By: /s/ Sue J. Kim
Miriam L. Schimmel
Payam Shahian
Sue J. Kim

Attorneys for Plaintiff Nancy Vitolo and aggrieved employees

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHUKRI SAKKAB, an individual, on behalf of himself, and on behalf of all persons similarly situated,
Plaintiff-Appellant,

v.

LUXOTTICA RETAIL NORTH AMERICA, INC., an Ohio corporation,
Defendant-Appellee.

NO. 13-55184

D.C. NO. 3:12-CV-00436-GPC-KSC

OPINION

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted
June 3, 2015—Pasadena, California

Filed September 28, 2015

Before: MILAN D. SMITH, JR., and N. RANDY SMITH, Circuit Judges, and JOAN H. LEFKOW, † Senior District Judge.

† The Honorable Joan Humphrey Lefkow, Senior District Judge for the United States District Court for the Northern District of Illinois, sitting by designation.

Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge N.R. Smith

SUMMARY[**]

Federal Arbitration Act / CA Private Attorney General Act

The panel reversed the district court's order granting Luxottica Retail North America, Inc.'s motion to compel arbitration of claims and dismissing plaintiffs first amended complaint, in a putative class action raising class employment-related claims and a non-class representative claim for civil penalties under the Private Attorney General Act.

Luxottica sought to compel arbitration under a dispute resolution agreement contained in its Retail Associate Guide. Plaintiff argued that the portion of the alternative dispute resolution agreement prohibiting him from bringing any PAGA claims on behalf of other employees was unenforceable under California law.

After the district court entered judgment in this case, the California Supreme Court announced the rule in *Iskanian v. CLS Transportation Los Angeles,* LLC, 59 Cal. 4th 348 (2014), barring the waiver of representative claims under PAGA.

The panel held that the waiver of plaintiff's representative PAGA claim could not be enforced. The

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel held that the Federal Arbitration Act did not preempt the California rule announced in *Iskanian*. Specifically, the panel held that following the logic of *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), the *Iskanian* rule is a "generally applicable" contract defense that may be preserved by the FAA's § 2 savings clause, provided it did not conflict with the FAA's purposes. The panel further found that the *Iskanian* rule did not conflict with the FAA's purposes.

The panel held that the non-PAGA claims in the first amended complaint must be arbitrated. The panel remanded for the district court and the parties to decide in the first instance where plaintiff's representative PAGA claim should be resolved, and to conduct other proceedings consistent with this opinion.

Dissenting, Judge N.R. Smith would hold that the majority should have applied *Concepcion* and deferred to the FAA's "liberal federal policy favoring arbitration." Judge N.R. Smith would hold that the *Iskanian* rule is preempted by the FAA, and he would affirm the district court.

COUNSEL

Kyle R. Nordrehaug (argued), Norman B. Blumenthal, and Aparajit Bhowmik, Blumenthal, Nordrehaug & Bhowmik, La Jolla, California, for Plaintiff-Appellant.

Keith A. Jacoby (argued), Scott M. Lidman, and Judy M. Iriye, Littler Mendelson, P.C., Los Angeles, California, for Defendant-Appellee.

Andrew J. Pincus (argued) and Archis A. Parasharami, Mayer Brown LLP, Washington, D.C., for Amici Curiae.

OPINION

M. SMITH, Circuit Judge:

This appeal presents issues of first impression regarding the scope of Federal Arbitration Act (FAA) preemption, 9 U.S.C. § 2 *et seq.,* and the meaning of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011). We must decide whether the FAA preempts the California rule announced in *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal. 4th 348 (2014), which bars the waiver of representative claims under the Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code § 2698 *et seq*. After closely examining *Concepcion* and the Court's other statements regarding the purposes of the FAA, we conclude that the *Iskanian* rule does not stand as an obstacle to the accomplishment of the FAA's objectives, and is not preempted. We reverse the judgment of the district court and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

The Plaintiff-Appellant, Shukri Sakkab (Sakkab), is a former employee of Lenscrafters, an eyewear retailer owned by the Defendant-Appellee, Luxottica Retail North America, Inc. (Luxottica). On January 17, 2012, Sakkab filed a putative class action complaint against Luxottica in the Superior Court of the State of California in and for the County of San Diego. The complaint asserted four causes of action arising out of Sakkab's employment by Luxottica, including (1) unlawful business practices, (2) failure to pay overtime compensation, (3) failure to

provide accurate itemized wage statements, and (4) failure to pay wages when due. The complaint alleged that Luxottica misclassified Sakkab and other employees as supervisors so that they would be exempt from overtime wages and meal and rest breaks. Luxottica answered and timely removed the case to federal court. On March 27, 2012, Sakkab filed a first amended complaint (FAC) adding a non-class, representative claim for civil penalties under the PAGA.

On April 23, 2012, Luxottica filed a motion to compel arbitration under the dispute resolution agreement contained in its "Retail Associate Guide." The agreement provided, in pertinent part:

> You and the Company each agree that, no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that relates in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim).[1]

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[1] According to Luxottica, two different versions of the dispute resolution agreement existed during the time that Luxottica employed Sakkab. In June 2011, Luxottica circulated a revised version of the dispute resolution agreement. The revised version provided:

> You and the Company each agree that, no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that relates in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit or court case (including any collective action) that relates in any way to your employment

Sakkab signed an acknowledgment indicating that he understood and agreed to the terms of the dispute resolution agreement on June 25, 2010.

On January 10, 2013, the district court granted Luxottica's motion to compel arbitration and dismissed the FAC. The court noted that Sakkab did not dispute that his first four claims were arbitrable. Sakkab argued, however, that the portion of the alternative dispute resolution agreement prohibiting him from bringing any PAGA claims on behalf of other employees was unenforceable under California law. For this reason, Sakkab argued, even if he was required to arbitrate his claims, he could not be denied a forum for his representative PAGA claim. The district court rejected Sakkab's argument that the right to bring a representative PAGA claim is unwaivable under California law. At the time, the California Supreme Court had not yet considered whether PAGA waivers were enforceable under California law. Relying on the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* the district

with the Company or (3) file (or join, participate or intervene in) a class-based arbitration (including any collective arbitration claim) with regard to any claim relating in any way to your employment with the Company to the extent permitted by applicable law.

Sakkab acknowledged that he understood and agreed to the terms of the revised version. For reasons that are not entirely clear, the district court assumed that the earlier version governed the arbitrability of this dispute. We need not resolve which version of the agreement governs. Neither party has argued that the district court erred by construing the earlier version of the agreement instead of the later version, or that the results would be any different if one version applied instead of the other. On appeal, Sakkab concedes that the version relied on by the district court governs, and that this version purports to prohibit him from arbitrating representative PAGA claims.

court concluded that the FAA would preempt a state rule barring waiver of PAGA claims The court then granted the motion to compel arbitration of the claims in the FAC, dismissed Sakkab's complaint, and entered judgment. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). We have appellate jurisdiction under 28 U. S.C. § 1291 because this is an appeal from a final judgment of the district court.

"The district court's decision to grant or deny a motion to compel arbitration is reviewed de novo." *Knutson v. Sirius XM Radio Inc.,* 771 F.3d 559, 564 (9th Cir. 2014) (quoting *Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1152 (9th Cir. 2004)).

DISCUSSION

After the district court entered judgment in this case, the California Supreme Court ruled that PAGA waivers are unenforceable under California Law. *Iskanian,* 59 Cal. 4th 348. On appeal, Luxottica argues that the FAA preempts the *Iskanian* rule. After considering the history of the PAGA statute and the Supreme Court's FAA preemption cases, we hold that the FAA does not preempt the *Iskanian* rule.

I. The Labor Code Private Attorneys General Act

California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.,* "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state."

Iskanian, 59 Cal. 4th at 360. An action brought under the PAGA is a type of qui tam action. *Id.* at 382.

The PAGA was enacted to correct two perceived flaws in California's Labor Code enforcement scheme. *Id.* at 378-79. The first flaw was that civil penalties were not available to redress violations of some provisions of the Labor Code. *Id.* at 378. Those provisions only provided for criminal sanctions, not civil fines, and could only be enforced in criminal prosecutions brought by district attorneys, not in civil actions brought by the Labor Commissioner. *See id.* at 379. As a result, many violations of the Labor Code went unpunished. *Id.* The PAGA addressed this problem by providing for civil penalties for most Labor Code violations. "For Labor Code violations for which no penalty is provided, the PAGA provides that the penalties are generally $100 for each aggrieved employee per pay period for the initial violation and $200 per pay period for each subsequent violation." *Id.* (citing Cal. Lab. Code § 2699(f)(2)).[2]

The second flaw the PAGA addressed was that, even where the Labor Code provided for civil penalties, "there was a shortage of government resources to pursue enforcement." *Id.*; *see also* 2003 Cal. Stat. ch. 906 § 1. The legislative history of the PAGA describes the legislature's perception of the seriousness of this problem:

> "Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing require-

[2] A court may award a lesser amount "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code § 2699(e)(2).

> ments—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. rig Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California." (Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended July 2, 2003, p. 4.)

Iskanian, 59 Cal. 4th at 379. To compensate for the lack of "[a]dequate financing of essential labor law enforcement functions," the legislature enacted the PAGA to permit aggrieved employees to act as private attorneys general to collect civil penalties for violations of the Labor Code. 2003 Cal. Stat. ch. 906 § 1(d). Labor Code section 2699(a) provides:

> any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees….

Seventy-five percent of the civil penalties recovered by aggrieved employees[3] under the PAGA are distributed to the Labor and Workforce Development Agency, while the remainder is distributed to the aggrieved employees. Cal. Lab. Code § 2699(i).[4]

Pre-dispute agreements to waive PAGA claims are unenforceable under California law. In *Iskanian v. CLS Transportation Los Angeles, Inc.,* the California Supreme Court held that two state statutes prohibited the enforcement of PAGA waivers. 59 Cal. 4th at 382-83. The first, California Civil Code §1668, codifies the general principle that agreements exculpating a party for violations of the law are unenforceable.[5] The *Iskanian* court observed that allowing employees to waive the right to bring PAGA actions

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[3] An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Cal. Lab. Code § 2699(c).

[4] Prior to bringing a PAGA action, an employee must notify the employer and the Labor and Workforce Development Agency of the specific provisions of the Labor Code alleged to have been violated. Cal. Lab. Code § 2699.3(a)(1). The Agency is required to notify the employee and employer of whether it intends to investigate the alleged violations. *Id. §* 2699.3(a)(2)(A). An aggrieved employee may commence an action if he receives notice that the Agency does not intend to investigate the alleged violations, or if he does not receive notice from the Agency within 33 days of notifying the Agency and the employer. *Id.* An employee may also bring a PAGA action if the Agency investigates the alleged violations and does not issue a citation to the employer within a specified period of time. *Id. §* 2699.3(a)(2)(B).

[5] California Civil Code §1668 provides that 101 contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

would "disable one of the primary mechanisms for enforcing the Labor Code." *Id.* at 383. It reasoned that "[b]ecause such an agreement has as its 'object,…indirectly, to exempt [the employer] from responsibility for [its] own…violation of law,' it is against public policy and may not be enforced." *Id.* (alterations in original) (quoting Cal. Civ. Code § 1668). The *Iskanian* court also found that agreements waiving the right to bring PAGA actions violated California Civil Code § 3513. *Id.* Civil Code § 3513 codifies the general principle that a law established for a public reason may not be contravened by private agreement.[6] The court reasoned that "agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." *Id.*

Agreements waiving the right to bring "representative" PAGA claims—that is, claims seeking penalties for Labor Code violations affecting other employees—are also unenforceable under California law. In *Iskanian,* the court held that even if the PAGA authorized purely "individual" claims,[7] an agreement to waive representative PAGA claims would be unenforceable. *Id.* at 384. The court observed that individual PAGA claims do not "result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the

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[6] California Civil Code § 3513 provides that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

[7] The court declined to decide whether the PAGA authorizes purely "individual" claims. *Iskanian,* 59 Cal. 4th at 384.

rights of numerous employees under the Labor Code." *Id.* (quoting *Brown v. Ralphs Grocery Co.,* 197 Cal. App. 4th 489, 502 (Ct. App. 2011)).

II. The Federal Arbitration Act Does Not Preempt the *Iskanian* Rule

If the *Iskanian* rule is valid, Sakkab's waiver of his right to bring a representative PAGA action is unenforceable. Therefore, this case turns on whether the FAA, 9 U.S.C. § 2 *et seq.,* preempts the *Iskanian* rule. We conclude that it does not.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *Concepcion,* 131 S. Ct. at 1745. Section 2 is the "primary substantive provision of the Act." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983)). It provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. While "[t]he FAA contains no express pre-emptive provision" and does not "reflect a congressional intent to occupy the entire field of arbitration," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 477 (1989), it preempts state law "to the extent that it 'stands as

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.* (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). The final clause of § 2, its saving clause, "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)); *see also Marmet Health Care Ctr., Inc. v. Brown,* 132 S. Ct. 1201, 1204 (2012). Even if a state-law rule is "generally applicable," it is preempted if it conflicts with the FAA's objectives. *Concepcion,* 131 S. Ct. at 1748.

A. The *Iskanian* Rule is a Ground for the Revocation of Any Contract

To fall within the ambit of § 2's saving clause, the *Iskanian* rule must be a "ground[]…for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). We conclude that it is.

The Supreme Court has clarified that a state contract defense must be "generally applicable" to be preserved by § 2's saving clause. *Concepcion,* 131 S. Ct. at 1746. It is well established that the FAA preempts state laws that single out arbitration agreements for special treatment. *See, e.g., Doctor's Assocs., 517 U.S.* at 687. At minimum, then, § 2's "any contract" language requires that a state contract defense place arbitration agreements on equal footing with non-arbitration agreements. *See id.* The *Iskanian* rule complies with this requirement. The rule bars any waiver of PAGA claims, regardless of

whether the waiver appears in an arbitration agreement or a non-arbitration agreement.

Some of our cases can be read to suggest that the phrase "any contract" in § 2's saving clause requires that a defense apply generally to all *types* of contracts, in addition to requiring that the defense apply equally to arbitration and non-arbitration agreements. *See Ting v. AT&T,* 319 F.3d 1126, 1147-48 (9th Cir. 2003) (holding that California's Consumer Legal Remedies Act, Cal. Civ. Code § 1751, is "not a law of 'general applicability" within the ambit of § 2's saving clause because it applies only to noncommercial consumer contracts); *Bradley v. Harris Research, Inc.,* 275 F.3d 884, 890 (9th Cir. 2001) (holding that California Business & Professions Code § 20040.05 does not apply to "any contract" because it "applies only to forum selection clauses and only to franchise agreements").[8] However, the Court's decision in

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[8] The reasoning of these cases was based on an ambiguous passage in *Southland Corp. v. Keating,* 465 U.S. 1, 16 n.11 (1984). The Court in *Southland* held that § 2 preempted a provision of California's Franchise Investment Law, Cal. Corp. Code § 31512 (1977), as applied to arbitration agreements. *Id. at* 10. In a partial dissent, Justice Stevens argued that the law was preserved by § 2 as a "ground[]…at law or in equity for the revocation of any contract." *Id.* at 18-20 (Stevens, J., concurring in part and dissenting in part). The majority rejected this argument. It reasoned that "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law." *Id.* at 16 n.11.

Cases following *Southland* appear to clarify that § 2's "any contract" language refers to whether a state law places arbitration agreements on equal footing with non-arbitration agreements, not whether it applies to all types of contracts. *See Perry v.*

AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, cuts against this construction of the saving clause. The Court in *Concepcion* held that the FAA preempted California law providing that class action waivers in certain consumer contracts of adhesion were unconscionable and unenforceable. 131 S. Ct. at 1748-53. Even though the state-law rule at issue only applied to a narrow class of consumer contracts, the Court strongly implied that the rule was a "generally applicable contract defense[n]." *See id.* at 1748. The Court held that the rule was preempted because it conflicted with the purposes of the FAA, even though the rule purported to apply to "any contract." *See id.* ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

Following the logic of *Concepcion,* we conclude that the *Iskanian* rule is a "generally applicable" contract defense that may be preserved by § 2's saving clause, provided it does not conflict with the FAA's purposes.

Thomas, 482 U.S. 483, 492 n.9 (1987) ("A court may not…construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."); *Doctor's Assocs.,* 517 U.S. at 686-87 ("States may not…decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.…[T]hat kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA]'s language and Congress's intent." (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 281 (1995))).

B. The *Iskanian* Rule Does Not Conflict with the FAA's Purposes

We turn now to whether the *Iskanian* rule conflicts with the FAA's purposes. We apply ordinary conflict preemption principles to determine whether a state-law rule conflicts with a federal statute containing a saving clause. *See Geier v. Am. Honda Motor Co., Inc.,* 529 U.S. 861, 870-72 (2000). In determining whether a state law is impliedly preempted, "[t]he purpose of Congress is the ultimate touchstone." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (alteration in original) (quoting *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn,* 375 U.S. 96, 103 (1963)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects…." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000). In exercising our judgment, we do not write on a blank slate, for the Supreme Court has repeatedly identified the purposes of the FAA and defined the scope of FAA preemption. *See Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (describing the Court's FAA preemption jurisprudence as "an edifice of [the Court's] own creation"). After considering the objectives of the FAA, we conclude that the *Iskanian* rule does not conflict with those objectives, and is not impliedly preempted.[9]

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[9] We reject Sakkab's contention that the PAGA waiver is invalid because it bars the assertion of statutory rights under *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985). "The 'effective vindication' exception, which permits the invalidation of an arbitration

1. The FAA's Purpose to Overcome Judicial Hostility to Arbitration

The Supreme Court has stated that Congress enacted the FAA to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 302 (2010) (quoting *Volt,* 489 U.S. at 478). The FAA therefore preempts state laws prohibiting the arbitration of specific types of claims. *See, e.g., Marmet,* 132 S. Ct. at 1203; *Preston v. Ferrer,* 552 U.S. 346, 356-59 (2008). The Amici Curiae argue that the *Iskanian* rule conflicts with the FAA's purpose to overcome judicial hostility to arbitration because it prohibits outright the arbitration of "individual" PAGA claims. We reject this argument.

The California Supreme Court's decision in *Iskanian* expresses no preference regarding whether individual PAGA claims are litigated or arbitrated. It provides only that representative PAGA claims may not be waived outright. 59 Cal. 4th at 384. The *Iskanian* rule does not prohibit the arbitration of any type of claim.

2. The FAA's Purpose to Ensure Enforcement of the Terms of Arbitration Agreements

The Supreme Court has stated that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion,* 131 S. Ct. at 1748 (second

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agreement when arbitration would prevent the 'effective vindication' of a federal statute, does not extend to state statutes." *Ferguson v. Corinthian Colls., Inc.,* 733 F.3d 928, 936 (9th Cir. 2013).

alteration in original) (quoting *Volt,* 489 U.S. at 478). The Court has also stated that the FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (quoting *Moses H. Cone,* 460 U.S. at 24). The *Iskanian* rule does not conflict with these purposes.

Read broadly, these statements of the FAA's purposes would require strict enforcement of all terms contained in an arbitration agreement, including terms that are unenforceable under generally applicable state law. Such a broad construction of the FAA's purposes is untenable, of course, because it would render § 2's saving clause wholly "ineffectual." *See Geier,* 529 U.S. at 870; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n.12 (1967) ("As the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). Congress plainly did not intend to preempt all generally applicable state contract defenses, only those that "interfere[] with arbitration," *Concepcion,* 131 S. Ct. at 1750.

A defense interferes with arbitration if, for example, it prevents parties from selecting the procedures they want applied in arbitration. *See id.* at 1748-53. *Concepcion* illustrates how a generally applicable contract defense might do so. The California rule at issue in *Concepcion,* which provided that class action waivers in certain consumer contracts of adhesion were unconscionable, did not explicitly discriminate against arbitration. *See id.* at 1745. As applied to arbitration agreements, however, the rule "interfere[ed] with fundamental attributes of arbitration," *id.* at 1748, by imposing formal classwide arbi-

tration procedures on the parties against their will. *Id.* at 1750-51. As the Court explained,

> "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.

Id. at 1751 (citation omitted) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 685 (2010)). The Court observed that "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." *Id.* The parties could not opt out of the formal procedures of class arbitration because the procedures were required to protect the due process rights of absent parties. *Id.* Therefore, although the California rule prohibiting class action waivers applied equally to both arbitration agreements and non-arbitration agreements, it could not be applied to arbitration agreements without interfering with parties' freedom to select informal procedures.

The *Iskanian* rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures. To understand why, it is essential to examine the "fun-

damental[]" differences between PAGA actions and class actions. *See Baumann v. Chase Inv. Servs. Corp.,* 747 F.3d 1117, 1123 (9th Cir. 2014) (quoting *McKenzie v. Fed. Express Corp.,* 765 F. Supp. 2d 1222, 1233 (C.D. Cal. 2011)). The class action is a procedural device for resolving the claims of absent parties on a representative basis. *See* Fed. R. Civ. P. 23; *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 832-33 (1999); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613-17 (1997). By contrast, a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer. An employee bringing a PAGA action does so "as the proxy or agent of the state's labor law enforcement agencies," *Iskanian,* 59 Cal. 4th at 380 (quoting *Arias v. Superior Court,* 46 Cal. 4th 969, 986 (2009)), who are the real parties in interest, *see id.* at 382. As the state's proxy, an employee-plaintiff may obtain civil penalties for violations committed against absent employees, Cal. Lab. Code § 2699(g)(1), just as the state could if it brought an enforcement action directly. However, by obtaining such penalties, the employee-plaintiff does not vindicate absent employees' claims, for the PAGA does not give absent employees any substantive right to bring their "own" PAGA claims. *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court,* 46 Cal. 4th 993, 1003 (2009); *see also Iskanian,* 59 Cal. 4th at 381 (explaining that "[t]he civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities"). An agreement to waive "representative" PAGA claims—that is, claims for penalties arising out of violations against other employees—is effec-

tively an agreement to limit the penalties an employee-plaintiff may recover on behalf of the state.

Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations. *Compare Concepcion,* 131 S. Ct. at 1751-52 (observing "it is…odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied"), *with Arias,* 46 Cal. 4th at 984-87. PAGA arbitrations therefore do not require the formal procedures of class arbitrations. *See Baumann,* 747 F.3d at 1123.[10]

> Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees—

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[10] A judgment in a PAGA action binds absent employees because it binds the government agency tasked with enforcing the labor laws. *Arias,* 46 Cal. 4th at 986. As the California Supreme Court has explained,

> [w]hen a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the 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.

Id. Since the aggrieved employee bringing the action "does so as the proxy or agent of the state's labor law enforcement agencies," absent employees are also bound by any judgment regarding civil penalties. *Id.*

> critical requirements in federal class actions under Rules 23(a)(4) and (g).…Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality.

Id. at 1122-23 (citations omitted). Because representative PAGA claims do not require any special procedures, prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs. Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims. This is a critically important distinction between the *Iskanian* rule and the rule at issue in *Concepcion.*

The dissent emphasizes that both the *Iskanian* rule and the rule at issue in *Concepcion* "interfere[] with the parties' freedom to limit their arbitration only to those claims arising between the contracting parties." We do not read *Concepcion* to require the enforcement of all waivers of representative claims in arbitration agreements. Whether a claim is technically denominated "representative" is an imperfect proxy for whether refusing to enforce waivers of that claim will deprive parties of the benefits of arbitration.[11] Instead, *Concepcion* requires us to examine whether the waived claims mandate procedures that

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[11] For example, even an "individual" PAGA claim does not arise solely between an employer and an employee. As the court in *Iskanian* observed, *"every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." *Iskanian,* 59 Cal. 4th at 387.

interfere with arbitration, as the class claims in *Concepcion* did. Here, they do not.

We take the dissent's broader point to be that the *Iskanian* rule defeats the parties' contractual expectations, as expressed in their arbitration agreement. *See Concepcion,* 131 S. Ct. at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."). We recognize that Sakkab and Luxottica likely expected the waiver of representative PAGA claims to be enforced, and that the *Iskanian* rule prevents that expectation from being fulfilled. Any generally applicable state law that invalidates a mutually agreed upon term of an arbitration agreement will, by definition, defeat the parties' contractual expectations. However, the FAA's saving clause clearly indicates that Congress did not intend for the parties' expectations to trump any and all other interests. As we have explained, a rule requiring that the parties' expectations be enforced in all circumstances, regardless of whether doing so conflicts with generally applicable state law, would render the saving clause wholly ineffectual.

We acknowledge that the Court in *Concepcion* also expressed concern that "class arbitration greatly increases risks to defendants" by aggregating claims and increasing the amount of potential damages. *Id.* at 1752. As the Court observed, arbitration is "poorly suited to the higher stakes of class litigation," because it does not provide for judicial review. *Id.* Although PAGA actions do not aggregate individual claims, they may nonetheless involve high stakes. Defendants may face hefty civil penalties in PAGA actions, and may be unwilling to forgo judicial review by arbitrating them. It does not follow, however, that the FAA preempts the *Iskanian* rule just because the

amount of civil penalties the PAGA authorizes could make arbitration a less attractive method than litigation for resolving representative PAGA claims. By their nature, some types of claims are better suited to arbitration than others. *See Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1991) (recognizing that agreements to arbitrate federal statutory claims are enforceable even if they do not appear to be "appropriate for arbitration"). But 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. *Cf. Medtronic,* 518 U.S. at 485 ("[B]ecause the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). Nor, we think, 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. *Cf. Booker v. Robert Half Int'l, Inc.,* 413 F.3d 77, 83 (D.C. Cir. 2005) (assuming, without deciding, that a term in an arbitration agreement barring punitive damages was unenforceable as applied to a claim under the District of Columbia Human Rights Act). The FAA contemplates that parties may simply agree *ex ante* to litigate high-stakes claims if they find arbitration's informal procedures unsuitable. By the same token, the FAA does not require courts to enforce agreements to waive the right to bring representative PAGA actions just because the amount of penalties an aggrieved employee is authorized to recover for the state makes the formal procedures of litigation more attractive than arbitration's informal procedures. Just as the high stakes involved in antitrust actions may cause parties to agree *ex ante* to exclude

antitrust claims from arbitration, parties may prefer to litigate representative PAGA claims.

It is true that PAGA actions, like many causes of action, can be complex. It is not true, however, that PAGA actions are necessarily "procedurally" complex, as the dissent claims. Rather, the potential complexity of PAGA actions is a direct result of how an employer's liability is measured under the statute. The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees. "[P]otential complexity should not suffice to ward off arbitration," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 633 (1985), where, as here, the complexity flows from the substance of the claim itself, rather than any procedures required to adjudicate it (as with class actions). *Cf. id.* (holding that an agreement to arbitrate antitrust claims was enforceable).

The dissent argues that representative PAGA actions will make the arbitration process "slower" and "more costly." There is no support for this conclusion in the record. *Cf. Concepcion,* 131 S. Ct. at 1751 (citing American Arbitration Association statistics regarding the duration of class arbitrations). Moreover, even if there were evidence that representative PAGA actions take longer or cost more to arbitrate than other types of claims, the same could be said of any complex or fact-intensive claim. Antitrust claims, for example, have the potential to make arbitration slower and more costly. This does not mean that a rule declining to enforce waivers of such claims interferes with the FAA in any meaningful sense, since, unlike class claims, parties are free to arbitrate them using the procedures of their choice.

In many ways, arbitration is well suited to resolving complex disputes, provided that the parties are free to decide how the arbitration will be conducted. *See id.; see also* American Arbitration Association Commercial Arbitration Rules (describing separate procedures for "Large, Complex, Commercial Disputes").

The dissent also argues that representative PAGA claims are "more likely to generate procedural morass." But whether arbitration of representative PAGA actions is likely to "generate procedural morass" depends, first and foremost, on the procedures the parties select. One way parties may streamline the resolution of complex PAGA claims is by agreeing to limit discovery in arbitration. *See Dotson v. Amgen, Inc.,* 181 Cal. App. 4th 975, 983 (Ct. App. 2010) (observing that "arbitration is meant to be a streamlined procedure. Limitations on discovery, including the number of depositions, is one of the ways streamlining is achieved"). California courts have recognized that "discovery limitations are an integral and permissible part of the arbitration process." *Id. (citing Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal. 4th 83, 106 n.11 (2000)); *see also Roman v. Superior Court,* 172 Cal. App. 4th 1462, 1476 (Ct. App. 2009). Notably, California law permits parties to arbitrate under the American Arbitration Association's employment dispute resolution rules. *See Roman,* 172 Cal. App. 4th at 1476. The rules give arbitrators broad authority to decide how much discovery is appropriate, "consistent with the expedited nature of arbitration." *See* American Arbitration Association Employment Arbitration Rules and Mediation Procedures (2009), at 19.

Of course, whether representative PAGA claims are likely to "generate procedural morass" will also

depend on whether, and to what extent, state law purports to limit parties' right to use informal procedures, including limited discovery, in representative PAGA arbitrations. It is conceivable that a state law imposing such limits could run afoul of the Court's decision in *Concepcion* by requiring a degree of formality that is inconsistent with traditional arbitration procedures. *See Concepcion,* 131 S. Ct. at 1751. No such state law is before us, however, and it is premature to conclude that representative PAGA claims will necessarily result in "procedural morass" when there is no indication that state law limits parties' freedom to select informal procedures, or limit discovery, in PAGA arbitrations. *Cf. Williams v. Superior Court,* 236 Cal. App. 4th 1151, 1156-58 (Ct. App. 2015) (upholding trial court's refusal to order statewide discovery in a PAGA action and observing that "[p]laintiff's proposed procedure, which contemplates jumping into extensive statewide discovery based only on the bare allegations of one local individual having no knowledge of the defendant's statewide practices would be a classic use of discovery tools to wage litigation rather than facilitate it").

In sum, the *Iskanian* rule does not conflict with the FAA, because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration. It only prohibits them 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.

Our conclusion that the FAA does not preempt the *Iskanian* rule is bolstered by the PAGA's central role in enforcing California's labor laws. The Court has instructed 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 purpose of Congress." *Medtronic,* 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)); *see also Arizona v. United States,* 132 S. Ct. 2492, 2503 (2012) (considering historic police powers of the State in analyzing obstacle preemption). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985) (quoting *DeCanas v. Bica,* 424 U.S. 351, 356 (1976)).

Both the PAGA statute and the *Iskanian* rule reflect California's judgment about how best to enforce its labor laws. "[T]he Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency." *Iskanian,* 59 Cal. 4th at 383. And the "sole purpose" of the *Iskanian* rule "is to vindicate the Labor and Workforce Development Agency's interest in enforcing the Labor Code." *Id.* at 388-89. The explicit purpose of the rule barring enforcement of agreements to waive representative PAGA claims is to preserve the deterrence scheme the legislature judged to be optimal. *See id.* at 384.

As the California Supreme Court has explained, a PAGA action is a form of qui tam action. *See id.* at 382. Qui tam actions predate the FAA by several centuries. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765,773-76 (2000). The FAA was not intended to preclude states

from authorizing qui tam actions to enforce state law. Nor, we think, was it intended to require courts to enforce agreements that severely limit the right to recover penalties for violations that did not directly harm the party bringing the action. The right to inform the state of violations that did not injure the informer is the very essence of a qui tam action. *See id.* at 775. That qui tam actions can be difficult to arbitrate does not mean that the FAA requires courts to enforce private agreements opting out of the state's chosen method of enforcing its labor laws.

III. Severability of the PAGA Waiver

Sakkab has not argued that the PAGA waiver contained in the arbitration agreement rendered the entire arbitration agreement void. Nor has he disputed that he is required to arbitrate the four non-PAGA claims in the FAC. It is therefore clear that the non-PAGA claims in the FAC must be arbitrated.

We have held that the waiver of Sakkab's representative PAGA claims may not be enforced. It is unclear, however, whether the parties have agreed to arbitrate such surviving claims or whether they must be litigated instead.[12] Accordingly, we reverse the district court's order dismissing the FAC, and return the issue to the district court and the parties to decide in the first instance where Sakkab's representative PAGA claims should be resolved, and to conduct such other proceedings as are consistent with this opinion.

REVERSED and REMANDED.

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[12] We note that the dispute resolution agreement provides that Luxottica "expressly does not agree to arbitrate any claim on a…representative basis."

N.R. SMITH, dissenting:

In 1925, "Congress enacted the [Federal Arbitration Act] in response to widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304, 2308–09 (2013). Despite ninety years of Supreme Court precedent invalidating state laws deemed hostile to arbitration, the majority today displays this same "judicial hostility" to arbitration agreements. Our court employed the same "judicial hostility" in *Laster v. AT&T Mobility LLC,* 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 131 S. Ct. 1740 (2011), for which we were subsequently reversed.

In this case, rather than upholding the purposes of the Federal Arbitration Act ("FAA"), the majority upholds a "judicially created" state rule that prevents parties to an arbitration agreement from agreeing that their future arbitration will address individual claims arising between one employee and one employer. To conclude that the state rule (created by *Iskanian v. CLS Transp. Los Angeles, LLC,* 327 P.3d 129 (Cal. 2014)) does not frustrate the purposes of the FAA, the majority ignores the basic precepts enunciated in *Concepcion.* Because the majority should have applied *Concepcion* and deferred to the FAA's "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983), rather than circumventing it, I must dissent.

I. Concepcion

Because the majority essentially ignores the Supreme Court's direction in *Concepcion* (a case very

similar in detail to this case), I begin by describing this important precedent in some detail.

In *Concepcion,* a consumer contract provided for "arbitration of all disputes between the parties, but required that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceedings." 131 S. Ct. at 1744 (internal quotation marks omitted). Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), which established a rule that invalidated class action waivers in contracts of adhesion, a federal district court "found that the arbitration provision was unconscionable." *Concepcion,* 131 S. Ct. at 1745. We affirmed, holding that the *Discover Bank* rule was not preempted by the FAA, because it was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* Further, we rejected AT&T's argument that "class proceedings will reduce the efficiency and expeditiousness of arbitration." *Id.*

The Supreme Court reversed and concluded that a rule " [r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. The Court held that, despite § 2's savings clause, even generally applicable contract defenses can violate the FAA if they serve as an obstacle to the objectives of the FAA. *Id.* The Court also identified the appropriate inquiry: If the state rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the rule is preempted. *Id.* at 1753. As part of that inquiry, the Court clarified the pur-

pose and objective of the FAA. "The overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748.

The Court then applied that analysis to the *Discover Bank* rule prohibiting the class action waivers. The Court explained that "arbitration is a matter of contract," *id.* at 1745, and "[a]lthough the [*Discover Bank*] rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post," id.* at 1750. Thus, rather than holding the parties to the terms of bilateral arbitration agreed upon in their contract, the *Discover Bank* rule allowed any party to subject the other to class-action arbitration. *Id.* The Court reasoned that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Id.* at 1750-51.

The Court then provided three reasons why *ex post,* state-mandated class arbitration worked as an obstacle to the FAA's purposes and objectives. First, "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." *Id.* at 1751. The Court explained that "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 685 (2010)). Because of the complex nature of class litigation, those benefits are lost when parties

are forced to pursue class arbitration rather than the bilateral arbitration to which the parties agreed in their agreement. *See Concepcion,* 131 S. Ct. at 1751.

Second, the Court reasoned that "class arbitration *requires* procedural formality." *Id.* "For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id.* (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12 (1985)). The Court found it unlikely that Congress, when passing the FAA, envisioned requiring such complex procedural requirements in an arbitration context. *Id.* at 1751–52.

Third, "class arbitration greatly increases risks to defendants." *Id.* at 1752. The Court explained:

> Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.…Arbitration is poorly suited to the higher stakes of class litigation.…We find it hard to believe that defendants would bet the company with no effective means of review,

> and even harder to believe that Congress would have intended to allow state courts to force such a decision.

Id.

After presenting these three reasons why *ex post,* state-mandated class arbitration worked as an obstacle to the objectives of the FAA, the Court addressed the argument that class arbitration was "necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. The Court rejected the argument, reasoning that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* Thus, the Court concluded that "[b]ecause 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA." *Id.* (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

II. FAA's preemption of the Iskanian *rule*

The majority cannot distinguish the present case from the principles outlined in *Concepcion. Concepcion* dealt with a state rule that prohibited class-action waivers in arbitration agreements. The present case involves a state rule that prohibits representative action waivers in arbitration agreements.

The *Discover Bank* rule and the *Iskanian* rule are sufficiently analogous to guide our decision.[1]

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[1] The majority spends a significant portion of its decision discussing whether *Iskanian's* rule is a "generally applicable contract defense." *See Concepcion,* 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)). However, the parties do not address the issue of whether the

Class actions and PAGA actions both allow an individual (who can normally only raise his or her own individual claims) to bring an action on behalf of other people or entities. *See Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2550 (2011) (reasoning that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–01 (1979)); *Arias v. Superior Court,* 209 P.3d 923, 986 (Cal. 2009) (explaining that an aggrieved employee suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies" and a judgment binds the state law enforcement agencies and nonparty aggrieved employees). Likewise, *waivers* of class actions and representative actions both seek to prevent the parties from raising claims on behalf of others by limiting arbitration to only those claims arising between the parties to the agreement.

Because the class action and representative action waivers fulfill the same purpose, it should be no

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Iskanian rule is a generally applicable contract defense. Therefore, I do not address the issue (although (a) I have serious doubts that the rule established by *Iskanian* falls into the same category as the common law contract defenses of duress or fraud, and (b) the Supreme Court did not determine in *Concepcion* whether the alleged unconscionability of failing to apply the *Discover Bank* rule was a generally applicable contract defense). Further, declaring that the *Iskanian* rule is a "generally applicable contract defense" does not help the majority. Under *Concepcion,* even generally applicable contract defenses may be preempted if they "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. The *Iskanian* rule stands as such an obstacle to "[t]he overarching purpose of the FAA…to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*

surprise that they are often (if not always) grouped together and use similar language.[2] The common inclusion of both class action and representative waivers in arbitration agreements indicates that one waiver, without the other, would not be sufficient to create the type of arbitration desired by the parties. For example, an arbitration agreement that includes a class waiver without including a representative waiver would not effectively limit the arbitration to only individual claims arising between the parties to the agreement. Thus, both the *Discover Bank* rule and *Iskanian* rule (by invalidating these waivers) act to prevent contracting parties from crafting arbitration agreements in a way that limits the arbitration to claims arising solely between the contracting parties.[3]

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[2] *In Concepcion,* the arbitration agreement required claims to be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Concepcion,* 131 S. Ct. at 1744. Here, Sakab's arbitration agreement requires that he will not "file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim)." Both waivers expressly prohibited both class and representative actions.

[3] The majority responds by claiming that this argument would require courts to enforce all waivers of representative claims, including individual claims in a representative capacity, in arbitration agreements. However, this argument regarding individual claims in a representative capacity again is not relevant to the facts at hand. Sakkab was given the right to pursue his individual PAGA claim in this arbitration. His employer did not object to Sakkab pursuing such an individual claim. Sakkab refused, instead pursuing the broader claim at issue here. That said, when parties contractually agree to waive any representative claims in an arbitration agreement and a state rule man-

The majority emphasizes the differences between class actions and PAGA claims. But differences between the two types of actions, no matter how plentiful the majority would want to characterize them, do not change the fact that a rule prohibiting the waiver of either type of action in an arbitration agreement interferes with the parties' freedom to limit their arbitration only to those claims arising between the contracting parties. The majority recognizes that one of the key problems with the *Discover Bank* rule in *Concepcion* was that "it could not be applied to arbitration agreements without interfering with *parties' freedom* to select informal procedures" for their own arbitrations. Maj. Op. at 20 (emphasis added). In an attempt to apply that principle to the *Iskanian* rule, the majority reasons that "the *Iskanian* rule does not conflict with the FAA, because *it leaves parties free to adopt the kinds of informal procedures normally available in arbitration."* Maj. Op. at 27 (emphasis added). However, the majority's reasoning overlooks the simple fact that, by preventing parties from limiting arbitration only to individual claims arising between the two contracting parties, the *Iskanian* rule interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration (just as did the *Discover Bank* rule). By requiring the availability of representative PAGA claims in arbitration (i.e., claims not specific to the contracting parties), the *Iskanian* rule interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. *See Concepcion,* 131 S. Ct. at 1748.

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dates a different decision, an analysis under *Concepcion* is warranted.

Because the effect of the waivers before challenged in *Concepcion* and now challenged in this case are similar, the analytic framework and reasoning in *Concepcion* is directly applicable. Just like the *Discover Bank* rule in *Concepcion,* the *Iskanian* rule does not *require* the parties to arbitrate representative PAGA claims. However, by invalidating representative waivers in an arbitration agreement (as applied to PAGA claims), the rule allows any party to an employment contract to demand arbitration of a representative PAGA claim *ex post,* despite the fact that the parties agreed to forgo such a demand in the agreement, where the parties have already agreed to waive all other forums. *See id.* at 1750. As explained below, by (a) preventing parties from crafting arbitration agreements to limit the arbitration only to individual claims and (b) allowing *ex post* demand for the arbitration of representative PAGA actions, the *Iskanian* rule forces the parties to lose the benefits of arbitration and frustrates the purposes of the FAA. The *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion:* it makes the process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk. *See id.* at 1751-52.

A. The Iskanian *rule makes arbitration slower, more costly, and more likely to generate procedural morass.*

First, the switch from the arbitration of only individual claims to the arbitration of representative PAGA claims on behalf of the State and all other aggrieved employees "sacrifices the principal advantage of arbitration—its informality—and makes the pro-

cess slower, more costly, and more likely to generate procedural morass." *Concepcion,* 131 S. Ct. at 1751.[4] When an aggrieved employee raises a representative PAGA claim, he must first show that his employer violated the California Labor Code. If the PAGA claimant is successful in proving that his or her employer violated the Labor Code, civil penalties are assessed against the employer in the amount of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Labor Code § 2699(f)(2). Thus, rather than merely focusing on the individual employee, the hours he worked, and the damages due to him, an arbitrator overseeing a representative PAGA claim would have to make specific factual determinations regarding (1) the number of other employees affected by the labor

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[4] For some unknown reason, the majority states that there is no support in the record for the conclusion that representative PAGA actions will make the arbitration process "slower" and "more costly." However, the arbitration of representative PAGA actions is clearly slower and more costly than bilateral arbitration for the reasons outlined herein (for example, the review of labor code violations and number of pay periods for affected employees will inherently be slower and more costly when brought in a representative capacity for multiple employees than the review of labor code violations and number of pay periods when brought in bilateral arbitration for a single employee). This conclusion is not unique and is adequately reflected in the record. Indeed, the Chamber of Commerce of the United States of America and Retail Litigation Center, Inc. filed an *amicus* brief in this case detailing how such representative claims lack "the simplicity, informality, and expedition that are characteristic of arbitration" and concluding that the arbitration of representative PAGA claims is as incompatible with arbitration as a class proceeding.

code violations, and (2) the number of pay periods that *each* of the affected employees worked. Because of the high stakes involved in these determinations, both of these issues would likely be fiercely contested by parties. In arbitrations involving large companies, the arbitrator would be required to make individual factual determinations regarding the employment status for hundreds or thousands of employees, none of whom are party to such arbitration. Further, the employee who brought the representative PAGA claim would not initially have access to the information needed to prove the number of affected employees or the number of pay periods they worked. Therefore, some kind of discovery would need to take place, requiring the employer to divulge the necessary documents (potentially a tremendous number of payroll and employment forms) to the PAGA claimant. This would not be a minor undertaking. All of these additional tasks and procedures necessarily makes the process substantially slower, substantially more costly, and more likely to generate procedural morass than non-representative, individual arbitration.

Despite these additional procedural hurdles present in a PAGA claim, the majority denies that representative PAGA claims would make the process slower, substantially more costly, and more likely to generate procedural morass. Instead, the majority reasons that any potential complexity of PAGA claims does not render such claims incompatible with arbitration. The majority holds that "arbitration is well suited to resolving complex disputes, *provided that the parties are free to decide how the arbitration will be conducted."* Maj. Op. at 26. However, that rationale ignores the problem the *Iskanian* rule creates; the parties had already decided how their arbi-

tration would be conducted (individually, in a non-representative capacity). The *Iskanian* rule instead allows the employee, *ex post,* to demand arbitration of representative claims.[5] Although two parties certainly could agree to arbitrate representative PAGA claims when they construct and sign the arbitration agreement, requiring the parties to resolve representative actions (after a contrary agreement between the parties has been struck) renders the arbitration much more complex, costly, and time consuming *than what the parties had agreed to do.* "Arbitration is a matter of contract," and "[t]he overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion,* 131 S. Ct. at 1745, 1748. When the parties have agreed to a specific, streamlined method of arbitration (such as the arbitration of individual claims only), and a relevant, state rule forces the parties to forego their chosen method of dispute resolution in favor of a procedure that is more costly and time consuming, the state rule frustrates the purposes of the FAA. As the *Concepcion* Court explained in the class arbitration context, "The conclusion follows that

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[5] The majority holds that parties could, *ex ante,* craft their arbitration agreements to deal with the complexity involved in the arbitration of representative PAGA claims. However, *Concepcion's* analysis was not concerned with the effect of the *Discover Bank* rule on future arbitration agreements, but instead focused on the *ex post* effect of the rule on arbitration agreements containing class waivers. *See Concepcion,* 131 S. Ct. at 1750 ("California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.").* Therefore, we also focus on *Iskanian's ex post* effect on Sakkab's arbitration agreement.

class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Id.* at 1750-51. Likewise, it follows that representative arbitration, to the extent it is manufactured by *Iskanian* rather than consensual, is inconsistent with the FAA.

The majority further reasons that, even if representative PAGA actions will make the arbitration process slower or more costly, the same could be said of any complex or fact-intensive claim. The majority compares representative PAGA actions to antitrust claims as an example of another type of claim that has the potential to make arbitration slower and more costly. This comparison is incorrect. Instead, the principle enumerated in *Concepcion* requires us to compare a representative PAGA claim (what the *Iskanian* rule would require) to individual, bilateral arbitration (what the parties had agreed to do in their arbitration agreement). Had the majority conducted the correct comparison, it would be forced to conclude that the arbitration of representative PAGA claims is certainly more likely to make the process slower, substantially more costly, and more likely to generate procedural morass than non-representative, individual arbitration.

B. The Iskanian *rule requires more formal and complex procedure.*

Second, representative PAGA actions are procedurally more complex than the arbitration of solely individual claims. Specifically, the discovery required in a representative PAGA claim is vastly more complex than would be required in an individual arbitration. In an individual arbitration, the employee already has access to all of his own employment records (or can easily obtain them from his employer).

He knows how long he has been working for the employer and can easily determine how many pay periods he has been employed. Likewise, he knows whether he has been affected by the Labor Code violations he is alleging and can provide individual evidence to support his claims. However, in a representative PAGA claim, the individual employee does not have access to any of this information on behalf of all the other potentially aggrieved employees. Therefore, the employee must be able to obtain the information from the employer or the other employees. The discovery necessary to obtain these documents from the employer would be significant and substantially more complex than discovery regarding only the employee's individual claims. The majority's proposed solution to this complexity, the use of hypothetical informal procedures instead of more formal ones, misses the mark. The procedural complexity present in representative PAGA claims is not attributable to the use of formal versus informal procedures. Instead, such complexity is a function of the sheer number of tasks and procedural hurdles present in bringing a representative PAGA claim.

The majority completely dismisses the procedural complexity that a representative PAGA claim entails. As the majority suggests, the arbitration of representative PAGA claims may not be as procedurally complex *as class arbitrations. See Concepcion,* 131 S. Ct. at 1751-52. However, (for the second time), the majority makes the wrong comparison. Instead of comparing a representative PAGA claim to individual, bilateral arbitration (i.e., what the parties had agreed to versus what the *Iskanian* rule would require, as the principle enumerated in *Concepcion* requires), the majority compares a representative PAGA claims to class arbitration and con-

cludes that, because the two procedures are different, a representative PAGA action is not inconsistent with arbitration. Had the majority conducted the correct comparison, the majority would be forced to conclude that the arbitration of representative PAGA claims is certainly more procedurally complex than bilateral arbitration.

The majority holds that any potential procedural complexity will depend on the arbitration procedures the parties select and that the parties may streamline complex PAGA claims by agreeing to informal procedures. However, this type of reasoning was also considered and rejected in *Concepcion,* where the plaintiff contended that because the parties could agree to informal procedures, class procedures were not necessarily incompatible with arbitration. 131 S. Ct. at 1752–53. Again, the majority fails to recognize that, although the parties could choose to employ procedures to address the complexity inherent in representative PAGA actions, they cannot be required by a state to do so. As the Court in *Concepcion* reasoned:

> The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. But what the parties in the aforementioned ex-

> amples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

Id. (citation omitted). Therefore, although parties may *choose* to employ complex discovery procedures, as would be required by a representative PAGA claim, state law cannot *demand* that they do so. Here, Sakkab and Luxottica chose to pursue individual, non-representative arbitration. Therefore, the *Iskanian* rule frustrates the purposes of the FAA by requiring them to undertake the procedural complexity of representative PAGA claims.

C. The Iskanian *rule exposes the defendants to substantial unanticipated risk*

Third, the arbitration of representative PAGA claims greatly increases the risk to employers. *See id.* at 1752. Rather than awarding damages for Labor Code violations for just one employee, representative PAGA claims award damages for all affected employees. Cal. Labor Code § 2699(f)(2). A representative PAGA claim could therefore increase the damages awarded in arbitration by a multiplier of a hundred or thousand times (depending on the size of the company). Thus, the concerns expressed in *Concepcion* are just as real in the present case:

> The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to [hundreds or thousands] of potential claimants are aggregated and de-

> cided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.…We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

Concepcion, 131 S. Ct. at 1752.

The majority admits that representative PAGA actions may involve high stakes, but then concludes that high stakes, alone, cannot lead to invalidation of the *Iskanian* rule and again compares PAGA actions to antitrust claims in illustrating its argument. Once again, (for the third time), the majority completely misses the point of *Concepcion* and invokes an incorrect comparison. Parties to an arbitration *could agree* to arbitrate high stakes issues. However, a state court cannot "force such a decision." *Id.* Comparing such high stakes PAGA actions to antitrust claims is not relevant. Again, the majority should have compared high stakes PAGA actions against the individual, bilateral arbitration that the parties actually agreed to undertake. When Sakkab and Luxottica entered into their arbitration agreement, they chose to limit the risk to which they were subjecting themselves to damages arising out of individual claims between the two parties. That is all. The *Iskanian* rule invalidates that decision and allows Sakkab to demand *ex post* arbitration of claims outside of that framework. *Concepcion* declared that this increased risk, to which the parties did not agree, frustrated the purposes of the FAA. When combined with the increased cost, time, and procedural complexity in-

herent in the arbitration of representative PAGA claims (when compared to solely individual arbitration), the increased risk to a defendant works as yet another way that the benefits of arbitration are lost through application of the *Iskanian* rule.

D. The Iskanian rule cannot be justified on state policy grounds.

The majority holds that its decision "is bolstered by the PAGA's central role in enforcing California's labor laws" and that "[b]oth the PAGA statute and the *Iskanian* rule reflect California's judgment about how best to enforce its labor laws." Maj. Op. at 28. However, under *Concepcion,* "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. As is evidenced by our discussion of the effective vindication exception to the FAA in *Ferguson v. Corinthian Colls., Inc.,* when it comes to arbitration agreements, "'[w]e have no earthly interest (quite the contrary) in vindicating' a state law."[6] 733 F.3d 928, 936 (9th Cir. 2013) (quoting *Italian Colors Rest.,* 133 S. Ct. at 2320 (Kagan, J., dissenting)). Thus, if a state law violates or frustrates the FAA, the state law must give way, even if such a decision prevents the state's interest from being vindicated. *Ferguson,* 733 F.3d at 936–37. By relying so heavily on state policy grounds to support its decision, the majority strays awfully close to invocation of the effective vindication doctrine, which the majority admits does not apply to the present case. Therefore, because the

[6] Sakkab argues that he cannot be denied a forum for his representative PAGA claims. However, Sakkab has no right to the vindication of a state law claim, as the majority correctly recognizes.

Iskanian rule serves as an obstacle to the objectives of the FAA, the desirability and importance of the rule to the State's policies and purposes cannot save it.[7]

Although the State's interest in an employee's ability to bring PAGA claims is ultimately irrelevant to the *Concepcion* analysis, it is important to note that preemption of the *Iskanian* rule does not preempt PAGA itself. In fact, PAGA could continue to play a meaningful role in California's labor law enforcement scheme without the *Iskanian* rule. First, any employee not subject to an arbitration agreement waiving such actions is free to bring a PAGA claim. In the present case, Luxottica gave Sakkab the option to opt out of the arbitration agreement if he simply returned the opt-out form to Luxottica within a specified period of time. We have previously reasoned that an opt out provision prevents an arbitration agreement from being a contract of adhesion, and supports the enforceability of the agreements. *See Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198, 1199-1200 (9th Cir. 2002). Thus, employers are incentivized to include opt out provisions in their arbitration agreements. Any employees who opt out of arbitration, or whose employers do not utilize arbitration, will be free to bring PAGA claims. Second,

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[7] The majority holds that "[t]he FAA was not intended to preclude states from authorizing qui tam actions to enforce state law." Maj. Op. at 29. However, the majority provides no support for that declaration. Under *Concepcion,* if a state rule authorizing a qui tam action frustrated the purposes or objectives of the FAA, that rule would certainly be invalidated. The majority provides no authority to support the contention that state law can preempt federal law if the state law involves qui tam actions.

PAGA requires that potential claimants provide notice to the State before pursuing a PAGA action. Cal. Labor Code § 2699.3. As no one has asserted that the State of California is prevented from raising the labor violations on its own, the notice provision of PAGA and the implementation of statutory damages for Labor Code violations can continue to provide a meaningful benefit to the State of California. Finally, inasmuch as a PAGA claim can be limited to damages stemming from a single employee's employment, PAGA continues to provide an opportunity for individuals to collect damages on behalf of the State, even in arbitration. Luxottica has expressly argued that an "individual" PAGA claim could be raised under its arbitration agreement with Sakkab. Although the existence of "individual" PAGA claims is disputed, *see Reyes v. Macy's, Inc.,* 202 Cal. App. 4th 1119, 1123 (Ct. App. 2011) (holding that a PAGA claimant may not bring an individual PAGA claim), the *Iskanian* court expressly chose not to decide the issue. *See Iskanian, LLC,* 327 P.3d at 384. Instead, the court reasoned that, even if such claims are available, individual PAGA claims would not "result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." *Id.* But, once again, the state's purpose is irrelevant. A state may not insulate causes of action from arbitration by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action. If the rule conflicts with the objectives of the FAA, the state rule must give way. *Concepcion,* 131 S. Ct. at 1753.

Because the *Iskanian* rule stands as an obstacle to the purposes and objectives of the FAA, there is no question—the rule must be preempted. Preemption

would be consistent both with the Supreme Court's controlling decision in *Concepcion* and the FAA's "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24. Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same in *Laster,* and were subsequently reversed in *Concepcion.* The majority now walks that same path. Accordingly, I would affirm.