IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 13-55184

SHUKRI SAKKAB, et al.

Plaintiff - Appellant

vs.

LUXOTTICA RETAIL NORTH AMERICA, INC.,

Defendant - Appellee

On Appeal From the United States District Court for the
Southern District of California, Case No. 3:12-cv-00436-GPC-KSC
The Honorable Gonzalo P. Curiel, United States District Judge, Presiding

APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF BY *AMICUS CURIAE*

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Pursuant to Federal Rules of Appellate Procedure 28(c) and 29(e), Appellant Shukri Sakkab ("Appellant") respectfully requests leave to file the accompanying Supplemental Brief in response to the *amicus* brief submitted by the Chamber of Commerce of the United States of America and Retail Litigation Center, Inc., which brief was submitted in support of Appellee's position.

The *amicus* brief was submitted out of time on or about October 28, 2014 after Appellant's Reply Brief was filed. As a result, Appellant did not have the opportunity to respond to the arguments in the *amicus* brief in the normal briefing, including the argument concerning *Iskanian v. CLS Transportation*, 59 Cal. 4th 348 (June 23, 2014), *cert. denied*, 135 S. Ct. 1155, 190 L. Ed. 2d 911 (2015). In addition, Appellant's Opening Brief and Reply Brief were both undersized by 1,700 words and 2,700 words, respectively. Finally, the *amicus* brief raises various District Court decisions which were issued after the Appellant's briefing was completed, so Appellant also seeks leave to respond to such arguments and citations through this Supplemental Brief which could not have been addressed by the initial briefing. For these reasons, the Supplemental Brief is warranted.

Appellant, therefore, respectfully requests that this Court grant Appellant leave to file the accompanying Supplemental Brief.

Dated: April 8, 2015

BLUMENTHAL, NORDREHAUG & BHOWMIK

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I. INTRODUCTION

Appellant Shukri Sakkab ("Appellant") respectfully submits this Supplemental Brief in response to the *amicus* brief submitted by the Chamber of Commerce of the United States of America and Retail Litigation Center, Inc. ("*Amicus*"). The issue presented by this case concerns the settled principle that an arbitration agreement cannot forfeit an employee's substantive rights affforded by statute when agreeing to arbitrate a statutory claim.[1] The United States Supreme Court explained in *Mitsubishi Motors*, **"[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."** *Id.,* 473 U.S. at p. 628.[2]

The Supreme Court has repeated these words from *Mitsubishi Motors* no fewer than seven times in subsequent cases. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 & fn.10 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shear son/American Express*, 490 U.S. 477, 481 (1989); *Shear son/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987). **Recently, the Supreme Court affirmed this principle, holding that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" would be invalidated on public policy grounds under the FAA.** *American Express Co. v. Italian Colors Rest.*,

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[1] Appellant does not argue and has never argued in this appeal that a waiver of the civil procedure of prosecuting Appellant's substantive claims as a class action is invalid.

[2] Emphasis added unless otherwise stated.

133 S. Ct. 2304, 2310 (2013) ("*Italian Colors*"). Indeed, the "the elimination of the right to pursue that remedy" is the very example the Supreme Court used to explain an invalid arbitration agreement. *Id.*, at 2311.

The specific substantive right at issue here is the statutory right of an employee to bring the statutory claim authorized by Cal. Labor Code §2699, the Private Attorney General Act ("PAGA") on behalf of the State of California as the deputized representative of the State. This substantive right is no different than an employee's substantive right to bring a statutory claim for minimum wages under Cal. Labor Code §1197, or a statutory claim for overtime wages under Cal. Labor Code §1194. Indeed, if the agreement at issue here attempted to prospectively waive an employee's substantive right to bring a claim for overtime, or impose a recovery inconsistent with the statutory right thereto, there would be no dispute that the prohibition would be unenforceable. This conclusion is unchanged by the fact that the unwaivable substantive right at issue is the substantive right to bring the statutory claim authorized by Cal. Labor Code §2699 rather than Cal. Labor Code §1194 or §1197.

Here, the prohibition on the PAGA claim violates this settled principle by foreclosing the substantive right in all forums asserted by the State of California's authorized representative for penalties claimed by the State of California under Cal. Labor Code §2699.[3] Accordingly, in *Iskanian v. CLS Transportation*, 59 Cal. 4th 348 (June 23, 2014), *cert. denied*, 135 S. Ct. 1155, 190 L. Ed. 2d 911 (2015), the California Supreme Court correctly held in no uncertain terms that "**an employee's right to bring a PAGA action is**

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[3] The fact that the State of California has chosen to share the penal recovery in part with the victimized employees is irrelevant to the State's substantive right to collect these civil penalties through its appointed representative.

unwaivable", and therefore, a prospective contractual waiver of an employee's substantive right to bring a statutory PAGA claim is unenforceable. *Iskanian*, at 382-383. Applying the Supreme Court's holdings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*") and *Italian Colors Restaurant*, 133 S. Ct. 2304, the *Iskanian* Court recognized that the waiver of a PAGA substantive right posed very different issues than a waiver of the class procedure. *Iskanian*, at 387.[4] Therefore, by overbroadly purporting to bar the assertion of all "representative" claims, which includes PAGA's substantive right of the State of California to collect penalties in all forums, the arbitration clause here is unenforceable because the arbitration provision denies Appellant, as the private attorney general of the State of California, to collect these penalties.[5] This holding is something the Supreme Court's precedents under the Federal Arbitration Act (FAA) have never allowed. As a result, the District Court's denial of all forums for Appellant's PAGA claim to be prosecuted was plain error, a denial of due process, and therefore must respectfully be reversed.

II. CONTRARY TO THE *AMICUS'S* MISREPRESENTATIONS, *ISKANIAN* IS ENTIRELY CONSISTENT WITH SUPREME COURT PRECEDENT

The *Amicus's* principal argument is that the *Iskanian* decision is wrong under the United States Supreme Court jurisprudence. The *amicus* brief,

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[4] Notably, there is no such thing as a claim for class action relief because, as noted in *Concepcion* at 1753, a class action is a "procedure" and not a substantive claim.

[5] As *Iskanian* explained, "a PAGA litigant's status as "the proxy or agent" of the state (*Arias, supra*, 46 Cal.4th at p. 986) is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Id*, at 388.

however, points to no decision of the Supreme Court that permits an arbitration agreement to prospectively waive an unwaivable substantive right afforded by statute, such as PAGA or minimum wage or overtime. Rather, Supreme Court decisions do not require enforcement of arbitration agreements or any other agreements that bar the assertion of unwaivable substantive rights provided by statute.

The arbitration agreement in this case purports to bar Appellant from bringing any statutory PAGA claim in any forum as a matter of contract law. It bans all "representative" actions, and as the California Supreme Court explained, **every PAGA action is a representative action brought on behalf of the state.** *Iskanian*, at 387. The Supreme Court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims. The FAA makes agreements to arbitrate substantive, statutory claims enforceable, but does not provide for enforcement of agreements where substantive, statutory claims cannot be pursued in any forum, particularly when such waivers are unenforceable as a matter of general contract law. **Section 2 of the FAA expressly precludes such enforcement.** Allowing employers to excuse themselves from litigating unwaivable statutory claims in all forums, for example, liability for claims seeking unpaid overtime or particular forms of relief authorized by state law, is not the FAA's object.

The Supreme Court's decisions enforcing arbitration agreements thus repeatedly emphasize that arbitration involves choice of forums, not waiver of claims: "**By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.**" *Mitsubishi Motors*, 473 U.S. at 628; accord *Waffle House*, 534 U.S. at 295, n.10; *Gilmer*, 500 U.S.

at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *Shearson/Am. Express*, 482 U.S. at 229-30. The Supreme Court specifically cautioned against "confus[ing] an agreement to arbitrate … statutory claims with a prospective waiver of the substantive right." *14 Penn Plaza*, 556 U.S. 24 7, 265 (2009). The FAA requires enforcement of the former but does not require states to permit the latter. **Indeed, the Supreme Court has insisted it would "condemn[] … as against public policy" an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies."** *Mitsubishi*, 473 U.S. at 637, n. 19.

The Supreme Court's recent arbitration decisions are in full agreement with this longstanding principle. **In *Concepcion*, for example, the Court made clear that it was not approving an agreement that waived the right to present a claim.** The Court emphasized that the plaintiffs' claim was "most unlikely to go unresolved" because the arbitration agreement not only permitted it to be arbitrated, but provided incentives for the plaintiffs to arbitrate if the company did not immediately settle for full value. *Concepcion*, 131 8. Ct. at 1753.

In *CompuCredit Corp. v. Greenwood*, 132 8. Ct. 665 (2012), the Court again stressed that while parties may waive some procedural rights in arbitration agreements, they do not waive their underlying statutory claims. Rather, the Court explained, "contractually required arbitration of claims satisfies the statutory prescription of civil liability," and is permissible as long as "the guarantee of the legal power to impose liability … is preserved." *Id.*, at 671.

Italian Colors strongly underscores that an arbitration agreement purporting to waive PAGA claims is unenforceable. While holding that a ban

on the use of the class action procedure in an arbitration agreement was enforceable even though it had the practical effect of making particular claims too costly to justify litigation, 133 8. Ct. at 2312, *Italian Colors* reiterated that arbitration agreements may not expressly waive substantive statutory claims and remedies. **As the Court explained, the principle that an arbitration agreement may not foreclose assertion of a statutory claim "finds its origin in the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies.'"** *Id.* at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). The Court added unequivocally: "**That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.**" *Id.* The Supreme Court's statements in *Italian Colors* prescribe the outcome reached by the California Supreme Court. Appellee's contractual ban on PAGA actions prospectively waives the right to pursue statutory rights and flatly forbids the assertion of statutory rights under PAGA. ***Italian Colors* reaffirms that "elimination of the right to pursue [a] remedy," remains off-limits for an arbitration agreement.** *Id.*, at 2311.

This non-waiver principle applies fully to state-law claims. Supreme Court decisions, including *Italian Colors*, have repeatedly stated that arbitration clauses may not waive substantive claims without suggesting that state law claims differ in this respect. Indeed, in *Preston*, 552 U.S. 349, the Supreme Court held that an arbitration agreement was enforceable in part because the signatory **"relinquishe[d] no substantive rights … California law may accord him."** *Id.*, at 359. The non-waiver principle applies to state-law claims because the FAA makes agreements to arbitrate claims enforceable, 9 U.S.C. § 2, but provides no authorization for enforcement of agreements to waive claims regardless of their source, and therefore does not conflict with state laws

disallowing such waivers**.** **Moreover, a state-law rule providing that statutory claims are not waivable in employment contracts is a general principle of state contract law applicable both to arbitration agreements and other contracts.** Thus, it is saved from preemption by the FAA's provision that an arbitration clause may be denied enforcement "**upon such grounds as exist at law or in equity for the revocation of any contract**."9 U.S.C. § 2.

Given these Supreme Court precedents, federal Courts of Appeals, unsurprisingly, broadly agree that an arbitration agreement is unenforceable to the extent it waives a right to a form of legally required relief. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (holding unenforceable a provision in an arbitration clause barring state and federal antitrust claims for **treble damages**); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir. 2003) (holding unenforceable an arbitration clause barring punitive and **exemplary damages** in Title VII cases); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (declining to enforce arbitration clause that purported to exclude claims for **damages** and equitable relief under Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1481 (D.C. Cir. 1997) (stating that an employee subject to an arbitration agreement "does not forgo the substantive rights afforded by .. . statute").

Here, the arbitration agreement does not merely limit remedies available for an unwaivable statutory claim for penalties, the agreement expressly precludes any PAGA representative penalty claims in all forums. Nothing in *Italian Colors*, *Concepcion* or any of the Supreme Court's decisions supports use of an arbitration agreement to prohibit assertion of a statutory claim for relief or suggests that the FAA preempts state law precluding enforcement of such an agreement. Rather, as two concurring justices in

Iskanian recognized, Supreme Court decisions provide strong support "for the conclusion that the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action in any forum." *Iskanian*, at 395.

If the preemption argument is accepted, Appellee will have successfully immunized itself from liability for payment of PAGA penalties in this case. Allowing employers to opt out of liability for PAGA penalties would overturn California's legislative judgment that i**t is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations.**" *Arias*, 209 P.3d at 929. Nothing in the FAA's requirement to enforce agreements to arbitrate claims justifies allowing a party to excuse itself from prospective liability for PAGA penalties by requiring its employees to agree prospectively not to arbitrate or litigate PAGA claims in all forums.

Iskanian also relied on the Supreme Court's decision in *Waffle House* to support its decision that the FAA does not preempt a PAGA action. In *Waffle House*, 534 U.S. 279, the Supreme Court held that an employment arbitration agreement governed by the FAA does not prevent the Equal Employment Opportunity Commission (EEOC) from suing an employer on behalf of an employee bound by that agreement for victim-specific relief. The Supreme Court based its conclusion primarily on the fact that the EEOC was not a party to the arbitration agreement. *Id.*, 534 U.S. at 288–289.

These same considerations are even more supportive here. Appellant brings the PAGA claim on behalf of the State of California to obtain remedies other than victim-specific relief, i.e., civil penalties paid largely into the state treasury, the PAGA action can only be prosecuted upon the Appellant being

deputized by the State of California, and the PAGA action does not represent the interests of any individual employee claims. Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state for such remedies. As the *Iskanian* decision explained:

> **Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship.** It is a dispute between an employer and the state, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code. Through his PAGA claim, Iskanian is seeking to recover civil penalties, 75 percent of which will go to the state's coffers. **We emphasized in Arias that "an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' "**; that "[i]n a lawsuit brought under the [PAGA], the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies"; and that "an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself." (*Arias, supra*, 46 Cal.4th at p. 986.) **The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest.** (46 Cal.4th at p. 986.) It is true that "a person may not bring a PAGA action unless he or she is 'an aggrieved employee' (§ 2699, subd. (a))" (conc. opn. of Chin, J., *post*, at p. 395), but that does not change the character of the litigant or the dispute.

Iskanian, at 386-387.

Accordingly, the public rights rationale from *Waffle House* further supports the conclusion in *Iskanian* that a PAGA action is not preempted.

III. *ISKANIAN* SHOULD BE FOLLOWED TO PREVENT FORFEITURE OF AN UNWAIVABLE, SUBSTANTIVE RIGHT TO COLLECT STATUTORY PENALTIES

A. *Iskanian* Protects PAGA Rights From Forfeiture

Since the briefing was completed, the California Supreme Court, in a unanimous decision, issued the *Iskanian* decision which addressed the exact same issues present in this appeal. *Iskanian* first held that as a matter of

California substantive law, **"an employee's right to bring a PAGA action is unwaivable."** *Iskanian*, at 383. The Court then held that, as a matter of state contract law, **the prospective waiver of representative claims under the PAGA "is contrary to public policy and unenforceable as a matter of state law."** *Iskanian*, at 384. The grounds for this holding were the ordinary contract principles set for in Cal. Civil Code §§ 1168 and 3513 applicable to all contracts. Finally, *Iskanian* concluded that this public policy applicable to all contracts is not preempted by the FAA and does not interfere with the FAA. *Iskanian*, at 387. Because *Iskanian* directly addressed the questions raised in this appeal, this Court should have no difficulty applying *Iskanian* to reverse the District Court's order.[6]

Following the decision in *Iskanian*, the employer petitioned the United States Supreme Court to review the decision. By Order dated January 20, 2015, the United States Supreme Court denied the petition for writ of certiorari as to *Iskanian*. 135 S. Ct. 1155, 190 L. Ed. 2d 911 (2015). Thus, this Court may act confidently in following *Iskanian* with the knowledge that the United States Supreme Court refused to overturn *Iskanian.*

The interpretation of PAGA and *Iskanian's* decision that waivers of PAGA claims are not enforceable are issues of California state law that are controlling in this appeal. See *U.S. Fid. & Guar. Co. v. Lee Investments LLC*,

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[6] In an effort to bypass the dispositive decision in *Iskanian*, Appellee argues that *Iskanian* does not apply because there was an "opt-out" at the inception of Appellant's employment. Such an argument is unavailing as the agreement is still an illegal as a prospective waiver of PAGA rights at the time of enforcement, and indeed, **this state law contractual argument was expressly rejected in *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109, 1121-22 (2015).**

641 F.3d 1126, 1133 (9th Cir. 2011); *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) ("When interpreting state law, federal courts are bound by decisions of the state's highest court"). The *amicus* brief argues at great length how this Court may ignore *Iskanian* and how the prospective waiver of an unwaivable statutory right is appropriate. In so doing, the *Amicus* never even acknowledges settled precedent to the contrary. Indeed, the *amicus* brief and the authorities cited therein make several fundamental errors in an effort to foist this argument onto this Court. Each of these errors are errors of citation to state law which have been conclusively determined by the California Supreme Court and therefore cannot be disregarded as cavalierly argued by the *Amicus*.

The first error of state law made by *Amicus* is the attempt to conflate the class action procedure with the PAGA substantive statutory right. As the California Supreme Court has repeatedly made clear, **PAGA is an unwaivable statutory right that is distinct and different from the class action procedure because the employee is the "proxy or agent of the state's labor law enforcement agencies."** *Arias*, 46 Cal.4th at 986; *Iskanian*, at 388. By seeking to conflate the class action "procedure" with the assertion of a substantive statutory right, the *amicus* brief attempts to make *Concepcion* applicable where it clearly is not. **This Court has already recognized in *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121-1122 (9th Cir. 2013), "a PAGA suit is fundamentally different than a class action."** This distinction and these decisions are ignored by the *Amicus* resulting in their erroneous conclusion.

The second error of state law made by the *amicus* brief is to refuse to accept PAGA as an unwaivable statutory right to bring a PAGA claim for

penalties. Instead, they erroneously assume that a PAGA right can be waived, like a procedure, in order to sustain their argument. Under controlling state law, however, "an employee's right to bring a PAGA action is unwaivable", and **therefore, a prospective contractual waiver of an employee's statutory right to bring a PAGA action is "against public policy and may not be enforced."** *Iskanian*, at 382-383. Under California law, the PAGA statutory right can no more be prospectively waived than the right to minimum wage or overtime. **Thus, as a matter of California state contract law, an employment agreement purporting to prospectively waive PAGA penalties, just like an employment agreement purporting to prospectively waive overtime wages or minimum wages, is unenforceable.** This rule applies to all employment contracts, regardless of whether the contract is an arbitration agreement or not. Thus, section 2 of the FAA mandates that an agreement to prospectively waive PAGA statutory penalties cannot be enforced.

The third error of state law made by the *amicus* brief is to invent the fiction of an "individual" PAGA claim to argue that the agreement does not prohibit Appellant's individual PAGA claim. There is no such thing as an individual PAGA claim. As explained in *Arias*, the *Amicus* argument is a clear error of state law in the characterization of PAGA. **A PAGA action is inherently a representative action, because the employee represents the State of California as the "proxy" or "agent" of the State in bringing this statutory claim as a law enforcement action.** *Arias*, 46 Cal.4th at 986. "A PAGA representative action is therefore a type of qui tam action." *Iskanian*, at 382. Therefore, as a matter of state law, "every PAGA action... ...is a representative action on behalf of the state." *Iskanian*, at 387. As a result, in *Iskanian*, the California Supreme Court rejected the argument that a ban on

representative claims on behalf of other individuals who still hold their own individual claims permitted a statutory PAGA claim to be vindicated. *Iskanian*, at 384. There is no such thing as an individual PAGA claim, and no such thing as a substantive class action claim. PAGA is a statutory right enforcing the state's right to penalties of which the aggrieved employees are entitled to receive 25%. A class action is just a civil procedure, and there is no such thing as a substantive class action right or claim.

The fourth error of state law made by the *amicus* brief is to argue that California law impermissibly declares statutory PAGA claims "off-limits" to arbitration. California law and *Iskanian* does no such thing. Rather, it is the arbitration agreement at issue in this case which declares that the PAGA representative claim cannot be brought in arbitration. Certainly, if the parties consented through an agreement which permitted PAGA representative claims in arbitration, then PAGA claims could be arbitrated. See e.g. *Martinez v. Leslie's Poolmart, Inc.*, 2014 U.S. Dist. LEXIS 156218 (C.D. Cal. 2014).[7] But that is not the case here because Appellee's agreement does not permit PAGA claims in arbitration. **Indeed, this illustrates the very problem with**

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[7] The fact that the statutory PAGA claim is being prohibited altogether by the agreement, and the fact that there is no state law rule that PAGA be litigated only in court and not in arbitration, distinguishes this case from the situation in *Ferguson v. Corinthian Colls. Inc.*, 733 F.3d 928 (9th 2013). **Here, Appellant's position is based on the fact that contractual PAGA waivers are unenforceable under Section 2 of the FAA, not the argument that PAGA claims must be heard in Court as was the case with the *Broughton-Cruz* rule in *Ferguson*.** See *Hernandez v. DMSI Staffing, LLC*, 2015 U.S. Dist. Lexis 12824, at *19-20 (N.D. Cal. Feb. 3, 2015). Further, this appeal concerns the forfeiture of an unwaivable statutory right, an issue which was not addressed in *Ferguson*. *See e.g. Preston*, 552 U.S. 359 (waiver of state statutory claim would violate the *Mitsubishi Motors* rule).

Appellee's agreement, the agreement does not shift the forum for PAGA claims to the arbitral venue as a valid arbitration agreement would, but instead attempts to deny the statutory PAGA claim any forum and prevent adjudication of this statutory claim altogether. This an employment agreement cannot do.

B. *Iskanian* Protects The State From Forfeiting Its Right To Enforce The Labor Code Through Its Proxy For The Collection Of Penalties

PAGA is an exercise of the "historical police powers of the state" to enforce the laws, raise revenue and prevent wage theft. *Iskanian*, at 388. PAGA actions "directly enforce the state's interest in penalizing and deterring employers who violate California's labor laws." *Iskanian*, at 387. PAGA addressed two problems. "First, the bill sponsors observed that "many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached." *Iskanian*, at 379. "The second problem was that even when statutes specified civil penalties, there was a shortage of government resources to pursue enforcement." *Id.* Accordingly, the Court explained:

> **As noted, the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Agency by empowering employees to enforce the Labor Code as representatives of the Agency.** Thus, an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. **Because 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**. (Civ. Code, § 1668.)

Iskanian, at 383.

California's creation of a cause of action in which the state can recover penalties, with a portion distributed to the aggrieved employees, reflected the

legislature's determination that "**adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.**" *Arias*, 46 Cal. 4th at 981. Thus, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." *Id.* at 986. **In short, a PAGA action is not a collective action, but is "representative" in that the plaintiff represents the interest of the state, acting to impose civil penalties (but not to provide compensatory damages) for violations committed by the employer**. The PAGA action is a dispute between an employer and the state, which alleges directly or through its agents-either the Labor and Workforce Development Agency or aggrieved employees-that the employer has violated the labor code.

The fact that PAGA is an exercise of the "historic police powers of the state" further support the *Iskanian* conclusion that the FAA does not preempt California's contract rule against PAGA waivers. The principle of federalism counsels against disabling the authority of a state law enforcement agency acting within its police powers. "**[S]tate laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest**." *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998). As the Supreme Court has observed:

> [D]espite the variety of . . . opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, **we have worked on 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.**

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55; *United States v. Locke*, 529 U.S. 89, 108 (2000) (finding that where Congress legislates "in a field which the States have traditionally occupied" starting assumption is "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" (citation omitted)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[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."); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (holding "a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act"). Labor law enforcement falls squarely within a state's police powers. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.") A state's authority over its law enforcement activities is central to state sovereignty. *Printz v. United States*, 521 U.S. 898, 928 (1997) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

Accordingly, *Iskanian* is correctly decided, and indeed, controlling on the issues argued by the *amicus* brief. The strained attempts by the *Amicus* to

contend otherwise should be rejected.

C. *Iskanian* Decision Does Not Exempt PAGA Claims From Arbitration Or Express Hostility to Arbitration

The California Supreme Court held prospective waivers of PAGA claims unenforceable but did not decide whether the PAGA claim in *Iskanian* will be arbitrated. Recognizing that the intentions of the parties were unclear regarding arbitrability of the PAGA claim if the waiver were invalidated, the court left that issue for remand. *Iskanian* did not state that PAGA claims are nonarbitrable. *Iskanian* only held that an employment agreement cannot waive an employee's right to bring a PAGA claim "**in some forum**" and left open the possibility that the forum could be arbitration. *Id.*, at 391. Here, the only reason the PAGA claim is not being arbitrated is because the Appellee’s agreement excludes a claim like PAGA from arbitration, which by agreement means the PAGA claim must in this case be brought in Court.

The California Supreme Court's decision thus does not conflict with *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), which held that the FAA preempts a "categorical rule prohibiting arbitration of a particular type of claim." *Id.*, at 1204. In *Marmet*, the Court held the agreement unenforceable because it viewed compelled arbitration of personal injury and wrongful death claims against nursing homes to be contrary to the state's public policy. *Id.*, at 1203. *Marmet* straightforwardly applied such decisions as *Perry v. Thomas*, 482 U.S. 483 (1987) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which hold that the FAA preempts states from "prohibit[ing] outright the arbitration of a particular type of claim." *Concepcion*, 131 S. Ct. at 1747. In *Iskanian*, the California Supreme Court did not foreclose arbitration of the PAGA claim. *Iskanian*, at 391.

The California Supreme Court has likewise held that "the FAA clearly preempts a state unconscionability rule that establishes an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1170 (2013), *cert. denied*, 134 S. Ct. 2724 (2014). The decision below accords with that principle: **It does not hold agreements to arbitrate PAGA claims unenforceable, but says only that an employer may not require employees to prospectively waive the right to pursue such a claim "in some forum."** *Iskanian*, at 391.

In disallowing waiver of PAGA claims, the California Supreme Court neither placed arbitration agreements on an "unequal 'footing'" with other contracts, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), nor "invalidate[d] [an] arbitration agreement[] under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996);see also *Perry*, 482 U.S. at 492 n.9. *Iskanian* provides even-handedly that an employment agreement may not require employees to prospectively waive the right to bring PAGA actions, whether or not the waiver is in an arbitration agreement or in another contract. This holding falls well within the principle that the FAA does not preempt state laws concerning the "enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9; see also 9 U.S.C. § 2 (making arbitration agreements "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Simply stated, there is no impediment to the employer including in the arbitration agreement that PAGA claims be prosecuted in arbitration.

The *Iskanian* decision neither leads to results incompatible with arbitration nor "interferes with fundamental attributes of arbitration and

thus creates a scheme inconsistent with the FAA." *Concepcion,* 131 S. Ct. at 1748. In *Concepcion*, this Court found such interference because California's rule against consumer contracts banning class actions effectively "allowed any party to a consumer contract to demand" classwide arbitration. *Id.*, at 1750. *Concepcion* held that mandating classwide arbitration procedure conflicted with the FAA because it fundamentally changed the nature of arbitration, requiring complex and formal procedures attributable to the inclusion of absent class members. *Id.*, at 1750-52.

No such interference results from holding PAGA claims nonwaivable, just as California law holds minimum wage and overtime claims to be nonwaivable. This is true under controlling state law concerning the nature of PAGA. As explained by *Iskanian*,

> **Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between . employers and employees over their respective rights and obligations toward each other.**

Id., at 387.

Arbitration as to purely private rights will proceed wholly unaltered by the California Supreme Court's opinion. **The employer must only leave open "some forum" in which a PAGA qui tam plaintiff may pursue the state's claims for penalties.** *Id.*[8]

Here, once the dismissal is reversed, the PAGA claim in this case will be resolved judicially because the agreement itself precludes arbitration of the PAGA claim. But even if the result were arbitration of the PAGA claim, the

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[8] Prior to the employer's latest attempt to eliminated PAGA claims in all forums by seeking a dismissal of the substantive, statutory PAGA claims, both state and federal court's stayed the PAGA claims and allowed the individual claims to first proceed in arbitration as the correct decision.

arbitration process would not be fundamentally transformed "inconsistent[ly] with the FAA." *Concepcion*, 131 S. Ct. at 1751. Class certification, notice, opt-out rights, due process, absent parties, and the other procedures that concerned the Court in *Concepcion* (see131 S. Ct. at 1751-52) are not features of PAGA proceedings. Although PAGA claims are unique in many ways, they are still pursued bilaterally, and the contract rule that an employment agreement cannot waive PAGA and must allow PAGA claims to be pursued in some forum does not improperly threaten the nature of arbitration, even if the forum ultimately provided is arbitration.

The *Iskanian* opinion, as a whole, confirms that the holding concerning PAGA does not reflect hostility toward arbitration. The enforceability of the PAGA waiver was only one of four major issues considered. As to each of the other three issues, the ruling unambiguously favored enforcement of the arbitration provision at issue. *Iskanian* explicitly overruled the decision in *Gentry*, which had held class-action prohibitions in employment agreements unenforceable in some circumstances, as incompatible with *Concepcion* because "the *Gentry* rule considers whether individual arbitration is an effective dispute resolution mechanism for employees by direct comparison to the advantages of a procedural device (a class action) that interferes with fundamental attributes of arbitration." *Iskanian*, at 365-366.

Iskanian likewise rejected the challenge to class-action bans based on federal labor laws. *Id.*, at 373. And in holding that CLS had not waived its right to arbitrate, the court emphasized that "[i]n light of the policy in favor of arbitration, 'waivers are not to be lightly inferred'". *Id.*, at 375. Amidst all these rulings favorable to arbitration, the Court's unwillingness to enforce the provision barring statutory PAGA claims reflects not hostility to arbitration, but

unwillingness to enforce decisions that prospectively deny the right to pursue PAGA claims altogether in all forums. Indeed, the two staunchest pro-arbitration justices of the court, Justices Chin and Baxter, agreed that the holding that **"the arbitration agreement is invalid insofar as it purports to preclude plaintiff Arshavir Iskanian from bringing in any forum a representative action under [PAGA] … is not inconsistent with the FAA."** *Id.*, at 392 (Chin, J., concurring).

Finally, the court expressly limited its holding to prevent circumvention of *Concepcion*. The court explained that its holding would not allow a state to "deputiz[e] employee A to bring a suit for the individual damages claims of employees B, C, and D." *Id.*, at 387. An action seeking such "victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a class action … [and] could not be maintained in the face of a class waiver." *Id.*, at 388. *Iskanian* explains that the distinction between a PAGA claim and such an evasion of *Concepcion* "is not merely semantic, **but rather, reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies.**" *Id.* The carefully limited holding that an employment agreement may not waive an employee's right to bring a PAGA claim threatens no end runs around the FAA.

D. The *Amicus's* Reliance On Class Waiver Cases Is Inapposite

The entire premise of the argument by the *Amicus* is that the waiver of the class action procedure is the same as requiring an employee to forfeit the unwaivable statutory PAGA right to penalties, and as a result, *Concepcion* applies, is faulty logic and erroneous law. This is an erroneous reading of state

law which was fully addressed in *Arias,* rejected by *Iskanian*, and is inconsistent with this Court's decision in *Baumann*.

In *Arias*, the California Supreme Court first addressed the issue of whether a PAGA claim is a class action, holding that a PAGA action is not a class action. *Arias*, at 975.

In *Iskanian*, the Court first upheld the validity of a class waiver, and then distinguished this "procedure" from the forfeiture of an unwaivable statutory PAGA right.

> **These statutes compel the conclusion that an employee's right to bring a PAGA action is unwaivable.**

Iskanian, at 383.

> **The 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.**

Iskanian, at 381.

> **It is a dispute between an employer and the state, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code.**

Iskanian, at 386.

> **Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other.**

Iskanian, at 387.

In *Baumann*, this Court followed the reasoning of *Arias* to conclude that PAGA claims were not class actions:

> The state Labor Code is silent as to whether a PAGA action is a "class action," but **the California Supreme Court has authoritatively addressed that issue, holding that PAGA actions are not class actions under state law.** *Arias*, 209 P.3d at 926. The court found PAGA actions fundamentally different from class actions, chiefly because the statutory suits are essentially law enforcement actions. *Id.* at 933-34.

Baumann, at 1121.

> **we conclude that PAGA actions are also not sufficiently similar to Rule 23 class actions** to trigger CAFA jurisdiction. Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action.

Baumann, at 1122.

> In addition, the finality of PAGA judgments differs distinctly from that of class action judgments.
>
> PAGA expressly provides that employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Cal. Lab. Code § 2699(g)(1)."[I]if the employer defeats a PAGA claim, the nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not bound by the judgment as to remedies other than civil penalties."
>
> **In short, "a PAGA suit is fundamentally different than a class action."** *McKenzie v. Fed. Express Corp.*, 765 F. Supp. 2d 1222, 1233 (C.D. Cal. 2011). These differences stem from the central nature of PAGA. PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA, bring claims on behalf of the state agency.

Baumann, at 1123.

> **In the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief**

Baumann, at 1124.

These decisions completely dispose of the argument by the *Amicus* that cases concerning the waiver of a class action procedure should be applied to the forfeiture of a statutory PAGA right. The former is a procedure, the latter is a substantive right mandated by statute, and the two are therefore fundamentally different.

The argument of the *amicus* brief also rests on its erroneous assertion that the California Supreme Court's interpretation of its own law is incorrect,

erroneously relying on propositions that are themselves directly contrary to state law as construed by that court. The *Amicus* assert that the employee is the real party in interest in a PAGA action. The California Supreme Court, however, definitively held that in a PAGA case, "[t]he government entity on whose behalf the plaintiff files suit is **always** the real party in interest in the suit." *Iskanian*, at 382. Similarly, the contention that control is maintained by the employee and not the government in a PAGA action ignores that, as the California Supreme Court explained, the government exercises initial control over the action (having the right to bring the suit after notice), receives the lion share of the statutory recovery, and is bound by any judgment obtained. *Iskanian*, at 380-82. Accordingly, such erroneous claims of the *Amicus* as to matters of state law are fatal to their arguments.

IV. THE *AMICUS* BRIEF'S RELIANCE ON DISTRICT COURT CASES FAILS

After the *Iskanian* decision, District Courts have issued conflicting decisions concerning PAGA. Some decisions, including the better reasoned decisions, followed *Iskanian*. See e.g. *Hernandez v. DMSI Staffing, LLC*, 2015 U.S. Dist. Lexis 12824 (N.D. Cal. Feb. 3, 2015). Other District Courts have refused to follow *Iskanian*, relying on the fact that preemption is a matter of federal law, however, these decisions each suffer from the fatal flaw of first failing to apply state law principles in a manner consistent with *Iskanian* as discussed herein. See e.g. *Estrada v. Cleannet United States*, 2015 U.S. Dist. Lexis 22403 (N.D. Cal. Feb. 24, 2015). The argument by the *Amicus* that this Court should follow a few District Court decisions which feature these facial errors of law, to the exclusion of a unanimous and well reasoned decision of the California Supreme Court, cannot be accepted. Just as the United States

Supreme Court found no occasion to revisit the *Iskanian* decision, this Court may comfortably rely on *Iskanian*.

A. The *Amicus* Ignore Better-Reasoned Cases Following *Iskanian*

While the decisions of the District Court's are split, the decisions which are faithful to *Iskanian's* interpretation of state law have found that a contractual PAGA waiver is not enforceable as a matter of state contract law. As a result, Section 2 of the FAA requires a court to interpret the arbitration agreement containing such a PAGA waiver as unenforceable to the extent all forums are closed to the PAGA claim. See *Hernandez v. DMSI Staffing, LLC*, 2015 U.S. Dist. Lexis 12824 (N.D. Cal. Feb. 3, 2015); *Zenelaj v. Handybook Inc.*, 2015 U.S. Dist. LEXIS 26068 (N.D. Cal. March 3, 2015); *Martinez v. Leslie's Poolmart, Inc.*, 2014 U.S. Dist. LEXIS 156218 (C.D. Cal. 2014); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. LEXIS 90256 (C.D. Cal. 2013); *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1069 (C.D. Cal. 2011); *Urbino v. Orkin Servs. of Cal.*, 882 F. Supp. 2d 1152, 1167 (C.D. Cal. 2011). The decision in *Hernandez* is particularly informative, not only because it addressed the various opinions on the topic, but also because the decision in *Hernandez* identified the flaws in the contrary decisions.

First, the District Court in *Hernandez* correctly observed that under state contract law, a waiver of the right to bring a private attorney general or representative action constitutes a prohibition on a PAGA representative claim. *Id.*, at *13. The decision then followed *Iskanian* to hold that such a waiver, as a matter of state contract law, is unenforceable. *Hernandez* also explained that under California law, a PAGA action is

fundamentally different than the class procedure:

> PAGA representative suits differ from class actions and other suits in which a private plaintiff seeks relief on behalf of the public. **A PAGA claim "functions as a substitute for an action brought by the government itself," and therefore any judgment binds the state labor law enforcement agencies**. *Arias*, 46 Cal. 4th at 986.

Id., at *15.

The *Hernandez* Court then addressed preemption under the FAA and concluded that the preemption noted in *Concepcion* did not apply to an illegal contractual PAGA waiver:

> **The reasoning of *Concepcion* does not extend to a PAGA representative action.** The Supreme Court in *Concepcion* identified aspects of class procedures that it found to be inconsistent with the FAA, which do not apply to PAGA representative actions. For example, *Concepcion* focused on the complexity of class certification procedures — including the need to determine whether the class may be certified, whether the named parties are sufficiently representative and typical, and how class discovery should be conducted. *Concepcion*, 131 S. Ct. at 1751. By contrast, as discussed in *Baumann*, "unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality." *Baumann*, 747 F.3d at 1123. There is no certification procedure. *Concepcion* noted it would typically take 583 or 630 days to complete class arbitrations. *Id.* Nothing in the record before this Court suggests PAGA representative claims would take nearly so long. *Concepcion* stressed the formality needed for class certification to bind class members, including the need for notice, an opportunity to be heard, and opt-out rights. *Concepcion*, 131 S. Ct. at 1751. PAGA, on the other hand, has "no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action." *Baumann*, 747 F.3d at 1122. Nor does a PAGA action require inquiry into the "named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees." *Id.* While the need for sufficient procedures to bind class members in class arbitration was cause for concern in *Concepcion*, PAGA's preclusive effect differs from that of class action judgments. "PAGA expressly provides that employees retain all rights 'to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.'" *Baumann*, 747 F.3d at 1123 (quoting Cal. Lab. Code § 2699(g)(1)). Although, as discussed supra, the governmental agency and those represented by it may be bound in terms of their rights under PAGA, *Arias*, 46 Cal. 4th at 986, **a PAGA recovery does not prevent employees from litigating their underlying wage and hour claims.** *Id.* at

> 987. The due-process-related procedural requirements of formal class actions do not obtain in PAGA representative actions. **Thus, the *Iskanian* rule against waiver of PAGA claims does not threaten to undermine the fundamental attributes of arbitration**.

Id., at *17-19.

> *Iskanian* highlights the ways that California's police powers would be adversely affected by FAA preemption. PAGA's objectives — enhancing law enforcement and efficiently deploying resources to address a problem that costs California billions of dollars each year — squarely address issues of public concern. *Iskanian*, 59 Cal. 4th 348 at 379, 173 Cal. Rptr. 3d 289, 327 P.3d 129; 384. FAA preemption of the rule against waiver of PAGA claims would do more than hinder the state's ability to enforce its laws through qui tam actions; **preemption would "disable one of the primary mechanisms for enforcing the Labor Code."** *Id.* at 383.

Id., at *26.

> The district court cases that have rejected *Iskanian* demonstrate that the risk to state sovereignty is not hypothetical. ...*Ortiz* illustrates that compelling arbitration of a PAGA claim does not merely enforce a forum selection clause, but instead can have the practical effect of entirely waiving a state agency's statutory remedy.

Id., at *26-27

> In short, *Iskanian's* anti-waiver rule does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. at 67)

Id., at *28.

B. The District Court Cases That Refused To Follow *Iskanian* Are Poorly Reasoned

As argued by the *Amicus*, other federal courts have refused to follow *Iskanian*.[9] See *Lucero v. Sears Holdings Mgmt. Corp.*, 2014 U.S. Dist. LEXIS

[9] There are pre-*Iskanian* decisions as well. Appellant does not address them further here because such decisions were primarily based upon a fundamental

168782 (S.D. Cal. 2014); *Mill v. Kmart Corp.*, 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. 2014); *Langston v. 20/20 Companies, Inc.*, 2014 U.S. Dist. LEXIS 151477 (C.D. Cal. 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 U.S. Dist. LEXIS 147752 (C.D. Cal. 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 140552 (E.D. Cal. 2014); *Fardig v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 139359 (C.D. Cal. 2014).

These cases are not persuasive, because they fail to recognize the critical difference between the statutory right of PAGA claims prosecuted on behalf of the government and the class action procedure which is not a substantive claim. Each of the decisions suffer from the errors concerning state law urged by the *Amicus* as discussed above. None of the decisions granted *Iskanian* the proper degree of authority as to state law nor any persuasive precedential value as to the preemption analysis. Moreover, these decisions, like the *Amicus*, erroneously attempt to manufacture a non-representative PAGA claim, which under settled California law is untenable and illogical. See *Iskanian*, at 387.

For example, in *Lucero*, the District Court first failed to acknowledge that in a PAGA action, the government is the real party in interest and that the PAGA claim was an enforcement action brought on behalf of the state. Then the District Court went on to simply follow the pre-*Iskanian* decision in *Velazquez v. Sears*, 2013 U.S. Dist. Lexis 121400 (S.D. Cal. 2013), which previously addressed the same form of arbitration agreement. This evidences the clear error of *Lucero* because the *Velasquez* decision erroneously equated a class waiver with a PAGA waiver. As discussed in *Iskanian*, such a

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misunderstanding of the nature of a PAGA claim, or concluded that a PAGA claim waiver was lawful under state law, as these decisions did not have the benefit of *Iskanian* resolving these issues.

characterization of PAGA is simply incorrect as a matter of controlling state law. Finally, *Lucero* never even articulated the basis for finding an illegal PAGA waiver to be preempted.

In *Mill*, the District Court likewise failed to articulate the basis for finding that the *Iskanian* contract rule prohibiting PAGA waivers was preempted. The *Mill* decision recited some law from *Concepcion*, but otherwise performed no analysis. Inexplicably, the District Court made the unsupported statement that a "PAGA waiver is not substantively unconscionable", which is a state law question that has been conclusively decided to the contrary. At bottom, it appears that the District Court in *Mill* approved the PAGA waiver based upon the decisions in *Langston*, *Chico* and *Ortiz*.

The decision in *Langston* is likewise erroneous because the decision simply disagrees with *Iskanian's* holding concerning the nature of PAGA. Langston calls this "inconsistency" as evidence that the *Iskanian* decision disfavors arbitration. This claimed inconsistency as to state law is both an untenable rejection of state law and is no different than the law is with overtime and minimum waive. As with other decisions, *Langston* erroneously concludes that because the courts in *Ortiz* and *Fardig* concluded that the PAGA waiver was enforceable, the court in *Langston* is also finding the PAGA waiver enforceable.

In *Chico*, the District Court first concluded without any support in state law, that the arbitration of PAGA would "fundamentally change the nature of arbitration." Such a conclusion as to the nature of PAGA is without merit, as the California Supreme Court has held that PAGA is not a class action and is a bilateral dispute where the employee represents the state. *Chico* then cited to

pre-*Iskanian* decisions as support for preemption, when all of these pre-*Iskanian* decisions evidence a multitude of errors of state law concerning PAGA and the lawfulness of a PAGA waiver. Finally, the *Chico* decision equates PAGA to a "classwide" procedure and cited to *Fardig* to conclude without analysis that *Iskanian* was preempted.

With respect to *Ortiz*, again the District Court relied on the same pre-*Iskanian* decisions which suffer from state law misconceptions concerning PAGA, such as holding that PAGA was a class action procedure. *Ortiz* acknowledged that "he waiver of a PAGA action may prevent a plaintiff from asserting a statutory right", which is correct. *Id.,* at *32. But then, without explaining why a statutory right could be waived, *Ortiz* simply makes the conclusory statement that PAGA waivers are enforceable.

Fardig, upon which all of these other decisions are apparently based, the District Court previously concluded pre-*Iskanian* that PAGA waivers were enforceable because PAGA was like a class claim. In fact, the initial decision in *Fardig* erroneously characterized PAGA as a "collective" action. 2014 U.S. Dist. LEXIS 87284, at *22. Subsequently, *Fardig* ruled on a request for reconsideration in light of *Iskanian*, which obviously rejected such a characterization of PAGA. The second *Fardig* decision affirmed its earlier ruling, but without acknowledging its error in the construction of PAGA as a collective action.

As a result, these recent District Court decisions approving of PAGA waivers each suffer from errors in their construction or understanding of PAGA. Indeed, the primary consideration in these decisions appears to be how many pre-*Iskanian* decisions approved of PAGA waivers rather than undertaking the exhaustive and detailed analysis articulated by *Iskanian* and

evidenced by the decision in *Hernandez*.

V. THE *AMICUS* BRIEF FAILS TO APPLY THE CORRECT PREEMPTION ANALYSIS

The *Amicus* proposes a preemption analysis which simply equates a substantive PAGA claim to a class action procedure in order to conclude that a statutory PAGA claim is preempted. **Not only is this fiction untrue as explained by *Iskanian* and *Baumann*, this argument conflates the critical distinction between a class procedure, and the unwaivable, substantive PAGA claim, which is a law enforcement action.** The preemption analysis for federal laws that interfere with state police powers is "clear and manifest" intent of congress. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). By enacting the FAA, Congress did not clearly intend to preempt a law like PAGA.

Supreme Court decisions do not suggest that an arbitration agreement between private parties can strip a state of its power to authorize enforcement actions on its own behalf. PAGA empowers a plaintiff to step into the shoes of the state (after complying with procedural requirements permitting state enforcers to step in first) and obtain civil penalties based on Labor Code violations affecting both the plaintiff and coworkers, while still litigating on a bilateral rather than a class basis. See *Arias*, 209 P.3d at 929-31. **The California Supreme Court ruled, as a matter of controlling state statutory construction, that the state is "always the real party in interest" in such actions**. *Iskanian*, at 382. The lion's share of the recovery (75%) goes to the state, which is bound by the outcome. An action for penalties, whether brought by state officers or a PAGA qui tam plaintiff, is fundamentally "a dispute between an employer and the state," acting "through its agents." *Iskanian*, at 386. Enforcing a prohibition of unwaivable statutory PAGA claims in an

employer's arbitration agreement would thus effectively impose that agreement on a governmental body that is not party to the agreement, and prevent the state from proceeding in the way its legislature deemed appropriate.

None of the Supreme Court's decisions enforcing arbitration agreements has involved a comparable right of action. "FAA jurisprudence-with one exception ...-consists entirely of disputes involving the parties' own rights and obligations, not the rights of a public enforcement agency." *Iskanian*, at 385. Moreover, the "one exception," *EEOC v. Waffle House*, "does not support [the] contention that the FAA preempts a PAGA action." *Iskanian*, at 386. *Waffle House* squarely held that an arbitration agreement cannot bind a governmental enforcement agency that is not a party to it. *Waffle House*, 534 U.S. at 294. Here, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract". *Id.* Allowing the arbitration agreement here to preclude recovery of penalties on behalf of the state would **"turn[] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies," the state's recourse to qui tam actions to enforce its laws.** *Id.*, at 295. As the California Supreme Court observed, "[n]othing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state for such remedies." *Iskanian*, at 386. Indeed, none of the Supreme Court's decisions suggests such preemption.

Holding that a federal statute aimed at enforcing agreements to resolve private disputes preempts a state's chosen means for pursuing its claims against those who violate its laws in all forums would violate fundamental preemption and due process principles. As the California Supreme Court pointed out, the Supreme Court has repeatedly held that "the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of

Congress." *Iskanian*, at 388, quoting *Ariz. v. United States*, 132 S. Ct. at 2501. **Enforcing wage-and-hour laws falls squarely within those police powers, and the structure of a state's law enforcement authority is central to its sovereignty.** *Iskanian*, at 388, citing *Metro. Life*, 471 U.S. at 756, and *Printz*, 521 U.S. at 928.

The FAA evinces no manifest purpose to displace state law enforcement. Its manifest purpose is to render arbitration agreements in contracts affecting commerce enforceable as between the contracting parties. It embodies no clear purpose to go beyond enforcing agreements affecting private interests and interfere with "the state's interest in penalizing and deterring employers who violate California's labor laws." *Iskanian*, at 387.

VI. CONCLUSION

For these reasons, the argument by the *Amicus* should be given short shrift and the District Court's order denying any forum for the proxy of the State of California to prosecute the substantive, statutory PAGA claim for penalties for Appellee's wage theft must respectfully be reversed.

Dated: April 8, 2015

BLUMENTHAL, NORDREHAUG & BHOWMIK

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 9,880 words.

Dated: April 8, 2015

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: *\/s/ Norman B. Blumenthal*

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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DATED this8th day of April, 2015.

By: *___/s/ Norman B. Blumenthal______*

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CERTIFICATE

for Brief in Paper Format

I, Kyle R. Nordrehaug, certify that this brief is identical to the version submitted electronically on April 8, 2015, pursuant to Rule 6© of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Dated: ___________,2015 Signature :_________________________

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