No. 14-341

In the Supreme Court of the United States

CLS TRANSPORTATION LOS ANGELES, LLC,
Petitioner,

v.

ARSHAVIR ISKANIAN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR *AMICI CURIAE* THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1] AND IMPORTANCE OF ISSUE

Pursuant to Supreme Court Rule 37, *Amici Curiae* – the Civil Justice Association of California and the California Chamber of Commerce – urge the Court to grant certiorari and decide an important issue of constitutional law:

> Can California's Private Attorney General Act – consistent with the Federal Arbitration Act and the Supremacy Clause – authorize any employee to sue (in a "representative" capacity) his or her employer for an array of state Labor Code violations with "fines" to be shared between prevailing plaintiffs and the state, but preclude parties to such actions from resolving their employment disagreements by private arbitration despite a pre-dispute agreement between them to do just that?

Amici represent a broad range of business and professional associations who strongly favor private, voluntary arbitration as a viable alternative to court litigation for resolving disputes. They support arbitration because "the informality of arbitral procedure . . . enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-*

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of the intent to file this *amici curiae* brief under Sup. Ct. R. 37.2 and have consented to its filing.

Plymouth Inc. 473 U.S. 614, 649 (1985) ("*Mitsubishi*"). They believe the opinion in this case, however, extending the reach of California's Private Attorney General Act ("PAGA")[2] beyond the preemptive sweep of the Federal Arbitration Act ("FAA")[3], creates a barrier to the use of arbitration that, unless razed, effectively kills it as a means for deciding many, if not most, employment disputes in California.[4] This outcome conflicts with the purpose and language of the FAA and this Court's numerous opinions explaining its scope and application. Left undisturbed, the California Supreme Court majority (5 to 2) opinion here[5] will upend pre-dispute arbitration agreements between employees and employers, forcing them into clogged, overburdened courtrooms for the determination of their differences by more costly and time-consuming litigation.

The Civil Justice Association of California ("CJAC") is a nonprofit organization representing businesses, professional associations and local governments. CJAC's principal purpose is to educate the public about ways to make laws for determining who gets paid, how

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[2] Cal. Labor Code §§ 2698 *et. seq*.

[3] 9 U.S.C. § 2.

[4] A 2008 empirical study found mandatory arbitration clauses in 92.9% of employment contracts and 76.9% of consumer contracts. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 878 (2008).

[5] *Iskanian v. CLS Transp. Los Angeles*, LLC, 173 Cal.Rptr.3d 289 (2014).

much, from whom and under what circumstances when certain conduct occasions harm to others, more "fair, efficient, economical and certain." Toward this end, CJAC regularly petitions the judiciary on a variety of issues, including support for arbitration. CJAC participated with the California Chamber of Commerce ("CalChamber") as amici curiae in a joint brief filed before the California Supreme Court in support of petitioner in this case.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For more than 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community. CalChamber supports arbitration and believes the opinion from the California Supreme Court prevents arbitration for many, if not most, employment disputes in derogation of the FAA and this Court's guiding opinions.

SUMMARY OF ARGUMENT

The FAA was enacted to reverse longstanding judicial hostility to arbitration agreements and place them upon the same footing as other contracts. It requires enforcement of arbitration agreements

according to their terms for any activity within the broad reach of the Commerce Clause unless Congress expressly and clearly specifies an exception for federal statutory rights otherwise coming within its ambit.

State laws like California's PAGA that impinge on the enforcement of arbitration agreements or treat them differently from other contracts conflict with and are preempted by the FAA. This includes state statutes that facially, or as interpreted, bar submission of certain subjects to arbitration despite, as here, the parties' pre-dispute agreement to waive their rights to prosecute their claims on a class or representative basis and do so instead on an individual basis. The FAA, in other words, limits the ability of a state to "enhance" its public enforcement capabilities by authorizing employees who have contractually agreed to arbitrate their statutory PAGA claims to ignore that agreement and pursue those claims in court as the state's "representatives."

In this case, the parties mutually agreed to resolve by arbitration all future employment disputes between them, waiving their rights to do so on a "class" or "representative" basis. This is a permissible waiver that cannot, consistent with the FAA, be overridden by statutes such as California's PAGA that confer on the parties a right to pursue claims in the form of "class" or "representative" actions. When, as here, state law prohibits outright the arbitration of a particular type of claim, that bar is displaced by the FAA.

ARGUMENT

I. THE PREEMPTIVE SWEEP OF THE FEDERAL ARBITRATION ACT PRECLUDES STATE LAW FROM INTERFERING WITH AGREEMENTS BETWEEN PARTIES TO RESOLVE THEIR DISPUTES BY ARBITRATION.

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478 (1989). "At its core, the policy behind arbitration is the same policy underlying private contracts in general: to allow those closest to a transaction to determine the terms of that transaction, thereby promoting efficiency and predictability."[6] Section 2 of the FAA makes this clear in stating that arbitration agreements are "valid, irrevocable, and enforceable" as written; § 3 requires courts to stay litigation of claims pending arbitration of same "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement. The FAA's intended purpose, then, is to "revers[e] centuries of judicial hostility to arbitration agreements," [citation] by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226

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[6] Jared A. Wilkerson, *In Whose Shoes?: Third-party Standing and "Binding" Arbitration Clauses in Securities Fraud Receiverships*, 8 J.L. ECON. & POL'Y 45, 57 (2011).

(1987), quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924). See also *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.' ").

The FAA applies to agreements to arbitrate both federal and, as here, state law claims, unless Congress expressly exempts certain *federal* claims.[7] "We read the Supreme Court's decisions on FAA preemption to mean that . . . the only way a particular statutory claim can be held inarbitrable is if *Congress* intended to keep that *federal* claim out of arbitration proceedings . . . ." *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 962 (9th Cir. 2012; italics added). But the intention of Congress to preclude arbitration for the vindication of *federal* statutory rights must be express and clear; it cannot be implied from the express permission in the statute for collective actions. See, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) (holding that explicit authorization of class actions in the Age Discrimination in Employment Act (29 U.S.C. § 626(b)), referencing, for purposes of enforcement 29 U.S.C. § 216 [providing for employee class actions as a remedy for Fair Labor Standard Act violations] does

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[7] But see Roger B. Jacobs, *Fits and Starts for Mandatory Arbitration*, 29 HOFSTRA LAB. & EMP. L.J. 547, 552-53 (2012), discussing Justice Thomas' preference for interpreting the FAA as a federal procedural rule, rather than as a substantive statutory requirement (accompanied by significant state preemption) as it is currently interpreted.

not bar enforcement of a class waiver in an arbitration agreement). *Id*. at 2311.

Arbitration agreements contained in *employment contracts* are, unless void for reasons applicable to contracts in general, enforceable under the FAA. *Circuit City v. Adams,* 532 U.S. 105, 109 (2001) ("*Circuit City*"). The Court recognizes the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 25 (1991) ("*Gilmer*"), quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983) ("*Moses H.*").

The cumulative effect of the Court's opinions on the FAA has been to give a broad sweep to its preemptive power, "decreasing the ability of state legislatures to pass new statutes limiting the FAA or even guiding its application." Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1433 (2014). "[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Preston v. Ferrer*, 552 U.S. 346, 349-350 (2008) ("*Preston*"). The FAA "is now definitively established as a substantive federal law, preemptive and binding on the states, and articulating a federal policy extending to issues well beyond its literal terms." Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1353 (1985).

A. California's Private Attorney General Act Violates the FAA by Barring Employers and Employees from Agreeing in Advance to Resolve by Arbitration All Disputes Between Them Arising out of their Employment Relationship.

The California Supreme Court opinion here holds that when "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as matter of state law." 173 Cal.Rptr.3d at 313. This holding is not based on any express language in PAGA restricting its enforcement solely to the court, but on the state high court's conclusion from parsing its text that "California's public policy prohibit[s] waiver of PAGA claims, whose sole purpose is to vindicate the [state's] interest in enforcing [its labor laws], [and therefore] does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." *Id*. at 388-389. The California court's opinion conflicts squarely with the FAA and numerous opinions of this Court limning its scope and application; it is also at variance with a recent string of consistent federal district court opinions holding that waiver of claims "as part of a class action, collective action, or otherwise jointly with any third party . . . encompass[es] representative PAGA claims."[8]

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[8] *Ortiz v. Hobby Lobby Stores, Inc*., No. 2:13-CV-01619 (E.D. Cal.), order dismissing claims to be pursued in individual arbitration, Oct. 1, 2014 (Doc. 28) at 16-17. See also *Langston v. 20/20 Companies, Inc*., No. 8:14-CV-01360 (C.D. Cal.), order granting motion to compel individual arbitration of PAGA claims, Oct. 17, 2014; *Chico v. Hilton Worldwide, Inc*., No. 2:14-CV-05750 (C.D.

The most recent definitive authority explaining why the broad preemptive ambit of the FAA trumps state laws interfering with arbitration is *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) ("*Concepcion*"). In that case, the Court decided a consumer arbitration agreement requiring, as does the contract in this case, that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding," (*id*. at 1744) was enforceable under the FAA. *Id*. at 1753. Relying largely on *Stolt-Nielsen S.A. v. Animal/Feeds Int'l Corp*., 559 U.S. 62 (2010), *Concepcion* held that the California law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA, and so was preempted by it. *Concepcion*, 131 S.Ct. at 1753. By entering into an arbitration agreement, parties seek to contractually modify the procedural rules that will be used to resolve their dispute. *Id*. at 1748-49. The Court viewed use of class

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Cal), order granting petition to compel arbitration (Oct. 7, 2014) (Doc. 53); and *Fardig v. Hobby Lobby Stores Inc*. (C.D. Cal., June 13, 2014, SACV 14-561 JVS ANX) 2014 WL 2810025 at *6-7, reconsideration denied, (C.D. Cal., Aug. 11, 2014, SACV 14-00561 JVS) 2014 WL 4782618 (order granting motion to compel individual arbitration of PAGA claims).

Currently pending before the Ninth Circuit Court of Appeal, fully briefed and awaiting oral argument, are two appeals of other district court decisions upholding representative PAGA waivers in arbitration agreements and holding PAGA claims to be individually arbitrable: *Sakkab v. Luxxotica Retail North America, Inc*., No. 3:12-CV-00436 (S.D. Cal), appeal filed No. 13-55184 (9th Cir. Jan. 30, 2013) and *Sierra v. Oakley Sales Corp*., No. 8:13-CV-00319 (C.D. Cal.), appeal filed, No. 13-55891 (9th Cir. May 21, 2013).

arbitration rather than bilateral arbitration as a modification of procedural rules akin to altering the rules of discovery or evidence. *Id*. at 1747. California law, by forbidding class arbitration waivers in consumer adhesion contracts and thus requiring the availability of classwide procedures, interfered with the freedom of the parties to select their procedural rules, and so "create[d] a scheme inconsistent with the FAA." *Id*. at 1748.

Further, *Concepcion* invalidated California legal doctrine that rendered such terms in an adhesion contract "unconscionable." *Id*. at 1746. Because the Court enforced the agreement as written, the plaintiffs were barred from invoking classwide proceedings, whether in litigation or arbitration. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 1747. In reaching its conclusion, the Court stated it was "worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."[9] *Id*.

Concepcion's exegesis on the broad preemptive scope of the FAA was hardly unexpected; it logically followed a long line of opinions striking down attempts by various states, chiefly California, to evade

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[9] *Concepcion* referenced Steven A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186-87 (2004).

arbitration despite paying "lip service"[10] to its many attributes over litigation. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) ("*Southland*"), for instance, is the first in a series of opinions recognizing the extensive preemptive reach of the FAA in the context of a state statute favoring judicial enforcement of its terms. *Southland* involved a 7-11 franchise in which the franchisee contracts included pre-dispute arbitration agreements, but the franchisees sought to avoid arbitration and pursue their claims in state court. The California high court, as it did here, interpreted the state law to prohibit arbitration of disputes arising pursuant to violations of the state's Franchise Investment Law. *Id*. at 5. This Court reversed, holding that the FAA was a substantive statute because § 2 of the Act referred to contracts "involving commerce." *Id*. at 6, 14-15.

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[10] See, e.g., *Schatz v. Allen Matkins Leck Gamble & Mallory LLP,* 45 Cal.4th 557, 564 (2009) (The California Arbitration Act's comprehensive statutory scheme . . . expresses a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution."). As the history of arbitral opinions from the Court over the past 30 years shows, California's Legislature and courts have been schizophrenic about arbitration, touting its advantages to the public while resisting the FAA's preemptive sweep by interpretations reminiscent of the bygone era of "interposition interposed" regarding individual civil rights law. See Mitchell Franklin, *Interposition Interposed: I*, 21 LAW IN TRANSITION 1, 12 (1961) (arguing that the Guarantee Clause of the Constitution, art. IV, § 4, like the Supremacy Clause, art. VI, § 2, gives the federal government "the positive constitutional duty and positive constitutional power to introduce and to maintain republican government, including a system of public education, in states which have wrecked, weakened, terrorized, or abandoned the public school system in order to avoid integration.").

Southland explained this "involving commerce" language indicated congressional intent to expand the reach of the FAA to cover the maximum extent of Congress' powers under the Constitution, which meant the FAA applied not only to federal court procedure but also to the substantive law of state court cases. "Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts." *Id*. at 12. *Southland* concluded that states cannot create statutory requirements that contradict either federal law or the policy choices of Congress in passing the FAA. "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Id.* at 10; italics added.

In another California case, *Perry v. Thomas*, 482 U.S. 483 (1987), a state statute allowed parties to bring actions to collect wages in court without regard for private contractual agreements to arbitrate.[11] This Court held the FAA preempted the law and stated the statute constituted an impermissible state effort to avoid enforcing arbitration agreements. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text of [the FAA] 9 U.S.C. § 2. . . . Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would

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[11] Cal. Lab. Code § 229.

enable the court to effect what. . .the state legislature cannot." *Id*. at 493, n. 9; italics added.

Preston, supra, 552 U.S. 346 addressed a law that vested original jurisdiction for cases arising under the California Talent Agencies Act (CTAA) in the state Labor Commissioner.[12] A California attorney tried to compel arbitration pursuant to a contract with a judge and TV personality (Judge Alex). *Preston*, 552 U.S. at 351. Judge Alex argued the contract was void due to the attorney's failure to get a license for talent agents required under the CTAA. *Id*. at 350. The California Court of Appeal decided the case on a different ground: that the Labor Commissioner had "exclusive original jurisdiction," holding the FAA did not preempt the California law because the state law did not discriminate against arbitration clauses, but rather relocated original jurisdiction for all disputes arising under the CTAA.[13] This Court disagreed, reversing and clarifying that the FAA preempted the law, and would also preempt any state laws seeking to establish primary jurisdiction in a forum that would limit the applicability and enforcement of arbitration agreements. "We hold today that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum . . . are superseded by the FAA." *Preston, supra*, 552 U.S. at 349-350.

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[12] Cal. Lab. Code § 1700.44(a).

[13] *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 631, 634 (2006), rev'd, 552 U.S. 346 (2008).

In *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) (per curiam), the Court held that, under the FAA, an arbitration agreement between a nursing home and a patient's family member was enforceable in a suit against the nursing home for personal injury or wrongful death, despite the state court's conclusion that arbitration of such claims was against that state's statutorily expressed public policy. *Id*. at 1203-04. Because the public policy of West Virginia prohibited "outright the arbitration of a particular type of claim" – personal injury and wrongful death claims – that policy was "displaced by the FAA." *Id.* at 1203. The California Supreme Court's opinion here concluding that PAGA claims are outside of arbitration is essentially the argument made and rejected in *Marmet*.

Similarly, in *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal.4th 659 (2011), the California Supreme Court issued a categorical ruling applicable to employment contracts. The court held that it was unconscionable and contrary to public policy for an employer to require an employee, as a condition of employment, to waive the right to a "Berman hearing," a dispute resolution mechanism established by the legislature to assist employees in recovering unpaid wages. This Court vacated this decision in light of *Concepcion*, and remanded for reconsideration the question of whether state public policy *can* require state administrative adjudicatory procedures inconsistent with the FAA even if those procedures may be otherwise desirable under state public policy. *Sonic-Calabasas A, Inc. v. Moreno*,132 S.Ct. 496 (2011). Upon remand, the California Supreme Court agreed, as it had to, that its first *Sonic* opinion was "inconsistent with the FAA" because "compelling

the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1124 (2013).[14]

B. The Rationale Offered by the California Supreme Court for Barring PAGA Claims from Arbitration Does Not Withstand Scrutiny.

The opinion for which review is sought provides two reasons for prohibiting statutory claims under PAGA from arbitral decision. First, "requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." 173 Cal.Rptr.3d at 294. "[W]hether an individual claim is permissible under the PAGA, a prohibition of representative claims frustrates the PAGA's objectives." *Id*. at 313. Second, "the FAA's goal of promoting arbitration as a means of *private* dispute resolution does not preclude our Legislature from *deputizing employees* to prosecute Labor Code violations *on the state's behalf*." *Id*.; italics added. Neither reason holds water.

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[14] However, the California Supreme Court also noted that while a court "may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer." *Id*. at 1125.

1. There is no Principled Reason for Distinguishing Between the FAA's Preclusion of Waivers of Class Action Remedies in Favor of Individual Arbitration and Waivers of Representative Actions under PAGA in Favor of Individual Arbitration.

No principled difference exists between a waiver of a "class action"to enforce a statutory right and a waiver of a "representative action" under PAGA. In fact and in law, "[a] class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties." *Earley v. Superior Court,* 79 Cal.App.4th 1420, 1434 (2000). Both devices for obtaining relief are procedural, not substantive. Hence, the waiver of the class action mechanism in an arbitration agreement authorized by the FAA and limned by *Concepcion* and its progeny applies *a fortiori* to waiver of the "representative" PAGA action at issue here.

The FAA requires a plaintiff employee's PAGA claims be subject to arbitration where the parties have, as here, signed an arbitration agreement to that effect. *Perry, supra,* 482 U.S. 483 (1987), for instance, holds that a California statute providing that actions for the collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate," was unconstitutional because it was preempted by the FAA. *Id*. at 484.

Class or "representative" proceedings are not necessary to ensure that individual claimants pursue their own remedies under PAGA. PAGA actions

prosecuted in court serve a dual purpose: relief for the individual plaintiff and furtherance of California's law enforcement goals by deputizing employees to enforce California labor law. But California cannot condition the enforcement of arbitration agreements on the availability of class or representative proceedings, even to serve desirable state goals. Insofar as PAGA requires California to do so, the FAA preempts it.

The whole point of the FAA is to prevent discrimination against arbitration agreements, to not allow the law to single out and treat differently one category of arbitration agreement from another, or to treat arbitration agreements in general differently from other contracts. That the non-discrimination rule of the FAA applies equally to *pre-dispute employment* along with *all other arbitration agreements* (unless expressly exempted by Congress) is clear from, *inter alia*, *Circuit City, supra*, 532 U.S. 105 and *Gilmer, supra,* 500 U.S. 20, 26, which underscores the FAA's "healthy regard" for the enforceability of pre-dispute arbitration agreements for a broad swath of employment contracts.[15]

That the class action or representative action procedure may be desirable to vindicate a statutory

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[15] A bill that has long languished in Congress, titled the Arbitration Fairness Act, seeks to amend the FAA and effectively overrule *Circuit City*. Its most recent incarnation states in relevant part: "no predispute arbitration agreement shall be valid or enforceable if it requires *arbitration of an employment dispute*." S. 987, 112th Cong. § 402 (2011)(italics added). Respondent herein has achieved by the California Supreme Court's opinion (and contrary to the Supremacy Clause) what Congress has thus far declined to do.

interest, rather than conform to judge-made rules on "public policy" or "unconscionability," is of no importance when it comes to the enforcement of arbitration agreements in which the parties waive these rights; both are impediments applied uniquely to arbitration and hence forbidden by the FAA. Indeed, *Mitsubishi, supra*, 473 U.S. 614 settled the applicability of pre-dispute arbitration to a waiver of judicially enforceable statutory rights. In that case, the Court addressed the scope of a pre-dispute arbitration agreement between Mitsubishi, a Japanese automobile manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican distributor. *Id*. at 616-17. Their agreement stipulated that all future disputes, controversies, or differences between the parties under their distribution contract would be resolved through arbitration in Japan, in accordance with the rules of the Japan Commercial Arbitration Association. *Id*. at 617. When a dispute over shipments arose, Mitsubishi filed suit in federal court in Puerto Rico and moved to compel arbitration under the FAA and the terms of the parties' arbitration agreement. *Id*. at 617-19; see also 9 U.S.C. § 4. Soler then counterclaimed, alleging, among other things, antitrust violations under the Sherman Antitrust Act. *Mitsubishi*, 473 U.S. at 619-20. The question was whether a statutory claim brought by Soler under the Sherman Act could be compelled into arbitration via the FAA. *Id*. at 624-25.

Relying on the "liberal federal policy favoring arbitration agreements," *Mitsubishi* held that, as a general rule, arbitration agreements must be enforced for *all* claims, including those based on statutory rights. *Id*. As a guiding principle, the Court spelled out Congress' preeminent concern in passing the FAA was

"to enforce private agreements into which parties had entered," (*id*.; quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)) and so agreements to arbitrate must be "rigorously enforce[d]" (*id*. at 626) with "any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration." *Id*.; quoting *Moses H., supra*, 460 U.S. at 24-25. *Mitsubishi* stands for the proposition that short of clear Congressional intent deriving from text or legislative history to the contrary, statutory claims furthering important public policies can properly be resolved in arbitration because, "[h]aving made the bargain to arbitrate, the party should be held to it." *Mitsubishi*, 473 U.S. at 628.

2. Bestowing Upon the State a Portion of the Monetary Penalties Recovered by a Successful Employee Plaintiff Pursuant to PAGA Does not Suffice to Exempt Claims under it from being Resolved Pursuant to an Agreement to Arbitrate all Employment Grievances.

Neither does (or should) it matter for purposes of arbitration under the FAA's preemptive umbrella that the statutory right prosecuted confers upon the state a portion of the prevailing plaintiff's monetary recovery.

The California high court's opinion seeks to exempt PAGA claims from arbitration by analogizing them to qui tam actions under the federal False Claims Act ("FCA"), where individuals acting on behalf of the government are allowed to share the recovery achieved by the reporting of false claims. "A PAGA representative action is therefore a type of qui tam action." 173 Cal.Rptr.3d at 311. The underlying assumption in this analogy is presumably that qui tam actions, because the

"government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit" (*id*.), are not subject to arbitration. But that assumption is undercut by *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001), which holds an arbitration clause in a contract with an FCA defendant does not render such a clause optional for the government, the real party in interest. *Id*. at 325. Although the court found the arbitration clause at issue non-binding on the government, it ruled that arbitration was nonetheless *mandatory* for the government. *Id.* at 320-21. The *Bankers Insurance Co*. opinion reasoned that clauses stating that parties "may" arbitrate give the parties, including the government, the choice of arbitrating the dispute or dropping the claim, not the choice of avoiding arbitration in order to litigate. The court made clear that the government could not seek to enforce the arbitration clause only when it is convenient to do so. *Id*. at 320.

Moreover, the majority opinion's view that PAGA claims "lie[ ] outside the FAA's coverage" because they are not disputes between employers and employees "arising out of their contractual relationship" (173 Cal. Rptr.3d at 315) flies in the face of PAGA's literal language. As the dissent points out, a person may not bring a PAGA claim unless he or she is "an aggrieved employee" who is "employed by" the alleged violator of the Labor Code and "against whom" at least one of alleged violations "was committed." *Id*. at 157.

Further, the majority opinion misconstrues the meaning and relevance of *EEOC v. Waffle House, Inc*., 534 U.S. 279 (2002) ("*Waffle House*") to this case. *Waffle House* holds that an employment arbitration agreement does not prevent the EEOC, a government agency in the comparable position of the administrative agency here

authorized to file PAGA actions, from suing an employer on behalf of an employee bound by that agreement because the EEOC was not a party to the arbitration agreement. From this, the majority makes the leap in logic that "nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action." 173 Cal.Rptr.3d at 315. But this reading of *Waffle House* misses the forest for the trees; it ignores *Waffle House*'s explanatory statement that the FAA "ensures the enforceability of private agreements to arbitrate" (534 U.S. at 289) and, as the dissent remarks, "casts considerable doubt on the majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable." 173 Cal.Rptr.3d at 324.

Finally, the California Supreme Court's conclusion that the arbitration agreement is void because it effectively denies an "aggrieved employee" from pursuing a "representative" PAGA claim in any forum misreads the plain language of that statute and its legislative history. PAGA states that penalties under pertinent Labor Code provisions "*may* . . . be recovered by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a); italics added. The California Assembly Committee on Judiciary analysis for PAGA instructively describes its remedial scope:

> [P]rivate suits for Labor Code violations could be brought only by an employee or former employee of the alleged violator against whom the alleged violation was committed. This action could also include fellow employees also harmed by the alleged violation.

Assembly Committee on Judiciary, Analysis of Labor Code Private Attorneys General Act of 2004, Hearing of June 26, 2003.

Hence an individual, but not a "representative" PAGA claim, can be prosecuted in arbitration if there is an agreement between the employee and employer to submit all their disputes arising out of the employment relationship to arbitration. Otherwise, "representative" PAGA claims against employers must be brought by employees who have not entered into pre-dispute arbitration agreements or by the state administrative agency vested with jurisdiction to prosecute such claims.

CONCLUSION

For all the foregoing reasons, amici submit the petition for a writ of certiorari should be granted, and the Court should reverse the decision of the California Supreme Court.

Respectfully submitted,

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