No. 14-341

In the

Supreme Court of the United States

CLS TRANSPORTATION LOS ANGELES, LLC,

Petitioner,

v.

ARSHAVIR ISKANIAN,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an employee's waiver in an arbitration agreement of a collective or "representative action" under the California Private Attorneys General Act, Cal. Labor Code § 2698, *et seq.*, so distinguishable from a "class action" waiver that it is immune from the otherwise preemptive effect of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, as held by this Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and National Federation of Independent Business respectfully submit this brief amicus curiae in support of Petitioner, CLS Transportation Los Angeles, LLC.[1]

Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court and the California Supreme Court involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See*, *e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Sanchez v. Valencia Holding Co.*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

No. S199119 (Cal. filed Jan. 4, 2013); *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443 (2007). PLF participated as amicus curiae in this case in the California Supreme Court. *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014).

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm that provides legal resources for and acts as the voice of small businesses in the nation's courts through representation on issues of public interest. To fulfill this role, the Center frequently files amicus briefs in cases that will impact small businesses, including cases like this which affect the right of small employers to freely enter into arbitration agreements with their employees.

REASONS FOR GRANTING THE PETITION

I

THE CALIFORNIA SUPREME COURT'S PERSISTENT REFUSAL TO UPHOLD ARBITRATION CONTRACTS FLAGRANTLY CONFLICTS WITH THIS COURT'S DECISIONS

A. The California Supreme Court Has a Long History of Ignoring This Court's Arbitration Decisions

Since 1984, this Court has been reversing California court decisions that are based on distrust and disapproval of arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 7 (1984) (reversing the California Supreme Court's holding that the state Franchise Investment Law required judicial resolution rather than arbitral resolution because "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration."); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (reversing California Court of Appeal decision by holding that the FAA preempts a state labor law authorizing wage collection actions regardless of an agreement to arbitrate: "[U]nder the Supremacy Clause, the state statute must give way."); *Preston*, 552 U.S. at 359 (reversing California Court of Appeal and holding that the FAA's protection of an arbitration agreement vesting jurisdiction over all disputes in an arbitral tribunal supersedes state laws lodging dispute resolution jurisdiction in a different judicial or administrative forum); *Concepcion*, 131 S.

Ct. at 1753 (reversing Ninth Circuit application of California's *Discover Bank* rule because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). *See also Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating and remanding California Supreme Court decision in *Sonic I*, which categorically forbade waiver of a Berman wage hearing prior to arbitration, for reconsideration in light of *Concepcion*); *CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014) (vacating and remanding California Court of Appeal decision invalidating an arbitration contract on the "vindication of rights" theory, for reconsideration in light of *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

Yet each time this Court upholds an arbitration contract because the federal law requires it, the California Supreme Court finds a new way to express its unrelieved hostility to arbitration. *See Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) ("[T]his court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so.") (citation omitted); *Gentry*, 42 Cal. 4th at 473 (Baxter, J., dissenting) (noting the California Supreme Court's "continuing effort to limit and restrict the terms of private arbitration agreements, which enjoy special protection under both state and federal law"). *See also James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (applying California law; noting that some California courts, even post-*Concepcion*, continue to find arbitration forum-selection clauses unenforceable as unconscionable, while applying a far less stringent

analysis to forum-selection clauses applicable to litigation). Although the California Supreme Court was forced to concede that *Gentry* was no longer good law in light of *Italian Colors* (*Iskanian*, 59 Cal. 4th at 360), the court offered contract-avoiding plaintiffs a potentially more powerful weapon by deeming PAGA claims unwaivable.

As a result of this intransigence, this Court continues to receive a steady stream of petitions for writs of certiorari to the California courts by parties seeking to enforce arbitration contracts. *See*, *e.g.*, *Bingham McCutchen LLP v. Harris*, No. 13-351, 2013 WL 5276021, at *10 (U.S. Sept. 17, 2013) (Petition for Writ of Certiorari) (seeking review of a California Court of Appeal decision that invalidated an arbitration contract in an employment discrimination case, noting: "The California courts' hostility to arbitration is hiding in plain sight. So determined was the court of appeal to defeat arbitration in this case that the decision it issued conflicts with decisions of this Court and lower courts on almost every core principle of Section 2 jurisprudence."), *cert. denied*, 134 S. Ct. 903 (2014); *Sonic Calabasas A, Inc. v. Moreno*, No. 13-856, 2014 WL 186959, at *6 (U.S. Jan. 15, 2014) (Petition for a Writ of Certiorari) (identifying "an express attempt by the California Supreme Court to effect on a case-by-case basis what the FAA expressly prohibits: consideration of state public policy considerations of accessibility, informality, and affordability that conflict with the paramount purpose of the FAA"), *cert. denied*, 134 S. Ct. 2724 (2014); *Ralphs Grocery Co. v. Brown*, No. 11-880, 2012 WL 151754, at *27-28 (U.S. Jan. 13, 2012) (Petition for Writ of Certiorari) (seeking review of California's "unwaivable statutory rights theory" that operates as

an "end-run around the FAA" to invalidate arbitration contracts in conflict with this Court's decisions), *cert. denied*, 132 S. Ct. 1910 (2012); *Athens Disposal Co., Inc. v. Franco*, No. 09-272, 2009 WL 2864365, at *20 (U.S. Aug. 31, 2009) (Petition for Writ of Certiorari) (California's decisions in conflict with the substantive federal law of arbitration "foster[s] geographic forum shopping and forum shopping between federal and state courts."), *cert. denied*, 558 U.S. 1136 (2010).

B. California Lower Courts Are Following the California Supreme Court's Anti-Arbitration Rulings

The lower courts in California are obliged to follow the anti-arbitration rulings of the California Supreme Court, *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962), even though that court has proven a poor interpreter of how the Federal Arbitration Act governs arbitration contracts. For example, the Court of Appeal in *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771 (2012), rejected *Concepcion* in a footnote, *id.* at 804 n.18, relying instead on *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83 (2000), and *Gentry* to invalidate an employment contract that required individual arbitration of disputes. One commentator described the opinion as "reasserting the California Courts' propensity to disrespect the wills of contracting parties seeking to adjudicate outside of the Courts." Anthony Rallo, Comment, *Weighing (In) Discretion on a Sliding Scale: California Appellate Court Hands down an Exposé of Modern Approaches to Jurisdiction and Unconscionability*, 5 Y.B. On Arb. & Mediation 315 (2013); *see also*, *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1141-42 (2012) (arbitration

contract is "unconscionable and unforceable under [California law]," specifically *Armendariz*, and *Concepcion* "does not change our analysis").

By categorically prohibiting the arbitration of PAGA claims, the court below echoed the reasoning of an intermediate court of appeal decision, *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011). The California Supreme Court denied review of *Brown* (Oct. 19, 2011), and this Court denied the petition for writ of certiorari, *Ralphs Grocery Co. v. Brown*, 132 S. Ct. 1910 (2012), with the result that many California state courts follow the *Brown* decision in lieu of a California Supreme Court decision on the subject. *See*, *e.g.*, *Whalley v. Wet Seal, Inc.*, No. G047406, 2013 WL 6057679, at *7-8 (Cal. Ct. App. Nov. 15, 2013) (noting split of authority in California state cases as to whether the right to arbitrate a PAGA claim can be waived, that California *federal* court cases uniformly hold a waiver of the right to arbitrate a PAGA representative claim is enforceable, and choosing to follow *Brown*). *Cf. Teimouri v. Macy's Inc.*, No. D060696, 2013 WL 2006815, at *15 (Cal. Ct. App. May 14, 2013) (explicitly rejecting *Brown* as incompatible with *Concepcion* and holding that the plaintiff's individual PAGA claims must be arbitrated, pursuant to her employment contract).

The decision below is already having a wide impact. Numerous cases were granted review by the California Supreme Court and held pending the decision in *Iskanian*. *See*, *e.g.*, *Franco v. Arakelian Enters., Inc.*, *rev. granted*, 211 Cal. App. 4th 314 (2013), and briefing deferred pending *Iskanian*; *Caron v. Mercedes-Benz Fin. Servs. USA, LLC*, *rev. granted*, 288 P.3d 431 (Cal. 2012), and briefing deferred pending

Iskanian and deferred again pending decision in *Sanchez v. Valencia Holding Co., LLC*, No. S199119 (Cal. filed Jan. 4, 2012); *Flores v. West Covina Auto Group*, *rev. granted and held*, 297 P.3d 884 (Cal. 2013); *Brown v. Superior Court*, 216 Cal. App. 4th 1302 (2013) (raising PAGA claims), *rev. granted*, 307 P.3d 877 (Cal. 2013), and briefing deferred pending *Iskanian* and then transferred to the court of appeal for reconsideration in light of *Iskanian*, 331 P.3d 1274 (Cal. 2014).

The California Supreme Court also granted review in *Ybarra v. Apartment Inv. & Mgmt. Co.*, No. B245901, 2014 WL 985644 (Cal. Ct. App. Mar. 13, 2014) (raising PAGA claims), *rev. granted* (June 25, 2014), and deferred briefing pending *Iskanian*. The court then transferred the case back to the court of appeal for reconsideration in light of *Iskanian* on August 27, 2014. Although the original *Ybarra* decision held that the arbitration contract compelled arbitration of the plaintiff's PAGA claims, the court after remand had no choice but to hold, based on *Iskanian*, that the PAGA claims could not be arbitrated and the contract invalid. *Ybarra v. Apartment Inv. & Mgmt. Co.*, No. B245901, 2014 WL 4980896 (Cal. Ct. App. Oct. 7, 2014).

With all of these cases raising PAGA claims and now moving forward, a new round of conflicting and unsettled law will arise in California such that employers and employees will be unable to tell whether arbitration contracts are worth the paper they are printed on.

C. The California Supreme Court Decision Conflicts with California-Based Federal Court Decisions

The decision below continues the California courts' collision course with the federal courts that show greater deference to this Court's rulings, rejecting the notion that PAGA claims are not arbitrable. *See*, *e.g.*, *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1305 (N.D. Cal. 2013) ("[I]n the wake of *Concepcion*, an arbitration agreement that denies a plaintiff a right of collective action is still a valid agreement. Thus, it follows that an arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement.") (citation omitted); *Asfaw v. Lowe's HIW, Inc.*, No. LA CV14–00697 JAK (AJWx), 2014 WL 1928612, at *9-10 (C.D. Cal. May 13, 2014) (rejecting *Brown* in light of this Court's and Ninth Circuit decisions upholding "representative action" waivers that required individual arbitration of PAGA claims, and citing multiple federal district court decisions to the same effect); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (rejecting plaintiff's attempt to nullify representative action waiver for PAGA claims as "no longer tenable" in light of *Concepcion*), *recon. denied*, No. CV 09-01522 GAF (MANx), 2011 WL 6961598 (C.D. Cal. Oct. 31, 2011) (with opinion refusing to follow the recently decided *Brown* because it was neither controlling nor persuasive).

In *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011), the district court held that a state "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for

unrelated reasons," nor can a state "prohibit[ ] outright the arbitration of a particular type of claim." [citing *Concepcion*]. Therefore, the court held that the plaintiff's PAGA claim was arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable. *See also Velazquez v. Sears, Roebuck and Co.*, No. 13cv680-WQH-DHB, 2013 WL 4525581, at *7-8 (S.D. Cal. Aug. 26, 2013) (plaintiff's claims under the Private Attorney General Act and *Gentry* are foreclosed in light of *Concepcion*).

The decision below demonstrates the California Supreme Court's persistence and creativity in generating new reasons to invalidate employment contracts providing for arbitration of disputes. It conflicts with a clear line of this Court's precedent demanding that lower courts abide by the FAA's explicit command to enforce arbitration agreements.

II

CALIFORNIA'S END-RUN AROUND THE FEDERAL ARBITRATION ACT ENCOURAGES MISCHIEF IN OTHER STATES, MAKING THIS A MATTER OF NATIONAL IMPORTANCE

A. California's Hostility to Arbitration Extends Beyond the State's Borders

Unfortunately, California is not alone in its hostility to arbitration. Its influence extends beyond its boundaries, for two reasons.

First, as a center of economic trade, contracts across the country provide that California law controls. *See*, *e.g.*, *Triad Sys. Fin. Corp. v. Stewart's Auto*

Supply, Inc., 47 F. Supp. 2d 1332, 1334 (N.D. Ala. 1999) (Alabama residents bound by contract that made California law controlling); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004) (upholding reinsurance agreement that designated California law as controlling); *Naegele v. Albers*, 940 F. Supp. 2d 1, 8-9 (D.D.C. 2013) (relying on California arbitration law and staying federal proceedings); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, No. 7177, 1986 WL 7612, at *6-7 (Del. Ch. July 9, 1986) (parties to oil and gas leases in Prudhoe Bay, Alaska, agreed that California law controlled their arbitration contract).

Second, some courts find California decisions persuasive authority when interpreting their own arbitration statutes. *See Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2014 WL 4459129, at *10 (N.Y. App. Div. Sept. 11, 2014) (finding persuasive an unpublished California Court of Appeal decision that invalidated an arbitration contract as incompatible with a state regulatory and statutory scheme related to workers' compensation); *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (adopting California approach to unconscionability that prohibited a ban on classwide arbitration); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646 (2011) (relying, in part, on California caselaw to invalidate arbitration clause in nursing home contract), *judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012). *See also Episcopal Church in Micronesia v. Chung Kuo Ins. Co., Ltd.*, No. 84-0001, 1985 WL 56588, at *2 (D. Guam June 28, 1985) (Guam's Arbitration Act is patterned after California's statutes and California law on the subject is persuasive, although not binding.); *Discover*

Bank v. Shea, 827 A.2d 358, 362 (N.J. Super. Ct. Law Div. 2001) (noting similarity of New Jersey and California law with respect to arbitration), *app. dismissed*, 827 A.2d 292 (N.J. Super. App. Div. 2003).[2]

For these reasons, California does not sit as an island of anti-arbitration hostility, but infects contract law nationwide. While this Court may weary of playing whack-a-mole with the California Supreme Court on this issue, employers, employees, businesses, and consumers need this Court to protect their freedom to contract for arbitral resolution of disputes.

B. Many States Grant Authority to Citizens To Pursue Statutory Violations Both Individually and in a Representative Capacity

PAGA actions were intended to solve the problem of under-enforcement of Labor Code violations by permitting individuals to step into the shoes of the government and sue on its behalf. *Iskanian*, 59 Cal. 4th at 383. Any decision rendered is binding on future parties, just as a decision in a case brought the government itself would be, and a portion of the civil penalties would be distributed among all employees

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[2] In other cases, plaintiffs rely heavily on California law in their arguments to invalidate arbitration contracts, but are rebuffed. *See*, *e.g.*, *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1133-34 (D. Ariz. 2009) (refusing plaintiff's request to import California arbitration law into Arizona); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 n.5 (5th Cir. 2004) (rejecting plaintiff's invocation of California because "California law and Texas law differ significantly, with the former being more hostile to the enforcement of arbitration agreements than the latter"); *Smith v. HireRight Solutions, Inc.*, No. 09-6007, 2010 WL 2270541, at *6 n.7 (E.D. Pa. June 7, 2010) (finding plaintiff's reliance on California law of unconscionability unpersuasive).

affected by the violation, as well as to the state's coffers. *Id.* at 387. The court below relied on these factors, reflecting the "PAGA litigant's substantive role in enforcing [state] labor laws on behalf of state law enforcement agencies," and held, therefore, that because the FAA applied to only private disputes, it could not preempt a state law that precluded waiver of representative PAGA actions. *Id.* at 388. Not only are the purported distinctions unfounded, but this holding provides both the California Legislature and other state courts and legislatures with a blue print of how to circumvent the FAA.

In fact, the California Legislature is already working to ensure that the *Iskanian* court's holding that PAGA claims cannot be arbitrated will expand beyond the PAGA law itself. Shortly after the decision, commentators Kirk Jenkins and Kelly Savage Day observed that the lower courts or legislation could expand the scope of the *Iskanian* ruling by arguing that additional statutes or causes of action are actually public interest claims where the state is the real party in interest. Kirk Jenkins & Kelly Savage Day, *Iskanian Decision Not Such a Clear Win for Business*, THE RECORDER (Sept. 5, 2014).[3] They were prescient. On September 30, 2014, California Governor Edmund G. Brown, Jr., signed into law Assembly Bill

[3] *Available at* http://www.therecorder.com/id=1202669090361/Viewpoint-Iskanian-Decision-Not-Such-a-Clear-Win-for-Business?slreturn=20140906145941 (last visited Oct. 16, 2014).

2617,[4] which prohibits mandatory, pre-dispute arbitration agreements in contracts for the provision of goods or services, to the extent an individual is required to waive the right to bring a civil action for violation of the Ralph Civil Rights Act (Cal. Civ. Code § 51.7), which prohibits violence or threat of violence against a person because of a person's protected characteristics (*e.g.*, political affiliation, sex, race, color, religion, marital status, etc.), and the Bane Civil Rights Act (Cal. Civ. Code § 52.1), which prohibits interference by intimidation or coercion with a person's constitutional or statutory rights.

The expanding statutory authorization of representative actions makes the decision below, which ignores the overriding similarities between traditional class actions and representative private attorney general actions for the purpose of rendering disputes unarbitrable, all the more important. *See*, *e.g.*, John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 671-72 (1986) (using "class action" and "private attorney general" interchangeably); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2148 (2004) (A private attorney general is a "class action attorney who pursues representative litigation on behalf of a group of private citizens" and whose "role is often authorized by the class action rules enabling representative litigation and by common law or statutory rules authorizing fee

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[4] Text of law *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_2601-2650/ab_2617_bill_20140930_chaptered.pdf (last visited Oct. 16, 2014).

shifting."). Both types of actions are brought by individuals on behalf of others similarly situated and aid in the enforcement of public laws. *Id.* at 2147. The only material difference is that PAGA's representative action permits litigants to obtain civil penalties payable, in part, to the state.

Many states "deputize" their citizens in this way. Several states other than California permit private parties to bring lawsuits to enforce state labor laws like those at issue in this case. For example, Illinois permits employees to sue on their own behalf and on behalf of others for any violation of the state Wage Payment and Collection Act. *See* 820 Ill. Comp. Stat. Ann. 115/11 ("Actions may be brought by one or more employees for and on behalf of themselves and other employees similarly situated."). In addition to past wages, employees may litigate recovery of statutory penalties. *Rekhi v. Wildwood Indus., Inc.*, 816 F. Supp. 1308, 1311 (C.D. Ill. 1992). The state also authorizes employees to sue to enforce the Illinois Minimum Wage Law, and provides for civil penalties to be paid directly to the state. *See* 820 Ill. Comp. Stat. Ann. 105/12. These employees, too, may serve in a representative capacity. *See Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 305, 307 (N.D. Ill. 2010) (certifying, based on Illinois law, classes of waiters and bartenders asserting claims under the Illinois Minimum Wage Law, Illinois Wage Payment and Collection Act, and Fair Labor Standards Act). *See also* Mass. Gen. Laws Ann. ch. 149, § 150 (permitting representative action for any lost wages or other benefits); *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 611, 618 (Minn. 2008) (Minnesota Fair Labor Standards Act—Minn. Stat. § 177.27—and Minnesota Payment of Wages Act—Minn. Stat. § 181.101—can be enforced by the

Commissioner of Labor or through civil actions with MFLSA civil penalties payable to the state and MPWA penalties payable to the employees); *Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 185 P.3d 446, 449 (Or. 2008) (Or. Rev. Stat. § 653.055 provides private right of action to pursue claims that employer failed to provide paid rest breaks); Okla. Stat. Ann. tit. 40, § 165.9 (employee can sue to enforce labor law on behalf of self or others); *Vassallo v. Haber Elec. Co.*, 435 A.2d 1046, 1051 (Del. Super. Ct. 1981) (laborer could bring suit to vindicate claims if state DOJ chose not to), *overruled on other grounds by Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999); *German v. Wisconsin Dep't of Transp., Div. of State Patrol*, 235 Wis. 2d 576, 585, 596 (1998) (employees authorized by Wis. Stat. § 109.03(5) to enforce administrative wage regulations).

Like employment law, consumer protection statutes abound that permit private enforcement of laws that prohibit false or misleading advertisements, and other unfair trade practices. Arbitration contracts are as prevalent in the consumer context as they are in the workplace. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2012) (arbitration clauses in consumer contracts are "no rarity"). Indeed, *every* state has authorized some form of a private cause of action to enforce its consumer protection laws.[5] Rebecca Eschler

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[5] *See*, *e.g.*, Tenn. Code Ann. §§ 47-18-1509(b), 47-18-1510(b) (any individual may sue on behalf of others to enforce consumer protection laws with civil penalties payable to the general fund); La. Rev. Stat. Ann. § 45:817 (same); Kan. Stat. Ann. § 50-634 (individual may sue to obtain declaratory and injunctive relief, civil penalties, or damages, or may sue in a class to obtain declaratory and injunctive relief); Or. Rev. Stat. § 646.638 (continued...)

Russell, *Unlawful Versus Unfair: A Comparative Analysis of Oregon's and Connecticut's Statutes Encouraging Private Attorneys General to Protect Consumers*, 47 Willamette L. Rev. 673, 675 (2011). Like PAGA, many of these laws in other states were enacted in response to large numbers of complaints and a lack of governmental resources to investigate them. *Id.* For example, New York's private attorney general law was meant to bolster public enforcement efforts, and permits representative actions. Joseph Thomas Moldovan, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook. L. Rev. 509, 519 n.33 (1982).

Because the public policies reflected in these laws present similarities to the representative PAGA action at issue in the court below, state courts may find these consumer representative actions to be outside the purview of the FAA. The exemption created by *Iskanian* would seemingly apply to the most common arbitration agreements that would otherwise cover these types of consumer claims. States are thus encouraged to create private causes of action in order to avoid the FAA, in violation of the Supremacy Clause.

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[5] (...continued)
(authorizing civil action on behalf of others); Conn. Gen. Stat. Ann. § 42-110g (same); Alaska Stat. Ann. § 45.50.531 (permitting civil action with portion of punitive damages payable to state); Wash. Rev. Code Ann. § 19.86.090 (permitting individual civil action for violation of unfair business practices law); Wis. Stat. § 100.20 (same); Minn. Stat. § 8.31 (same).

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October, 2014.

Respectfully submitted,

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