No. 13-55184

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Shukri SAKKAB, an individual, on behalf of
himself, and on behalf of all persons similarly situated,

Plaintiff-Appellant,

v.

LUXOTTICA RETAIL NORTH AMERICA, INC., an Ohio corporation,

Defendant-Appellee.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm. We are affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly held company has 10% or greater ownership of the NFIB Small Business Legal Center.

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INTRODUCTION[1]

Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, Pacific Legal Foundation and the National Federation of Independent Business Legal Center respectfully submit this brief amicus curiae in support of the petition for rehearing en banc, filed by Luxottica Retail North America, Inc.

IDENTITY AND INTEREST OF AMICI CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the 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 the United States Supreme Court and the California Supreme Court involving the Federal Arbitration Act (FAA) and contractual arbitration in general. Of particular relevance to this case, PLF participated in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and *Iskanian v. CLS Transportation Los Angeles*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015). PLF believes that the freedom of contract underlies and enhances constitutional rights and promotes a strong economy.

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[1] In accordance with Fed. R. App. P. 29(c)(5), Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amici, their members, or their counsel have made a monetary contribution to this brief's preparation or submission.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. 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 represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business, and favors enforcement of contracts between employees and employers to resolve employment-related disputes in arbitration.

REASONS FOR GRANTING THE PETITION

I

THIS COURT SHOULD NOT ENABLE THE CALIFORNIA SUPREME COURT'S CONTINUED DEFIANCE OF FEDERAL LAW

Since 1984, the U.S. Supreme Court has been reversing California court decisions reflecting judicial hostility toward 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 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 v. Ferrer*, 552 U.S. 346, 359 (2008) (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); *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating California Supreme Court decision that categorically forbade waiver of an administrative wage hearing prior to arbitration, for

reconsideration in light of *Concepcion*); *see also Concepcion*, 131 S. Ct. at 1753 (reversing this Court's 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"); *DIRECTV, Inc. v. Imburgia*, Supreme Court docket no. 14-462 (pending arbitration case out of the California Court of Appeal); *MHN Gov't Svcs. Inc., v. Zaborowski*, Supreme Court docket no. 14-1458 (pending arbitration case reviewing this Court's application of California law).

The freedom to make and enforce contracts reflects a fundamental element of free choice and must be protected for that reason. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662, 683 (2010) ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit." (citation and quotation marks omitted)); *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). Consistent with these principles, the FAA reflects both a "liberal federal policy favoring arbitration agreements" and the "fundamental

principle that arbitration is a matter of contract."[2] *Concepcion*, 131 S. Ct. at 1745, 1749; *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." (internal quotation omitted)); *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (*en banc*) ("[T]he FAA was intended to 'overcome an anachronistic judicial hostility to agreements to arbitrate . . . .' ") (citation omitted). This includes arbitral resolution of state statutory claims. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Feeney v. Dell*, 466 Mass. 1001, 1003 (2013) ("[T]he analysis the Court set forth in *Concepcion* (and reinforced in [*Italian Colors*]) applies without regard to whether the claim sought to be vindicated arises under Federal or State law.").

Courts must "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745 (citations omitted); 9 U.S.C. § 2. Thus, the FAA's preemptive effect extends to grounds that generally exist "at law or in equity for the revocation of any contract[]" when those grounds "have been applied in a fashion *that disfavors arbitration*." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). Courts may not fashion contract

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[2] There is no statute in California, or any other state, that *requires* parties to a transaction to arbitrate disputes. Moreover, in this case, Sakkab could have opted out of the arbitration contract. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 449 (9th Cir. 2015) (N.R. Smith, J., dissenting).

law principles that "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.

This is "a principle of rigorous equality." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119-20 (1st Cir. 1989) ("[N]o state may simply subject arbitration to individuated regulation in the same manner as it might subject some other unprotected contractual device (say, a prescriptive period or exculpatory clause contained within a private contract)."). *See also Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (overturning a state's "public policy" exception to enforcement of arbitration agreements if the matter involved personal injury or wrongful death causes of action); *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (reversing a state court decision which struck down a noncompete agreement that contained an arbitration provision, and reminding the state court that "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law"). *Concepcion* specifically invalidated California's *Discover Bank* rule because, as a practical matter, the state's courts applied the unconscionability doctrine in a way that disproportionately undermined arbitration agreements. 131 S. Ct. at 1747-48. Here, too, the panel decision singles out claims brought under California's Private Attorney General Act (PAGA)—and, by extension, any statute that authorizes citizen enforcement so long as the state gets a cut of the money—as too special to be resolved in arbitration. The panel's decision invalidates

arbitration contracts for reasons unique to the arbitration itself, and cannot stand in light of *Concepcion*.

II

CALIFORNIA'S PUBLIC POLICY OBJECTIVE OF DEPUTIZING LABOR CODE ENFORCERS CANNOT TRUMP CONGRESS'S INTENT TO PROTECT ARBITRATION CONTRACTS

As the panel noted, PAGA representative actions were intended to solve the state's problem of under-enforcement of Labor Code violations by permitting individuals to step into the shoes of the government and sue on its behalf. *Sakkab*, 803 F.3d at 429-30; *Iskanian*, 59 Cal. 4th at 359; Cal. Lab. Code § 2699(a). Employers and employees who otherwise have the right to agree to resolve their disputes in arbitration should not be forced to bear the burdens on the state fisc stemming from California's financial woes such that the state lacks resources to enforce state laws. *See* Ben Nicholson, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 McGeorge L. Rev. 581, 584 (2004). By leveraging the state's failure to enforce its own laws into a means to evade the congressional mandate of the Federal Arbitration Act, the *Iskanian* court and the panel in this case carve-out an unlimitable means to defeat congressional intent. The FAA is not concerned with California's budget priorities and creates no exception for employment-related disputes that include a proxy claim.

PAGA may be the most wide-ranging statutory authorization for employees to bring representative actions against employers, but it is hardly unique, adding to the importance of this case. Many states authorize employees to bring representative actions to enforce aspects of statutory requirements in labor and employment law. Examples within this Circuit include Wash. Rev. Code Ann. § 49.78.330(2) (authorizing representative actions to enforce family leave provisions); Idaho Code Ann. § 44-1704(2) (employee may bring representative action alleging violation of the prohibition against discriminatory wages based on sex); Nev. Rev. Stat. Ann. § 613.490(2)(b) (employees may bring representative actions against employers to enforce statute delineating permitted use of lie detectors); Nev. Rev. Stat. Ann. § 613.590(2)(b) (allowing representative action to enforce prohibitions on employer use of employee consumer credit reports); Or. Rev. Stat. § 652.230(3) (authorizing representative action for unpaid wages and liquidated damages); and 4 N. Mar. I. Code § 9244(a) (representative action authorized for employees to enforce Northern Mariana Islands Minimum Wage and Hour Act).[3]

The Ninth Circuit Court of Appeals is a highly influential court and its decision in this case may well influence other courts' consideration of FAA preemption of similar statutes across the county. If the panel decision stands, arbitration contracts agreeing to informal resolution of disputes that could be brought under other

[3] http://www.cnmilaw.org/pdf/cmc_section/T4/9244.pdf.

"deputizing" state laws are at risk. Many states "deputize" their citizens 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. 115/11; *Rekhi v. Wildwood Industries, Inc.*, 816 F. Supp. 1308, 1311 (C.D. Ill. 1992) (In addition to past wages, employees may litigate recovery of statutory penalties.). 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. 105/12. *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); Okla. Stat. tit. 40, § 165.9(A) (employee can sue to enforce labor law on behalf of self and others); N.M. Stat. Ann. § 50-4-26 (authorizing representative action to prosecute Minimum Wage Act violations); Md. Lab. & Empl. Code § 3-307(a)(2) (permitting representative action to recover wages and liquidated damages in sex discrimination cases).

The PAGA exception is especially broad because proxies need not be limited to the employment context. A wide range of laws deputize consumers to enforce laws "on behalf of the state." 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.[4] Rebecca Eschler 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.* *See also* Joseph Thomas Moldovan, Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 Brook. L. Rev. 509, 519

[4] In this Circuit, *see, e.g.*, Or. Rev. Stat. § 646.638(8) (authorizing class action to challenge unlawful trade practices); Alaska Stat. § 45.50.531 (permitting civil action with portion of punitive damages payable to state). *See also*, Tenn. Code §§ 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. § 45:817(B)-(C) (same); Kan. Stat. § 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); Conn. Gen. Stat. § 42-110g(b) (authorizing class actions for damages under unfair trade practices law).

n.33 (1982) (New York's private attorney general law permits representative actions meant to bolster public enforcement efforts.).

The expanding statutory authorization of representative actions makes the panel's decision, 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 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.

The exemption created by *Iskanian* and approved by the panel decision in this case seemingly applies to the most common arbitration agreements that would

otherwise cover employment and consumer claims. States are thus encouraged to create private causes of action in order to avoid the FAA, in violation of the Supremacy Clause.

III

THE PANEL DECISION ERRONEOUSLY LIMITED *CONCEPCION*

By forbidding employers and employees from arbitrating "proxy" claims, the panel decision ignores *Concepcion*'s holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S. Ct. at 1747. As Judge N.R. Smith succinctly explained in his dissent to the panel decision:

> The majority cannot distinguish the present case from the principles outlined in *Concepcion*. *Concepcion* dealt with a state rule that prohibited class-action waivers in arbitration agreements. The present case involves a state rule that prohibits representative action waivers in arbitration agreements. ¶ The *Discover Bank* rule and the *Iskanian* rule are sufficiently analogous to guide our decision.

Sakkab, 803 F.3d at 442 (N.R. Smith, J., dissenting).

At bottom, PAGA claims are derivative of other statutes, which otherwise are fully arbitrable. *See, e.g.*, *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1147-48 (2011) (PAGA claim entirely derivative of other causes of action alleged in the complaint); *Elliot v. Spherion Pac. Work, LLC*, 572 F. Supp. 2d 1169, 1181-82 (C.D. Cal. 2008) (PAGA claim wholly dependent on other causes of action). The panel

decision elevating this derivative procedure above that of Congress's command that all courts uphold arbitration contracts unless they violate principles of contract law applicable to *all contracts*, serves only to circumvent the FAA. California's state policy of offloading certain law enforcement activities to volunteers cannot be permitted to thwart federal law commanding that courts uphold the freedom of employers and employees to contract for informal resolution of disputes.

CONCLUSION

This petition for rehearing en banc should be granted.

DATED: November 20, 2015.

Respectfully submitted,

/s/ Deborah J. La Fetra
DEBORAH J. LA FETRA

Counsel for Amici Curiae
Pacific Legal Foundation and National
Federation of Independent Business
Small Business Legal Center

CERTIFICATE OF COMPLIANCE

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/s/ Deborah J. La Fetra
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Pacific Legal Foundation and National
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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I electronically filed the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF REHEARING EN BANC 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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DEBORAH J. LA FETRA