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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

California's Labor Code Private Attorneys General Act of 2004 (PAGA) creates an action in which an individual plaintiff may seek penalties for Labor Code violations on behalf of the state, with a portion of the penalties recovered paid to the plaintiff and other victims of the violations. The questions presented by this case are:

1. Whether the California Supreme Court's interlocutory ruling that respondent Iskanian's PAGA claim may not be waived—a ruling that does not determine whether arbitration of that claim will or will not occur—is a final decision reviewable by this Court under 28 U.S.C. § 1257.

2. Whether the Federal Arbitration Act (FAA) requires California to enforce a provision in an arbitration agreement that purports to bar an employee from asserting claims under PAGA.

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INTRODUCTION

Respondent Arshavir Iskanian brought this case against petitioner CLS Transportation of Los Angeles in part as a class action seeking damages for employees who had not received compensation required by California law, and in part as a representative action under California's distinctive Labor Code Private Attorneys General Act of 2004 (PAGA). Cal. Lab. Code §§ 2698, *et seq*. PAGA allows an employee who has suffered a violation of California's labor laws to bring a form of qui tam action on the state's behalf to recover civil penalties payable mostly to the state and partly to the plaintiff and other victims. CLS defended by invoking a provision in its arbitration agreement with employees prohibiting class actions and also barring any representative claim under PAGA.

Applying this Court's holdings in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the California Supreme Court enforced the arbitration agreement's class-action ban. The court overruled *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), which had held arbitration clauses prohibiting class actions unenforceable when they inhibit employees' assertion of unwaivable substantive rights.

The court recognized, however, that the PAGA claim posed very different issues. By purporting to bar assertion of any "representative" claim, the arbitration clause would completely preclude an employee from asserting a PAGA claim, something this Court's precedents under the Federal Arbitration Act (FAA) have never allowed. Moreover, the real party in interest in the PAGA claim—California—is not a party to

the agreement that assertedly bars it from proceeding through its authorized representative—the PAGA plaintiff. The court concluded that requiring an employee to waive the right to bring PAGA actions in any forum as a condition of employment violated public policy, and that the FAA does not require enforcement of such a waiver. It held that PAGA claims must be available *in some forum*, but it did not determine whether that forum would be arbitration or litigation. Rather, it remanded for consideration of that issue and of whether the PAGA claim is time-barred.

This Court lacks jurisdiction because the decision of the California Supreme Court is not "final." 28 U.S.C. § 1257. It neither terminates the litigation nor finally decides whether arbitration of the PAGA claim will be compelled. And, as the remand for possible consideration of a limitations defense illlustrates, the FAA preemption issue the petition presents may ultimately be unnecessary to the case's final resolution.

Even if the Court had jurisdiction, it should deny certiorari. The California Supreme Court's decision applying FAA preemption principles to the novel state law at issue does not conflict with the decision of any federal appellate court or state supreme court, and if a conflict arises this Court will have later opportunities to resolve it. Nor does the decision conflict with this Court's FAA jurisprudence. The decision does not exempt any class of claims from arbitration, but holds only that the FAA does not require enforcement of agreements purporting to *waive altogether* representative claims on behalf of a state. This Court has never enforced an arbitration agreement containing such a waiver. Moreover, as the concurring justices below stated, the same result would follow even if the

PAGA claim belonged solely to the individual, because the FAA does not require enforcement of agreements waiving such statutory claims (just as it would not require enforcement of an agreement that purported to waive claims for overtime under state law).

STATEMENT

1. The Private Attorneys General Act

PAGA provides a unique enforcement method for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover statutory penalties for Labor Code violations on behalf of the state, with a share going to the individual plaintiffs and other employees. Before PAGA's enactment in 2003, only the state could obtain those penalties. *See* Pet App. 46a–52a.

PAGA provides that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a). For Labor Code provisions that do not specify a monetary penalty, PAGA provides its own penalties, generally $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *Id.* § 2699(f)(2).

Under PAGA, penalties may be recovered by "an aggrieved employee … in a civil action … filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged

violations was committed." *Id.* § 2699(g). Penalties recovered under PAGA "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code …; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

"A PAGA representative action is … a type of *qui tam* action." Pet. App. 52a. It deputizes an individual to recover penalties for the state, with a portion going to the individual. PAGA differs from a classic qui tam action insofar as "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Id.* Nonetheless, because a PAGA action is aimed at deterring and punishing violations of the Labor Code, and not compensating individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id.* at 53a–54a. Thus, every PAGA action, whether it implicates violations involving one or a thousand employees, is a "representative" action on behalf of the state. *Id.* at 62a.

Before filing a PAGA action, an "aggrieved employee" must give notice of the claimed violations to the employer and the California Labor and Workforce Development Agency. *Id.* § 2699.3(a)(1). The agency is deemed to authorize the employee to sue on the state's behalf if it fails to respond within 33 days, responds that it does not intend to investigate, or investigates and does not issue a citation within 158 days. *Id.* §§ 2699.3(a)(2), 2699(h).

PAGA actions need not be prosecuted as class actions and are commonly maintained by individual plaintiffs as representatives of the state and other

employees with respect to statutory penalties. *See Arias v. Super. Ct.*, 209 P.3d 923, 929–34 (Cal. 2009). They require neither class certification nor notice to other employees. *See id*. Other employees are bound by a PAGA adjudication *only* with respect to statutory penalties, just as they would be "bound by a judgment in an action brought by the government." *Id*. at 933. The effect of a PAGA judgment rests not on the principles that make class action judgments binding on class members, *see Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379–80 (2011), but on a very different basis: "When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party." *Arias*, 209 P.3d at 934 (citing Restatement (2d) of Judgments § 41(1)(d), comt. d (1982)).

California's creation of a right of action in which an individual may recover penalties for the state, with a portion distributed to himself and other 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*, 209 P.3d at 929–30. 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 933.

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 suffered by the plaintiff and other employees. The 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." Pet. App. 61a.

2. Proceedings Below

a. The PAGA Action.— Iskanian brought this action against CLS in 2006. CLS moved to compel arbitration in February 2007 under a mandatory predispute arbitration agreement that it imposed in 2004 on its entire workforce.

The agreement prohibited CLS's employees from pursuing any claim on a class or representative basis:

> (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.

The trial court granted CLS's motion to compel arbitration. While Iskanian's appeal was pending, the California Supreme Court decided *Gentry*. The Court of Appeal reversed and remanded for reconsideration in light of *Gentry*. CLS then withdrew its motion to compel arbitration.

Three years later, after this Court decided *Concepcion*, CLS revived its attempt to compel arbitration. Iskanian resisted, contending that CLS had waived arbitration, that *Gentry* remained valid after *Concepcion*, and that the agreement's ban on PAGA representative actions was unenforceable. The trial court again compelled arbitration, and Iskanian appealed. The Court of Appeal affirmed, holding that CLS had not waived arbitration, that *Concepcion* effectively overruled *Gentry*, and that the ban on PAGA actions was enforceable.

b. The California Supreme Court's Decision.—The California Supreme Court affirmed in part and reversed in part. The court concluded that *Concepcion* and *American Express* required it to overrule its holding in *Gentry*. The court also held that the class-action ban does not violate federal labor laws, contrary to the reasoning of the National Labor Relations Board in *D.R. Horton Inc. & Cuda*, 357 NLRB No. 184, 2012 WL 36274 (2012).[1] The court therefore held that the FAA requires enforcement of the arbi-

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[1] The court's holding, based largely on the analysis of *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), did not consider whether federal labor law precludes waiver of rights to engage in concerted legal action other than class actions. Justice Werdegar dissented from the court's holding on this issue. Pet. App. 82a.

tration provision's class-action prohibition. And the court held that CLS had not waived arbitration because it would have been futile to seek to enforce the arbitration clause after *Gentry* but before *Concepcion*.

All seven justices, however, agreed that CLS's agreement purported to bar an employee from pursuing a PAGA claim in any forum, and that such an agreement is unenforceable. The court began by holding, as a state-law matter, that in view of the critical importance of PAGA in enforcing California's labor laws, agreements requiring employees to waive the entitlement to bring PAGA representative actions as a condition of employment are unenforceable. The court then held that the FAA does not override state law and require enforcement of such a purported waiver.

The court's five-justice majority opinion on this point rested largely on the court's state-law holding that the real party in interest under PAGA is the state, on whose behalf the PAGA plaintiff seeks penalties. As the court observed, any PAGA action is by definition a representative action on the state's behalf, Pet. App. 62a, and thus enforcement of an employment agreement banning representative actions would prevent the state from pursuing its claim through the agent authorized by law to represent it: the PAGA plaintiff. Because "a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency," Pet. App. 57a, and because the state is not a party to the arbitration agreement invoked to bar the claim, the court held that permitting the PAGA action to proceed would not conflict with the FAA's fundamental requirement that private arbitration agreements be enforced as be-

tween the parties. *See id.* at 60a–61a (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

Justices Chin and Baxter concurred in all aspects of the judgment. As to the PAGA waiver, they reached the same result through a different analysis. The concurring justices relied on this Court's precedents stating that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id*. at 76a (quoting *American Express*, 133 S. Ct. at 2310). Based on this "analysis firmly grounded in high court precedent," the concurring justices concluded that "the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action *in any forum*." *Id*. at 78a.

Having held that Iskanian's PAGA claim must be available in "some forum," *id*. at 70a, the court remanded for consideration of whether the forum would be arbitral or judicial and for a determination whether CLS had a statute-of-limitations defense that would bar Iskanian's PAGA claim altogether. *Id*. at 70a–71a.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction because the decision below is not final.

This Court has certiorari jurisdiction only over "[f]inal judgments or decrees" of state courts. 28 U.S.C. § 1257(a). This limitation is no mere formality to be observed in the breach:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be

> final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.,* 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

The judgment below is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. The case came to California Supreme Court on interlocutory appeal from a decision compelling arbitration and barring both Iskanian's PAGA representative claim and his non-PAGA class claims. As to the latter, the court affirmed the lower courts' determination that the arbitration agreement's class-action ban was enforceable. As to the PAGA claim, the court held that the agreement purporting to waive it by barring all representative actions is unenforceable, but did not resolve whether the claim would ultimately be arbitrated or litigated in court. Concluding that that issue, together with CLS's contention that Iskanian's PAGA claim was time-barred, should be considered on remand, the California Supreme Court directed the lower courts to determine whether Iskanian's PAGA claim can proceed and, if so, where. Consequently, the case is far from over: There has been no "*final* word of a final court." *Market St.*, 324 U.S. at 551 (emphasis added).

This Court has exercised jurisdiction over state-court judgments that do not terminate a case in only a

"limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). This case fits none of those narrow categories.

The first *Cox* category covers cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained" *Cox*, 420 U.S. at 479. Here, it is by no means "preordained" that Iskanian will prevail on his PAGA claim. *See Thomas*, 532 U.S. at 778. Not only is the statute-of-limitations defense unresolved, but whether the claim will proceed in arbitration or in court is undecided, and Iskanian may not succeed in proving his claim wherever it is ultimately permitted to proceed.

Cox's second category includes only cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. The federal issue here will not survive and require decision regardless of the outcome of future proceedings. If Iskanian's PAGA claim is found time-barred or fails on the merits, the question whether the FAA preempts California law providing that the claim may not be waived will be moot. *Jefferson*, 522 U.S. at 82.

Cox category three comprises unusual "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts

to come, but in which later review of the federal issue *cannot* be had, *whatever the ultimate outcome of the case*." *Cox*, 420 U.S. at 481 (emphasis added). This category encompasses only cases where state law offers *no* subsequent opportunity to obtain a judgment over which this Court could exercise jurisdiction. *See id.* at 481–82. CLS does not face such a situation. It can seek further appellate review either if the trial court declines to compel arbitration, or if the PAGA claim is arbitrated and one of the parties files an application to vacate the result. Although the California Supreme Court's ruling would be the "law of the case" within the state-court system, "that determination [would] in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 83. The third exception is thus inapplicable. *See id*.

Finally, the fourth *Cox* category "covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*, 539 U.S. 654, 658–59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482–83).

This case falls well outside the fourth category. Denial of immediate review would not "seriously erode federal policy." Because the decision below does not deny arbitration of any claim, this case is wholly unlike *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984), and *Perry v. Thomas*, 482 U.S. 483, 489 n.7

(1987), where this Court held that definitive state-court decisions refusing to compel arbitration were "final" under *Cox*. Indeed, because federal policy does not favor use of compulsory arbitration to waive claims, the California Supreme Court's decision in no way threatens federal policy.

Moreover, a party invoking *Cox* category four must demonstrate not just that the lower court's decision may be wrong from the standpoint of federal policy, but that *deferring review until final judgment* would seriously damage federal interests. Here, if the trial court on remand declines to compel arbitration of the PAGA claim, requiring CLS to avail itself of the appeal California law permits from such a disposition will not erode federal policy. If the trial court compels arbitration of the PAGA claim, no federal policy will be eroded by requiring CLS either to seek further review through an alternative writ or to await the arbitration's outcome before seeking further review by applying to vacate the award. Federal policy generally *favors* deferring review until after arbitration, and the FAA itself does not provide immediate appellate review of orders compelling arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 85–86 (2000); 9 U.S.C. § 16.[2]

This Court's consideration of whether to review CLS's preemption claim would also be better informed

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[2] Moreover, arbitration of a PAGA claim would not damage federal interests because such arbitration would be traditional, bilateral arbitration (*see infra* at 29) and would not fundamentally alter the nature of arbitration as class arbitration may. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

if the Court knew the outcome of the remand proceedings—that is, whether the PAGA claim will proceed at all, and if so whether it will proceed in court or arbitration. Federal policy would thus be enhanced, not eroded, by awaiting the result of the remand proceedings. In addition, CLS may claim some additional federal-law basis for objecting to whatever the trial court decides about whether the claim should proceed in arbitration or in court.[3] Thus, asserting jurisdiction at this point might create the possibility of piecemeal review of federal issues, which the Court avoids in applying the *Cox* factors. *See Nike*, 539 U.S. at 660.

The prospect of serious injury to federal interests is also obviated by the likelihood that additional appellate rulings will provide further opportunities for this Court to address the issue if necessary, and also will better inform the Court's judgment about whether review is warranted. As CLS points out, the issue has arisen in a number of federal district court actions but has yet to be decided by the Ninth Circuit. A decision by that court could either add weight to that of the California Supreme Court if the two courts agree, or create a division of authority that may warrant review. In either event, this Court will have the benefit of additional appellate-court views if it allows the issue to work its way through the federal courts. At the same time, the Court will retain the ability to step in should it appear that federal policy is threatened.

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[3] For example, if the trial court were to sever the PAGA waiver from the arbitration agreement and compel arbitration of the PAGA claim, CLS might contend that that result violates *Stolt-Nielsen*.

Immediate review of a non-final state-court decision is by no means essential to the defense of federal policy.

Finally, as in *Nike*, this case could only be squeezed into the fourth *Cox* category if the Court assumed there were only two possible results: a reversal precluding assertion of Iskanian's PAGA claim altogether, or an affirmance of the California Supreme Court's remand order. The possibilities, however, are not necessarily so limited.[4] "[B]ecause an opinion on the merits in this case could take any one of a number of different paths, it is not clear whether reversal of the California Supreme Court would 'be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come.'" *Nike*, 539 U.S. at 660.

Thorough review of the *Cox* categories thus confirms that the decision below is not the state courts' *final* word. The Court lacks jurisdiction under § 1257.

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[4] Conceivably, for example, this Court might hold the waiver unenforceable to the extent the PAGA claim is based on violations affecting Iskanian personally and entitling him to a share of penalties, but enforceable insofar as he seeks recoveries benefiting other employees and/or the state. Such a result would be problematic because such an "individual" PAGA claim may not be permitted by California law, *see* Pet. App. 56a, but some of the federal district court decisions CLS cites have ruled in that manner. The presence of this unresolved state-law issue is another reason this Court should deny review.

II. The issue does not merit review.

A. There is no conflict among decisions of state supreme courts or federal courts of appeals.

CLS points to no federal appellate authority, and no authority of any other state supreme court, addressing the specific question whether the FAA mandates enforcement of an agreement to waive PAGA claims or the more general question whether the FAA preempts state laws precluding waiver of qui tam claims in contracts containing predispute arbitration clauses. No federal court of appeals or state supreme court has issued a decision that conflicts with the holding of the California Supreme Court. This Court need not reach out to review the first decision at that level addressing the application of its recent decisions in *Concepcion* and *American Express* in this very different, indeed unique, state-law context.

CLS contends that the decision below conflicts with federal *district court* authority on whether the FAA requires courts to enforce waivers of PAGA claims in arbitration agreements. But federal district court decisions in the wake of the California Supreme Court's decision in this case have reached different results on whether to follow the state court's reasoning on FAA preemption. The most recent such opinion, *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014), followed the decision below in holding that "the FAA 'does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.'" *Id*. at *4 (quoting Pet. App. 13a.). Other district courts have disagreed, *see*, *e.g.*, *Fardig v. Hobby Lobby Stores Inc.,* 2014 WL 4782618 (C.D. Cal. Aug. 11,

2014), though one such court has expressly "recognize[d]" the force of the argument against preemption and acknowledged that, unlike a class action waiver, which "allow[s] recovery of a statutory right on an individual basis, the waiver of a PAGA action may prevent a plaintiff from asserting a statutory right." *Ortiz v. Hobby Lobby Stores, Inc.*, __ F. Supp. 2d __, 2014 WL 4961126 at *11 (E.D. Cal. Oct. 1, 2014).

Disagreement among district court judges within the same circuit is not the sort of conflict that necessitates intervention by this Court, as it may be resolved by the court of appeals. The Ninth Circuit has not yet ruled on whether arbitration clauses may bar PAGA claims, but the district court decisions raising the issue make it likely the court of appeals will decide the question. Indeed, the issue is pending before the Ninth Circuit in at least one case, *Hopkins v. BCI Coca Cola Bottling Co.*, No. 13-56126, in which briefing was recently completed.

When the Ninth Circuit addresses the issue, it may agree or disagree with the California Supreme Court.[5] Whatever result the Ninth Circuit may reach, its rea-

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[5] The Ninth Circuit's opinions in this area demonstrate that it is willing to disagree with state courts on FAA preemption when, rightly or wrongly, it considers such disagreement warranted. *See*, *e.g.*, *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013) (holding California's *Broughton-Cruz* rule, under which certain claims for injunctive relief are nonarbitrable, preempted by the FAA); *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151 (9th Cir. 2013) (holding that the FAA preempts Montana's doctrine that waivers of fundamental rights are outside the reasonable expectations of contracting parties); *Coneff v. AT&T Corp*., 673 F.3d 1155 (9th Cir. 2012) (holding Washington case law prohibiting class action waivers preempted by the FAA).

soning will shed additional light on the application of FAA preemption analysis to California's prohibition on employment agreements that waive PAGA claims. Should a real conflict develop, this Court may consider whether it justifies review; conversely, congruence of results and reasoning may indicate that review is unwarranted. Further appellate consideration of the issue will in any event contribute to this Court's evaluation of whether the issue merits review.

The issue may also arise in other federal courts of appeals or state supreme courts. Actions governed by California law, including PAGA actions, are not brought solely in state and federal courts in California,[6] so appellate courts elsewhere may have occasion to weigh in on the issue. Similar issues may conceivably arise under laws of other states authorizing private attorney general actions, though differences among state laws may make direct conflicts unlikely.[7] Even so, if there were merit to CLS's argument that the FAA preempts states from prohibiting waiver of claims under private attorney general statutes, there would undoubtedly be opportunity for conflict among appellate courts over the issue. Meanwhile, absent

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[6] *See*, *e.g.*, *Westerfield v. Wash. Mut. Bank*, 2007 WL 2162989, at *4 (E.D.N.Y. July 26, 2007); *In re Bank of Am. Wage & Hour Employment Litig.*, 286 F.R.D. 572, 587 (D. Kan. 2012); *Cohen v. UBS Fin. Servs., Inc.*, 2012 WL 6041634, at *2 (S.D.N.Y. Dec. 4, 2012); *Zaitzeff v. Peregrine Fin. Group, Inc.*, 2010 WL 438158, at *2–3 (N.D. Ill. Feb. 1, 2010).

[7] *Cf. Hedeen v. Autos Direct Online, Inc.*, __ N.E.3d __, 2014 WL 4748386 at *11 (Ohio Ct. App. Sept. 25, 2014) (discussing private attorney general provisions of Ohio's consumer laws); *Zuckman v. Monster Bev. Corp.*, 958 F. Supp. 2d 293 (D.D.C. 2013) (discussing private attorney general provisions of DC's Consumer Protection Procedures Act).

any federal appellate or state supreme court decision that conflicts with the California court's application of preemption principles to the unusual PAGA right of action, the reasons ordinarily justifying review by this Court are lacking. *See* S. Ct. R. 10(b).

B. The California Supreme Court's decision is fully consistent with this Court's precedents.

CLS's principal argument for review is that the decision below is wrong under this Court's FAA jurisprudence. CLS points to no decision of this Court that addresses whether an arbitration agreement can preclude assertion of a representative or qui tam claim, and thus there is no specific conflict of decisions within the meaning of this Court's Rule 10(c). Rather, CLS argues that the state court *misapplied* this Court's precedents. Such arguments "rarely" justify a grant of certiorari. S. Ct. R. 10. This case is not one of those rare instances, because the decision below aligns with this Court's FAA jurisprudence.

1. This Court's decisions do not require enforcement of arbitration agreements that bar assertion of statutory rights.

The arbitration agreement in this case purports to bar Iskanian from bringing any PAGA claim: It bans *all* "representative actions," and as the California Supreme Court explained, "*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." Pet. App.

62a.[8] This Court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims. The FAA makes *agreements to arbitrate claims* enforceable; it does not provide for enforcement of agreements that claims *cannot be pursued at all*. Allowing defendants to excuse themselves from forms of liability—for example, liability for claims seeking unpaid overtime, or particular forms of damages allowed by state law, or injunctive relief—is not the FAA's object.

This 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 Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Waffle House*, 534 U.S. at 295, n.10; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987).

This Court has specifically cautioned against "confus[ing] an agreement to arbitrate … statutory claims with a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). The FAA requires enforcement of the former but does not require states to permit the latter. Indeed, this Court has insisted it would "condemn[] … as against

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[8] CLS's suggestion that its agreement does not bar "individual" PAGA claims is contrary to this state-law ruling.

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.

This 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 S. Ct. at 1753.

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

American Express strongly underscores that an arbitration agreement purporting to waive PAGA claims is unenforceable. While holding that a class-action ban in an arbitration agreement was enforceable even though it had the *practical* effect of making particular claims too costly for the plaintiffs, 133 S. Ct. at 2312, *American Express* reiterated that arbitration agreements may not expressly waive statutory claims and remedies. As the Court explained, the principle that an arbitration agreement may not foreclose assertion of particular claims "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) (emphasis added by Court). The Court added unequivocally: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id*.

The Court's statements in *American Express* prescribe the outcome reached by the California Supreme Court. CLS's contractual ban on PAGA actions prospectively waives the right to pursue statutory remedies and flatly forbids the assertion of statutory rights under PAGA. *American Express* reaffirms that "elimination of the right to pursue [a] remedy," *id*. at 2311, remains off-limits for an arbitration agreement.

This non-waiver principle applies fully to state-law claims. The Court's decisions, including *American Express*, have repeatedly stated that arbitration clauses may not waive claims without suggesting that state-law claims differ in this respect.[9] Indeed, in *Preston v. Ferrer*, 552 U.S. 349 (2008), this 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*

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[9] Justice Kagan's dissent in *American Express* asserted that procedures incompatible with arbitration cannot be justified by the need to make it practical to pursue state-law claims, *see* 133 S. Ct. at 2320, but did not state that an arbitration clause may expressly waive a state-law claim.

claims regardless of their source, and therefore does not conflict with state laws disallowing such waivers.[10]

Given this Court's precedents, the 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") (citations omitted).

Here, the arbitration agreement does not merely *limit* remedies available for a claim: It expressly precludes *any* PAGA representative claim. Nothing in *American Express*, *Concepcion* or any of this Court's rulings supports use of an arbitration agreement to prohibit assertion of a claim for relief or suggests that

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[10] 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.

the FAA preempts state law precluding enforcement of such an agreement. Rather, as the two concurring justices below recognized, this Court's 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*." Pet. App. 72a.

By extracting such agreements from all its employees, CLS will, if its preemption argument is accepted, have successfully immunized itself from liability under PAGA. Allowing employers to opt out of liability for PAGA penalties would overturn California's legislative judgment that it 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 that states enforce agreements to arbitrate claims justifies allowing a party to excuse itself from liability by requiring its employees to agree *not* to arbitrate *or* litigate particular claims.

2. This Court's 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 recoveries 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 below—as a matter of state statutory construction—that the state is the "real party in inter-

est" in such actions. Pet. App. 53a. The lion's share of the recovery goes to the state, which is bound by the outcome. An action for statutory 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." Pet. App. 61a. Enforcing a prohibition of 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 this Court's decisions enforcing arbitration agreements has involved a comparable right of action. As the court below correctly stated, this Court's "FAA jurisprudence—with one exception …—consists entirely of disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." Pet. App. 58a–59a. Moreover, the "one exception," *EEOC v. Waffle House*, "does not support CLS's contention that the FAA preempts a PAGA action." *Id*.

Waffle House squarely held that an arbitration agreement cannot bind a governmental enforcement agency that is not a party to it. *See* 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, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." *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," *id.* at 295—the state's recourse to qui tam actions to enforce its laws.

As the California 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." Pet. App. 61a. Indeed, none of this 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 would violate fundamental preemption principles. As the California Supreme Court pointed out, this 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." *Id*. at 63a–64a (quoting *Ariz. v. United States*, 132 S. Ct. 2492, 2501 (2012)). 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. *Id*. (citing *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985); *Printz v. United States*, 521 U.S. 898, 928 (1997)).

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." Pet. App. 62a.

3. The decision below does not exempt PAGA claims form arbitration.

The California Supreme Court held prospective waivers of PAGA claims unenforceable but did not decide whether Iskanian's PAGA claim 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. The court made clear that it was not holding that PAGA claims are nonarbitrable: It held only that an employment agreement cannot waive an employee's right to bring a PAGA claim "in some forum," Pet. App. 70a; *see also id*. at 81a (Chin, J., concurring), and left open the possibility that the forum could be arbitration.

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 arbitration agreement did not, as here, foreclose the plaintiffs from asserting their claims in arbitration. The West Virginia Supreme 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. *See id*. at 1203. This Court's reversal in *Marmet* straightforwardly applied such decisions as *Perry v. Thomas*, 482 U.S. at 491, and *Southland Corp. v. Keating*, 465 U.S. at 10, 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.

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*, 311 P.3d 184, 220 (2013) (emphasis added), *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 employee may not, as a condition of employment, be required to waive the right to pursue such a claim "*in some forum*." Pet. App. 70a (emphasis added).

4. The California Supreme Court's decision is not hostile to arbitration.

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. The court's decision provides even-handedly that an employment agreement may not require employees to waive the right to bring PAGA actions, whether or not the waiver is in an arbitration agreement. Pet. App. 13a, 54a–56a. That 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* 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").

The state court's 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. The Court held that classwide arbitration 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. "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." Pet. App. 62a. 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. *See id*.

Here, it remains to be determined whether the PAGA claim in this case will be arbitrated or resolved judicially. But even if the result is arbitration, the arbitration process will not be fundamentally transformed "inconsistent[ly] with the FAA." *Concepcion*, 131 S. Ct. at 1751. Although PAGA claims seek recoveries benefiting the state and other employees, they are not class proceedings, but bilateral ones between individual plaintiffs and defendants. *See Arias*, 209

P.2d at 929–34. Class certification, notice, opt-out rights, and the other procedures that concerned the Court in *Concepcion* (*see* 131 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 California Supreme Court's holding that an employment agreement must allow them to be pursued in some forum does not improperly threaten the nature of arbitration, even if the forum ultimately provided is arbitration.

The California Supreme Court's 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 by the court. As to each of the other three issues, the court's ruling unambiguously favored enforcement of the arbitration provision at issue. The court explicitly overruled its 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." Pet. App. 23a.

The court likewise rejected Iskanian's challenge to class-action bans based on federal labor laws. Pet. App. 35a–37a. 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 41a (citation omitted), and it announced, for the first time,

that "futility" is "a ground for delaying a petition to compel arbitration." *Id*. at 42a.

Amidst all these rulings favorable to CLS's arbitration agreement, the court's unwillingness to enforce the provision barring PAGA claims reflects not hostility to arbitration, but unwillingness to expand the court's approval of arbitration to encompass agreements that waive claims—particularly claims that ultimately belong to the state. Indeed, the two staunchest pro-arbitration justices of the court, Justices Chin and Baxter,[11] 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." Pet. App. 72a (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." Pet. App. 63a. 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*. The court explained that the distinction between a PAGA claim and such an evasion of *Concepcion* "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*. The court's carefully lim-

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[11] Both justices, for example, dissented in *Gentry*. *See* 165 P.3d at 575 (Baxter, J., dissenting).

ited holding that an employment agreement may not waive an employee's right to bring a PAGA claim threatens no end runs around the FAA.

III. CLS's disagreements with the California Supreme Court on points of state law underscore the unsuitability of this case for review.

CLS's plea for review rests substantially on its assertion that the California Supreme Court's decision invokes a "false analogy" between PAGA actions and qui tam actions that the California court "incorrectly" borrowed from a federal district court opinion, *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211 (C.D. Cal. June 25, 2013). Pet. 22.

The California Supreme Court, however, nowhere mentioned *Cunningham*, but held as a matter of state law that "[a] PAGA representative action is … a type of qui tam action." Pet. App. 52a. This Court is, of course, bound by the state supreme court's construction of the state's own statute. *See*, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874).

CLS's claim that the California Supreme Court's interpretation of its own law is "incorrect" rests on propositions that are themselves directly contrary to state law as construed by that court. CLS asserts that in a qui tam action the real party in interest is the government, while 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." Pet. App. 52a–53a. Similarly, CLS's contention that "control may be retained by the executive branch

in a qui tam action" but not in a PAGA action, Pet. 23, ignores that, as the California Supreme Court explained, an individual plaintiff conducts a PAGA action only when the executive branch declines the option to take control—an option the court found sufficient to preserve executive branch authority. *See* Pet. App. 67a–68a.

CLS's assertion that "qui tam actions can be prospectively released," Pet. 24, likewise ignores the California Supreme Court's state-law ruling that a prospective waiver of a PAGA claim *as a condition of employment* violates public policy. Pet. App. 54a–56a. CLS cites federal decisions concerning circumstances under which federal qui tam claims can be waived (decisions that involved *settlements*, not anticipatory waivers in employment agreements). But whether and when a particular claim is subject to waiver is a matter determined by the law of the jurisdiction that creates the claim. That federal law permits waivers of federal qui tam claims in certain circumstances has no bearing on whether the California court was "correct" in holding that it violates California public policy to permit waiver of this type of qui tam claim in an employment agreement. That holding is authoritative with respect to that state-law issue.

The only question potentially subject to review by this Court is whether the FAA preempts the California Supreme Court's holding that PAGA claims are not subject to waiver in an employment agreement. The state court's holding that the FAA does not preempt the state-law prohibition of such waivers is, as explained above, fully consistent with this Court's precedents. That CLS must resort to characterizing the California court's authoritative state-law rulings

as "sophistry" (Pet. 24) to try to bolster its preemption arguments is all the more reason to refuse its request for review of the state supreme court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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