No. 14-790

IN THE

Supreme Court of the United States

BRIDGESTONE RETAIL OPERATIONS, LLC,
F/K/A MORGAN TIRE & AUTO, LLC,

Petitioner,

v.

MILTON BROWN, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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April 27, 2015

QUESTIONS PRESENTED

California's Labor Code Private Attorneys General Act of 2004 (PAGA) creates an action in which an individual plaintiff may seek civil penalties for Labor Code violations on behalf of the state, with the majority of the penalties recovered paid to the state, and the rest paid to the plaintiff and other victims of the violations. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), the California Supreme Court held that an arbitration clause in an employment agreement may not prospectively waive an employee's entitlement to bring PAGA claims. In this case, the California Supreme Court ordered a lower court's opinion vacated and remanded for further consideration in light of *Iskanian*. The questions presented by this case are:

1. Whether the California Supreme Court's interlocutory order transferring this case to the California Court of Appeal for further consideration in light of *Iskanian*—a ruling that did not determine whether arbitration of respondents' PAGA claims 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) preempts the holding in *Iskanian* and requires California to enforce a provision in an arbitration agreement that purports to bar an employee from asserting claims under PAGA in any forum.

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INTRODUCTION

California's distinctive Private Attorneys General Act (PAGA), Cal. Lab. Code §§ 2698 *et seq.*, 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. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), the California Supreme Court held that an arbitration clause in an employment agreement may not prospectively waive an employee's entitlement to bring PAGA claims in some forum. The defendant in *Iskanian* filed a petition for certiorari arguing that the Federal Arbitration Act (FAA) preempts that holding. On January 20, 2015, this Court denied certiorari. 135 S. Ct. 1155 (2015).

In this case, the California Supreme Court vacated a lower appellate court's decision and remanded for further consideration in light of *Iskanian*. The court of appeal later applied *Iskanian* to invalidate part of an arbitration agreement that purported to bar claims under PAGA, found the arbitration agreement otherwise enforceable, and remanded to the trial court for a determination whether the PAGA claims would proceed in arbitration or in court.

The petition for certiorari filed by Bridgestone Retail Operations in this case raises the same claims of FAA preemption that were asserted in *Iskanian*, this time to challenge the California Supreme Court's order vacating and remanding in light of *Iskanian*. Nothing has changed in the short time since certiorari was denied in *Iskanian* to make the issue worthy of review. The reasons for denying review offered in the brief in opposition in *Iskanian* apply fully here.

First, the California Supreme Court decision that Bridgestone challenges is not "final" under 28 U.S.C. § 1257 because it neither terminated the litigation nor finally decided whether arbitration of the PAGA claim would be compelled. Indeed, the decision is even less final than was *Iskanian* because it did not decide anything about the enforceability of any part of the arbitration agreement except that it should be reconsidered by the court of appeal. The court of appeal's subsequent ruling is not the subject of the petition, which is directed only to the California Supreme Court's decision vacating and remanding.

Second, even if this Court had jurisdiction under § 1257, the order below would not merit review. As was true three months ago, *Iskanian* does not conflict with decisions of any federal court of appeals or state supreme court. Nor does *Iskanian* conflict with any decision of this Court. It exempts no claims from arbitration, but only holds that the FAA does not require enforcement of agreements that waive altogether the pursuit of representative claims on behalf of a state. This Court has never addressed an agreement containing such a waiver, much less enforced it.

Indeed, this case does not even present the question posed by Bridgestone, which is whether the FAA contains an "exception" for claims made by private parties on behalf of the state. *Iskanian* did not hold that PAGA claims fall within an "exception" to the FAA. It did not address whether such claims are arbitrable, but only whether they may be waived. The order in this case vacating and remanding likewise created no such "exception."

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 civil penalties for the state, with a share going to the individual plaintiffs and other employees. Before PAGA's enactment in 2003, only the state could obtain such penalties. *See Iskanian*, 327 P.3d at 145–46. PAGA now authorizes recovery of penalties under the Labor Code 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." *Iskanian*, 327 P.3d at 148. PAGA actions differ from classic qui tam actions in that "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.* Still, because a PAGA action is aimed at deterring and punishing Labor Code violations 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.* Every PAGA action, whether implicating violations involving one or a thousand employees, is a "representative" action on behalf of the state. *Id.* at 151.

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 authorizes 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. *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 civil 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 … 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), cmt. 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 class action. It is "representative" in that the plaintiff represents the state's interest in imposing civil penalties 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." *Iskanian*, 327 P.3d at 151.

2. The *Iskanian* Decision

Iskanian was a lawsuit alleging violations of California wage-and-hour laws. The plaintiff sought both to bring a class action and to pursue a representative claim under PAGA. The defendant moved to compel arbitration under an agreement that barred both class actions and representative actions. The plaintiff argued that the class-action ban was invalid under the California Supreme Court's decision in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), which had held class bans in employment arbitration agreements unenforceable in some circumstances; that the ban on class and representative actions violated federal labor laws; and that the employer had waived the right to

arbitrate. Of most significance here, the plaintiff also argued that the ban on representative actions was unenforceable because it would completely foreclose the pursuit of a PAGA claim.

After a court of appeal enforced the arbitration agreement, the California Supreme Court in *Iskanian* largely affirmed but reversed in part. The court concluded that this Court's decisions 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), required it to overrule *Gentry* and enforce the class-action ban. The court also held that the class-action ban did not violate federal labor laws, based largely on the reasoning of *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). And the court held that the defendant had not waived arbitration because it would have been futile to seek to enforce the arbitration clause before *Concepcion*.

All seven justices, however, agreed that the agreement was unenforceable to the extent it purported to bar the plaintiff from pursuing a PAGA claim in any forum. The court began by holding that, given 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 under state law. The court then held that the FAA does not 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 be-

half, *Iskanian*, 327 P.3d at 151, 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," *id.* at 149, and because the state is not a party to the 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 between the parties. *See id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Having held that a PAGA claim must be available in "some forum," *id*. at 155, the court remanded for consideration of whether the forum for the PAGA claims in *Iskanian* would be arbitral or judicial. *Id*.

Justices Chin and Baxter concurred in all aspects of the judgment. As to the PAGA waiver, 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 157 (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 158.

3. The Proceedings in This Case

Respondents Milton Brown and Lee Moncada are automobile mechanics who were employed by Bridgestone in California. They brought this action in a Cali-

fornia state court, claiming that Bridgestone violated California wage-and-hour laws by not properly recording time worked, not paying overtime, not providing meal breaks and rest periods, not paying minimum wage, not providing accurate wage statements, not paying wages on time, and not paying wages due at the time of discharge. Brown and Moncada sought to represent a class of similarly situated employees and also asserted claims for civil penalties under PAGA.

Bridgestone moved to compel arbitration under an agreement that, like the one in *Iskanian*, purported to prohibit employees from pursuing any claims "on a class basis or as a collective action or representative action," either in court or in arbitration. Pet. App. 164a–65a. The trial court enforced both the class- and representative-action bans.

Brown and Moncada sought review in the California Court of Appeal, which, treating the proceeding as one for a writ of mandate, vacated the trial court's order in part. The court of appeal rejected the plaintiffs' arguments that Bridgestone had waived its right to arbitrate and that the class-action ban violated federal labor law, but it held that the prohibition on PAGA actions was unenforceable under California law, and that the FAA did not require its enforcement. The court held that the remaining claims were subject to individual arbitration but that the PAGA claims were not (because the agreement purported to ban their assertion but did not provide that they would be arbitrated if that ban were unenforceable).

Bridgestone petitioned for review in the California Supreme Court, which granted the petition and deferred action pending its decision in *Iskanian*. After issuing *Iskanian*, the California Supreme Court trans-

ferred the case back to the court of appeal with instructions that it vacate its decision in its entirety and reconsider the case in light of *Iskanian*. It is that transfer order—and only that order—of which Bridgestone seeks review.

Following the California Supreme Court's transfer order, the court of appeal, in a decision unmentioned by Bridgestone, issued a new opinion. *See Brown v. Super. Ct.*, 2014 WL 5409196 (Cal. Ct. App. Oct. 24, 2014). In the post-remand decision, the court first subjected its holding on waiver to a full-scale reanalysis in light of *Iskanian* and other California case law, and again held that Bridgestone had not waived the right to arbitrate. *Id*. at *4–6. The court likewise reaffirmed that the arbitration agreement's class-action ban does not violate federal labor laws. *Id*. at *6.

As to the purported ban on representative claims, the court followed *Iskanian* in holding it unenforceable as to PAGA claims. *Id*. at *6–7. However, the court altered its previous directions to the trial court. Unlike its earlier decision, which had held the PAGA claim was not subject to arbitration, the court's new decision directed the trial court to determine "(1) whether the parties would prefer to resolve the representative PAGA claim through arbitration; (2) if not, whether it is appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation; and (3) if such bifurcation occurs, whether the arbitration should be stayed pursuant to Code of Civil Procedure section 1281.2." *Id*. at *7.

Bridgestone has not sought further review of the court of appeal's decision, and the trial court has not yet acted.

REASONS FOR DENYING THE WRIT

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

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction only over "[f]inal judgments or decrees" of state courts.

> 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 order below is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. Here, as in *Iskanian*, the case came to the California appellate courts on interlocutory review of a decision compelling arbitration. The intermediate appellate court, on its initial review, affirmed the trial court's determination that the arbitration agreement's class-action ban was enforceable but held that the trial court had erred in enforcing the waiver of PAGA claims, and remanded. Subsequently, in the decision that Bridgestone asks this Court to review, the California Supreme Court decided *no* issues con-

cerning the enforceability of the arbitration agreement, but only transferred the case back to the court of appeal with directions that it vacate its decision and reconsider all the issues in light of *Iskanian*.

The California Supreme Court's order thus did not, as Bridgestone states, "refuse[] to enforce an arbitration agreement under the Federal Arbitration Act." Pet. 1. It left the enforceability of the agreement to further consideration, and it said nothing about the consequences in the trial court of whatever the court of appeal ultimately decided as to the agreement's enforceability. In no sense was the transfer order the "*final* word of a final court." *Market St.*, 324 U.S. at 551 (emphasis added).

The subsequent decision of the California court of appeal, which Bridgestone does not mention, let alone seek to have reviewed, was likewise not final. It held that the arbitration agreement was enforceable except for its prohibition of PAGA representative actions, but it did not resolve whether the PAGA claim would ultimately be arbitrated or litigated in court. Instead, it remanded to the trial court for resolution of that issue and related matters concerning the scope and timing of any arbitration. Those issues remain unresolved, as do the merits of the plaintiffs' claims.

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. *See*

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 the plaintiffs will prevail on their PAGA claims. *See Thomas*, 532 U.S. at 778. Whether the claims will proceed in arbitration or in court is undecided, and the plaintiffs may not succeed in proving their claims wherever they ultimately 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. Here, the highest court did not finally decide the federal issue; moreover, the federal issue will not necessarily survive and require decision regardless of the outcome of future proceedings. If the PAGA claims fail on the merits, the FAA preemption issue will be moot. *Jefferson*, 522 U.S. at 82. In addition, the California Supreme Court's transfer order (the only decision Bridgestone challenges) reopened the question whether Bridgestone waived arbitration, making the survival of the FAA preemption issue dependent on the court of appeal's decision of the waiver issue on remand.

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. The California Supreme Court's order did not present Bridgestone with such a situation. It could have sought review of the court of appeal's decision on remand, and it may still 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. If such review were sought, the interlocutory appellate decisions that have so far occurred 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*.

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). The transfer order Bridgestone challenges did not finally decide any federal issue, and denial of immediate review would not "seriously erode federal policy."

Specifically, the order did not deny arbitration of any claim, and the scope of any arbitration is still to be decided on remand. The case is thus 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 arbitration were "final" under *Cox*. Bridgestone's perfunctory citation of *Southland* (Pet. 1) thus falls far short of establishing this Court's jurisdiction over an order that merely vacates and remands a lower court decision and leaves open the question of the extent to which arbitration will ultimately be compelled.[1] Moreover, because federal policy does not favor use of compulsory arbitration to *waive* claims, *Iskanian*'s holding that PAGA claims may not be waived—unlike a holding denying arbitration—in no way threatens federal policy.

A party invoking *Cox* category four must demonstrate not just that a state 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 Bridgestone to avail itself of the appeal California law permits from such a disposition will not erode federal policy. If, instead, the trial court orders arbitration of the PAGA claim, no federal policy will be eroded by requiring Bridgestone 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 arbitra-

[1] The petitioner's reply in *Iskanian* argued that a recent order of this Court granting certiorari, vacating, and remanding a California appellate decision in a similar procedural posture supports jurisdiction under § 1257, but decisions that do not address jurisdiction are not precedents as to jurisdiction. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448–49 (2011).

tion, 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.

This Court's consideration of whether to review the preemption claim would be better informed if the Court knew the outcome of the remand proceedings—*i.e.*, whether the PAGA claim will proceed in court or arbitration. Federal policy would thus be enhanced, not eroded, by awaiting the result of the remand. In addition, Bridgestone 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.[2] 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 other appellate rulings will provide further opportunities for this Court to address the issue if necessary, and will better inform the Court's judgment about whether review is warranted. The issue whether the FAA preempts *Iskanian*'s holding has arisen in a number of federal district court actions but has yet to be decided by the Ninth Circuit. Three such cases are fully briefed and scheduled for oral argument before a panel of the

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[2] For example, if the trial court compels arbitration of the PAGA claim, Bridgestone may say that that result violates *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

Ninth Circuit on June 3 and 4, 2015,[3] and at least one other appeal on the issue is pending.[4] 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 might 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. Immediate review of a non-final state-court order is by no means essential to the defense of federal policy.

In short, the California Supreme Court's transfer order, similar to a decision of this court to grant certiorari, vacate, and remand a lower court's ruling, is in no sense the state courts' *final* word in this case. This Court lacks jurisdiction under § 1257.

II. The question presented does not merit review.

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

Like the petitioner in *Iskanian*, Bridgestone can point to no federal appellate or state supreme court decision other than *Iskanian* addressing whether the FAA mandates enforcement of an agreement to waive PAGA claims or, more generally, whether the FAA preempts state laws providing that arbitration clauses

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[3] *Hopkins v. BCI Coca Cola Bottling Co.*, No. 13-56126 (9th Cir.); *Sierra v. Oakley Sales Corp.*, No. 13-55891 (9th Cir.); *Sakkab v. Luxottica Retail N. Am., Inc.*, No. 13-55184 (9th Cir.).

[4] *Hernandez v. DMSI Staffing, LLC*, No. 15-15366 (9th Cir.).

may not waive qui tam claims. *Iskanian* remains the only decision at that level addressing the application of *Concepcion* and *American Express* in this unusual state-law context. It is thus unsurprising that this Court declined to review *Iskanian*, and, given that no conflict has arisen since this Court denied certiorari in that case, there is still less reason to review an order that merely remanded a lower court decision for further consideration in light of *Iskanian*.

While federal *district* court decisions in the wake of *Iskanian* have reached different results, several of the more recent and better reasoned decisions have followed *Iskanian*. *See Alvarez v. AutoZone, Inc.*, 2015 U.S. Dist. LEXIS 48447 (C.D. Cal. April 13, 2015); *Zenelaj v. Handbook Inc.*, __ F. Supp. 3d __, 2015 WL 971320 (N.D. Cal. March 3, 2015); *Hernandez v. DMSI Staffing, LLC*, __ F. Supp. 3d __, 2015 WL 458083 (N.D. Cal. Feb. 3, 2015) (appeal pending); *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014). Others have disagreed. *See, e.g.*, *Nanavati v. Adecco USA*, __ F. Supp. 3d __, 2015 WL 1738152 (N.D. Cal. April 13, 2015). But even district courts that have declined to follow *Iskanian* have conceded that the opposing view is "thorough and well reasoned," *id*. at *7, and have "recognize[d]" that the argument against preemption finds support in the fact 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).

Such respectful disagreement among district court judges within the same circuit is not the sort of con-

flict 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 with multiple appeals pending before it, *see supra* 15, the court will soon decide the issue. When it does so, the Ninth Circuit may agree or disagree with *Iskanian*.[5] In either event, its reasoning will shed additional light on the application of FAA preemption analysis to California's prohibition on employment agreements that waive PAGA claims. Should a conflict develop, this Court may consider whether it justifies review; conversely, congruence of results and reasoning may indicate that review is unwarranted.[6] Further appellate considera-

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[5] The Ninth Circuit's opinions demonstrate that it is willing to disagree with state courts on FAA preemption when it considers such disagreement warranted. *See*, *e.g.*, *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013); *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151 (9th Cir. 2013); *Coneff v. AT&T Corp*., 673 F.3d 1155 (9th Cir. 2012).

[6] The issue may also arise in cases outside the Ninth Circuit because claims governed by California law, including PAGA claims, are litigated in other state and federal courts. *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). Private attorney general provisions in laws of other states might raise similar issues. *Cf. Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d 957, 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). Thus, if Bridgestone's positions have merit,

(*Footnote continued*)

tion of the issue will in either case contribute to this Court's evaluation of whether the issue merits review. Meanwhile, absent a conflict over *Iskanian*'s application of preemption principles to the unusual PAGA right of action, the reasons ordinarily justifying review by this Court remain lacking. *See* S. Ct. R. 10(b).

B. *Iskanian* is fully consistent with this Court's precedents.

Like the petitioner in *Iskanian*, Bridgestone seeks review principally on the theory that *Iskanian* conflicts with this Court's FAA jurisprudence. But its arguments are no more persuasive than those of the petitioner in *Iskanian*, and they provide no basis for granting review of the transfer order here (let alone summarily reversing it) in the wake of the Court's denial of review in *Iskanian* itself. Bridgestone's petition, like the one in *Iskanian*, 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 conflict of decisions within the meaning of this Court's Rule 10(c).

Rather, Bridgestone argues that *Iskanian* 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, and Bridgestone's variations on the arguments presented in *Iskanian* do not demonstrate otherwise.

Indeed, other than that Bridgestone thinks its merits arguments are better than those presented in

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there are other possible opportunities for a conflict in authority to arise.

the petitioner's reply brief in *Iskanian*, *see* Bridgestone Supp. Br. 1–2, Bridgestone offers no reasons why, having denied certiorari in *Iskanian*, this Court should review this case—in which the California Supreme Court decided nothing. Far from demonstrating "conclusively" (Supp. Br. 2) that *Iskanian* was wrongly decided, Bridgestone's arguments, like those in *Iskanian*, fail to show that this case is one of those rare ones that merit review when a conflict of authority does not exist and an issue is still making its way through the federal courts. Indeed, this case is less suitable for review than *Iskanian*, not only because of the nature of the order below, but because the question Bridgestone seeks to present is not even posed by the case (or even by *Iskanian*).

1. *Iskanian* creates no "exception" to the FAA.

Bridgestone's sole question presented is whether the FAA "contains an implicit exception for claims brought by private parties when state law treats the claims as being brought 'on behalf of the state.'" Pet. i). Bridgestone's principal argument is that *Iskanian* improperly exempted PAGA claims from the FAA, in violation of the principles of such cases as *Perry v. Thomas*, 482 U.S. 483, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012). *See* Pet. 15–16.

But *Iskanian* did not hold that PAGA claims are *nonarbitrable* or not subject to the FAA. *Iskanian* held only that an employment agreement cannot prospectively waive an employee's right to bring a PAGA claim "in some forum," *Iskanian*, 327 P.3d at 155; *see also id*. at 159 (Chin, J., concurring), and left open the

possibility that the forum could be arbitration. Likewise, the decisions in this case leave undecided whether the PAGA claims will ultimately be arbitrated. Bridgestone's question is thus not presented by either *Iskanian* or the order in this case.

Moreover, *Iskanian* does not conflict with *Marmet*, 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 *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), *cert. denied*, 134 S. Ct. 2724 (2014). *Iskanian* 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 any forum. *Iskanian*, 327 P.3d at 155.

Nor does *Iskanian* reflect "hostility" to arbitration, as Bridgestone repeatedly asserts. Pet. 4, 15, 28–31. In disallowing waiver of PAGA claims, *Iskanian* neither placed arbitration agreements on an "unequal 'footing'" with other contracts, *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995), nor "invalidate[d] [an] arbitration agreement[] under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry*, 482 U.S. at 492 n.9. *Iskanian* provides even-handedly that an employment agreement may not forbid employees to bring PAGA actions, whether or not the prohibition is in an arbitration agreement. *Iskanian*, 327 P.3d at 133, 148–49. 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 *Iskanian* opinion, as a whole, confirms that its holding concerning PAGA does not reflect hostility toward arbitration. Significant aspects of the court's holding unambiguously favored enforcement of arbitration agreements. Applying this Court's decision in *Concepcion*, the court explicitly overruled its decision in *Gentry* and held class-action prohibitions in employment arbitration agreements enforceable because class actions would "interfere[] with fundamental attributes of arbitration." *Iskanian*, 327 P.3d. at 137.[7]

[7] Bridgestone does not argue that arbitration of a PAGA representative action would similarly "interfere[] with fundamental attributes of arbitration." *Concepcion*, 131 S. Ct. at 1748. As *Iskanian* pointed out, "[r]epresentative actions under the PAGA, (*Footnote continued*)

Iskanian likewise rejected a challenge to arbitral class-action bans based on federal labor laws. *Id*. at 137–43. And in holding that the defendant had not waived its right to arbitrate, *Iskanian* emphasized that "[i]n light of the policy in favor of arbitration, 'waivers are not to be lightly inferred.'" *Id*. at 143 (citation omitted).

Amidst all these rulings favorable to arbitration, *Iskanian*'s unwillingness to enforce the provision barring PAGA claims reflects not hostility to arbitration, but refusal to expand *approval* of arbitration to encompass agreements that waive claims—particularly claims belonging to the state. Indeed, the court's two staunchest pro-arbitration justices, Justices Chin and Baxter,[8] agreed that the holding that "the arbitration agreement is invalid insofar as it purports to preclude plaintiff … from bringing in any forum a representative action under [PAGA] … is not inconsistent with the FAA." *Id*. at 155 (Chin, J., concurring).

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unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." *Iskanian*, 327 P.3d at 152. 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. *See Arias*, 209 P.2d at 929–34.

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

2. This Court's FAA decisions do not require enforcement of agreements that strip states of power to authorize enforcement actions on their behalf.

Iskanian held—as a matter of state statutory construction—that the state is the "real party in interest" in PAGA actions. 327 P.3d at 151. 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 as a PAGA qui tam plaintiff, is thus fundamentally "a dispute between an employer and the *state*," acting "through its agents." *Id*. Enforcing a waiver of PAGA claims in an employer's arbitration agreement would effectively impose that waiver on a governmental body that is not party to the agreement, and prevent the state from asserting its claims through a party its legislature deemed an appropriate representative.

Bridgestone contends that *Iskanian* was wrongly decided because the FAA does not exempt claims brought on behalf of a state. Pet. 16–22. Again, however, Bridgestone's argument rests on its mischaracterization of *Iskanian* as holding that PAGA claims are not subject to arbitration. What *Iskanian* in fact held was that to avoid binding the state to a waiver to which it did not agree, an employee must be permitted to bring a PAGA claim *in some forum*. *See* 327 P.3d at 155. *Iskanian* did not decide whether that forum would be arbitral or judicial, and did not hold that an agreement to *arbitrate* PAGA claims—as opposed to an agreement to *waive* them—was outside the FAA.

Bridgestone's argument (Pet. 20–21) that a state may not rely on its own policy preferences to foreclose

arbitration of a claim arising out of a contract that contains an arbitration agreement enforceable under section 2 of the FAA, 9 U.S.C., § 2, is thus beside the point: *Iskanian* does not hold that a state can displace arbitration for unrelated policy reasons or allow employees to avoid arbitration to advance state interests. Nor does *Iskanian* hold that "statutory claims fall outside the scope of the FAA" if they are designed to further social policies. Pet. 20.

Bridgestone's citation of *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), offers no support for its contention that *Iskanian's* "real party in interest" analysis conflicts with this Court's jurisprudence. *Hood* held that under the language of the statutory provision at issue there (which defines "mass actions" subject to federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)), the identity of the "real party in interest" in an action brought by a state attorney general on behalf of the state is not determinative of whether the action meets the statutory definition. 134 S. Ct. at 742–45. That holding, resting on the language and context of the specific statute before the Court, has no bearing on whether the FAA, which incorporates ordinary principles of contract law, *see* 9 U.S.C. § 2, requires that a waiver of the right to bring a claim be enforced against a real party in interest who is not a party to the purported contractual waiver.

In fact, none of this Court's decisions enforcing arbitration agreements has even touched on whether such an agreement can waive a claim on behalf of a state. As *Iskanian* 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." 327 P.3d at 150. Moreover, the "one exception," *EEOC v. Waffle House*, "does not support [the] contention that the FAA preempts a PAGA action." *Id*. at 151.

Waffle House 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 *Iskanian* 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." 327 P.3d at 151. Indeed, none of this Court's decisions suggests such preemption.

Bridgestone argues that *Waffle House* does not compel the outcome below because its holding was that the governmental party itself could not be required to *arbitrate*, not that its rights could not be limited in other respects. Pet. 19. But *Waffle House*'s rejection of the notion that an arbitration agreement can waive a non-party's statutory remedies, 534 U.S. at 295, provides strong support for *Iskanian's* holding. Moreover, Bridgestone's burden is to demonstrate that *Iskanian* is in *conflict* with this Court's decisions, not just that those decisions do not compel *Iskanian*'s

outcome. Nothing in *Waffle House*—the Court's most analogous decision—supports that argument.

Bridgestone characterizes *Iskanian*'s narrow holding that an employee must be permitted *some* forum in which to assert a PAGA claim on behalf of the state as "sweeping and unprecedented," Pet. 22, and contends that *any* state-law claim could similarly be "label[ed]" as one on behalf of the state. Pet. 29; Supp. Br. 2. But when 75 percent of the recovery in an action will go directly to the state, calling the state the real party in interest is no mere "superficial moniker." Supp. Br. 2. Nothing in *Iskanian* suggests that a state could slap the same label on an action in which the state had no similar interest. All rights of action under state law may advance enforcement of state law, but not all seek relief directly on behalf of the state. Bridgestone's argument ignores that the state's status as the real party in interest rests not just on its "strong policy interest," Supp. Br. 2, but on the fact that a PAGA action seeks relief for the state itself.

Iskanian expressly stated that it would *not* allow a state to "deputiz[e] employee A to bring a suit for the individual damages claims of employees B, C, and D." *Id*. at 152. 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*. (emphasis added). *Is-*

kanian's carefully limited holding threatens no end runs around the FAA.

By contrast, Bridgestone's position would severely limit the state's ability to pursue its claims. By extracting such agreements from all its employees, Bridgestone will, if its preemption argument is accepted, have successfully immunized itself from liability under PAGA. That result would hardly be inconsequential, as Bridgestone suggests. Pet. 21. 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.

Indeed, holding that a federal statute aimed at enforcing agreements to resolve private disputes preempts a state's ability to assert its claims against those who violate its laws would violate fundamental preemption principles. As *Iskanian* 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 152 (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 enforcement of state law. Its purpose is to render arbitration agreements in contracts affecting commerce enforceable as between the contracting parties. It em-

bodies 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." *Id.*

3. This Court's FAA decisions do not require enforcement of agreements barring assertion of statutory rights.

The arbitration agreement in this case, like the one in *Iskanian*, purports to bar employees 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." *Iskanian*, 327 P.3d at 151.

As the concurring Justices in *Iskanian* pointed out, 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 specific kinds of claims, or particular forms of penalties 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); *McMahon*, 482 U.S. at 229–30. An agreement to arbitrate is thus not "a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Indeed, this Court has insisted it would "condemn[] … as against public policy" an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637, n.19.

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 despite its *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* strongly support *Iskanian*'s outcome. A 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.

Bridgestone characterizes the concurring justices' position in *Iskanian* as relying on the view that an arbitration agreement must allow "effective vindication" of rights, and it contends that the "effective vindication" doctrine is inapplicable to state-law claims. Pet. 24–26. But the concurring justices did not assert that an arbitration agreement can be disregarded merely because arbitration would not be a practically effective means of vindicating a state-law claim. Indeed, they joined the majority in holding that the interest in ensuring "effective vindication" of rights could not sustain the *Gentry* decision. They concluded that the defect in the agreement in *Iskanian* was that it "*forbids* [the plaintiff] from asserting his statutory rights under PAGA in any forum." *Iskanian*, 327 P.3d at 127 (emphasis added).

The principle that the FAA does not require enforcement of agreements that *forbid* assertion of claims applies equally to state and federal 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. 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 *arbi-*

trate claims enforceable, 9 U.S.C. § 2, but provides no authorization for enforcement of agreements to *waive* claims regardless of their source. The FAA therefore does not conflict with state laws disallowing such waivers. Moreover, a state-law rule providing that employment contracts may not waive statutory claims is a general principle of state contract law applicable both to arbitration agreements and other contracts. Thus, such a rule 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. Bridgestone cites no holding of this Court or any other that the FAA requires enforcement of an agreement to waive, as opposed to arbitrate, a claim.[9]

Here, the arbitration agreement expressly precludes *any* PAGA representative claim. Bridgestone suggests that this prohibition is acceptable because it still permits employees to obtain individual remedies (such as back wages) otherwise available for violations of their rights under the wage-and-hour laws. Pet. 26–28. But Bridgestone concedes that its ban on PAGA representative actions precludes an employee from recovering even his own personal share of the addi-

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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 waive a state-law claim. The lower-court decisions cited by Bridgestone (Pet. 25–26) similarly hold that arbitration agreements may be enforced in the face of arguments that arbitration poses practical obstacles to effective enforcement of state law (such as high costs or class-action bans), not that the FAA requires enforcement of agreements waiving state-law claims.

tional statutory penalties that PAGA entitles him to pursue, as such penalties can be obtained only in a PAGA representative action. Pet. 27. Nothing in *American Express*, *Concepcion* or any of this Court's rulings supports such use of an arbitration agreement to prohibit assertion of a claim for relief or suggests that the FAA preempts state law precluding enforcement of such an agreement. Rather, as the two concurring justices in *Iskanian* recognized, this Court's decisions strongly support the view that an agreement that "purports to preclude [plaintiffs] from bringing a PAGA action *in any forum*" is unenforceable. *Iskanian*, 327 P.3d at 158.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 27, 2015