No. 16-1503

IN THE

Supreme Court of the United States

BLOOMINGDALE'S, INC.,

Petitioner,

v.

BERNADETTE TANGUILIG,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

California law provides that an employment agreement may not force an employee to waive the right to bring representative claims pursuant to California's Private Attorneys General Act (PAGA). The California Court of Appeal below held that the Federal Arbitration Act (FAA) does not preempt this anti-waiver rule, and rejected defendant's demand for arbitration of a supposed "individual" PAGA claim. Defendant and Petitioner Bloomingdale's, Inc. now asserts that the question presented by this case is whether the FAA "preempts a state-law rule that prohibits the enforcement of a pre-dispute arbitration agreement with respect to a dispute covered by the scope of that agreement unless the State consents."

The only questions properly presented, however, are as follows:

1. Does Petitioner's failure to present the state-consent issue to the Supreme Court of California bar it from presenting that issue in its Petition for a Writ of Certiorari?

2. May Petitioner rely on the FAA to demand arbitration of an "individual" PAGA claim when, as matter of California law, a PAGA claim can only be brought on a representative basis?

3. May Petitioner rely on the FAA to challenge the California rule prohibiting predispute waivers of PAGA claims when such a challenge is beyond the scope of the Petition's statement of the question presented?

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INTRODUCTION

Petitioner Bloomingdale's, Inc. presents a question that it did not properly raise below. Bloomingdale's seeks review of a California appellate court decision affirming the denial of Bloomingdale's motion to compel "individual" arbitration of claims asserted against it pursuant to California's Private Attorneys General Act (PAGA). Bloomingdale's argues that the appellate court based its holding on the view that a PAGA claim cannot be submitted to arbitration unless the State of California consents; and incorrectly asserts that this consent requirement was first established by the California Supreme Court in *Iskanian v. CLS Transportation Services, LLC*, 327 P.3d 129 (Cal. 2014). The only question Bloomingdale's Petition purports to present concerns whether such a consent requirement would be preempted by the Federal Arbitration Act (FAA).

Bloomingdale's did not present this question to the California Supreme Court. When Bloomingdale's sought discretionary review from that court, it only raised issues relating to the *Iskanian* rule against preemptive waivers of representative PAGA claims. Bloomingdale's did not ask the California Supreme Court to consider the appellate court's claimed imposition of a consent requirement; its petition for review did not even refer to its current contention that the court of appeal wrongly imposed a requirement of state consent. Nor did Bloomingdale's give the California Supreme Court a chance to rule on whether such a requirement would be consistent with the portion of *Iskanian* holding that a defendant "must answer ... representative PAGA claims in some forum"—without foreclosing the possibility that parties could "resolve a

representative PAGA claim through arbitration." *Id.* at 155.

Because Bloomingdale's seeks review of a decision of a lower state court, it bears the burden of showing that it gave the state court of last resort "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Bloomingdale's cannot meet this burden. Thus, even if there were disagreements among lower courts over whether state-consent requirements for arbitration of PAGA suits or similar actions were preempted—and Bloomingdale's identifies no such conflict—this case would not be an appropriate vehicle for considering the issue.

There also are additional, fatal defects in the Petition. Although Bloomingdale's seeks to argue that the state court of appeal erred in holding that the state's consent is required to arbitrate a representative PAGA action, that issue is not presented here. Bloomingdale's did not move to compel arbitration of the *representative* PAGA claims asserted in the case. The arbitrability of representative claims was never at issue in this case; and issues relating to the arbitrability of representative PAGA claims thus cannot be addressed in proceedings before this Court.

The issues that Bloomingdale's seeks to raise with respect to the arbitrability of an "individual" PAGA claim also are not properly before this Court. As a matter of California law, a "PAGA claim is not an individual claim." *Reyes v. Macy's, Inc.*, 135 Cal. Rptr. 3d 832, 836 (Cal. Ct. App. 2011). Whether Bloomingdale's can carve off some portion of the representative PAGA claims asserted by Tanguilig for "individual"

arbitration is a state-law question that this Court lacks authority to decide.

To the extent the Petition argues that the FAA preempts any California law declaring predispute waivers of the right to bring representative PAGA actions invalid, Bloomingdale's violates this Court's Rule 14.1(a)—which limits the issues that may be considered by the Court to those that are "fairly included" within the question presented by a petitioner. Bloomingdale's chose to frame the question presented by its Petition to focus solely on whether arbitration of PAGA claims requires the state's consent. Having done so, it may not expand the scope of the Petition by asserting arguments relating to California's rule against PAGA waivers.

Finally, even if they were properly presented by the Petition, Bloomingdale's attacks on *Iskanian* and its holdings prohibiting representative action waivers are neither fresh nor compelling. As Bloomingdale's acknowledges, it previously advanced the same arguments in support of its request for certiorari in *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110, which this Court denied just three months ago. 137 S. Ct. 2267 (2017). As in *Vitolo*, Bloomingdale's has not raised any issues warranting review by this Court.

STATEMENT

A. California's Private Attorneys General Act.

"In September 2003, the [California] Legislature enacted the Labor Code Private Attorneys General Act of 2004," California Labor Code § 2698 *et seq*. *Arias v. Superior Court*, 209 P.3d 923, 929 (Cal. 2009). The intent of California's Legislature was to establish "civil

penalties for Labor Code violations significant enough to deter violations" and to address the "shortage of government resources to pursue enforcement" of Labor Code violations. *Iskanian*, 327 P.3d at 146 (citation and internal quotation marks omitted).

PAGA "allow[s] aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations …." *Arias*, 209 P.3d at 929. "Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.'" *Id*. at 930 (quoting Cal. Labor Code § 2699(i)). An employee's PAGA suit for civil penalties "functions as a substitute for an action brought by the government itself," *id*. at 933, and "'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Id*. at 934 (quoting *People v. Pacific Land Research Co*., 569 P.2d 125, 129 (Cal. 1977)).

"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 PAGA aims to deter and punish Labor Code violations rather than compensate individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id*.

PAGA actions may be, and typically are, brought by an individual "employee plaintiff suing ... as the proxy or agent of the state's labor law enforcement agencies." *Arias*, 209 P.3d at 933. In such cases, where

"an employee's representative action against an employer is seeking civil penalties" pursuant to PAGA, "class action requirements ... need not be met." *Id.* at 926.

B. *Iskanian.*

The employee plaintiff in *Iskanian* asserted individual claims, class claims, and a representative PAGA claim based on alleged violations of California wage-and-hour laws. The defendant employer moved to compel arbitration pursuant to the terms of an agreement containing waiver provisions that barred both class actions and representative PAGA actions. The California Supreme Court found that that the individual claims could be compelled to arbitration and that the class claims were subject to dismissal. It held that any state-law rule deeming the class-action waiver to be unenforceable was preempted by the FAA. *Iskanian*, 327 P.3d at 133.

But the California Supreme Court refused to enforce the representative-action waiver. The court held that, where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law," *id.* at 149; and, likewise, "that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." *Id.* at 133. It further ruled that the FAA does not preempt "a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." *Id.* at 152.

On the question of preemption, the court's five-justice majority determined that "the rule against PAGA waivers does not frustrate the FAA's objectives because ... the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." *Id*. at 149.

Justices Chin and Baxter, concurring in the judgment, set forth an alternate basis for concluding that the FAA does not preempt a state-law rule against enforcing PAGA waivers. They relied on this Court's holdings establishing 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 *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2301 (2013)). Based on this precedent, the concurring justices determined, "the conclusion that the arbitration agreement here is invalid insofar as it forbids Iskanian from asserting his statutory right under PAGA in any forum does not run afoul of the FAA." *Id*.

Having determined that the defendant employer "cannot compel the waiver of Iskanian's representative PAGA claim," the California Supreme Court unanimously held that the defendant "must answer the representative PAGA claims in some forum." *Id*. at 154–55. As the arbitration agreement in *Iskanian* provided "no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration," the court remanded the matter for further proceedings. *Id*. at 155.

Whether the State of California would need to consent to the arbitration of a PAGA claim is a question

that was neither presented nor discussed in *Iskanian*. The court announced no holding on that question.

C. Proceedings Below.

Respondent Bernadette Tanguilig, a Bloomingdale's employee, "filed a representative action on behalf of herself and fellow employees pursuant to [PAGA], alleging several Labor Code violations by the company." Pet. App. 2a. Subsequently, "Bloomingdale's moved to compel arbitration of Tanguilig's 'individual PAGA claim' and stay or dismiss the remainder of the complaint." *Id.* Bloomingdale's predicated its motion on an arbitration agreement that, like the agreement at issue in *Iskanian*, required all employment-related disputes to be submitted to arbitration and included a representative action waiver effectively barring employees from pursuing representative claims in any forum. *Id.* at 6a & n.2. Applying the *Iskanian* rule against representative action waivers, the trial court denied the motion. *See id.* at 7a.; *id.* at 21a–22a. Bloomingdale's appealed—asserting two, distinct arguments. It first contended that *Iskanian* had been wrongly decided, or had been superseded by the intervening decisions of this Court, and that the waiver provision of the arbitration agreement therefore could be applied to bar Tanguilig from pursuing any representative PAGA claim. *Id.* at 8a–12a. Bloomingdale's further asserted that, even if the representative action waiver was unenforceable, the courts could still "compel arbitration of 'the individual portion of Tanguilig's PAGA claim.'" *Id.* at 13a.

The appellate court addressed these two arguments separately. With respect to the contention that the terms of the arbitration agreement precluded Tanguilig from prosecuting a representative claim, the

court held that "*Iskanian* definitively resolves" the issue. *Id.* at 12a. It ruled, "The representative action waiver ... is unenforceable under state law and this California rule is not preempted by the FAA. Tanguilig's purported waiver of her right to bring a representative PAGA action is unenforceable." *Id.*

With respect to the second argument proffered by Bloomingdale's—its demand for arbitration of Tanguilig's "individual" PAGA claim—the court noted, "It is less than clear whether an 'individual' PAGA cause of action is cognizable, even in a judicial forum." *Id.* at 13a. As the court explained, at least two California appellate courts have already "concluded that 'a single representative PAGA claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim.'" *Id.* at 14a n.5 (quoting *Williams v. Super. Ct.*, 188 Cal. Rptr. 3d 83, 84 (Cal. Ct. App. 2015) and citing *Perez v. U-Haul Co. of Cal.*, 207 Cal. Rptr. 3d 605, 614 (Cal. Ct. App. 2016) (following *Williams*)).

The court determined that it did not need to decide "whether an 'individual PAGA claim' (i.e., a PAGA claim brought solely on behalf of the plaintiff) is cognizable." Pet. App. 14a. Rather, it stated that, whether or not such a claim is cognizable, "a PAGA plaintiff's request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer ... because the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim." *Id.* at 15a.

Having rejected both arguments advanced by Bloomingdale's in support of its appeal, the court af-

firmed the order denying the motion to compel arbitration. Bloomingdale's then petitioned the California Supreme Court for review.

Bloomingdale's petition for review presented a single question: "Does the Federal Arbitration Act preempt this Court's rule in *Iskanian v. CLS Transportation Services, LLC* … that conditions the enforcement of a predispute arbitration agreement on the availability of a procedure to pursue collective relief under the California Private Attorneys General Act?" Pet. for Review 1. Bloomingdale's petition assumed that a predispute agreement to arbitrate PAGA claims would be enforceable under California law, so long as representative claims were permitted in arbitration. The petition challenged *Iskanian's* holding that waivers of the right to bring representative PAGA claims are unenforceable. It did not seek reversal on the basis of the court of appeal's statements concerning state consent to arbitration. Indeed, the petition did not even mention those statements. The California Supreme Court denied the Bloomingdale's petition on March 1, 2017.

D. The Bloomingdale's Petitions for Certiorari.

Bloomingdale's filed this Petition for a Writ of Certiorari as the companion to another request for certiorari it filed a few months earlier. Bloomingdale's asserted, "This case involves the same issue as *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110." Pet. 32.

The request for certiorari in *Vitolo* was supported by seven amicus briefs and was fully briefed by the parties. The court denied certiorari on June 19, 2017, a week after this Petition was filed. 137 S. Ct. 2267.

REASONS FOR DENYING THE WRIT

A. Petitioner asks this Court to review a question that it did not raise below.

The Petition improperly asks this Court consider a new question that Bloomingdale's did not present to the California Supreme Court. In its state-court request for review, Bloomingdale's asked the California Supreme Court to overrule the *Iskanian* rule barring representative action waivers—arguing that the FAA preempted this rule, which "conditions the enforcement of a predispute arbitration agreement on the availability of a procedure to pursue collective relief under [PAGA]." Pet. for Review 1.

Bloomingdale's now claims to construe *Iskanian* as establishing "a state-law rule that prohibits the enforcement of a predispute arbitration agreement with respect to a dispute covered by the scope of that agreement unless the State consents"; and it asks the Court to consider "whether the Federal Arbitration Act preempts [this] state-law rule." Pet. i; *see also* Pet. 2–4. Bloomingdale's failed to present this question to the California Supreme Court. Its Petition thus is fatally deficient and must be denied.

Bloomingdale's seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). But "under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)).

It is "a petitioner's burden ... to demonstrate that it presented the particular claim at issue here with 'fair precision and in due time'" in state court proceedings. *Adams*, 520 U.S. 83, 87 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). The petitioner has the "burden of showing that the issue was properly presented" to the highest state court; and must demonstrate that "the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Id.* (*quoting Webb*, 451 U.S. at 501).

To implement this requirement, this Court's Rule 14.1(g)(i) provides that, when a petition seeks "review of a state court judgment," the petition's statement of the case must affirmatively specify when and how the petitioner raised the federal questions sought to be reviewed at all levels in the state courts. The Petition makes no effort to identify when and how Bloomingdale's raised the state-consent question in the California Supreme Court. And Bloomingdale's could not make the necessary showing even if it attempted to comply with Rule 14.1(g)(1).

Bloomingdale's never presented any question relating to the issue of "consent" to the California Supreme Court. It is not enough that the intermediate appellate court's opinion discussed this issue. In order to establish jurisdiction in this Court, a petitioner challenging the rulings of an intermediate state appellate court must have first sought "discretionary review by the state court of last resort." S. Ct. Rule 13.1; 28 U.S.C. § 1257(a).

A petitioner may not circumvent review in the state court of last resort by raising one question at the

state level and raising a different question when asking this Court to issue a writ of certiorari. Bloomingdale's attempt to do so is contrary to "powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts." *Webb*, 451 U.S. at 499.

The first of these policy considerations is "comity to the States." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law ...." *Webb*, 451 U.S. at 499.

In addition, there are substantial, practical grounds for requiring petitioners to first present federal questions to the state courts. *Id.* at 500–01. Not only does the requirement serve this Court's need for a properly developed record, but it also "permits the state courts to exercise their authority ... to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth," and "insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Id.*

All of these considerations are implicated here in the strongest way because Bloomingdale's is seeking to ascribe statements made by an intermediate appellate court to the state's highest court without ever having given that court an opportunity to consider their correctness. Bloomingdale's does not just argue that the *appellate* court improperly imposed a consent requirement; it contends the California Supreme

Court itself held in *Iskanian* that "[the state] must consent to arbitration before it can occur." Pet. 3.

But *Iskanian* did not address that issue. It nowhere holds that California's consent must be obtained as a prerequisite to arbitration of a PAGA claim. Rather, *Iskanian* holds that California law bars the enforcement of any provision in an "arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum." *Iskanian*, 327 P.3d at 133. As the Ninth Circuit has explained, "*Iskanian* expresses no preference regarding whether individual PAGA claims are litigated or arbitrated. It provides only that representative PAGA claims may not be waived outright." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). And *Iskanian* contains no discussion of the question of whose consent would be required to subject a PAGA claim to arbitration.

Had Bloomingdale's raised the court of appeal's comments about the question of consent with the California Supreme Court, that court could have considered whether the issue was sufficiently important to merit review and, if so, resolved whether the lower court had correctly stated California law on the point. Given Bloomingdale's failure to do so, the California Supreme Court's denial of review reflects the same judgment as this Court's recent denial of review in *Vitolo*: The *Iskanian* holding barring PAGA waivers does not merit further review.

Any statements by the court of appeal suggesting that California must consent to the arbitration of a PAGA claim reflect only the views of one intermediate state court. They do not definitively resolve California

law on this point, and are not binding on the California Supreme Court or other California courts of appeal. The correctness of a decision of a lower state court on a state-law question does not merit review by this Court, and falls well outside the bounds of review when the petitioner has failed to seek review of the point by the state's highest court.

That review is unwarranted is underscored by Bloomingdale's failure to identify any disagreements among lower state or federal courts concerning whether the FAA preempts state-consent requirements for arbitration of PAGA claims or similar state-law claims. If other courts address this issue, and a conflict develops, there will be an opportunity for this Court to review the issue in a case where it is genuinely presented and has been properly preserved by the petitioner.

B. The California appellate court's suggestion that a representative PAGA claim is subject to arbitration only with the state's consent is dicta.

To the extent that Bloomingdale's challenges the decision of the California appellate court, as opposed to the California Supreme Court's *Iskanian* rulings, it states, "The primary holding of the decision below is simple: 'a PAGA claim, individual or collective, cannot be arbitrated pursuant to a predispute arbitration agreement without the state's consent.'" Pet. 12 (quoting Pet. App. 16a). With respect to representative or collective PAGA claims, however, the appellate court's statements are not a holding.[1] They are merely dicta

[1] The appellate court treated the terms "collective action" and "representative action" as synonymous and interchangeable. *See* Pet. App. 6a & n.2.

and thus are not a proper subject for review by this Court.

The appellate court could not have made any holding on the conditions to be satisfied by a party requesting arbitration of a representative PAGA claim. No such request was before it. Bloomingdale's moved to compel arbitration of only "Tanguilig's individual claims" or the "individual element of her PAGA claim." Pet. App. 7a, 8a. Bloomingdale's did not seek to arbitrate the representative PAGA claims asserted in Tanguilig's complaint. Bloomingdale's instead argued that all representative PAGA claims should be stayed or dismissed because the arbitration agreement effectively barred their assertion in any forum. *Id.* at 6a–7a & n.2.

As Bloomingdale's never moved to compel arbitration of a *representative* PAGA claim, the appellate court's decision may not be read as denying this nonexistent request based on the absence of state consent or as otherwise holding that the arbitrability of a representative PAGA claim turns on whether the state has consented to arbitration. Significantly, the appellate court's discussion of the consent issue appears entirely in the section of its opinion addressing Petitioner's argument that the court "should compel arbitration of 'the individual portion of Tanguilig's PAGA claim' and stay 'the representative portion.'" *Id.* at 13a; *see id.* at 13a–18a.

C. Whether a rule requiring the state to consent to the arbitration of an "individual" PAGA claim would contravene the FAA is a meaningless question because, as a matter of California law, a PAGA claim cannot be brought solely on behalf of an individual plaintiff.

This Court should not undertake to decide if the FAA would preempt a rule requiring the state to consent to the arbitration of an "individual" PAGA claim. California does not allow for such claims. As a matter of state law, a "PAGA claim is not an individual claim." *Reyes v. Macy's*, 135 Cal. Rptr. 3d at 836; *Williams*, 188 Cal. Rptr. 3d at 84. A PAGA claim must be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a).

Whether an "individual" PAGA claim is cognizable is a question of California law; and "California courts are the ultimate authority on that law." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). The California courts have determined that "a plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees.'" *Reyes*, 135 Cal. Rptr. 3d at 835 (quoting *Machado v. M.A.T. & Sons Landscape, Inc.*, 2009 WL 2230788 at *2 (E.D. Cal., July 23, 2009)). The plaintiff "does not bring the PAGA claim as an individual claim, but 'as the proxy or agent of the state's labor law enforcement agencies.'" *Id.* (quoting *Arias*, 209 P.3d at 933).

The California courts have further determined that, when a plaintiff asserts only representative

PAGA claims, a "representative PAGA claim *cannot* be split into an arbitrable individual claim and a nonarbitrable representative claim." *Williams*, 188 Cal. Rptr. 3d at 87 (emphasis in original). Under California law, there is "no legal authority" supporting the suggestion that "a single representative action may be split in such a manner." *Id.*; *see also Hernandez v. Ross Stores, Inc.*, 212 Cal. Rptr. 3d 485, 489 (Cal. Ct. App. 2016) (in a representative PAGA action, whether the plaintiff qualifies as an "aggrieved employee" with standing to bring PAGA claims cannot be sent to arbitration as a separate, "individual" question). Thus, to provide, as the Bloomingdale's arbitration agreement purports to provide, that PAGA claims may not be pursued on a representative basis is to say that they cannot be pursued at all. As a matter of California law, PAGA claims are inherently representative.

There is no reported decision by any California court accepting the argument that an "individual" PAGA claim is cognizable; or allowing some "individual portion" of a representative PAGA claim to be split off for separate consideration. Thus, while the California Supreme Court has not yet found it necessary to decide definitively "whether or not an individual claim is permissible under the PAGA," *Iskanian* 327 P.3d at 149, there is no basis for assuming that it would reject the unanimous conclusion of California's appellate courts. Indeed, the California Supreme Court has already held that "a prohibition of *representative* claims frustrates the PAGA's objectives" because a PAGA claim "'for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.'" *Id.* at

384 (quoting *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 862 (Cal. Ct. App. 2011)).[2]

When Bloomingdale's petitioned the California Supreme Court for review in this case, it could have challenged the portion of the appellate court's order refusing to compel arbitration of an "individual" PAGA claim; or otherwise could have asked the court to rule on the viability of an "individual" PAGA claim. It did not do so. Instead, it chose to take on *Iskanian*'s holding that the right to bring a representative PAGA claim is unwaivable. Bloomingdale's may not now switch gears and ask this Court to overturn the numerous California appellate court decisions establishing that—as a pure matter of state law—a PAGA claim can only be brought as an indivisible, representative claim seeking civil penalties for Labor Code violations affecting the plaintiff and other aggrieved employees.

This Court should not undertake to decide an issue whose significance will be entirely hypothetical unless an issue of state law is later decided (against the weight of state-court authority) in favor of the petitioning party's position. *Cf. Rescue Army v. Municipal Ct.*, 331 U.S. 549, 584 (1947) (dismissing appeal because the federal question sought to be presented implicated a "serious problem of construction relating …

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[2] Without finally ruling on whether an "individual" PAGA claim is allowable, the California Supreme Court has observed that "*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 (internal quotation marks omitted).

to the terms of the questioned legislation or to its interpretation by the state courts").

D. Petitioner's challenge to California's ban on representative action waivers raises issues beyond the scope of the question presented.

In seeking to smuggle into its Petition a broader challenge to California's state-law rule against predispute waivers of representative PAGA claims (*see* Pet. 16–20, 25–33), Bloomingdale's raises issues that are not encompassed by the question it has presented. The Court should not consider such extraneous issues or any of Petitioner's arguments relating to them.

"[U]nder this Court's Rule 14.1(a), '[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Although this "rule is prudential in nature," the Court will "disregard it 'only in the most exceptional cases.'" *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976)). Even if an issue can be considered "related to" or "complementary to" to the question presented, the Court ordinarily will not consider any issue beyond the scope of the question presented. *Id.*; *see also Wood v. Allen*, 558 U.S. 290, 304 (2010).

The question Bloomingdale's seeks to present here is narrow. It concerns only whether the FAA would preempt "a state-law rule that prohibits the enforcement of a predispute arbitration agreement with respect to a dispute covered by the scope of that agreement unless the State consents." Pet. i. Yet Bloomingdale's devotes a substantial portion of its brief to attacking the state-law rule that prohibits preemptive, representative action waivers and asserting that the

FAA preempts *Iskanian's* bar on "the enforcement of predispute agreements to arbitrate PAGA claims on an individual basis." Pet. 16. Issues relating to the *Iskanian* rule against representative action waivers are beyond the scope of the question presented—which Bloomingdale's chose to focus solely on state-consent issues. Bloomingdale's thus has failed properly to raise such issues; and the Court should not consider them.

In any event, Bloomingdale's misperceives the law in arguing that *Iskanian's* holdings regarding PAGA waivers place predispute arbitration agreements "on unequal footing with other contracts" and thus are preempted by the FAA. Pet. 16; *see id.* at 16–20. *Iskanian* sets forth a rule generally applicable to all contracts. The California Supreme Court held that if any "employment agreement compels the waiver of representative claims under the PAGA, it is ... unenforceable as a matter of state law." *Iskanian*, 327 P.3d at 149.

As the Ninth Circuit has explained, the *Iskanian* rule that "predispute agreements to waive PAGA claims are unenforceable under California law" satisfies the requirement that "a state contract defense place arbitration agreements on equal footing with non-arbitration agreements." *Sakkab*, 803 F.3d at 430, 432. "The rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbi-

tration agreement or a non-arbitration agreement." *Id*. at 432.[3]

Just as the *Iskanian* rule does not treat arbitration agreements differently from other contracts, it also "leaves parties free to adopt the kinds of informal procedures normally available in arbitration." *Id*. at 439. It thus "does not conflict with the FAA" and is not preempted. *Id*.

Bloomingdale's contrary assertion is based on arguments identical to those set forth in the many petitions attacking *Iskanian* that this Court has already denied.[4] As in those prior cases, Bloomingdale's arguments fail to establish any need for review by this Court.

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[3] While *Iskanian* expressly declares that contractual provisions imposing predispute waivers of representative PAGA claims are invalid, it leaves open the possibility that a post-dispute contract waving PAGA claims would be enforceable. *Iskanian*, 327 P.3d at 152. Contrary to Bloomingdale's contention, drawing a distinction between predispute and post-dispute contracts does not discriminate against arbitration agreements. Under *Iskanian*, all predispute waivers (whether or not set forth in arbitration agreements) are treated equally; and all post-dispute waivers (whether or not set forth in arbitration agreements) are treated equally.

[4] *See Vitolo*, 137 S. Ct. 2267; *Apple Am. Group, LLC v. Salazar*, 136 S. Ct. 688 (2015); *Carmax Auto Superstores Cal., LLC v. Areso*, 136 S. Ct. 689 (2015); *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015); *Iskanian*, 135 S. Ct. 1155 (2015).

E. Petitioner's challenge to California law establishing that the state is the real party in interest in a PAGA action does not provide a basis for granting certiorari.

As a matter of California law, every PAGA claim is a law enforcement action brought on behalf of the state. *Arias*, 209 P.3d at 933–34. Nevertheless, Bloomingdale's argues that California's interest is irrelevant and that, because Tanguilig signed an arbitration agreement, "the FAA requires Tanguilig's PAGA claim to proceed in arbitration on an individual basis." Pet. 24. This argument is largely a rehash of contentions that Bloomingdale's unsuccessfully asserted in support of the *Vitolo* petition the Court denied just a few months ago; and it raises no issue warranting review.

Not only is Bloomingdale's demand for "individual" arbitration contrary to California law establishing that a PAGA claim must be brought on a representative basis, but, as demonstrated above, its challenge to the state-law ban on representative action waivers also improperly exceeds the scope of the question presented.

Moreover, Petitioner's analysis is erroneous. Bloomingdale's contends that only Tanguilig, not the state, is a party to this litigation. However, the California Supreme Court has conclusively determined that, as a matter of California law, "the state is the real party in interest" in any PAGA action. *Iskanian*, 327 P.3d at 148. The court based this holding on the facts that a PAGA action can only be brought by the state or by employee-plaintiffs authorized by the law to act as its representatives; that any judgment in a

PAGA action will be binding on the state; and that 75% of any civil penalties recovered will be paid to the state. *Id*. at 151.

Bloomingdale's nevertheless insists that the state cannot be considered a party because Tanguilig filed and controls the action. Pet. 21–22 (citing, *inter alia*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). The question presented in *Waffle House* was whether an arbitration agreement between an employer and an employee could bar the Equal Employment Opportunity Commission (EEOC), a non-party to that agreement, from pursuing "victim-specific judicial relief" on behalf of the employee. *Waffle House*, 534 U.S. at 282. Because the claims at issue sought relief inuring *entirely* to the individual employee, the issue of the EEOC's control over the litigation was important to the characterization of the government as a real party in interest. *Waffle House*, 534 U.S. at 290–91. Here, in contrast, the state's interest is established by its right to receive the major share of any civil penalties recovered.

As the California Supreme Court observed, "Nothing 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." *Iskanian*, 327 P.3d at 151. Significantly, in reversing a decision applying the doctrine of FAA preemption to bar claims asserted by the EEOC, *Waffle House* criticized the lower court for "turn[ing] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." *Waffle House*, 534 U.S. at 295. *Iskanian's* holding that the FAA does not preempt the rule disallowing waivers of statutory remedies available only through representative PAGA actions is fully

consistent with *Waffle House*'s refusal to allow transformation of arbitration agreements into waivers of remedies.

The *Iskanian* holding is also consistent with the line of decisions by this Court establishing that, "'[b]y 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 ... forum.'" *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). As in *Vitolo*, there is no need to reconsider this line of precedent or to review the decisions of California courts that are in accord with it.

Finally, this case would be a particularly poor vehicle for addressing any issue concerning FAA preemption of California law concerning the enforceability of PAGA waivers because it arises from a state court. There is continuing disagreement among the Justices of this Court over whether the FAA applies in state courts. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting). If this Court were to review this case on the merits, the vote of at least one Justice would be to affirm on the ground that the FAA does not apply to state courts, and there would be a significant likelihood that no holding on any other issue that might be presented by the case would command a majority of the Court. Review would thus threaten to waste the time and efforts of the Court.

CONCLUSION

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

Respectfully submitted,

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