No. 11-880

IN THE

Supreme Court of the United States

RALPHS GROCERY COMPANY, *et al.*

Petitioners,

v.

TERRI BROWN,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court possess jurisdiction to review a state court's interlocutory appellate ruling that does not determine whether a motion to compel arbitration will be granted or denied by the trial court on remand and thus is not a "final judgment" under 28 U.S.C. § 1257(a)?

2. Does the implied preemptive effect of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, require California state courts to enforce a contract that purports to prohibit an employee from bringing claims against her employer in any forum, judicial or arbitral, under California's Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.*?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT 3
1. The Private Attorneys General Act 3
2. Ralphs' Arbitration Policy 6
3. Facts and Decision Below 7
REASONS FOR DENYING THE WRIT 12
I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final. 12
II. The Issues Do Not Merit Review. 19
III. The Decision Below Is Correct. 24
IV. The Apparent Illegality of the PAGA Prohibition Under Federal Labor Law Is Another Reason for Denying Review. 31
CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases:

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 25

In re Am. Exp. Merch. Litig.,
667 F.3d 204 (2d Cir. 2012) 27

Arias v. Super. Ct.,
209 P.3d 923 (Cal. 2009) 4, 5, 23, 28, 29, 30

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) .....*passim*

Broughton v. Cigna Healthplans,
988 P.2d 67 (Cal. 1999) 10, 20

Chen-Oster v. Goldman, Sachs & Co.,
785 F. Supp. 2d 394 (S.D.N.Y. 2011) 28

Chen-Oster v. Goldman, Sachs & Co.,
2011 WL 2671813 (S.D.N.Y. July 7, 2011) 28

Cole v. Burns Int'l Sec. Servs.,
105 F.3d 1465 (D.C. Cir. 1997) 26

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 25, 26

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975) 14, 15, 16, 17, 18

Cruz v. PacifiCare Health Sys., Inc.,
66 P.3d 1157 (Cal. 2003) 10, 20

In re D.R. Horton, Inc.,
357 NLRB No. 184, 192 L.R.R.M. 1137
(Jan. 3, 2012) 31, 32

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 2, 24, 29, 30

Florida v. Thomas,
532 U.S. 774 (2001) 14

Franco v. Athens Disposal Co.,
90 Cal. Rptr. 3d 539 (Cal. Ct. App. 2009),
cert. denied, 130 S. Ct. 1050 (2010) 8, 19

Gentry v. Super. Ct.,
165 P.3d 556 (Cal. 2007) 8, 9, 20, 21

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 24, 26, 27

Green Tree Fin. Corp. v. Randolph,
531 U.S. 79 (2000) 17

Hadnot v. Bay, Ltd.,
344 F.3d 474 (5th Cir. 2003) 26

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 12, 13, 15, 16

Kilgore v. Keybank, NA,
__ F.3d __, 2012 WL 718344
(Mar. 7, 2012) 19, 20

Kristian v. Comcast Corp.,
446 F.3d 25 (1st Cir. 2006) 26

Machado v. M.A.T. & Sons Landscape, Inc.,
2009 WL 2230788 (E.D. Cal. July 23, 2009) 28

Market St. Ry. Co. v. R.R. Comm'n,
324 U.S. 548 (1945) 12, 14

Marmet Health Care Ctr., Inc. v. Brown,
132 S. Ct. 1201 (2012) 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 2, 24, 25

Nike, Inc. v. Kasky,
539 U.S. 654 (2003)..... 16, 17, 18

NLRB v. Wash. Aluminum Co.,
370 U.S. 9 (1962)..... 31

O'Dell v. Espinoza,
456 U.S. 430 (1982)..... 14

Paladino v. Avnet Computer Techs., Inc.,
134 F.3d 1054 (11th Cir. 1998)..... 26

Perry v. Thomas,
482 U.S. 483 (1987)..... 17, 19

Plows v. Rockwell Collins, Inc.,
812 F. Supp. 2d 1063 (C.D. Cal. 2011) 22

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945)..... 12

Reyes v. Macy's, Inc.,
135 Cal. Rptr. 3d 832 (Cal. Ct. App. 2011)..... 23, 28

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989)..... 24, 25

Shankle v. B-G Maint. Mgmt. of Colo., Inc.,
163 F.3d 1230 (10th Cir. 1999)..... 26

Shearson/Am. Express, Inc. v. McMahon,
482 U.S. 220 (1987)..... 25

Sonic-Calabasas A, Inc. v. Moreno,
132 S. Ct. 496 (2011)..... 20

Southland Corp. v. Keating,
465 U.S. 1 (1984)..... 17

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
130 S. Ct. 1758 (2010)..... 17

Trope v. Katz,
902 P.2d 259 (Cal. 1995) 15, 19

Urbino v. Orkin Servs. of Cal., Inc.,
__ F. Supp. 2d __, 2011 WL 4595249
(C.D. Cal. Oct. 5, 2011) 22

Zembsch v. Super. Ct.,
53 Cal. Rptr. 3d 69 (Cal. Ct. App. 2006) 13

Constitutional Provisions, Statutes, and Rules:

28 U.S.C. § 1257(a) 1, 12, 17

29 U.S.C. § 157 31

Cal. Bus. & Prof. Code §§ 17200 *et seq*. 8

Cal. Labor Code § 204 8

Cal. Labor Code § 226(a) 8

Cal. Labor Code § 226.7 8

Cal. Labor Code § 512(a) 8

Cal. R. Ct. 8.500 19

Federal Arbitration Act,
9 U.S.C. §§ 1 *et seq*. .....*passim*

§ 16 17

Private Attorneys General Act,
Cal. Lab. Code §§ 2698 *et seq*. .....*passim*

§ 2699(a) 3

§ 2699(c) 4

§ 2699(f)(2) 3

§ 2699(g) 4

§ 2699(g)(1) 4

§ 2699(h) 4

§ 2699(i) 5, 29
§ 2699.3(a)(1) 4
§ 2699.3(a)(2) 4
§ 2699.3(b) 4
§ 2699.3(c) 4
S. Ct. R. 10 ..... 19, 21

INTRODUCTION

The interlocutory decision of the California Court of Appeal in this case is the first appellate ruling since *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to consider whether a mandatory arbitration agreement, imposed as a condition of employment, can preclude an individual employee from pursuing in *any* forum, judicial or arbitral, a claim under California's unique Private Attorneys General Act, Cal. Lab. Code §§ 2698 *et seq.* ("PAGA"). PAGA authorizes an employee who suffers a violation of California's labor laws to supplement the state's limited enforcement capacity by suing, as a representative of the state, to recover civil penalties payable partly to the state and partly to employees.

The intermediate state court below held, three months after *Concepcion*, that the implied preemptive effect of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. ("FAA"), does not require California courts to enforce agreements prohibiting employees from bringing PAGA claims. The appellate court remanded the case so the trial court could determine which, if any, of the claims must be arbitrated by applying to the arbitration agreement in this case ordinary California contract-law principles concerning severability of unenforceable terms. Additional appellate proceedings are likely whichever way these issues are resolved. The intermediate state court's interlocutory decision thus is not a final judgment, and this Court therefore lacks jurisdiction under 28 U.S.C. § 1257(a).

Even if this Court had jurisdiction, this case would not merit review. No other appellate court, state or federal, has yet considered the validity of arbitration agreements prohibiting PAGA claims in light of *Con-*

cepcion. The decision below does not even represent the definitive view of the California courts, as the California Supreme Court has not spoken on the subject. Thus, this case presents nothing approaching a conflict among the federal courts of appeals, or between a federal court of appeals and a state court of last resort. Petitioner Ralphs Grocery Company merely contends that a single lower state court erred in addressing an issue of first impression: whether *Concepcion* requires enforcement of provisions in an arbitration agreement that completely prohibit employees from pursuing PAGA claims. Absent a conflict, and with appellate courts just beginning to address the consequences of *Concepcion* outside its immediate context of class-action bans, there is no reason for this Court to review the California Court of Appeal's decision.

Moreover, Ralphs' claim that the lower court misapplied *Concepcion* is wrong on the merits. Unlike the arbitration clause in *Concepcion*, which barred class-action procedures that this Court considered incompatible with arbitration but did *not* foreclose any right of action, the arbitration clause at issue here purports to eliminate an employee's entitlement to bring a PAGA claim. This Court has emphasized that arbitration agreements may not be used to effect waivers of statutory rights of action. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Moreover, the claims at issue here are asserted on behalf of the *state*, and this Court has held that arbitration agreements among private parties cannot bind governmental entities that are not parties to the agreements. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). Further, unlike the class actions at issue in *Concepcion*, PAGA claims do not require creation of new procedures for aggregated adjudication

that would be antithetical to an arbitral forum, because PAGA claims are litigated as bilateral actions. Therefore, enforcing generally applicable state law providing for PAGA claims (whether in court or in arbitration) does not discriminate against arbitration.

In short, Ralphs' request that this Court reach out to address *Concepcion*'s application to California's unusual statute is wholly unwarranted. The petition should be denied.

STATEMENT

1. The Private Attorneys General Act

The California statute involved here, PAGA, provides a unique enforcement method for California's Labor Code by enlisting individual plaintiffs as private attorneys general who may recover statutory penalties for Labor Code violations on behalf of themselves, the state, and other employees—penalties that, before PAGA's enactment in 2003, could be obtained only by the state. PAGA provides that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a). For Labor Code provisions that do not themselves specify a monetary penalty, PAGA provides its own penalties, generally $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *Id.* § 2699(f)(2). PAGA provides that these penalties may likewise be recovered by "an

aggrieved employee … in a civil action … filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed." *Id*. § 2699(g).

The statute defines an "aggrieved employee" as an employee against whom a Labor Code violation was committed. *Id.* § 2699(c). Before filing a PAGA action, such an employee must give notice of the claimed Labor Code violations on which the action is based to both the employer and the California Labor and Workforce Development Agency. *Id.* § 2699.3(a)(1). The agency is deemed to authorize the employee to sue on behalf of the state if it fails to respond to the notice 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).[1]

PAGA actions need not be prosecuted as class actions and are commonly maintained by individual plaintiffs. *See Arias v. Superior Court*, 209 P.3d 923, 929-34 (Cal. 2009). PAGA actions thus require neither class certification nor notice to similarly situated employees. *See id*. An individual PAGA plaintiff "may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed," as well as "an award of reasonable attorney's fees and costs." *Id*. § 2699(g)(1). Any penalties so recovered "shall be distributed as follows: 75 percent to the La-

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[1] Slightly different procedures apply to claimed violations of the occupational safety provisions of the Labor Code and certain other types of violations. *See* Cal. Labor Code §§ 2699.3(b) & (c).

bor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

California's creation of a right of action in which an individual litigant may recover penalties on behalf of herself, the state, and other employees reflected the legislature's determination that "adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." *Arias*, 209 P.3d at 929-30. Thus, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." *Id*. at 933.

In short, a PAGA action is not a collective action, but is "representative" in the sense that the individual plaintiff represents the interest of the state, acting on behalf of the plaintiff and any other employees who were victims of wrongdoing. Any action seeking the penalties provided by PAGA—even to the extent that it seeks them for wrongs suffered by the individual plaintiff—is thus brought by the plaintiff as a "private attorney general."

2. Ralphs' Arbitration Policy

Respondent Terri Brown was employed by Ralphs as a security guard in Los Angeles beginning in September 2005. Incorporated by reference in Ms. Brown's employment application was Ralphs' binding arbitration policy. That policy provides that it "is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available to Employees or the Company in a court of law or equity or in an administrative agency." Pet. App. 42a-43a. With the exception of claims arising out of collective bargaining agreements, the policy "applies to any and all employment-related disputes that exist or arise between Employees and Ralphs (or any of them) that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws (referred to in this Arbitration Policy as 'Covered Disputes')." *Id.* at 44a (emphasis omitted).

The arbitration policy also states that "[i]f any Employee or Ralphs (or any of them) wishes to initiate or participate in formal proceedings to resolve his or her Covered Disputes, the employee or Ralphs (or any of them) must submit those Covered Disputes to final and binding arbitration as described in this Arbitration Policy." *Id.* at 44a. Thus, under the policy, "[a]rbitration as described in this Arbitration Policy is the sole and exclusive remedy for any and all Covered Disputes that exist or may arise." *Id.* at 45a-46a. The policy expressly states that "Covered Disputes subject to this Arbitration Policy include all Employees' individual statutory claims or disputes under federal, state and local laws including, for example and with-

out limitations, any claims or disputes arising under …. the California Labor Code ….” *Id.* at 46a-47a.

Ralphs’ arbitration policy broadly prohibits not only class actions, but also all private attorney general and representative actions. Specifically, the policy states: “there is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated.” *Id.* at 51a-52a (emphasis omitted). For added emphasis, it reiterates that “there are no class actions or Representative Actions permitted under this Arbitration Policy.” *Id.* at 52a (emphasis omitted).

The arbitration policy is, in effect, not an agreement to *arbitrate* an employee’s PAGA claims, but a flat prohibition against the assertion of claims for PAGA remedies based on violations of covered Labor Code provisions. PAGA claims do not fall within the class of “Excluded Claims” under the policy, so the policy does not permit them to be brought outside of arbitration. But because all PAGA claims for penalties are “private attorney general actions” and are at least in part “brought in a representative capacity on behalf of the general public,” Ralphs’ policy also does not permit them to be arbitrated. The policy thus purports to exempt Ralphs from liability under PAGA altogether by prohibiting the assertion of PAGA claims in *any* forum.

3. Facts and Decision Below

On October 14, 2009, Ms. Brown filed this action alleging that Ralphs had committed multiple Labor

Code violations. Specifically, Ms. Brown alleged Ralphs violated California law by (1) failing to provide mandatory meal periods, or to pay required premiums for the missed meal periods, in violation of Labor Code §§ 226.7 & 512(a); (2) failing to provide mandatory rest periods, or to pay premiums for the missed rest periods, in violation of Labor Code § 226.7; (3) failing to timely pay all wages due in violation of Labor Code § 204; and (4) failing to provide accurate wage statements in violation of Labor Code § 226(a). Ms. Brown claimed that Ralphs had thus committed unlawful business practices in violation of California Business & Professions Code §§ 17200 *et seq*., and she sought to represent a class of similarly situated employees in seeking damages under § 17200. In addition to these class claims, Ms. Brown asserted claims for penalties under PAGA for herself, the state, and other employees for the claimed Labor Code violations.

On January 6, 2010, Ralphs moved to compel arbitration of all Ms. Brown's claims. In opposition, Ms. Brown argued that both the class-action ban and the prohibition of PAGA claims were unconscionable and rendered the arbitration agreement unenforceable. Ruling before this Court's decision in *Concepcion*, and relying on the California Supreme Court's decision in *Gentry v. Superior Court* 165 P.3d 556 (2007), which had held class-action bans in employment arbitration agreements unconscionable under certain circumstances, the trial court held that the class-action ban in Ralphs' arbitration policy was unconscionable. In addition, citing a previous California Court of Appeal decision, *Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 3d 539 (2009), the court held that the PAGA prohibition was unenforceable. Because the court viewed the arbitration policy as being irremediably tainted by the

combination of two unenforceable provisions, the court denied Ralphs' motion to compel arbitration in its entirety.

Ralphs appealed, and this Court decided *Concepcion* while the appeal was pending. After receiving additional briefing on *Concepcion*, the California Court of Appeal held that the trial court had erred in finding the class-action ban unconscionable. Accordingly, the Court of Appeal reversed and remanded the decision denying Ralphs' request for arbitration. The Court of Appeal noted but did not reach the question whether *Concepcion* effectively overruled *Gentry*'s holding that a class-action ban in an employment agreement could be unconscionable under certain factual circumstances. The court determined that the evidentiary showing needed to establish unconscionability under *Gentry* had not been made, and "[a]ccordingly, we do not have to determine whether, under [*Concepcion*], the rule in *Gentry* concerning the invalidity of class-action waivers in employee-employer contract arbitration clauses is preempted by the FAA." Pet. App. 8a-9a (citation omitted).

By contrast, the Court of Appeal held that *Concepcion* did not require enforcement of the agreement's prohibition of PAGA claims. The court stressed that "the PAGA creates a statutory right for civil penalties for Labor Code violations 'that otherwise would be sought by state labor law enforcement agencies.'" *Id.* at 12a. The court recognized that *Concepcion* required enforcement of arbitration clauses that compelled plaintiffs to assert their claims in arbitration without class procedures, but stated that nothing in *Concepcion* authorized enforcement of an agreement that extinguished a statutory entitlement altogether, par-

ticularly "a public right, such as that created under the PAGA." *Id*.

The court contrasted the question whether a prohibition of PAGA claims is enforceable with the issues decided in two pre-*Concepcion* California cases, *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003), which had said that claims for injunctive relief on behalf of the public were not subject to arbitration. Those cases, the court explained, "dealt with arbitrability," not with an attempt to foreclose a particular type of claim completely. Pet. App. 13a-14a. Emphasizing that, under *Arias*, PAGA claims are not class actions, *id*. at 11a, the court held that permitting the prohibition of PAGA claims would significantly undermine the state interests California sought to pursue by creating the PAGA right of action, and that declining to enforce such a prohibition would "not conflict with the purposes of the FAA." *Id*. at 16a.

In so holding, the court noted that Ralphs' policy appears to preclude *all* PAGA actions, because any PAGA claim "is brought by the claimant for penalties as a private attorney general." Pet. App. at 16a, n.7. The court further stated that *even if* the arbitration agreement could be construed to allow PAGA claims for penalties based solely on violations suffered by the individual plaintiff, as opposed to other employees, its enforcement would undermine the interests California sought to achieve by creating the PAGA right of action. The court also noted that claims limited to penalties for the named plaintiff may not even be cognizable under PAGA. *Id.* at 16a-18a & n.8.

Although the court held that the ban on PAGA claims was unenforceable, it still reversed in its entirety the trial court's order declining to compel arbitration, because that order had been based on the court's erroneous conclusion that the arbitration policy was unenforceable in two respects and was so pervaded by unlawfulness that the unenforceable provisions could not be severed. The Court of Appeal instructed the trial court, on remand, to determine "whether to sever the PAGA waiver provision and enforce the arbitration agreement and class action waiver or whether to refuse to enforce the entire agreement or portions thereof." *Id*. at 20a. Noting that "Plaintiff argues that the entire agreement should be deemed unenforceable, but suggests that one alternative, even if undesirable, would be to arbitrate the PAGA representative action," the court stated that "[t]his issue will be determined by the trial court upon remand." *Id*. at 20a, n.9. Thus, under the terms of the remand, it remains to be determined what claims, if any, will be arbitrated, and whether Ralphs' motion to compel arbitration will ultimately be granted, granted in part and denied in part, or denied completely.

On March 1, 2012, the trial court held a status conference attended by counsel for both Ralphs and Ms. Brown. The trial court set a hearing date of May 2, 2012, to resolve the issues identified by the Court of Appeal with respect to Ralphs' motion to compel arbitration. The court ordered the parties to meet and confer to identify these outstanding issues and stipulate to a briefing schedule to address them. The parties have now tentatively agreed to submit simultaneous opening and rebuttal briefs on April 11, 2012, and April 25, 2012, respectively.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final.

Title 28 U.S.C. § 1257(a) grants this Court jurisdiction to review only "[f]inal judgments or decrees" of state courts. As this Court has explained, this limitation on its certiorari jurisdiction is no mere formality to be observed in the breach:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.,* 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

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

The judgment below is not final in either of the two relevant senses. First, it is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. The case came to the Court of Appeal on an interlocutory appeal from a decision declining to compel arbitration both of Ms. Brown's PAGA claims and of other claims not based on PAGA. As to the non-PAGA claims, the appellate court *reversed* the trial court's determination that a class-action ban rendered the arbitration agreement

unconscionable. With respect to the PAGA claims, the court agreed with the trial court's holding that the part of the arbitration agreement purporting to waive them was unenforceable, but did not resolve whether that provision could be severed from the arbitration clause as a whole, or what the consequences of severance would be. Concluding that those issues should be decided on remand, the Court of Appeal reversed the trial court's order denying arbitration, and remanded to allow the trial court to determine what claims, if any, were arbitrable. The case is far from over.

Second, the decision is not one that is "subject to no further review or correction in any state tribunal." *Id*. The Court of Appeal's order leaves open the possibility that the trial court may compel arbitration as to all of Ms. Brown's claims, including the PAGA claims. Such an order would be nonfinal and not subject to appeal as a matter of right, but Ralphs could seek immediate review at the appellate level through a petition for alternative writs. *See Zembsch v. Super. Ct.*, 53 Cal. Rptr. 3d 69, 74 (Cal. Ct. App. 2006). Moreover, if Ms. Brown were ultimately to prevail on her PAGA claims in arbitration, Ralphs could then seek to vacate the arbitration award on the ground that the PAGA claims were barred by the arbitration agreement, and could again appeal that issue up through the California court system, seeking review by the California Supreme Court and ultimately by this Court if its appeal were unsuccessful.

If, on the other hand, the trial court were to deny arbitration of the PAGA claims (or all of Ms. Brown's claims) on the ground that the invalid waiver provision cannot be severed from the arbitration clause, that order would be subject to immediate appeal by

Ralph's, which could again present its claim that the FAA preempts California's refusal to enforce the PAGA prohibition, seek review by the California Supreme Court on that issue, and file a petition for a writ of certiorari in this Court if it were unsuccessful.

In sum, the decision does not terminate the litigation, nor is it subject to no further review by the California state court system: It is not the "final word of a final court." *Market St.*, 324 U.S. at 551.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). This case fits none of those narrow categories.

The first *Cox* category covers cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," and "the judgment of the state court on the federal issue is deemed final" because "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. Here, it is by no means "preordained" that Ms. Brown will prevail on her PAGA claims unless they are barred by the arbitration agreement. *See Thomas*, 532 U.S. at 778.

Cox's second category is confined to 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. Even leaving aside that the federal issue here has not been finally decided by the state's highest court—which denied review but could take up the issue in later proceedings—the federal issue here will not survive and require decision regardless of the outcome of the state-court proceedings yet to come. If Ms. Brown does not prevail on her PAGA claims, the question whether the FAA preempts the state courts from holding that those claims are not barred by the arbitration agreement will be moot. *Jefferson*, 522 U.S. at 82.

Cox category three comprises those 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). *Cox* explained that this category encompasses cases in which state law offers *no* subsequent opportunity to obtain a court judgment over which this Court could exercise jurisdiction. *See id.* at 481-82. Ralphs does not face such a situation. As explained above, it can seek further appellate review either if the trial court declines to compel arbitration, or if the PAGA claims are arbitrated and Ralphs files an application to vacate the result. Because the California Supreme Court's denial of review "is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal," *Trope v. Katz*, 902 P.2d 259, 268 n.1 (Cal. 1995), the California Supreme Court could take up the merits of Ralphs' preemption argument in such a later appeal. But even if that court were to treat the Court of Appeal's "interlocutory ruling as 'law of the case,' that determination [would] in no way limit [this

Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 83. The third exception is thus inapplicable. *See id*.

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

This case falls well outside the fourth *Cox* category. To begin with, because California's Supreme Court did not address the merits of the issue but can grant review in a subsequent appeal, the issue has not been "finally decided in the state courts." Moreover, denial of immediate review would not "seriously erode federal policy." If the trial court on remand declines to compel arbitration of some or all of Ralphs claims, federal policy would not be eroded by requiring Ralphs to take the appeal permitted from such a disposition. If, on the other hand, the trial court compels arbitration of the PAGA claims, no federal policy would be eroded by requiring Ralphs to seek further review through an alternative writ proceeding or by awaiting the outcome of the bilateral arbitration that would follow before affording Ralphs further review (if it lost in the arbitration) through an application to vacate the award. Indeed, federal policy generally *favors* arbitration, and thus the FAA generally does not

provide for immediate appellate review of an order compelling arbitration. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 85-86 (2000); 9 U.S.C. § 16.[2] This 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 to compel arbitration were "final" for purposes of § 1257 as construed in *Cox*.

Indeed, this Court's consideration of whether to review the preemption claim here would be better informed if the Court knew the outcome of the remand proceedings—that is, whether the PAGA claims will be litigated in court or arbitrated. To that extent, federal policy would be enhanced, not eroded, by awaiting the result of the remand proceedings before considering whether Ralphs' preemption argument merits review. In addition, Ralphs may assert some additional federal-law grounds to object to the consequences of the trial courts' severability ruling (whatever it may be).[3] Thus, asserting jurisdiction over Ralphs' petition at this point might create the possi-

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[2] It cannot be argued here that federal policy would be eroded by arbitration of PAGA claims, because such arbitration would be traditional, bilateral arbitration and would not fundamentally alter the nature of the arbitration proceedings in the way that this Court suggested that class arbitration would in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).

[3] For example, if the trial court were to completely sever the PAGA waiver from the arbitration agreement and hold that the PAGA claims are subject to arbitration, Ralphs might contend that that result somehow violates *Stolt-Nielsen* even if the waiver is itself unenforceable. *See* Pet. 10, 25.

bility of piecemeal review of federal issues, which the Court has generally sought to avoid in applying the *Cox* factors. *See Nike*, 539 U.S. at 660.

Finally, as in *Nike*, this case could only be squeezed into the fourth *Cox* category if the Court assumed that there were only two possible results: a reversal that would preclude assertion of Ms. Brown's PAGA claims altogether, or an affirmance that would allow the remand to the trial court ordered by the Court of Appeal. But it is by no means clear that the possibilities are so limited.[4] "[B]ecause an opinion on the merits in this case could take any one of a number of different paths, it is not clear whether reversal of the California [Court of Appeal] would 'be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come.'" *Nike*, 539 U.S. at 660.

A thorough review of the *Cox* categories thus confirms that this case does not in any way present this Court with the opportunity to review the final word of a final court. The Court lacks jurisdiction under § 1257, and the petition must be denied.

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[4] Conceivably, for example, this Court might split the difference and hold that the waiver was invalid as to PAGA claims based on violations affecting Ms. Brown personally and entitling her to a share of penalties, but not as to PAGA claims seeking recoveries from which other employees would benefit. Such a result would, moreover, carry with it a number of further complexities, including the question whether such an "individual" PAGA claim is even permitted by California law. *See infra* at 27-28.

II. The Issues Do Not Merit Review.

The question whether the FAA requires courts to enforce an agreement prohibiting an employee from bringing a PAGA claim merely because that prohibition is contained in an arbitration agreement has, so far, been addressed by only one appellate court in the wake of *Concepcion*: the court below.[5] That court, moreover, is only an intermediate state court. Its decision does not necessarily reflect the position the California Supreme Court would take if it were to address the issue on its merits. *See Trope v. Katz*, 902 P.2d at 268 n.1. Such review could well occur if a division of authority on the issue were to develop within the California Court of Appeal, or if a conflict with federal appellate authority demonstrated a need for review. *See* Cal. R. Ct. 8.500.

As yet, however, there is no authority on the issue in the federal courts of appeals, let alone conflicting authority. Thus, not only is there no *conflict* among federal courts of appeals and/or state courts of last resort such as would justify review here under this Court's Rule 10; no such courts have even addressed the issue.

The Ninth Circuit's recent decision in *Kilgore v. Keybank, NA*, __ F.3d __, 2012 WL 718344 (Mar. 7, 2012), addresses the wholly different question wheth-

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[5] Before *Concepcion*, a panel of the same district of the California Court of Appeal had also held that a provision in an arbitration agreement purporting to waive PAGA claims was unenforceable. *Franco v. Athens Disposal Co., supra*. However, the agreement in *Franco*, unlike the agreement here, was construed by the court to permit individual claims to be arbitrated. This Court denied certiorari in *Franco*. 130 S. Ct. 1050 (2010).

er California may enforce the so-called "*Broughton-Cruz*" rule precluding arbitration of claims for public injunctions. The Ninth Circuit held that under *Concepcion* and cases such as *Perry v. Thomas, supra*, the *Broughton-Cruz* rule is preempted "because the rule 'prohibits outright the arbitration of a particular type of claim.'" 2012 WL 718344 at *10. As the California Court of Appeal noted, however, the *Broughton-Cruz* issue addressed in *Kilgore* is very different from the issue here. Pet. App. 13a-14a. This case, unlike *Kilgore*, does not involve a state-law rule *precluding arbitration* of a claim; rather, it involves the question whether an agreement that does not require arbitration of a claim but instead *forecloses the claim altogether* must be enforced because of the FAA. *Kilgore* does not address that issue, and Ralphs' attempt to suggest that this case implicates the survival of the *Broughton-Cruz* rule (Pet. 33-34) is incorrect.

This Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), likewise held only that a "categorical rule prohibiting arbitration of a particular type of claim" is preempted by the FAA, *id*., and does not speak to the issue here. The Court's order vacating and remanding in *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011), is also irrelevant, as the issue there was whether the state could require resort to an administrative adjudicatory forum before an arbitration agreement would be enforced.

Nor does this case present, as Ralphs and one of its amici suggest, a broad disputed issue as to the continuing vitality of the California Supreme Court's decision in *Gentry*, *supra*. The Court of Appeal very pointedly expressed no view on whether the principal hold-

ing of *Gentry*—that class-action bans in arbitration agreements applicable to statutory employment claims are unenforceable under some circumstances—remains viable after *Concepcion*. Pet. App. 8a-9a. The Court of Appeal only referred in passing to some of *Gentry*'s reasoning in reaching the much narrower conclusion that an arbitration agreement may not completely deny an employee the right to bring a statutory claim under PAGA. *Id*. at 11a-13a.

Thus, Ralphs is requesting that this Court reach out to decide a novel issue in the very first case in which it has reached the appellate level in the wake of *Concepcion*, solely because, in Ralphs' view, the reasoning of the Court of Appeal is incompatible with that of *Concepcion*. The Court of Appeal, of course, addressed and distinguished *Concepcion* (and, as discussed below, did so correctly). Even if Ralphs were correct that the Court of Appeal misconstrued the teachings of *Concepcion*, its petition amounts to no more than a request that this Court correct a claimed error made by a lower state court in applying this Court's decisions—a purpose for which, as this Court's Rule 10 states, "[a] petition for a writ of certiorari is rarely granted."

Granting certiorari to consider the correctness of the Court of Appeal's ruling under *Concepcion* is especially unwarranted in light of the recency of that opinion, rendered less than a year ago. The state and federal appellate courts are just beginning to consider the implications of *Concepcion*, particularly in cases outside of its core area of application to state-law contract principles that declare class-action prohibitions unconscionable. There is no immediate need for this Court to take up the possible extension of *Concepcion*

to the very different type of claim at issue here absent further development of the case law resulting in either a significant decisional conflict or some other indication that intervention by this Court is urgently needed. Should such a conflict develop, there will be ample time for this Court to address the issue then; alternatively, if further consideration of the question at the appellate level leads to a convergence of views, time will have proved that review by this Court is not needed.

As Ralphs points out, the issue of PAGA prohibitions in arbitration agreements has also arisen in a handful of federal district court cases, some of which have adopted the view advanced by Ralphs, while the better reasoned ones have followed the decision below. *See Urbino v. Orkin Servs. of Cal.*, Inc., __ F. Supp. 2d __, 2011 WL 4595249, at *11 (C.D. Cal. Oct. 5, 2011); *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1070 (C.D. Cal. 2011). Those cases create the likelihood that the issue may at some point be addressed by the Ninth Circuit, offering an opportunity for judges on that court to contribute their views on the issue, and for the development of either a conflict that might merit resolution by this Court or a consensus that might obviate the need for such review.

The absence of a need for review here is underscored by the uniqueness of the law at issue. PAGA's provision for individual employee-plaintiffs to serve as private attorneys general seeking penalties on behalf of the state (a portion of which may go to the plaintiff and to other affected workers) for Labor Code violations is highly unusual; indeed, Ralphs does not point to any direct analogs to PAGA in other states. PAGA provides, in effect, for the plaintiff to step into the

shoes of the state (after complying with a number of procedural requirements to allow state enforcers to step in first if they so choose) and obtain recoveries based on Labor Code violations affecting both the plaintiff and her coworkers, while still litigating on a bilateral rather than a class basis. *See Arias*, 209 P.3d at 929-31. None of this Court's decisions involving arbitration has involved a remotely comparable scheme, nor has any other appellate precedent of which we are aware. Indeed, although Ralphs contends that the decision below provides a "roadmap" to other state courts and legislatures to "exempt countless claims from the FAA's mandates," Pet. 12, Ralphs points to no other state law with the same features as PAGA, and no other state court that has rendered a decision on whether claims under such a statute can be prohibited by an arbitration agreement.

The inappropriateness of Ralphs' request that this Court reach out to review the first decision by any appellate court involving the application of *Concepcion*'s principles in the unique context of PAGA is underscored by the possibility that issues of state law that the California Supreme Court has not yet had the opportunity to decide may bear on the proper resolution of the question presented. For example, as discussed further below, whether the arbitration agreement in this case impermissibly extinguishes Ms. Brown's right to assert a PAGA claim may depend in part on whether it is legally possible to assert a PAGA claim seeking penalties only for violations suffered by the individual plaintiff, as opposed to other employees who were victims of the same violations. *See infra* at 27-28. Although some lower courts have addressed that question (*e.g.*, *Reyes v. Macy's, Inc.*, 135 Cal. Rptr. 3d 832 (2011) (holding that PAGA claims may

not be limited to recovery of penalties for violations involving only the individual plaintiff); *see also* Pet. App. 18a, n. 8), the California Supreme Court has not. The existence of such an unresolved question of state law lurking in the background of the case strongly counsels against taking up the FAA preemption issue without a definitive construction of the state law from the state's highest court.

III. The Decision Below Is Correct.

The arbitration agreement in this case purports to bar Ms. Brown from bringing any PAGA claim for penalties and attorney fees, even a claim seeking only penalties attributable to Labor Code violations involving her personally. But this Court has never held that the FAA's provision that arbitration agreements are enforceable extends to agreements that completely waive an individual's rights to assert particular claims. The FAA is limited to agreements providing that claims must be *pursued in arbitration*; it does not provide for enforcement of agreements that particular claims *cannot be pursued at all*.

Ralphs' lengthy recitation of this Court's many decisions holding that agreements to arbitrate are enforceable is thus beside the point, as it overlooks that this Court's decisions enforcing arbitration agreements have repeatedly emphasized that arbitration is merely a choice of forums, not a 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*, 473 U.S. at 628; *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. Ex-*

press, Inc., 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

Thus, agreements to arbitrate particular claims are enforceable under the FAA "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637. The Court has specifically cautioned against "confus[ing] an agreement to arbitrate … statutory claims with a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). The FAA may require enforcement of the former, but it does not require states to permit the latter. Indeed, this Court has stated that it would "condemn[] … as against public policy" an arbitration agreement that operated "as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637, n. 19.

This Court's recent arbitration decisions are in full agreement with this longstanding principle. In *Concepcion*, for example, the Court made clear that it was *not* approving an agreement that would completely foreclose consumers from presenting a claim. The Court emphasized that the claim of the plaintiffs in that case was "most unlikely to go unresolved" because the arbitration agreement not only permitted it to be arbitrated, but provided incentives for the plaintiffs to arbitrate it if the company did not immediately settle it for full value. *Concepcion*, 131 S. Ct. at 1753.

In the Court's most recent decision concerning arbitration, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), the Court again stressed that while parties may waive *procedural* rights in arbitration agreements—that is, the right to bring claims in court

under procedures applicable to court actions—they do not waive their underlying claims. Rather, as the Court explained, "contractually required arbitration of claims *satisfies* the statutory prescription of civil liability," *id*. at 671 (emphasis added), and is permissible as long as "*the guarantee of the legal power to impose liability* … is preserved." *Id*. (emphasis in original).

In light of these principles, it is not surprising that the federal courts of appeals are in broad agreement that an arbitration agreement is unenforceable to the extent that it waives a right to a form of legally required relief, or, as a practical matter, forecloses altogether the pursuit of particular claims. *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (holding unenforceable a provision in an arbitration clause barring antitrust claims for treble damages); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n. 14 (5th Cir. 2003) (holding provision in an arbitration clause barring punitive and exemplary damages in Title VII cases unenforceable); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (holding that an arbitration agreement requiring excessive fees did not adequately protect employee's ability to pursue Title VII claims); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (declining to enforce arbitration clause that purported to exclude claims for damages and equitable relief under Title VII because "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute ... the arbitration clause is not enforceable"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) ("We do not read *Gilmer* as mandating enforcement of all mandatory agreements to arbitrate statutory claims;

rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme."); *see also In re Am. Exp. Merch. Litig.*, 667 F.3d 204, 218 (2d Cir. 2012) (arbitration provision is unenforceable if it "precludes plaintiffs from enforcing their statutory rights").

Here, the arbitration agreement does not merely *limit* remedies available for a claim or impose practical barriers that effectively preclude assertion of a claim: It expressly precludes assertion of *any* PAGA claim and thus renders the liability for penalties and attorney fees created by PAGA completely unavailable to Ms. Brown. The agreement, by its terms, purports to preclude any claim brought "as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public." Pet. App. 52a. As the Court of Appeal observed, "any PAGA claim … is brought as a private attorney general," even if it seeks only penalties attributable to a violation involving the individual plaintiff. *Id*. at 16a, n.7. Nothing in *Concepcion* or any other of this Court's rulings supports the idea that an arbitration agreement can be used to completely prohibit the assertion of a substantive claim for relief or that the FAA preempts state law precluding enforcement of such an agreement.

Moreover, by extracting similar agreements from each of its employees, Ralphs would, if its preemption argument were accepted, be able to immunize itself completely from the liability for penalties and fees created by PAGA. This result would follow even if the arbitration agreement could be read, contrary to its language, to allow employees to assert PAGA claims for penalties on their own behalf in arbitration, and to

foreclose only PAGA claims seeking penalties on behalf of other employees.[6] PAGA's language suggests that PAGA claims cannot be brought *solely* to recover penalties for the particular PAGA plaintiff. *See Machado v. M.A.T. & Sons Landscape, Inc.*, 2009 WL 2230788, at *2-3 (E.D. Cal. July 23, 2009); *see also* Pet. App. 18a, n.8; *Reyes v. Macy's, Inc.*, *supra*. Thus, even if the arbitration agreement theoretically did not bar "individual" PAGA claims (although it does so on its face), it would still effectively preclude PAGA claims altogether to the extent that such claims *cannot*, as a matter of law, be brought as purely "individual" claims. *Cf. Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394 (S.D.N.Y. 2011) (both holding that a class-action ban in an arbitration clause may not be enforced to bar Title VII pattern-and-practice claims that, as a matter of law, may be asserted only through a class action).

Allowing employers to opt out of liability for penalties under PAGA would effectively overturn California's legislative judgment that it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations." *Arias*, 209 P.3d at 929. Nothing in the FAA's requirement that states enforce agreements to resolve disputes by arbitration justifies al-

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[6] Ralphs' petition seems to suggest that its arbitration policy may be capable of such a reading—that is, that it merely "limit[s] relief to the party who initiated the action." Pet. 3. The Court of Appeal, however, did not construe it in that manner. *See* Pet. App. 16a & n.7. That Ralphs' argument depends in part on an unresolved and contested issued of contract construction is yet another reason for this Court to deny review.

lowing a party to excuse itself from liability by requiring its employees to agree *not* to arbitrate *or* litigate particular disputes.

Permitting an arbitration agreement in an individual employment contract to be used to foreclose PAGA claims is particularly unwarranted because PAGA claims are, ultimately, claims of the State of California. In litigating a PAGA claim, an individual plaintiff acts "as the proxy or agent of the state's labor law enforcement agencies," and "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties …." *Arias*, 209 P.3d at 933. Indeed, the bulk of the penalties recovered by a successful plaintiff must be remitted to the state. *See id.*; *see also* Cal. Labor Code § 2699(i) (providing that civil penalties recovered pursuant to PAGA shall be distributed "75 percent to the Labor and Workforce Development Agency … and 25 percent to the aggrieved employees.").

Enforcing a prohibition of PAGA claims in an employee arbitration agreement would thus have the effect of imposing that agreement on a governmental body that is not party to the agreement. This Court in *Waffle House*, however, squarely held that an arbitration agreement cannot bind a governmental enforcement agency that is not a party to it. *See* 534 U.S. at 294. Here, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." *Id.* Allowing the arbitration agreement here to preclude recovery of penalties on behalf of the state would "turn[] what is effectively a forum selection clause in-

to a waiver of a nonparty's statutory remedies." *Id.* at 295. Neither *Concepcion* nor any other authority cited by Ralphs permits that result.

Finally, the decision of the court below does not lead to a result that is hostile to or incompatible with arbitration, or that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748. Much of this Court's reasoning in *Concepcion* rested on the Court's conclusion that California's *Discover Bank* rule effectively "allowed any party to a consumer contract to demand" classwide arbitration. *Id*. at 1750. The Court held that requiring classwide rather than bilateral arbitration was at odds with the FAA because it fundamentally changed the nature of arbitration, requiring complex and formal procedures attributable to its inclusion of absent class members. *Id*. at 1750-52.

Here, it remains to be determined whether the result of invalidating the PAGA prohibition would result in arbitration or judicial resolution of the PAGA claims in this case. But even if the result were to be arbitration, that would not fundamentally transform the arbitration process in a manner "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1751. Although PAGA claims seek recoveries that will benefit the state and other employees, they are not class proceedings, but bilateral ones, between individually named plaintiffs and defendants. *See Arias*, 209 P.2d at 929-34. Class certification, class notice, opt-out rights, and the other procedural steps that concerned the Court in *Concepcion* (*see* 131 S. Ct. at 1751-52) are not features of PAGA proceedings. In short, although PAGA claims are unique in many ways, they are still

pursued bilaterally, and the California Court of Appeal's holding that an arbitration agreement may not preclude a plaintiff from asserting them does not improperly threaten to change the nature of arbitration.

IV. The Apparent Illegality of the PAGA Prohibition Under Federal Labor Law Is Another Reason for Denying Review.

On January 3, 2012, the National Labor Relations Board ("NLRB"), in *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 192 L.R.R.M. 1137, determined that an employment agreement containing an arbitration clause with a ban on class proceedings violates the National Labor Relations Act ("NLRA") provision prohibiting employers from interfering with employees' rights to engage in "concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. § 157.[7] A contract purporting to prohibit employees from pursuing representative actions to remedy Labor Code violations would, under the reasoning of *D.R. Horton*, be equally unlawful under the NLRA.

The employer in *D.R. Horton* has sought judicial review of the decision in the U.S. Court of Appeals for the Fifth Circuit. Pending the outcome, the position of the agency responsible for enforcing the NLRA is that agreements such as the one at issue here are illegal under *federal law*. That view, if sustained, would render merely academic the question whether a state's refusal to enforce an agreement extinguishing PAGA

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[7] The NLRA's protection of concerted activity and the NLRB's construction of it in *D.R. Horton* apply to nonunionized as well as unionized employees, and to individual employment agreements as well as collective bargaining agreements. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

rights is preempted by the FAA. While the decision in *D.R. Horton* remains in force, there is thus no need to address whether the FAA preempts the lower court's state-law holding here.

Moreover, Ms. Brown has now filed an unfair labor practice charge against Ralphs for its effort to enforce the PAGA prohibition against her. The proceeding before the NLRB is currently under way, as Ms. Brown has already met with the field examiner to give a confidential statement and has filed her position statement requesting that the Board intervene by seeking an injunction in federal district court under section 10(j) of the NLRA. The Board's staff has advised counsel for both parties in writing that it has categorized the case as possibly warranting relief and as warranting priority consideration. Should the charge result in proceedings by the NLRB to enjoin Ralphs from enforcing the provision at issue here, the question of FAA preemption would be moot. Regardless of whether that specific action occurs, however, *D.R. Horton*'s invalidation of agreements such as the one at issue here on federal-law grounds eliminates any present need to answer the question whether a decision holding such an agreement unenforceable under state law is preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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