17-254

No. 17-

IN THE

Supreme Court of the United States

PRUDENTIAL OVERALL SUPPLY,

Petitioner,

v.

ROBERTO BETANCOURT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law rule that prohibits enforcement of an arbitration agreement in a dispute covered by that agreement unless the State consents, based on the fiction that the State is a party to the lawsuit, when in fact it is not.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the California Court of Appeal and California Supreme Court. The State of California is not and never has been a party to this litigation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Prudential Overall Supply states that there is no parent company or publicly held company owning 10% or more of the corporation's stock.

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Petitioner Prudential Overall Supply ("Prudential") respectfully petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, filed on March 7, 2017.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, reported in 9 Cal. App. 5th 439 (2017), is reprinted in the Appendix A at 1a-15a. The summary order of the California Supreme Court denying Prudential's petition for review, Appendix B at 16a, is unreported. The Riverside County Superior Court Order denying Prudential's petition to compel arbitration, Appendix C at 17a-18a, is unreported.

JURISDICTION

The opinion of the California Court of Appeal was entered on March 7, 2017. Appendix A at 1a. Prudential timely petitioned for review by the California Supreme Court on April 12, 2017, which was denied on May 24, 2017. Appendix C at 16a. Thus, the California Supreme Court entered its final judgment on May 24, 2017. Pursuant to Supreme Court Rule 13, this petition became due on August 22, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *Perry v. Thomas*, 482 U.S. 483, 489 n. 7 (1987).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, clause ii, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 9, Section 2 of the United States Code provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

State legislatures and courts have a history of attempts at evading the Federal Arbitration Act ("FAA"), and in this effort California has led the field. In this case a California Court of Appeal has again ignored this Court's prior decisions by creating a rule that an employee's arbitration agreement with his employer will not be enforced in a civil action brought by the employee for statutory penalties under California Labor Code § 2699. This rule is based on the fiction that the State is a party to such claims and therefore must consent to any arbitration. However, this Court has repeatedly held that the FAA preempts state-law rules that prohibit or obstruct the enforcement of valid arbitration agreements. This case presents the straightforward question whether the FAA preempts such a state-law rule.

In a published opinion, the Court of Appeal refused to enforce an arbitration agreement entered into by an employee who later filed a civil action against his former employer seeking monetary penalties under California's Labor Code for alleged wage and hour violations. The statute under which the action was filed – the California Labor Code Private Attorney General Act, California Labor Code §2699 *et seq.* ("PAGA") – does not require a judicial forum, does not give the State any role in the prosecution of the civil action once it is filed by an employee, and mandates only that any monetary penalties recovered in the action are shared between the employee bringing the lawsuit and the State.

The Court of Appeal prohibited outright the arbitration of PAGA claims any time the agreement to

arbitrate was entered into by the employee and employer before the lawsuit was filed, stating: "Prudential cannot rely on the predispute agreement with Betancourt to compel arbitration.... relying on a predispute agreement with a private party will not suffice to compel arbitration of a PAGA claim." Appendix A at 9a. To justify its refusal to enforce the arbitration agreement, the Court of Appeal relied on the fiction that the State is a party to the lawsuit, even though the State plays no role in the filing or prosecution of the case. The Court of Appeal held that the employee's arbitration agreement could not be enforced against the employee bringing the lawsuit, because the State was not a signatory to the arbitration agreement and therefore did not expressly consent to arbitration of the State's interest in plaintiff employee's civil action, stating: "a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state." Appendix A at 8a.

Underpinning the Court of Appeal's refusal to enforce the employee's arbitration agreement is the fallacy that the State is the real party in the PAGA action and the equally false notion that the employee bringing the PAGA lawsuit is not. By this transparent ruse the Court of Appeal has attempted to evade the FAA's requirement that the employee's arbitration agreement be enforced. This judicial shell game designed to avoid arbitration of PAGA claims should not be countenanced by this Court.

The reality is that the State is not in any meaningful way a party in a PAGA action, and the State plays no role in the prosecution, dismissal, or settlement of the lawsuit. By contrast, the employee signatory to the arbitration agreement has all the attributes of a party-plaintiff: (1)

the employee files the PAGA action as the named plaintiff; (2) the employee prosecutes the lawsuit; (3) the employee makes all decisions regarding the action; (4) the employee can settle the action; (5) the employee can dismiss the case; (6) the employee can decide not to file the PAGA action; (7) the employee obtains any monetary judgment and retains 25% of the penalties; and (8) the employee is awarded attorneys' fees if he prevails in the action.

The Court of Appeal's decision is directly contrary to the FAA and decisions of this Court that prohibit such state anti-arbitration rulemaking for the following reasons: First, the decision is contrary to the primary purpose of the FAA to ensure that private arbitration agreements are vigorously enforced according to their terms. Second, the decision prohibits enforcement of and erects barriers to the enforcement of arbitration agreements covered by the FAA. Third, the decision places arbitration agreements on unequal footing with other contracts by requiring the State's consent as a condition for enforcing the arbitration agreement.

The Court of Appeal's decision is also contrary to the decisions of the Ninth Circuit Court of Appeals and numerous federal district courts in California, which have held that PAGA claims are not exempt from arbitration, because an outright prohibition on arbitrating PAGA claims is preempted by the FAA. Thus, the enforceability of employment arbitration agreements in California PAGA cases presently depends entirely on whether the case is filed in, or can be removed to, federal court.

The question presented is immensely important because employees and employers throughout California

routinely agree to arbitrate their employment-related disputes at the outset of the employment relationship. The Court of Appeal's decision will invalidate vast numbers of employment arbitration agreements covered by the FAA in California as applied to PAGA claims. This Court's review is therefore essential.

Given the clear failure of the lower court to heed this Court's repeated instructions that the FAA does not permit states to prohibit arbitration of particular claims and requires arbitration agreements to be placed on equal footing with other contracts, the Court may wish to consider summary reversal or vacatur for reconsideration in light of *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

STATEMENT OF THE CASE

California's Labor Code Private Attorney General Act.[1]

PAGA allows an employee to bring an action to recover civil penalties for violations of California's Labor Code on behalf of that employee and other current and former employees. Cal. Lab. Code § 2699(a). PAGA claims may be filed either on their own or along with claims seeking wages, damages and statutory penalties for the same alleged Labor Code violations that form the basis of the

1. References and descriptions in this section are to the statutory provisions as they existed when Respondent filed his civil action. California amended the statute effective June 27, 2016, but the changes apply only to actions filed on or after July 1, 2016.

PAGA claim. PAGA's default penalty per violation is $100 for each aggrieved employee per pay period for the first violation and $200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code § 2699(f)(2). Of the penalties recovered, the employees retain 25% and remit 75% to the State. Cal. Lab. Code § 2699(i). A prevailing plaintiff also recovers attorneys' fees. Cal. Lab. Code § 2699(g)(1).

Prior to filing a PAGA claim, the employee need only provide written notice of the alleged violations to the State and the employer. Cal. Lab. Code § 2699.3(a). PAGA does not mandate a judicial forum. If the State chooses to investigate the alleged violations and finds them meritorious, then an administrative citation and hearing process follows, not a civil action. Lab. Code § 98. In practice, however, "review and investigations of PAGA claims are quite rare." Cal. Dep't of Indus. Relations 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP-2016-GB, at 1. Indeed, only one employee is presently staffed to review PAGA notices, and the State investigates less than 1% of all PAGA claims. *Id.* at 1 n.1. Thus, by default, virtually every employee who files a PAGA notice obtains the State's tacit consent to bring his or her own PAGA claim.

The employee is free to file a PAGA claim if, within 33 days of the written notice, the State either fails to respond or notifies the employee that it does not intend to investigate. Cal. Lab. Code § 2699.3(a)(2).[2] After the

2. In this respect, private plaintiff PAGA claims are like private plaintiff discrimination claims under the Age Discrimination in Employment Act, 29 U.S.C. § 626, and Title VII of the Civil Rights

employee has filed a PAGA claim, the employee controls its prosecution without any State involvement. The State is never a named party and has no right to intervene.

Factual Background

Petitioner Prudential Overall Supply, Inc. ("Prudential") is a multi-state company headquartered in Irvine, California that provides uniforms and apparel, facility supplies, and clean room services to its business customers. Prudential buys and sells goods and services in interstate commerce. Respondent Roberto Betancourt ("Betancourt") worked for Prudential as a sales representative from January 2006 to September 2013. At the commencement of his employment on January 30, 2006, Betancourt signed an Agreement to Arbitrate, in which he agreed "to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Prudential Overall Supply."

Betancourt filed a civil lawsuit on April 1, 2015, alleging multiple violations of the Labor Code during his employment. Based on the alleged violations, Betancourt sought not only civil monetary penalties under PAGA, but also business expenses, unpaid wages, untimely wages, interest, attorneys' fees, costs, and statutory penalties, and "such other and further relief as the Court may deem equitable and appropriate." Appendix A at 3a.

Act, 42 U.S.C. 2000e-5(f)(1), in which notice of the allegations must be filed with the agency, which then issues a perfunctory "right to sue" letter permitting the employee to pursue the claim in the employee's own name, either in a civil action or, when the employee has agreed to arbitrate, in arbitration.

In response, Prudential filed a petition to compel arbitration and stay the action. The trial court denied the petition. At the hearing, the trial court stated its ruling as follows:

> Under the California Supreme Court's recent decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, a 2014 case, the Supreme Court found that the Federal Arbitration Act does not preempt a PAGA action, and an aggrieved employee cannot be compelled to arbitrate a PAGA claim.
>
> Because plaintiff's PAGA claim is not subject to the agreement to arbitrate, defendant's petition to compel arbitration is therefore denied.

Appendix D at 20a.

Prudential appealed. On March 7, 2017 the Court of Appeal affirmed. *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439 (2017). On May 24, 2017, the California Supreme Court summarily denied Prudential's Petition for Review. This Petition follows.

REASONS FOR GRANTING REVIEW

Just five years ago this Court declared that "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*, including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Technologies,*

LLC v. Howard, 568 U.S. 17, 17–18 (2012) (per curiam). How California's courts implement this Court's precedents and the interpretation of the FAA manifestly presents an important question of law.

The decision below defies this Court's clear and repeated holdings that the FAA preempts state-law rules that discriminate against arbitration agreements. By prohibiting outright the enforcement of a plaintiff employee's agreement to arbitrate PAGA claims, the court below disregarded this Court's definitive interpretation of the FAA. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion, supra*, 563 U.S. at 341 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

In requiring that the State of California consent to the arbitration in order for an arbitration agreement to be enforceable in a PAGA case filed and prosecuted by the employee – even though California law does not impose that requirement on other types of contracts – the court below flatly violated the FAA's mandate that courts must "place [] arbitration contracts on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry, supra*, 482 U.S. at 492 n. 9.

Whether PAGA claims are arbitrable was the issue squarely presented to, and decided erroneously by the trial court and the Court of Appeal. The Court of Appeal held:

> The trial court correctly denied Prudential's motion to compel arbitration because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state. (citations omitted) This is currently a PAGA case, and Prudential is relying on a 2006 predispute arbitration agreement by Betancourt to compel arbitration in this 2015 case brought on behalf of the state. . . . The state is not bound by Betancourt's predispute agreement to arbitrate.

Appendix A at 8a (emphasis added).

By drawing a red circle around PAGA claims and declaring them entirely exempt from arbitration in all cases involving pre-dispute arbitration agreements, the Court of Appeal created a state law rule that is plainly in conflict with and therefore preempted by the FAA.

Indeed, an unbroken line of decisions by the *federal* appellate court for California as well as numerous decisions of *federal* District Courts in California have held exactly the opposite. These *federal* decisions hold that PAGA claims are subject to arbitration under pre-dispute agreements between the actual parties to the lawsuit, notwithstanding the State's interest in its share of any monetary penalties recovered. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015); *Wulfe v. Valero Ref. Co.-Cal.*, 641 Fed. Appx. 758, 760 (9th Cir. 2016); *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 681 F. App'x 592, 594 (9th Cir. 2017); *Bui v. Northrop Grumman Sys. Corp.*, No. 15-CV-1397-WQH-WVG, 2015

WL 8492502, at *7 (S.D. Cal. 2015); *Hernandez v. DMSI Staffing, LLC.*, 79 F. Supp. 3d 1054, 1067 (N.D. Cal. 2015), *aff'd sub nom. Hernandez v. DMSI Staffing, LLC,* 677 F. App'x 359 (9th Cir. 2017).

These federal courts are correct. In addition, this conflict between the state and federal courts of California means that a party's rights under the FAA currently turn entirely on whether the lawsuit is prosecuted in state or federal court.

Because the question is cleanly presented, this case is a perfect vehicle to resolve the issue of arbitration of PAGA claims. The Court of Appeal did not address other issues raised by Prudential, because it ruled that PAGA claims are never arbitrable based on a pre-dispute arbitration agreement entered into by the employee with his employer. Therefore, this single issue is squarely presented in this case.

The issue presented is fully ripe. California's Supreme Court now has twice refused to correct two separate Courts of Appeal that have defied this Court's precedents by holding that PAGA claims are exempt from arbitration. Appendix B; *Tanguilig v. Bloomingdales*, 5 Cal. App. 5th 665, 677-678 (2016) (*review denied* March 1, 2017);[3] *see also, Richard Esparza v. KS Industries, L.P.*, No. F072597, 2017 WL 3276363, at *1 (Cal. Ct App. Aug. 2, 2017) ("The State of California is not a party to the agreement and, thus, [PAGA] claims brought by it or on its

3. A petition for certiorari is pending before this Court in *Tanguilig. See* Petition for Writ of Certiorari, *Bloomingdale's, Inc. v. Bernadette Tanguilig*, No. 16-1503 (June 19, 2017).

behalf are not subject to arbitration."). The Ninth Circuit has clearly and repeatedly rejected the California courts' approach. Further percolation would serve no purpose. Only this Court can resolve the question presented, and that question is ripe for resolution now.

The decision below is yet another in a long line of state court decisions seeking to evade this Court's precedents on arbitration. *See, e.g., Kindred, supra*, 137 S. Ct. at 1427; *Nitro-Lift, supra*, 568 U.S. at 20; *Marmet Health Care Center, Inc. v. Brown,* 565 U.S. 530, 532-33 (2012). California leads the field in such attempts to circumvent the FAA with state law rules disfavoring arbitration. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015), *CarMax Auto Superstores California, LLC v. Fowler*, 134 S.Ct. 1277, 188 L.Ed.2d 290 (2014), *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. 973 (2011) and *Perry, supra*, 482 U.S. at 489. Review and reversal or vacatur of the decision below is warranted to prevent the Court of Appeal's flouting of the FAA and preserve the integrity of this Court's precedents.

A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The FAA "is a law of the United States . . . . Consequently, the judges of every State must follow it." *Imburgia, supra*, 136 S.Ct. at 468. In *Concepcion, supra*, 563 U.S. at 341, this Court explained the most obvious type of state law rules that are preempted by the FAA: "When state law prohibits outright the arbitration of a particular type of claim," it presents a "straightforward" analysis: "The conflicting rule is displaced by the FAA."

In this case, the Court of Appeal's holding prohibits outright the arbitration of a particular type of claim – PAGA claims for civil penalties – any time the agreement to arbitrate was entered into by the parties before the lawsuit was filed. The Court of Appeal stated:

> Prudential cannot rely on the predispute agreement with Betancourt to compel arbitration. Therefore, while a PAGA action might be subject to arbitration, relying on a predispute agreement with a private party will not suffice to compel arbitration of a PAGA claim.

Appendix A at 9a. The Court of Appeal's prohibition of arbitrating PAGA claims could hardly be clearer.

Legislative and judicial attempts to preclude arbitration of California Labor Code claims have been held by this Court to be preempted by the FAA in numerous cases. *Perry, supra*, 482 U.S. at 483 (California Labor Code § 229, restricting arbitration of wage disputes, preempted and invalidated by FAA); *Preston, supra*, 522 U.S. at 354-57 (FAA supersedes the California Talent Agencies Act, which vests exclusive jurisdiction of disputes under the Act in the California Labor Commissioner); *Sonic-Calabasas, supra*, 565 U.S. 973 (2011) (vacating the California rule requiring a Labor Commissioner administrative hearing before arbitration of a wage dispute covered by the arbitration agreement).

The California Court of Appeal's rule prohibiting enforcement of pre-dispute arbitration agreements in PAGA cases filed and prosecuted solely by the signatory

employee against the signatory employer cannot be squared with the plain terms and manifest purpose of the FAA.[4] Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002)(quotation marks omitted). Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law,* *** 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry, supra*, 482 U.S. at 492, n. 9 (quoting 9 U.S.C. § 2).

This principle means that "Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto, supra,* 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

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4. The *Betancourt* rule, which singles out pre-dispute agreements to arbitrate PAGA claims for unequal treatment, contravenes the text of FAA § 2: "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). By its terms, then, the FAA requires the enforcement of both pre-dispute and post-dispute arbitration agreements and mandates that they be treated equally. If Congress had intended to make only post-dispute arbitration agreements enforceable under the FAA, it would have done so. *See* 15 U.S.C. § 1226(a)(2).

Concepcion, supra, 563 U.S. at 339; *see also Imburgia, supra,* 136 S. Ct. at 471; *Perry,* 482 U.S. at 492 n.9. Nor may States apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion,* 563 U.S. at 341; *see also Kindred,* 137 S. Ct. at 1427. Like California Labor Code section 229 prohibiting arbitration of any claim for wages under the Labor Code (which this Court held preempted by the FAA 30 years ago in *Perry, supra,* 482 U.S. at 492), the Court of Appeal's rule is an outright prohibition on arbitration of a particular type of Labor Code claim.

The Court of Appeal attempted to justify its anti-arbitration rule as one of general applicability based on the wrongheaded notion that because the State has an interest in Betancourt's PAGA claim for monetary penalties it is the "real party" to the PAGA action and Betancourt is not. Relying on this false premise the Court of Appeal concluded, "Thus, the fact that Betancourt may have entered into a predispute agreement to arbitrate does not bind the state to arbitration." Appendix A at 11a-12a. The *Betancourt* rationale relies on a double fiction: (1) that the State, despite being entirely absent from the proceeding and having no authority to intervene, is a party; and (2) that the plaintiff, despite statutory authorization to sue in his own name and to prosecute or settle the PAGA claims without any State involvement, is nevertheless acting on the State's behalf and therefore his private agreement to arbitrate is inapplicable.[5] This artifice is in direct

5. The false analogy often drawn by California courts is that PAGA claims are "a kind of *qui tam*" claim. This Court has held that in a federal *qui tam* action the named plaintiff, not the government, is the party plaintiff and the government is not a party unless the government has intervened in the action. *United States ex rel. Einstein v. City of New York,* 556 U.S. 928, 933 (2009). Furthermore, comparison of California's actual *qui tam* statute, Government Code section 12652, to Labor Code section 2699, shows that PAGA claims bear no resemblance to *qui tam* actions, either in terms of the injured party whose rights were violated or the continuing right of the State or its subdivisions to control the litigation or any settlement, even in cases where they do not intervene at the outset. California Government Code §12652 authorizes *qui tam* actions in which the State has been defrauded and monetarily injured, and authorizes the State to intervene and control the litigation or its disposition at all stages. PAGA authorizes additional penalties that are derivative of and based solely upon Labor Code violations suffered by the employee, and once the employee obtains standing to assert a PAGA claim, the State lacks any ability to intervene in or control the litigation.

conflict with the FAA, which requires that Betancourt's arbitration agreement be enforced to compel arbitration of any action filed and prosecuted by Betancourt.

This case is in marked contrast to cases where a State or federal agency is an actual party to the lawsuit against the employer and directly controls the litigation, in which case the employee's arbitration agreement with the employer does not bar the government from pursuing its own action in court. For example, this Court ruled in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) that an employee's arbitration agreement with his employer did not prevent the EEOC from suing the employer on behalf of the employee for victim-specific relief. The Court simply concluded that the EEOC was not required to arbitrate, because the EEOC, not the employee was the actual party to the litigation. *See Preston, supra,* 552 U.S. at 359 (explaining "in *Waffle House* . . . the Court addressed the role of an agency . . . as prosecutor, pursuing an enforcement action in its own name."). But the Court's

conclusion in *Waffle House* was based on the facts that: (1) the employee was not a party to the lawsuit; (2) the employee did not exercise control over the litigation; (3) the EEOC was not a proxy for the individual employee; and (4) the EEOC could prosecute the action without the employee's consent. The Court explained that the result would be different if "the EEOC could prosecute its claim only with [the employee's] consent" or "if its prayer for relief could be dictated by [the employee]." *Waffle House*, *supra*, 534 U.S. at 291.

The Court of Appeal's reasoning here that the State is the real party in the PAGA action and that Betancourt is not a party is in direct contravention of the rationale of *Waffle House*, because here Betancourt is the named party to the lawsuit and he controls the litigation in its entirety. Betancourt filed the lawsuit; he is thus a party to it and the State is not. This Court held in *United States ex rel. Einstein v. City of New York*, 556 U.S. 928, 933 (2009) that "A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought'" the government's 'status as a 'real party in interest' in a *qui tam* action does not automatically convert it into a 'party,'" and stated that when a real party in interest "has declined to bring the action or intervene, there is no basis for deeming it a 'party.'" This Court further stated: "A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.' *Black's Law Dictionary* 1154 (8th ed.2004). An individual may also become a 'party' to a lawsuit by intervening in the action."

Generally applicable California law is to the same effect. A California Court of Appeal in *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 592 (2010) held that the

employee, not the State, is the plaintiff in a PAGA action when the State fails to pursue the matter itself, stating:

> [Plaintiff employee] contends the State of California is, as a legal matter, the actual plaintiff here. Not so. The PAGA authorized [the employee] to file this action 'on behalf of himself . . . and other current and former employees.' (§2699, subd.(a).) The act 'empowers or deputizes an aggrieved employee to sue for civil penalties . . . as an alternative to enforcement by the [State]. (Emphasis added).

This case involves the very same law, PAGA. The contrary rationale of the Court of Appeal here treats arbitration agreements more unfavorably than other types of agreements.

The *Betancourt* rule is preempted by the FAA, because the reasoning does not apply to any agreement other than an agreement to arbitrate. For example, California law permits private plaintiffs to enter into agreements to settle and release allegations of Labor Code violations before any PAGA lawsuit is filed. Those agreements are enforced to preclude derivative PAGA claims for penalties entirely, without regard to whether the State signed the settlement agreement or otherwise consented to the settlement and release. *See Villacres*, *supra*, 189 Cal. App. at 591 (holding that a class representative's settlement agreement released PAGA claims by covered class members). Indeed, PAGA itself contemplates that private plaintiffs may choose to *never* pursue claims for PAGA penalties (in which case the State's interest is extinguished by the employee's inaction)

or may settle or dismiss PAGA actions without giving notice to or obtaining the consent of the State. Cal. Lab. Code § 2699 (2015). Plainly, the decision below selectively disfavors only arbitration agreements.

Another comparison illustrates the unequal treatment given to the arbitration agreement here. Unlike the anti-arbitration rule in this case, California courts have held enforceable other types of agreements, even where the private plaintiff filed the action in a private attorney general capacity authorized by statute. In *Net2Phone, Inc. v. Superior Court*, 109 Cal. App. 4th 583, 587-588 (2003), a California Court of Appeal held a forum selection clause in a consumer contract was enforceable against the private plaintiff suing in a private attorney general capacity under California's Unfair Competition Law, *even assuming the forum selection clause would not be enforceable against the California Attorney General making the same claims*. In so holding, the court rejected the argument that because the private plaintiff was suing in place of the State's Attorney General, the forum selection clause therefore could not be enforced against the private plaintiff. As the court stated "The filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the issue presented here." *Net2Phone*, *supra*, 109 Cal. App. 4th at 587.

Such obvious inconsistency has led this Court to conclude that similarly suspect judicial rules have improperly targeted arbitration agreements, in contravention of the FAA. *See, e.g.*, *Kindred*, *supra*, 137 S.Ct. at 1427 (holding that FAA preempted Kentucky Supreme

Court's special rule requiring express authorization by principal of agent to enter into arbitration agreements but not other contracts); *Imburgia*, *supra*, 136 S. Ct. at 470-71 (holding that the FAA preempted the California Court of Appeal's interpretation of the term "law of your state" because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation of 'law of your state' in any context other than arbitration.").

This Court should not countenance the Court of Appeal decision, which is transparently incorrect and concocted only to evade FAA preemption.

B. The Decision Below Is Exceptionally Important.

This Court's immediate intervention to prevent California courts from continuing to evade the dictates of the FAA is warranted for three reasons: (1) This issue arises with great and increasing frequency; (2) There is a square conflict between the State court's decision below and decisions on the very same legal issue by the federal courts in California; and (3) This Court's intervention will make it clear that states may not invalidate arbitration agreements on grounds which contravene the FAA and this Court's precedents.

1. This issue arises with great and increasing frequency.

California is the most populous state in the country, is a hub to numerous major U.S. and global industries, and is home to approximately 12% of all employees in the United

States.[6] Many of those employees agree to arbitration of their employment-related disputes at the outset of their employment, before any dispute has arisen.[7] As a result of *Betancourt*, employment arbitration agreements under which California employers and employees agreed to arbitrate PAGA claims cannot be enforced.

Enterprising plaintiffs and their attorneys are quickly taking advantage of this new loophole, using it to shirk their contractual obligation to arbitrate employment claims. The California courts' refusal to enforce pre-dispute agreements to arbitrate PAGA claims has caused the number of PAGA actions to skyrocket. "Annual PAGA filings have increased over 200 percent in the last five years, and over 400 percent since 2004. The fact that PAGA claims cannot be waived by agreements to arbitrate contributes heavily to the prevalence of these suits." Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable,* 56 Santa Clara L. Rev. 413, 415 (2016) (citation omitted). In California, as many as 635 new PAGA notices are now being filed every

6. As of April 2017, California had an employed workforce of 18,254,700. Bureau of Labor Statistics, California, https://www.bls.gov/eag/eag.ca.htm. At that time, the United States employed workforce was 153,156,000. Bureau of Labor Statistics, Employment status of the civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm.

7. See Colvin, A.J.S. (2012) *American Workplace Dispute Resolution in the Individual Rights Era* [electronic version]. Retrieved August 9, 2017 from Cornell University ILR School website http://digitalcommons.ilr.cornell.edu/articles/833/, citing surveys that 14.1% to 16.39% of businesses had adopted employment arbitration procedures, suggesting "a relatively rapid growth of employment arbitration procedures during the 1990's and 2000's."

month. Cal. Dep't of Indus. Relations 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP-2016-GB, at 2. This trend will undoubtedly accelerate without this Court's intervention.

2. There is a square conflict between the ruling below and decisions on the very same legal issue by the federal courts in California.

The Court of Appeal below relied on selected and incomplete quotations from *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348 (2014) to hold that PAGA claims are not arbitrable. Appendix A at 7a-8a, 11a-12a. The precise holding of *Iskanian* is that where "an employment agreement compels the waiver of representative claims," whether or not the agreement specifically references PAGA, it "frustrates the PAGA's objectives" and "is contrary to public policy and unenforceable as a matter of state law." *Iskanian, supra,* 59 Cal. 4th at 384. The focus of *Iskanian* is not on preventing enforcement of arbitration agreements in cases involving PAGA claims, but on preventing waiver of substantive statutory remedies. *Iskanian* held that an employer "cannot compel the waiver of [the employee's] representative PAGA claim but that the agreement [to arbitrate] is otherwise enforceable according to its terms." *Iskanian, supra,* 59 Cal. 4th at 391.

Indeed, in *Iskanian* the court expressly remanded the PAGA claims in that case for determination of "a number of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA

claim to litigation?" *Iskanian*, *supra*, 59 Cal. 4th at 391-92. *Iskanian* did not rule out an arbitral forum for PAGA claims, but stated that the employer "must answer the representative PAGA claims in some forum." 59 Cal. 4th at 392. The parties in this case already agreed on a single forum for resolving the PAGA claim and all other employment claims – they agreed on arbitration. Appendix A, 12a-13a.

The Ninth Circuit Court of Appeals has explained on several occasions that pursuant to *Iskanian's* interpretation of California law, PAGA claims are not exempt from arbitration, but instead are subject to arbitration if the parties' agreement allows pursuit of PAGA's civil penalties. "The California Supreme Court's decision in *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. [] The *Iskanian* rule does not prohibit the arbitration of any type of claim." *Sakkab*, *supra*, 803 F.3d at 434 (internal citation omitted); *see also Poublon*, *supra*, 846 F.3d at 1273 ("the waiver of representative claims is unenforceable to the extent it prevents an employee from bringing a PAGA action. This clause can be limited without affecting the remainder of the agreement."); *Valdez*, *supra*, 681 F. App'x at 594; *Wulfe*, *supra*, 641 Fed. Appx. at 760.

Accordingly, under the Ninth Circuit's interpretation of California law, "[n]othing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims." *Sakkab*, *supra*, 803 F.3d at 436. Since *Sakkab* determined that the narrow *Iskanian* rule was not in conflict with the FAA, numerous federal

district courts in California have compelled arbitration of PAGA claims.[8]

As the Ninth Circuit noted, the limited state law rule established by *Iskanian* does not conflict with and therefore is not preempted by the FAA. *Sakkab*, *supra*, 803 F.3d at 434 ("The *Iskanian* rule does not prohibit the arbitration of any type of claim."). The same cannot be said of the *per se* rule against arbitration of PAGA claims that the Court of Appeal created in this case.

Indeed, the Ninth Circuit rejected the exact rule proffered by the Court of Appeal below in this case. *Valdez v. Terminix Int'l Co. Ltd. P'ship*, *supra*. As the Ninth Circuit stated:

> *Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration, and thus that individual employees can bind the state to an arbitral forum. *** Accordingly, an individual employee, acting as an agent for the government, can agree to pursue a PAGA claim in arbitration. *Iskanian* does not require that a PAGA claim be pursued in the judicial forum; it holds only

8. *See e.g., Galvan v. Michael Kors USA Holdings, Inc.*, 2017 WL 253985, at *10 (C.D. Cal. 2017); *Bui v. Northrop Grumman Sys. Corp.*, No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. 2015) ("Neither *Iskanian* nor *Sakkab* suggest that PAGA claims cannot be arbitrated."); *Hernandez v. DMSI Staffing, LLC.*, 79 F. Supp. 3d 1054, 1067 (N.D. Cal. 2015) ("The fact that the waiver provisions of the arbitration clauses at issue cannot be enforced to bar PAGA representative claims does not necessarily dictate which forum is proper for their adjudication"), *aff'd sub nom*; *Hernandez v. DMSI Staffing, LLC*, 677 F. App'x 359 (9th Cir. 2017).

that a complete waiver of the right to bring a PAGA claim is invalid.

Valdez, *supra*, 681 F. App'x at 594 (internal citations omitted, emphasis added).

Here, the Court of Appeal below extracted the exact opposite rationale from *Iskanian*, to justify a *per se* rule that an employee's predispute agreement to arbitrate may never be enforced against the employee's asserted PAGA claims. This sweeping expansion of *Iskanian*, if allowed to stand, will invalidate vast numbers of employment arbitration agreements when applied to PAGA cases.

The Ninth Circuit also held that the FAA as interpreted by this Court in *Concepcion* preempts California's rule attempting to exempt from arbitration private attorney general actions seeking public injunctive relief under California's consumer protection laws. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (holding that *Concepcion's* core holding "also resolves this case. By exempting from arbitration claims for public injunctive relief under the CLRA, UCL, and FAL, the *Broughton–Cruz* rule similarly prohibits outright arbitration of a particular type of claim.")

The Court of Appeal's decision in this case cannot be reconciled with the Ninth Circuit decisions discussed above. This conflict between California's state and federal courts will continue to prejudice companies like Prudential, who are headquartered in California and unable to remove PAGA cases to federal court. California state courts will not enforce predispute arbitration agreements in PAGA cases based on *Betancourt*, *Tanguilig v. Bloomingdales*,

5 Cal. App. 4th 665, 677-678 (2016) (refusing to enforce a pre-dispute arbitration agreement against signatory employee's PAGA claim for monetary penalties because the State had not expressly consented to arbitrate), and *Richard Esparza v. KS Industries, L.P.*, No. F072597, 2017 WL 3276363, at *1 (Cal. Ct App. Aug. 2, 2017) (refusing to enforce arbitration agreement to PAGA claims because State was not a party to the arbitration agreement).

In contrast, companies headquartered or incorporated elsewhere will be able to remove such cases to federal court and enforce their arbitration agreements – thereby allowing those companies "to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation ***."). That dichotomy places California businesses like Prudential at a distinct disadvantage.

The circumstances here are therefore similar to those that warranted this Court's review in *Imburgia*. *See* 136 S. Ct. at 467-48 (observing that the petition granted "not[ed] that the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal"). This Court's intervention is needed in order to ensure that parties' rights in California under the FAA do not depend on the forum – state or federal court – in which they seek to enforce an arbitration agreement.

3. This Court's intervention also will make clear that states may not invalidate arbitration agreements in contravention of the FAA and this Court's precedents.

This Court repeatedly has intervened by granting summary reversals when state courts have ignored or refused to apply controlling precedents interpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the *** FAA," "[i]t is a matter of great importance *** that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, *supra*, 568 U.S. 17 at 501; *accord Marmet*, *supra*, 565 U.S. at 532 (the Court summarily vacated and remanded the lower court's decision, because "The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court."); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (the Court summarily vacated the Florida District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter* [*Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)]."); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (the Court summarily reversed the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)).

This Court also recently reversed the Kentucky Supreme Court, which had imposed a state law rule

prohibiting authorized agents from binding their principals to arbitration agreements, despite broad authority under Kentucky law to enter into all manner of other contracts. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017) ("Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment."). As this Court held in that case, "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 1428. The rule imposed by the Court of Appeal below, selectively finding pre-dispute agreements invalid in PAGA cases, should fare no better.

In addition, earlier last term, this Court reversed a decision of the California Court of Appeal adopting an incorrect interpretation of an arbitration agreement in an attempt to find the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468-71. This Court was once again compelled to remind the lower courts of their "undisputed obligation" to follow its precedents: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Id.* at 468.

The decision below demonstrates that California courts continue to defy this Court's instructions.[9] Left

9. Indeed, the trial court in this case admitted California courts' propensity to avoid the FAA to "get out" of arbitration: "*Iskanian* is good law. A lot of people don't want to hear that, because

to stand, the decision below could well prompt other state legislatures to "deputize" private plaintiffs in order to render their previously signed arbitration agreements unenforceable or could prompt state courts to manufacture interpretations of state agency law that single out arbitration for disfavored treatment in an effort to circumvent the FAA. This approach has already been recommended to anti-arbitration state legislatures. *See* Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203 (2013).

C. Alternatively, Summary Reversal Or Remand Would Be Appropriate In This Case.

Given the clear conflict between the decision below and this Court's precedents, the Court may wish to consider summarily reversing the decision below.

If the Court believes that neither plenary review nor summary reversal is warranted, it may wish to consider granting, vacating, and remanding the decision below in light of *Kindred Nursing Centers*, *Imburgia*, and *Concepcion.* This Court has already taken that course in other cases presenting state courts' refusal to adhere to this Court's precedents interpreting the FAA. *See Schumacher Homes of Circleville, Inc. v. Spencer,* 136 S. Ct. 1157 (2016); *Ritz-Carlton Development Co. v. Narayan,* 136 S. Ct. 799 (2016); *CarMax Auto Superstores*

nationally everybody is going in favor of the FAA. But California is an exception. They find a lot of these clauses unconscionable, and they look for exceptions to get out of the arbitration – mandatory arbitration." Appendix D at 24a (emphasis added).

California, LLC v. Fowler, 134 S.Ct. 1277, 188 L.Ed.2d 290 (2014). Doing the same here would remind the California courts that they may not prohibit arbitration of a particular type of state law claim or otherwise disfavor arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or vacatur for reconsideration in light of *Kindred Nursing Centers*, *Imburgia*, and *Concepcion.*

Respectfully submitted

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