

No. 11-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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RALPHS GROCERY COMPANY, ET AL.,  
*Petitioners,*

v.

TERRI BROWN,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

The arbitration agreement at issue in this case (1) is governed by the Federal Arbitration Act (FAA); (2) requires arbitration of all disputes between the parties; and (3) expressly provides that no dispute may be arbitrated as a class action, a representative action, or a private attorney general action.

The FAA provides that arbitration agreements “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. Last term, this Court reaffirmed that “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms.” *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 1748 (2011). This Court also reaffirmed that the Supremacy Clause forbids courts from relying on state law or policies to declare arbitration agreement terms unenforceable. *Id.* at 1753.

In contravention of these settled principles, the California appellate court relied on a state law unwaivable statutory rights theory to declare unenforceable the representative and private attorney general arbitration waiver terms of the parties’ agreement, adopting a categorical public policy that invalidates such waiver terms whenever the state legislature declares, or a court holds, that a representative action serves a state interest.

Thus, the question in this case is:

Whether the FAA preempts a state law public-policy-based rule providing that arbitration agreement terms waiving arbitration of representative claims brought pursuant to a state statute are unenforceable.

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioners are Ralphp Grocery Company and The Kroger Co. Respondent is Ms. Terri Brown.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Petitioner Ralphp Grocery Company is a for-profit privately-held corporate entity. The Kroger Co. is a for-profit publicly-held corporate entity. The Kroger Co. owns 10% or more of the stock of Ralphp Grocery Company. No other publicly-held companies own 10% or more of the stock of either Petitioner.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Ralphs Grocery Company and The Kroger Co. respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of California, Second Appellate District.

## OPINIONS BELOW

The decision and opinion of the California Court of Appeal is reported at 128 Cal.Rptr.3d 854 (Cal. Ct. App. 2011) and is reprinted in the Appendix to the Petition (“App.”) at 1a-29a. The order and opinion of the trial court is unreported and is reprinted at App. 31a-40a.

## JURISDICTION

The California Court of Appeal issued its judgment and opinion on July 12, 2011, App. 1a-29a, and denied a petition for rehearing on July 29, 2011. The California Supreme Court denied review on October 19, 2011. App. 41a. This Court’s jurisdiction rests on 28 U.S.C. § 1257(a).<sup>1</sup>

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<sup>1</sup> The judgment of the California Court of Appeal is final within the meaning of 28 U.S.C. § 1257(a). This Court has granted certiorari petitions seeking review of state court judgments denying efforts to compel arbitration. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without addressing jurisdiction); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof \* \* \* 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.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

A written provision in \* \* \* a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, \* \* \* 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.

## STATEMENT

This Court repeatedly and consistently has instructed that the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, mandates the enforcement of an arbitration agreement according to its terms no matter what state law or policy might be invoked as a basis for non-enforcement. Nonetheless, a divided panel of the California Court of Appeal refused to

enforce an arbitration agreement term waiving representative and private attorney general arbitrations under the California Private Attorney General Act of 2004, Labor Code §§ 2698-2699.5 (the PAGA), solely on the basis of state law and policy considerations—a decision the California Supreme Court declined to review.

The PAGA creates a private right of action under which employees may assert on behalf of themselves and other current or former employees claims for violations of the California Labor Code. Cal. Lab. Code §§ 2698, 2699. The California appellate court held that the representative and private attorney general arbitration waiver in the parties' agreement could be declared unenforceable because the PAGA creates an unwaivable statutory right to civil penalties for violations of the California Labor Code, and it serves state interests to grant relief to similarly-aggrieved nonparties in PAGA representative actions, rather than limiting relief to the party who initiated the action.

By striking the representative and private attorney general arbitration waiver terms, the California appellate court did exactly what the FAA unequivocally forbids: it relied on the state's law and policy as a basis to refuse to enforce a term in the parties' arbitration agreement—concluding that Congress's objectives in enacting the FAA should yield to the state interests served by the PAGA.

This Court has noted that “the judicial hostility toward arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas declaring arbitration against public policy.” *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_,

131 S.Ct. 1740, 1747 (2011) (internal quotations and citation omitted); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA was enacted to end “ancient” judicial hostility to arbitration). The California appellate court’s decision is just such a “device” or “formula” for avoiding the FAA by declaring an arbitration agreement term unenforceable based on a state’s public policy. This case presents an ideal opportunity to instruct that this device, like other devices this Court has rejected, equally contravenes the FAA.

#### **A. The Arbitration Agreement**

Before Terri Brown began her employment with Ralphs Grocery Company, she signed an agreement to comply with Ralphs’ Dispute Resolution Program and Mediation and Binding Arbitration Policy. App. 3a. The arbitration agreement expressly provides that it is governed by the FAA. App. 50a. Except for disputes arising out of the terms of a collective bargaining agreement, the arbitration agreement “applies to any and all employment-related disputes . . . between Employees and Ralphs . . . 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’).” App. 4a (boldface and underscoring omitted); App. 44a.

The arbitration agreement further provides that “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. . . . [T]here are no judge or jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy.” App. 4a (boldface and underscoring omitted); *see also* App. 51a-52a.

The arbitration requirement is mutual—both the employee and Ralphs are required to submit claims to arbitration. The arbitration agreement provides for the selection of a neutral arbitrator and gives the parties “the right to conduct normal civil discovery and to bring motions, as provided by the [Federal Rules of Civil Procedure]” and to be represented by counsel. App. 51a-53a. With respect to remedies, the arbitration agreement empowers the arbitrator “to award any party to the arbitration proceedings any remedy at law or in equity that the party would otherwise have been entitled to had the matter been litigated in a court or before a government agency with jurisdiction over the matter. For example, general, special and punitive damages, injunctive relief, costs and attorneys fees may be awarded if the applicable law provides for them.” App. 54a.

### **B. The Underlying Allegations and Trial Court Proceedings**

Brown filed a class action complaint in the Superior Court of Los Angeles County, asserting claims on behalf of herself and other current and former employees for violations of the California Labor Code, as well as a claim under the California Business and Professions Code § 17200, predicated on the alleged Labor Code violations. Brown also

sought to bring a representative action for civil penalties under the PAGA for the alleged Labor Code violations. App. 3a.

Ralphs filed a petition to compel arbitration, invoking the Mediation and Binding Arbitration Policy that Brown had signed. App. 3a. Brown opposed Ralphs' petition, arguing that the class arbitration waiver term was unconscionable, that the representative arbitration waiver term was unenforceable, and that the presence of these two terms rendered the entire arbitration agreement unenforceable. App. 4a-5a.

The trial court concluded that the arbitration agreement was procedurally unconscionable and that the combination of the class arbitration and representative arbitration waiver terms rendered the entire agreement substantively unconscionable. App. 31a-40a; *see also* App. 5a. As a result of these findings, the trial court denied Ralphs' petition to compel arbitration. App. 40a.

### **C. The Decision Below**

Ralphs timely appealed to the California Court of Appeal. After the appeal was briefed and argued, the California appellate court asked the parties to submit additional letter briefs addressing the impact of this Court's decision in *Concepcion*, which was issued after the briefing had been completed and the appeal had been argued. App. 5a-6a.

On July 12, 2011, the California Court of Appeal issued a published decision unanimously concluding that Brown had not met her burden under California law to demonstrate that the class arbitration waiver

term was unenforceable. App. 6a-9a. A majority of the court, however, concluded that the representative and private attorney general arbitration waiver was unenforceable, invoking a state law unwaivable statutory rights policy to conclude that enforcement of the waiver term would impede California's interest in enforcing the Labor Code's statutory scheme through PAGA representative actions. App. 9a-18a.

In analyzing the enforceability of the representative and private attorney general arbitration waiver, the California appellate court declared that neither this Court's recent decision in *Concepcion*—nor any of this Court's other FAA precedents for that matter—controlled the outcome of the appeal, and that it was free to apply California law, because this Court's FAA decisions do not specifically address representative or private attorney general arbitration waivers. More specifically, the court stated: “United States Supreme Court authority does not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws, for the employee suing under the PAGA does so as a proxy or agent for the state's labor law enforcement agencies . . . . Until the Supreme Court [addresses such a statute], we continue to follow what we believe to be California law.” App. 18a (citation and internal quotations omitted).

Instead of applying this Court's FAA precedents, the court applied the state's unwaivable statutory rights theory embodied in the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). App. 9a-11a. In *Gentry*, the California Supreme Court held that class arbitration waiver terms are unenforceable if a court concludes

that classwide arbitration is a more effective way to vindicate statutory rights. *See Gentry*, 42 Cal.4th at 457-70. In establishing an unwaivable statutory rights rule that governs the enforceability of class arbitration waivers, the California Supreme Court went beyond the holding of its earlier decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), which declared class arbitration waivers unenforceable on grounds of unconscionability, and held that a class arbitration waiver can be declared unenforceable if the waiver undermines the vindication of a statutory right, even if it is not unconscionable. *See Gentry*, 42 Cal.4th at 453-56, 465-66.

In this case, the California appellate court concluded that the principle of California law embodied in *Gentry* controlled the question and mandated the conclusion that the representative and private attorney general arbitration waiver was unenforceable. The court held that, under California law, “efforts to ‘ . . . preclude [the plaintiff] . . . from performing the core function of a private attorney general . . . impede[ ] *Gentry*’s goal of ‘comprehensive[ly] enforc[ing]’ a statutory scheme.” App. 11a (citation omitted).

The court also relied on California Civil Code § 3513 (“a law established for a public reason cannot be contravened by private agreement”) as support for the proposition that the representative and private attorney general arbitration waivers were unenforceable. App. 12a-13a. The court reasoned that this statute, too, provided a basis to conclude that the representative arbitration waiver term in the parties’ arbitration agreement was unenforceable because “the PAGA creates a statutory right for civil

penalties for Labor Code violations” that cannot be waived under California law. App. 12a.

The majority then remanded the matter to the trial court to decide whether the representative and private attorney general arbitration waiver rendered the entire arbitration agreement unenforceable or whether the term could be severed and, if so, whether the representative PAGA action would be adjudicated in arbitration or court. App. 18a-20a.<sup>2</sup>

Justice Kriegler dissented from the court’s decision regarding the enforceability of the representative and private attorney general arbitration waivers. App. 21a-29a. He began by noting that “[i]n a series of cases, the United States Supreme Court has found California statutory and decisional law that impedes contractual arbitration agreements to be preempted by the FAA.” App. 23a. Justice Kriegler then concluded that this Court’s FAA precedents—many of which involved rejection of California’s legislative and judicial efforts to undermine the enforceability of arbitration agreements—controlled the outcome of the appeal and required enforcement of the parties’ arbitration agreement according to its terms, including the representative action and private attorney general waiver terms. App. 26a. As Justice Kriegler put it: “Application of [California’s unwaivable statutory rights rule] in this case means the agreement to arbitrate will not be enforced due to state law, which

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<sup>2</sup> The California Court of Appeal issued an order on July 20, 2011 modifying the opinion (the court added one case citation). The judgment remained the same. App. 30a. The modification is reflected in the published opinion.

is inconsistent with . . . Supreme Court authority.” App. 26a. Justice Kriegler also concluded that one of the remand options given to the trial court—to order the PAGA representative action to arbitration—was precluded by this Court’s decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1758 (2010), which held that parties cannot be forced to collective arbitration absent an affirmative agreement to do so. App. 28a-29a.

Ralphs filed a petition for rehearing, which was denied on July 29, 2011. Then, Ralphs sought review by the California Supreme Court, which denied its Petition for Review on October 19, 2011. App. 41a.

### **REASONS FOR GRANTING THE PETITION**

As this Court made clear thirty years ago and reaffirmed just last term, the FAA preempts state laws that declare agreements to arbitrate unenforceable as a matter of public policy because otherwise “states could wholly eviscerate Congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ simply by passing statutes . . . [that] override the [FAA’s] declared policy requiring enforcement of arbitration agreements.” *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); *see also Concepcion*, 131 S.Ct. at 1747 (a court may not abrogate an arbitration agreement as “unenforceable as against public policy”). Accordingly, this Court’s controlling authority unambiguously provides that state law and policies—no matter how compelling—are subordinate to the FAA and thus must yield to the FAA’s core purpose to ensure the enforcement of arbitration agreements in accordance with their terms.

Review of the California appellate court's decision to declare terms in the parties' arbitration agreement unenforceable based on state law and policy is warranted—indeed, urgently needed—for several reasons.

**First**, the California appellate court's decision fundamentally conflicts with this Court's FAA precedents—many rejecting California's statutory law or public policies as a basis for departing from FAA principles. The California court's derogation of the FAA's controlling principles is starkly revealed by its assertion that this Court's precedents “do[ ] not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.” App. 12a-13a. That assertion answers the wrong question. When the FAA governs, as it does here, the question is not whether public rights can be waived even if the waiver is contrary to state law. The question is whether public rights provided by state statutes or state policies can justify a state court's refusal to enforce arbitration agreements governed by the FAA. Two paramount FAA principles—underscored in this Court's decisions—combine to answer that question “no”: first, the principle requiring enforcement of arbitration agreements according to their terms and, second, the principle that state laws rendering arbitration agreements, or some of their terms, unenforceable, are preempted by the FAA because state policies and interests cannot trump the FAA's congressionally-established mandates.

The California court, however, declared that it was free to disregard this Court's precedents because they did not specifically address a state law rule rendering a representative arbitration waiver

unenforceable. This Court should not countenance this overly narrow view of the reach of this Court's decisions or the California Court's concomitant effort to avoid controlling law. The reasoning underlying, no less than the outcome of, this Court's decisions, embody this Court's pronouncements on the law that binds lower courts. Review of this matter will provide this Court with the opportunity to clearly instruct on a foundational principle of jurisprudence and admonish that the principles reflected in this Court's FAA decisions are controlling regardless of whether they specifically address the viability of the precise state law or policy confronting the lower court.

**Second**, the legal issue implicated in the California court's decision is an important one and the California court's justification for invalidating an arbitration agreement's terms will provide a roadmap that state courts and legislatures can follow to exempt countless claims from the FAA's mandates. The crux of the California court's decision is that the FAA does not apply whenever an "unwaivable statutory right" is involved—that is, when a state legislature declares, or a court concludes, that a statute serves a public purpose. If that proposition takes hold, this Court's precedents easily can be evaded and the FAA's purposes readily can be undermined. Indeed, under the California court's reasoning, all that a state need do to override a private agreement not to assert a representative claim in arbitration is to enact a private attorney general provision as a companion to a whole host of statutory schemes and then declare that the private attorney general cause of action serves a public purpose. Legislatures and courts in other states that

are hostile to arbitration likely will follow this roadmap.

Section 2 of the FAA does not rescue the California unwaivable statutory rights rule from FAA preemption. Section 2 provides that arbitration agreements are “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. The rule fashioned by the California court is not a general defense to contract formation. Instead, it is a public policy rule that the California court employed to interfere with the enforcement of arbitration agreement terms concerning a particular subset of disputes. Consequently, the rule stands as an obstacle to the accomplishment of the FAA’s core purpose and thus is preempted by the FAA.

This Court repeatedly has struck down efforts by the California legislature and courts to devise state law and public policy exceptions to the FAA’s mandate that arbitration agreements must be enforced according to their terms. This Court should grant certiorari to address the important question of whether California’s newest device for interfering with private arbitration agreements, like the earlier ones, is preempted by the FAA.

The need for this Court’s review is immediate and acute. An examination of the California appellate court majority and dissenting opinions shows that there is a vast disparity of opinion on the impact of this Court’s precedents—including *Concepcion*, which overruled California’s rule barring class arbitration waivers—on the enforceability of representative and private attorney general arbitration waivers. Other courts, too, have reached divergent conclusions on

this question—further revealing the conflict. Without this Court’s guidance, lower courts will be left to speculate about the reach of this Court’s precedents with inconsistencies and years of confusion sure to result.

In short, the California appellate court’s decision—which the California Supreme Court has refused to review—involves a manifestly important legal question, which the court answered in a way that is in substantial conflict with this Court’s precedents and threatens to provide a path for state legislatures and courts to evade the FAA’s mandates. This case presents an ideal opportunity for this Court to intervene before things get too much farther off track.

### **I. The Decision Below Conflicts With This Court’s Precedents**

This Court’s settled jurisprudence holds that the FAA displaces any state law (whether a statute or judicial decision) that conflicts with the FAA or frustrates its objectives, regardless of the policy concerns that motivated the law. Indeed, in an unbroken line of decisions, this Court has instructed state courts that the FAA requires the enforcement of an arbitration agreement according to its terms no matter what state policy might be invoked as a basis for non-enforcement.

Almost thirty years ago, this Court explained that the FAA embodies “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S.

1, 24 (1983); *see also Southland*, 465 U.S. at 10 (the FAA embodies “a national policy favoring arbitration”). As this Court further explained, the FAA “create[s] a body of federal substantive law of arbitrability,” *Moses H. Cone*, 460 U.S. at 24, and announces a “broad principle of enforceability,” *Southland*, 465 U.S. at 11, that prohibits state legislatures, courts, and officials from acting in derogation of the national policy favoring arbitration and mandates that an arbitration agreement—just like any other contract—must be enforced on its terms.

As a corollary to these enforceability and non-hostility principles, moreover, this Court has held that the FAA preempts any state statute, judicial precedent, or policy that conflicts with the FAA’s purposes, policies, or mandates. *See Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (“The FAA’s displacement of conflicting state law is now well established, and has been repeatedly reaffirmed.”) (citations and internal quotations omitted). Accordingly, state policies or interests—even compelling ones—do not justify overriding the FAA’s mandate that arbitration agreements be enforced according to their terms. *See Southland*, 465 U.S. at 10-11 (there is “nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under State law”); *Concepcion*, 131 S.Ct. at 1747 (a court may not abrogate an arbitration agreement as “unenforceable as against public policy”).

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 106 (2001), for example, this Court was confronted with an argument made by numerous state attorneys general advocating deference to the states’ policies in

construing the reach of the FAA when employment discrimination actions under state law are involved. In concluding that invocation of state policies will not save a conflicting state law from FAA preemption, this Court noted that it had repeatedly reaffirmed the principle that Congress intended the FAA to preempt state laws that interfered or conflicted with its mandates and underlying purposes, and admonished that courts should “not chip away” at the settled rule invalidating any state law that does so. *Id.* at 121-123; *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995) (rejecting arguments “supported by 20 state attorneys general . . . ask[ing] [the Court] to overrule *Southland* and thereby to permit Alabama to apply its antiarbitration statute” and explaining that there are no “statutory niche[s] in which a State remains free to apply its antiarbitration law or policy”); *see also Concepcion*, 131 S.Ct. at 1753 (“States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”).

Indeed, in light of the primacy of Congress’s purposes in enacting the FAA, this Court has not hesitated to invalidate state laws that stand in the way of accomplishment of the FAA’s core purpose of enforcing arbitration agreements according to their terms. Over the last three decades, this Court repeatedly has struck down on Supremacy Clause grounds state laws that conflicted with the FAA—many of which were rules established by California’s legislature and courts invoking state statutes or

public policies as justification for declaring an arbitration agreement's terms unenforceable.<sup>3</sup>

First, in *Southland*, this Court addressed the California Supreme Court's decision holding that claims under California's Franchise Investment Law ("FIL") could not be compelled into arbitration, notwithstanding the parties' agreement to do so, because the FIL "require[d] judicial consideration of claims brought under that statute." *Southland*, 465 U.S. at 2. In reversing, this Court held that the California Supreme Court's decision "directly conflicts with . . . the Federal Arbitration Act and violates the Supremacy Clause" because, through the FAA, Congress "mandated the enforcement of arbitration agreements." *Id.* at 10. As a consequence of the congressional mandate, this Court explained, the FAA "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. This Court further explained that FAA arbitrations must proceed "unencumbered by state law constraints," because the FAA was enacted "to assure those who desired arbitration . . . that their expectations would not be undermined . . .

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<sup>3</sup> These California Supreme Court decisions culminated in *Discover Bank* and *Gentry*, in which the California high court, over strong dissents, refused to enforce class arbitration waivers on grounds of unconscionability (*Discover Bank*) and an unwaivable statutory rights theory (*Gentry*). Although this Court overturned *Discover Bank* last term, the California appellate court's analysis of the representative arbitration waiver in this case relied on *Gentry*, which had built upon and expanded *Discover Bank*. App. 11a-13a; see also *Gentry*, 42 Cal.4th at 453-56, 465-466.

by state courts or legislatures.” *Id.* at 13 (internal quotations omitted).

Then, in *Perry v. Thomas*, 482 U.S. 483 (1987), this Court held that the FAA preempted another express enactment of the California legislature—a provision of the Labor Code that allowed wage collection actions to be maintained in a judicial forum “without regard to the existence of any private agreement to arbitrate.” *Id.* at 484 (quoting the 1971 version of Cal. Lab. Code § 229). This Court noted that “[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered.” *Id.* at 490 (alteration omitted) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1987)). It also reaffirmed once again that Congress, through the FAA, had “foreclose[d] state legislative attempts to undercut the enforceability of arbitration agreements.” *Id.* at 489 (quoting *Southland*, 465 U.S. at 16). In light of these principles, this Court held that “California’s [statutory] requirement that litigants be provided a judicial forum for resolving wage disputes” is in “unmistakable conflict” with the “clear federal policy” requiring the enforcement of arbitration agreements and, therefore, “under the Supremacy Clause, the state statute must give way.” *Id.* at 491.

Next, in *Preston v. Ferrer*, this Court held that the FAA barred enforcement of a provision of the California Talent Agencies Act requiring that certain labor disputes be referred to the Labor Commissioner before being allowed to proceed to arbitration. *Preston*, 552 U.S. at 355-56. This Court held that “when parties agree to arbitrate . . . [¶] . . . , state laws lodging primary jurisdiction in another forum,

whether judicial or administrative, are superseded by the FAA.” *Id.* at 349-50. Therefore, the California statute requiring that certain disputes first go to the Labor Commissioner, notwithstanding that the parties had agreed to arbitrate, “conflict[ed] with the FAA’s dispute resolution regime” because it “impose[d] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally.” *Id.* at 356 (citations omitted). As in *Southland* and *Perry*, this Court again concluded that the California statute could not stand in light of the settled principle that the FAA “forecloses state legislative attempts to undercut the enforceability of arbitration agreements.” *Id.* at 353 (alteration omitted) (quoting *Southland*, 465 U.S. at 16).

Most recently, this Court reaffirmed that California’s courts—like California’s legislature—cannot establish rules that interfere with the FAA’s purposes. In *Concepcion*, this Court held that the FAA preempted the California Supreme Court’s decision in *Discover Bank*, which established a “rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.” *Concepcion*, 131 S.Ct. at 1746. In invalidating the “*Discover Bank* rule,” this Court began by reiterating that “[t]he overarching purpose of the FAA, evident [by its] text . . . is to ensure the enforcement of arbitration agreements according to their terms. *Concepcion*, 131 S.Ct. at 1748. This Court next explained that, as a corollary to this principle, parties are free to structure their arbitration agreements as they like: parties “may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom [they] will arbitrate.” *Id.* at

1748-49 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), and *Stolt-Nielsen*, 130 S.Ct. at 1773). Consequently, state laws that override the parties' express agreements are preempted because they interfere with the FAA's agreement-enforcement mandate. *Concepcion*, 131 S.Ct. at 1748.

With these principles in mind, this Court found that California's *Discover Bank* rule interfered with the term in the parties' agreement prohibiting class claims because, "[a]lthough the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*." *Concepcion*, 131 S.Ct. at 1750. This Court then held that the *Discover Bank* rule impeded the FAA's core purpose—to ensure the enforcement of arbitration agreements according to their terms—and, thus, it was preempted by the FAA because it “st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 1753 (citation and internal quotations omitted).

Application of the settled FAA law and policy discussed above should have led to the same result here that was reached in *Southland*, *Perry*, *Preston*, and *Concepcion*—enforcement of the parties' arbitration agreement according to its terms regardless of whether California law or policy might provide a basis to deny enforcement. Yet, the California appellate court invoked a state law unwaivable statutory rights theory—which is based on state public policy—to strike the representative arbitration waiver term in the parties' agreement. That holding fundamentally contravenes the FAA and directly conflicts with the controlling guideposts in this Court's FAA precedents because: (1) it fails to

enforce the parties' arbitration agreement according to its terms; and (2) it relies on state law as a basis for that decision.

The California court first headed down the wrong path when it concluded that it was authorized to disregard this Court's FAA precedents, reasoning that these decisions had no bearing on the enforceability of the representative and private attorney general arbitration waiver term because they did not "specifically address" such a waiver term. App. 17a.<sup>4</sup> This is not a legally sustainable approach to construing the impact and reach of this Court's decisions. This Court not only decides the specific case at hand, but also establishes authoritative and controlling legal principles. Subordinate courts are bound by the reasoning underlying, no less than the outcome of, this Court's decisions. See *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."); *United States v. Nachtigal*, 507 U.S. 1, 2-6 (1993) (holding

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<sup>4</sup> See also App. 18a ("United States Supreme Court authority does not address a statute such as the PAGA, which is a mechanism by which the state itself can enforce state labor laws, for the employee suing under the PAGA does so as a proxy or agent for the state's labor law enforcement agencies. . . . Until the Supreme Court [addresses such a statute], we continue to follow what we believe to be California law.") (citation and internal quotations omitted); App. 12a (*Concepcion* "does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code.").

that the Ninth Circuit erred by not finding the case before it controlled by intervening Supreme Court authority even though circuit authority was not expressly overruled).

Accordingly, the California appellate court was required to apply the principles embodied in this Court's FAA decisions notwithstanding that they did not specifically address representative and private attorney general arbitration waivers. There can be no doubt that this Court emphatically has held that *no* state law or policy can override the FAA and its purposes. A straightforward application of that principle here would have led to a different conclusion, namely, that the public policies underlying California's PAGA statute must yield to the FAA's agreement-enforcement mandate and, consequently, the representative and private attorney general arbitration waiver must be enforced. But, because the California court did not pay heed to what this Court's precedents say, it rendered a decision that conflicts with the FAA.

An examination of the California appellate court's reasoning reveals that the court similarly disregarded other core principles of this Court's FAA jurisprudence. In that regard, the court concluded that Congress's objectives in enacting the FAA should yield to California's interests because PAGA representative claims are statutory causes of action brought on behalf of the public, provide a valuable mechanism for the enforcement of public rights, and thereby serve state interests. App. 11a; *see generally* App. 9a-18a. There are multiple problems with this analysis.

To begin, the California court’s reasoning reverts to the long-rejected view that state public policies may be invoked as a basis to refuse to enforce an arbitration agreement according to its terms. When an arbitration agreement governed by the FAA is involved, state policies—no matter how compelling—must give way. *See, e.g., Circuit City*, 532 U.S. at 121-22 (concluding that invocation of state policies did not save a conflicting state law from FAA preemption); *Concepcion*, 131 S.Ct. at 1747 (same); *Allied-Bruce*, 513 U.S. at 273 (same).

Nor does the California court’s suggestion that the FAA analysis is somehow altered and the FAA applies with less force because the PAGA provides “a statutory right for civil penalties for violations of the Labor Code” withstand scrutiny. *See* App. 12a. This Court long ago made clear that there is no “presumption against arbitration of statutory claims.” *Mitsubishi*, 473 U.S. at 625; *see also id.* at 627 (the FAA “provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability”). This Court also has held that the FAA’s mandates apply with full force even when federal statutory claims that serve public interests are involved and has rejected policy arguments against enforcement of arbitration agreements in the context of federal statutory claims that are akin to private attorney general enforcement. *See id.* at 635 (rejecting argument that arbitrability of antitrust claims should be assessed differently because antitrust claims brought by private parties play an important role in government enforcement of such laws); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (holding that Exchange Act and

RICO claims were subject to arbitration despite the broader public interests served by those claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991) (rejecting argument that ADEA claims were not arbitrable because the act is designed to further important social policies).<sup>5</sup>

The arbitration agreement terms here, waiving representative and private attorney general arbitrations, expressly limit both the types of claims that may be brought in the arbitration (individual claims only) and with whom the parties will arbitrate (Brown and Ralphs only). *See Concepcion*, 131 S.Ct. at 1748-1759 (explaining that the parties may agree to limit the claims and parties to be involved in arbitration and these agreements must be enforced) (citations omitted). The California court's invalidation of the representative and private attorney general arbitration waiver terms interferes with those express agreements. To borrow from

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<sup>5</sup> Although a court may examine whether there is an inherent conflict between the FAA's enforcement principles and statutory rights conferred in another *federal* statute, no similar assessment may be made when state legislation is involved. That is because only Congress—not state legislatures or courts—may exempt a statute from the FAA's purview. *See CompuCredit Corp. v. Greenwood*, \_\_\_ U.S. \_\_\_, slip op. at 3 (Jan. 10, 2012) (FAA's "policy favoring arbitration agreements" applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary *congressional* command.") (quoting *Shearson*, 482 U.S. at 226) (emphasis added); *Mitsubishi*, 473 U.S. at 628 ("Having made the bargain to arbitrate, the party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedy for the statutory rights at issue.") (emphasis added).

*Concepcion*, the California court’s ruling allows Brown to “demand . . . *ex post*” what was expressly prohibited under her arbitration agreement with Ralphs and bring a representative claim under the PAGA. *See id.* at 1750. And, in light of this Court’s decision in *Stolt-Nielsen*, those claims must be brought in a judicial forum. *Stolt-Nielsen*, 130 S.Ct. at 1775 (holding that there shall be no collective arbitration unless the parties have affirmatively and expressly agreed to it).

Section 2 of the FAA does not save the California court’s rule from preemption. Section 2 provides that arbitration agreements are “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; *Perry*, 482 U.S. at 492 n.9 (“[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”). However, the unwaivable statutory rights rule applied by the California court—and California Civil Code § 3513, which the court relied upon to support that judicial rule—are not generally applicable defenses to contract enforcement saved from preemption by § 2 of the FAA. Instead, they are state public policy rules employed by the California appellate court to interfere with the enforcement of arbitration agreement terms. *See Allied-Bruce*, 513 U.S. at 281 (“States may regulate . . . arbitration contracts . . . under general contract law principles . . . . What States may not do is . . . enforce [a contract’s] basic terms . . . but not . . . its arbitration clause.”).

State law rules like this one, which interfere with the enforcement of arbitration agreements, are

preempted by the FAA—and § 2 cannot be stretched to save such rules. As this Court instructed last term, “[a]lthough § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” *Concepcion*, 131 S.Ct. at 1748; see also *Perry*, 482 U.S. at 489-90 (“We see nothing in the [FAA] indicating that [its] broad principle of enforceability is subject to any additional limitations under state law.”) (citations omitted). Consequently, a state law rule that, on its face, might appear to be generally applicable to all contracts is not an arbitration-neutral rule if it thwarts the enforcement of arbitration agreements. *Concepcion*, 131 S.Ct. at 1747 (the FAA preempts a rule applying “public-policy disapproval of exculpatory agreements . . . [that] . . . ha[s] a disproportionate impact on arbitration agreements”) (citations and internal quotations omitted); *id.* at 1753 (“If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to ‘any contract.’”) (Thomas, J., concurring).

When the FAA applies, as it does here, that federal law and its policies control the enforcement of the parties’ arbitration agreement. Consequently, when parties have agreed to arbitration as their dispute resolution mechanism, the FAA’s core rules requiring the enforcement of arbitration agreements according to their terms, and forbidding the application of state law and policies that interfere with the arbitration agreement terms, cannot be avoided. In determining whether a state law rule

can co-exist with the FAA, the analysis does not focus on the substance of the state law rule, but rather on how the rule affects the enforcement of the parties' arbitration agreement. In that regard, § 2 of the FAA does not save state law rules that interfere with the enforcement of such agreements.

Here, the California appellate court's application of an unwaivable statutory rights theory—which it found was supported by California Civil Code § 3513—interferes profoundly and directly with the express terms of the agreement between Brown and Ralphs.<sup>6</sup> The net effect of the California appellate court's ruling is that Brown must be permitted to assert PAGA representative claims (notwithstanding the parties' arbitration agreement expressly forbidding such claims) and that those claims must be adjudicated in a judicial forum (notwithstanding the parties' agreement to arbitrate any and all disputes that arise between them). The rule announced by the California appellate court cannot be characterized as an arbitration-neutral rule

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<sup>6</sup> *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal.4th 659 (2011), represents yet another decision in which the California Supreme Court refused to enforce the terms of an arbitration agreement governed by the FAA. In his dissent in *Sonic-Calabasas*, Justice Chin relied on this Court's precedents to explain why California's unwaivable statutory rights rule, which is grounded in state public policy, is not an arbitration-neutral rule saved from preemption by § 2. *Sonic-Calabasas*, 51 Cal.4th at 710 (Chin, J., dissenting). On October 31, 2011, this Court granted Sonic-Calabasas's petition for writ of certiorari, vacated the judgment, and remanded the case to the Supreme Court of California for further consideration in light of *Concepcion*.

subject to the savings provision of § 2 of the FAA because it interferes with the enforcement of arbitration agreements.

In sum, a careful analysis of the California appellate court's ruling reveals that it accomplishes an end-run around the FAA. It invalidates representative and private attorney general arbitration waivers based on the public policy view that representative proceedings are effective means for vindicating state statutory rights. Although the PAGA reflects California's public policy, neither its law enforcement purposes nor its laudatory aims should have guided the court's FAA preemption inquiry. Indeed, the California court simply went down the wrong path when it focused on the nature of a PAGA claim rather than the terms of the private arbitration agreement between Brown and Ralph—which expressly disallows representative and private attorney general arbitrations. While, under the PAGA, a citizen may serve as a “proxy” for the Labor Commissioner, Brown, by agreeing not to bring a representative action, agreed not to serve as such a proxy. The FAA requires the enforcement of that agreement.<sup>7</sup>

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<sup>7</sup> “[The PAGA] does not create property or any other substantive rights[, but instead] is simply a procedural statute allowing an aggrieved employee to recover civil fines—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.” *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal.4th 993, 1003 (2009). An individual's waiver of the private right of action to bring PAGA representative claims does not undermine the Labor Code's protections because nothing in the parties' arbitration agreement prevents the Department of Labor from enforcing the Labor Code. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. Continued on following page

## **II. The Decision Below Involves An Exceptionally Important Issue And There Is An Immediate And Urgent Need For Review**

The problems engendered by the California appellate court's ruling are manifest and acute. A close look at this Court's FAA decisions over the last three decades reveals that state legislatures and courts—in particular those in California—have ceaselessly searched for creative rationales to avoid the FAA's mandates. The decision here employs yet another new rationale: a state's declaration that a statutory representative cause of action is unwaivable because such an action serves the state's interests.

The California court's decision, therefore, threatens to create a pervasive problem in California and beyond by creating a template for state legislatures and courts to follow as a way around the FAA's agreement-enforcement mandate. If the decision is allowed to stand, legislatures will be emboldened to undermine private arbitration agreements by including a representative action or private attorney general provision in a statutory scheme and then barring waivers of these representative claims by declaring that they serve the state's interests. Courts, too, can avoid the FAA's

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279, 297-298 (2002) (the existence of a private arbitration agreement does not deprive the E.E.O.C. of its enforcement authority).

mandate by making a judicial determination that a statutory representative cause of action serves a state interest and thus is unwaivable, even in the absence of an express legislative enactment.

As explained, such a legislative enactment or judicial declaration would substantially interfere with private arbitration agreements and thereby thwart the FAA's core purposes. Accordingly, because substantial mischief will result if the California appellate court's reasoning is followed—which it surely will be by state legislatures and courts hostile to arbitration—there is an immediate need for this Court to set things straight.

Indeed, the need for this Court's guidance on whether the California court's decision and underlying rationale are tenable in light of this Court's FAA precedents is no abstraction. Within months of this Court's decision in *Concepcion* invalidating California's judicial rule barring class arbitration waivers, the California appellate court in this case and a federal district court in another case came to opposite conclusions on the question of whether the FAA forbids the invocation of California's unwaivable statutory rights rule as a basis to strike a representative arbitration waiver term.

Shortly before the California Court of Appeal held that PAGA representative arbitration waivers are unenforceable under California law, a federal district court held that the FAA, and in particular this Court's decision in *Concepcion*, required the enforcement of PAGA representative arbitration waivers. *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122 (C.D. Cal. 2011). In so holding, the federal

court concluded that California appellate court decisions employing an unwaivable statutory rights theory to bar representative arbitration waivers “show[ ] . . . that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions[,] [but] . . . *Concepcion* makes clear . . . that the state cannot impose such a requirement because it would be inconsistent with the FAA.” *Id.* at 1142 (citations omitted).<sup>8</sup>

Decisions that came after *Brown* and *Quevedo* further reveal the controversy regarding the meaning, scope and reach of this Court’s FAA decisions. Some courts, like the district court in *Quevedo*, have followed the FAA principles articulated in this Court’s case law and concluded that the FAA preempts state laws that forbid representative arbitration waivers. *Grabowski v. C.H. Robinson Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 4353998 (S.D. Cal. Sept. 19, 2011) (granting motion to compel individual arbitration of PAGA claims because *Concepcion* forbade California from invalidating class arbitration waivers and finding *Quevedo*’s reasoning more faithful to the FAA and this Court’s decision than *Brown*’s reasoning); *Valle v. Lowe’s HIW, Inc.*, No. 11-1489, 2011 WL 3667441,

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<sup>8</sup> Further complicating matters, in denying the *Quevedo* plaintiffs’ reconsideration motion, which was based on the California appellate court’s *Brown* decision, the district court noted that it “is under no obligation to follow the ruling of a California intermediate court of appeal (or indeed a ruling of the California Supreme Court) that is inconsistent with controlling Supreme Court precedent.” *Quevedo v. Macy’s, Inc.*, Civ. A. No. 09-1522, Dkt. No. 75, slip op. at 2 (C.D. Cal. Oct. 31, 2011); *see also id.* at 4-5.

at \*5-6, \*8 (N.D. Cal. Aug. 22, 2011) (granting motion to compel individual arbitration and holding that PAGA representative arbitration waiver was enforceable).

Other courts, however, have felt obliged to adopt the California appellate court's reasoning and declined to enforce PAGA representative arbitration waivers. *Plows v. Rockwell Collins, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 3501872, at \*5 (C.D. Cal. Aug. 9, 2011) (following *Brown* and holding that an agreement's express waiver of PAGA representative arbitration was not enforceable); *Urbino v. Orkin Servs. of Cal., Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 4595249, at \*10-11 (C.D. Cal. Oct. 5, 2011) (same).

The divergence in views regarding the enforceability of representative and private attorney general arbitration waivers also implicates an even more basic question about the continuing vitality of the California Supreme Court's decision in *Gentry*. The California appellate court's majority and dissenting opinions plainly demonstrate that there is a difference of opinion on this question. App. 11a-13a (majority opinion invoking *Gentry*); App. 21a-22a (dissent noting that it is difficult to conclude that *Gentry* survives *Concepcion*). See also *Valle*, 2011 WL 3667441, at \*6 ("*Gentry* is no longer good law"); *Plows*, 2011 WL 3501872, at \*5 ("*Gentry* is valid law").

Cases outside the context of representative arbitration waivers further reflect the divergence in views regarding *Concepcion*'s impact on California judicial decisions declining to enforce arbitration agreements on state public policy grounds. For example, before *Concepcion*, the California Supreme

Court (in divided decisions) held that the FAA did not preempt California from declaring that claims for injunctive relief under California’s Consumer Legal Remedies Act (“CLRA”) and unfair competition law (“UCL”) are not arbitrable. *Broughton v. Cigna Healthplans of Cal.*, 21 Cal.4th 1066, 1079-84 (1999) (CLRA claims); *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal.4th 303, 311-16 (2003) (UCL claims). In holding that PAGA arbitration waivers are unenforceable, the court below relied on *Broughton* and *Cruz*. App. 13a-14a. However, the rationale underlying those decisions—that arbitration agreements are not enforceable with respect to UCL and CLRA injunctive relief claims because such claims serve a public purpose—is no longer tenable in light of *Concepcion*’s holding that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Concepcion*, 131 S.Ct. at 1753.

There is a divergence in views, also, on whether *Broughton* and *Cruz* can stand in light of *Concepcion*. Several federal judges have held that they cannot. *Meyer v. T-Mobile USA Inc.*, No. C 10-05858, 2011 WL 4434810, at \*8 (N.D. Cal. Sept. 23, 2011); *Valle*, 2011 WL 3667441, at \*6-9; *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663, 2011 WL 1842712, at \*2 (N.D. Cal. May 16, 2011); *Nelson v. AT&T Mobility LLC*, No. C10-4802, 2011 WL 3651153, at \*2 (N.D. Cal. Aug. 18, 2011), \*4; *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, No. C-10-2553, 2011 WL 2886407, at \*4 (N.D. Cal. July 19, 2011). Other federal court judges, however, have declined to apply *Concepcion*’s reasoning to state law efforts to bar arbitration of UCL and CLRA injunctive relief claims, following the California appellate court’s

reasoning in this case. *Ferguson v. Corinthian Colleges*, Civ. A. No. 11-0127, 2011 WL 4852339, at \*9 (C.D. Cal. Oct. 6, 2011); *In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, No. ML 09-2093, 2011 WL 4090774, at \*9-10 (C.D. Cal. Sept. 6, 2011).

As the California appellate court's divided decision in *Brown*—which the California Supreme Court refused to review—and other decisions reflect, there is substantial uncertainty about the reach of this Court's precedents and their impact on the issue of the enforceability of collective arbitration waivers and the continuing vitality of state decisional law that relies on state public policy in evaluating arbitrability. This uncertainty, in turn, will consume judicial resources and also will have a far-reaching impact on individuals and businesses attempting to draft agreements and who need to be able to predict how courts will rule on the enforceability of representative arbitration waivers.

In light of the impact of this legal uncertainty on courts, litigants, and the public, there is no reason for this Court to defer review until cases percolate for some period of time. It is this Court's particular role to provide guidance on important issues and only this Court can prevent years of confusion and conflict during which individuals and businesses will be uncertain about whether the FAA's agreement-enforcement mandate can be overridden to declare representative and private attorney general arbitration waivers unenforceable based on a state law unwaivable statutory rights theory. This Court, therefore, should grant certiorari to address the controversy regarding the manifestly important

question presented by the California appellate court's decision.

### CONCLUSION

This case presents the question of whether a state may refuse to enforce a representative and private attorney general arbitration waiver term in an arbitration agreement based on state public policy considerations. The California appellate court's decision striking the representative action waiver term based on what it believed to be prevailing state law is in substantial conflict with this Court's precedents and provides a roadmap for other state courts and legislatures to avoid the FAA's mandates. This petition for a writ of certiorari should be granted so that this Court can address the important issue regarding what happens at the intersection of state policies regarding unwaivable statutory rights and federal policies mandating enforcement of arbitration agreements.<sup>9</sup>

Although lower courts and litigants will benefit greatly from a full explication from this Court on the important issue presented, this case also is a candidate for summary reversal in light of the

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<sup>9</sup> By the time this petition is considered, this Court will have acted upon two petitions which raise similar issues in seeking review of a decision of the West Virginia Supreme Court. *Clarksburg Nursing Home & Rehabilitation Center, LLC D/B/D Clarksburg Continuous Care Center, et al. v. Marchio*, No. 11-394; *Marmet Health Care Center, Inc., et al. v. Brown*, No. 11 391. Should this Court grant either or both of those petitions, there would be additional reasons to grant Ralphs' petition and, at minimum, hold the matter pending this Court's decision.

California appellate court's "obvious" errors. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam). Indeed, summary reversal would send a message that efforts to evade this Court's FAA precedents will not be tolerated.

Respectfully submitted.

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