No. 16-1110

In the Supreme Court of the United States

BLOOMINGDALE'S, INC.,

Petitioner,

v.

NANCY VITOLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, the Chamber of Commerce of the United States of America and California Chamber of Commerce respectfully submit this brief amici curiae in support of Petitioner, Bloomingdale's, Inc.[1]

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world, representing 300,000 direct members and indirectly representing more than 3,000,000 U.S. businesses and professional organizations in various industries from every region of the country. The Chamber advocates for the interests of its members in matters before the courts, Congress and the Executive Branch, and regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the enforceability of

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Correspondence evidencing such consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

arbitration agreements. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 368 (2016); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts to improve the state's economic and jobs climate by representing the business community on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the state and federal courts by filing amicus curiae briefs in cases, like this one, involving issues of paramount concern to the business community.

The Chamber and CalChamber have long promoted arbitration as a means of alternative dispute resolution that avoids the unnecessary costs, distractions, and delays characteristic of traditional civil litigation. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and this Court's consistent endorsement of arbitration, many of Amici's members have structured their employment contracts to include arbitration agreements to facilitate fair,

speedy, and inexpensive resolution of employment-related disputes. These agreements typically require that arbitration be conducted on an individual basis in order to preserve the arbitral benefits of simplicity, informality and expedition.

This case concerns the enforceability of bilateral arbitration agreements under the FAA in the face of state law rules that disallow essential attributes of arbitration. In *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015), a divided panel of the Ninth Circuit held that, notwithstanding the FAA, a California judge-made rule (the "*Iskanian* rule"[2]) may prohibit bilateral arbitration agreements for claims under the State's Private Attorney General Act ("PAGA"), Cal. Labor Code § 2698 *et seq.*, which authorizes private plaintiffs to recover civil penalties, which are shared with the State, for labor law violations potentially affecting large numbers of employees. Relying on *Sakkab*, the court below reached the same conclusion.

The Ninth Circuit's endorsement of the *Iskanian* rule threatens to disrupt existing arbitration agreements and to erode the benefits of bilateral arbitration as an alternative to litigation. Amici therefore have a strong interest in this Court's granting certiorari to ensure uniform and accurate application of the FAA.

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[2] *See Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is but the latest chapter in a long and well-documented history of attempts by courts in California to invent new "devices and formulas" aimed at circumventing binding arbitration agreements and the preemptive force of the FAA. *Concepcion*, 563 U.S. at 342; *see*, *e.g.*, *Imburgia*, 136 S. Ct. at 466; *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Southland* v. *Keating*, 465 U.S. 1 (1984); *see also* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1433-40 (2014). Immediate review is needed to prevent an end-run around *Concepcion* and this Court's other long-standing precedents upholding the strong federal policy in favor of arbitration, which represent the "authoritative interpretation of [the FAA]" that the "judges of every State must follow." *Imburgia*, 136 S. Ct. at 468.

Nancy Vitolo agreed to arbitrate any disputes with her employer on an individual basis, and expressly waived her right to participate in any class or representative actions arising out of her employment. She now seeks to avoid that binding agreement and assert the functional equivalent of class claims on behalf of thousands other employees by invoking California's *Iskanian* rule, which prohibits the waiver of representative PAGA claims as a matter of state law.

This Court has encountered this gambit before. Prior to 2011, California plaintiffs like Vitolo attempted to avoid bilateral arbitration by invoking California's so-called "*Discover Bank*" rule, which prohibited the waiver of class adjudication as a matter of state law.[3] But this Court rejected that approach in *Concepcion*, holding that state law rules like *Discover Bank* that invalidate parties' agreements to arbitrate on an individual basis interfere with the fundamental attributes of arbitration and are thus preempted under the FAA. 563 U.S. at 346-52.

Unable to invoke *Discover Bank*'s anti-waiver rule to bring a class action, Vitolo seeks instead the functionally identical result by invoking the *Iskanian* anti-waiver rule to bring representative claims under PAGA. Vitolo's strategy here is part of an increasing trend among California plaintiffs to try to avoid bilateral arbitration agreements and the FAA's requirement that these agreements be enforced according to their terms.

Because representative PAGA actions are, in all material respects, the equivalent of class actions, the *Iskanian* rule is preempted for the same reasons that *Concepcion* held the *Discover Bank* rule was preempted. As explained in *Concepcion*, the FAA requires that courts enforce bilateral arbitration agreements despite contrary state law, unless that state law (a) is a "generally applicable" defense that permits the revocation of "any contract"; and (b) does not otherwise "stand as an obstacle" to the goals of

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[3] *See Discover Bank* v. *Superior Court*, 36 Cal. 4th 148 (2005).

the FAA by interfering with a fundamental attribute of arbitration. 563 U.S. at 341-43. Amici agree with petitioners that the *Iskanian* rule flunks that test and must therefore yield to the FAA.

Amici write separately to emphasize that the Ninth Circuit's attempt in *Sakkab* to reconcile the *Iskanian* rule with the FAA by adopting an indefensibly cramped reading of *Concepcion* is not only wrong as a matter of law but also has far-reaching practical consequences for businesses across California and beyond. Indeed, the *Iskanian* rule interferes with the same fundamental attributes of arbitration as the *Discover Bank* rule at issue in *Concepcion*: it makes dispute resolution slower and more costly, it increases procedural formality, and it heightens risks to defendants. *Sakkab*, 803 F.3d at 444 (Smith, J., dissenting). The *Sakkab* majority, however, focused on technical distinctions between representative actions under PAGA and class actions under Rule 23 that have nothing to do with the substance of this Court's reasoning in *Concepcion*. In so doing, *Sakkab* flatly ignored the central teaching of *Concepcion*: bilateral dispute resolution is so fundamental an attribute of arbitration that grafting aggregate procedures onto it turns arbitration into something it is not, in contravention of the FAA.

The Ninth Circuit's flouting of *Concepcion*'s holding is imposing a major cost on employers in the Nation's most populous state. PAGA litigation is

growing rapidly.[4] Representative PAGA actions are attractive to the plaintiffs' bar because they allow plaintiffs (and their counsel) to seek the enormous potential recoveries that result from aggregating the claims of others—recoveries that traditionally were available only in class actions. Indeed, representative PAGA actions are brought on behalf of large classes of hundreds or even thousands of absent employees and the aggregated statutory penalties under PAGA easily match or even exceed the potential recovery in a class action.[5]

By endorsing the *Iskanian* rule in *Sakkab*, the Ninth Circuit contributed to the proliferation of representative PAGA claims by eliminating in one fell swoop countless bilateral arbitration agreements covering PAGA claims and instead forcing employers to arbitrate these massive and unwieldy PAGA actions on a collective basis. That decision will have enormous repercussions for businesses with employees in California, discouraging arbitration programs covering labor and employment claims and depriving both employers and employees of the important benefits that arbitration provides. Moreover, to the extent *Sakkab*'s flawed logic is adopted by other courts or applied in other contexts, enterprising plaintiffs throughout the country may

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[4] *See, e.g.*, Erin Coe, Iskanian *Ruling to Unleash Flood of PAGA Claims*, Law360 (June 24, 2014), https://perma.cc/5UQ7-YRXP.

[5] *See generally* Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413 (2016).

attempt similar end-runs around the FAA by recasting class actions as "representative" actions to avoid bilateral arbitration.

For all of these reasons, this Court should grant review to eliminate the irreconcilable conflict between *Sakkab*'s holding and this Court's binding precedents, and to ensure robust protection of the federal arbitration rights on which so many businesses throughout the country rely in structuring their relationships with employees.

ARGUMENT

I. The Question Presented Is of Significant Legal Importance Because the Ninth Circuit's Endorsement of the *Iskanian* Rule Contradicts the FAA and This Court's Precedents.

The FAA makes written agreements to arbitrate "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. As this Court has repeatedly held, the statute reflects a "liberal federal policy favoring arbitration," which requires courts rigorously to enforce agreements to arbitrate "according to their terms." *Concepcion*, 563 U.S. at 339; *see also Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (same).

The FAA's broad command that courts enforce arbitration agreements has a narrow exception: Section 2 of the Act contains a "savings clause" that "provide[s] for revocation of arbitration agreements only upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 684-85 (1996) (quoting 9

U.S.C. § 2). This Court has repeatedly emphasized the limited scope of Section 2's savings clause. The clause permits "agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs.*, 517 U.S. at 687); *see also Perry*, 482 U.S. at 492 n.9 (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally" (emphasis omitted)).

Section 2 thus saves state-law contract defenses from preemption only if they are "generally applicable" to "any contract." *Doctor's Assocs.*, 517 U.S. at 687. But even where an ostensibly general state-law rule purports to preclude arbitration, it cannot survive preemption if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Such rules are preempted if in practice they have a "disproportionate impact" on arbitration or "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 342-44. Thus, in *Concepcion*, California's *Discover Bank* rule was preempted because requiring the availability of classwide arbitration, as opposed to bilateral arbitration, sacrificed the very speed, efficiency, and informality that prompts parties to agree to arbitrate disputes in the first place. *Concepcion*, 563 U.S. at 347-51. The *Iskanian* rule is preempted for the same reasons.

A. The *Iskanian* Rule Plainly Conflicts With Fundamental Attributes of Arbitration and Is Therefore Preempted by the FAA.

Even assuming that the *Iskanian* rule is properly construed as a "generally applicable" contract defense under California law, the rule clearly undermines the FAA's core objectives of protecting arbitration that is fast, efficient, and informal, and is therefore preempted under the reasoning of *Concepcion*.[6] Because a "prime objective" of arbitration "is to achieve 'streamlined proceedings and expeditious results,'" the FAA affords parties discretion to design their own arbitration processes tailored to their needs, including "limit[ing] *with whom* a party will arbitrate its disputes." *Concepcion*, 563 U.S. at 344-46 (emphasis in original).

But a state-law rule that prevents waiver of representative PAGA claims—no less than the state-law rule that prevented waiver of class actions in

[6] In Amici's view, the *Iskanian* rule should not be construed as "generally applicable" because it applies uniquely in the context of arbitration agreements. The rule prevents the waiver of a single type of claim (representative claims under PAGA) in a single type of contract (dispute resolution agreements with employees). That type of specialized defense in a particular area of the law bears no resemblance to generally applicable common law doctrines like fraud, duress, or mutual mistake. The *Iskanian* rule did not "ar[i]se to govern issues concerning the validity, revocability, and enforceability of contracts generally," *Perry*, 482 U.S. at 492 n.9, and it therefore does not fall within the FAA's savings clause. In any event, generally applicable or not, the *Iskanian* rule plainly conflicts with fundamental attributes of arbitration and is therefore preempted under *Concepcion*.

Concepcion—limits "the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration." *Sakkab*, 803 F.3d at 444 (Smith, J., dissenting). The *Iskanian* rule thus "interferes with the fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Id.* The *Sakkab* majority ignored the obvious, relevant parallels between class actions and representative PAGA actions to avoid *Concepcion* and reach an outcome that better suited its policy preferences. But that sort of "judicial hostility" to arbitration is precisely what the FAA was enacted to counteract. *See Italian Colors*, 133 S. Ct. at 2308-09.

B. Representative PAGA Actions and Class Actions Are Equally Incompatible with Arbitration as Envisioned by the FAA.

As Judge Smith explained in his dissent in *Sakkab*, "[t]he *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion*." 803 F.3d at 444 (Smith, J., dissenting). Requiring arbitration of representative or aggregate claims "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; requires "procedural formalit[ies]" that otherwise would not apply; and "greatly increases risks to defendants," because arbitration lacks the multi-level appellate review that exists in a judicial forum, which is especially important in a case that threatens damages attributable to thousands of absent claimants. *Concepcion*, 563 U.S. at 348-50.

1. *Arbitration of Representative PAGA Actions Increases Inefficiency and Costs.*

For starters, arbitrating representative PAGA claims on behalf of hundreds or even thousands of current and former employees will inevitably be slower, less efficient, and more expensive than adjudicating similar claims on an individualized basis. *Cf. Concepcion*, 563 U.S. at 346 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'"). Because PAGA remedies for alleged violations must be assessed on an individual, per-pay-period basis for each affected employee on each and every asserted code violation, *see* Cal. Labor Code § 2699(f)(2), the expansive fact-finding required to adjudicate representative PAGA claims would eliminate many, if not all, of the efficiencies of time and cost otherwise gained through use of the arbitral forum.

The Court need not speculate whether arbitration of representative PAGA claims will be unwieldy. As an example, in *Driscoll* v. *Granite Rock Co.*, No. 08-cv-103426, 2011 WL 10366147 (Cal. Super. Ct. Sept. 20, 2011), a bench trial on representative PAGA claims lasted *14 days* and involved *55 witnesses* and *285 exhibits*, including expert witnesses to prove violations as to each employee. *Id.* at *1. Cases like *Driscoll* illustrate the "inherent manageability problems" that representative PAGA actions inevitably raise. *See* Goodman, *supra* note 5 at 441. In fact, the plaintiff in *Driscoll* purported to represent a relatively small class of 200 current and former employees. *See* 2011 WL 10366147, at *1. The burdens of aggregate arbitration would multiply

exponentially for larger PAGA actions, which recent cases illustrate can balloon to include thousands if not tens of thousands of absent employees.[7] Indeed, as petitioner notes, Vitolo's own representative PAGA action potentially encompasses claims by as many as 8,748 Bloomingdale's employees across California. Pet. at 19.

2. *Arbitration of Representative PAGA Actions Increases Procedural Complexity.*

In addition to being slower and more costly, arbitrating representative employment claims on behalf of hundreds or thousands of absent employees will be far more procedurally complex than conventional bilateral arbitration. As Judge Smith noted, an employee in individual arbitration "already has access to all of his own employment records." *Sakkab*, 803 F.3d at 446 (Smith, J., dissenting). But an employee acting as a PAGA representative "does not have access to any of this information" for the slew of absent employees she purports to represent

[7] *See, e.g.*, *Amey* v. *Cinemark USA Inc.*, No. 13-cv-05669, 2015 WL 2251504, at *17 (N.D. Cal. May 13, 2015) (addressing PAGA claim with "more than 10,000 class members"); *see also* Compl., *O'Bosky* v. *Starbucks Corp.*, No. 37-2015-00014973, 2015 WL 2254889, *2 (Cal. Super. Ct. May 4, 2015) (raising PAGA claims on behalf of 65,000 employees); Defs.' Mot. to Strike, *Ortiz* v. *CVS Caremark Corp.*, No. 12-cv-05859, 2014 WL 2445114, at *4 (N.D. Cal. Jan. 28, 2014) (addressing PAGA claims relating to more than 50,000 employees across 850 stores); Def.'s Opp'n to Class Certification, *Cline* v. *Kmart Corp.*, No. 11-cv-02575, 2013 WL 2391711, at *1, 12 (N.D. Cal. May 13, 2013) (addressing a PAGA "class" of 13,000 cashiers at 101 stores statewide).

and must obtain it if she is to perform a representative role. *Id.* And the defendant must have the ability to meet whatever evidence the employee intends to present in support of her and the absent employees' claims. As a result, arbitrating representative PAGA claims necessarily will require "substantially more complex" discovery procedures. *Id.* at 447.

Moreover, because "[c]onfidentiality becomes more difficult" in collective actions, *Concepcion*, 563 U.S. at 348, more formal procedures likely will be necessary to protect absent employees' privacy interests. And even assuming the parties can institute a workable discovery plan, the problems of proof and case management may be so complex as to be practically "unmanageable." *Ortiz* v. *CVS Caremark Corp.*, No. 12-cv-05859, 2014 WL 1117614, at *4 (N.D. Cal. Mar. 19, 2014).

3. *Arbitration of Representative PAGA Actions Increases Risks to Defendants.*

In addition to eliminating the procedural benefits of bilateral arbitration (speed, efficiency, and procedural simplicity), arbitration of representative claims would also greatly magnify the risk that comes from the limited opportunities for review of an arbitrator's decision. Compared to arbitrating a single employee's claims, arbitrating representative PAGA claims "'increase[s] risks to defendants' by aggregating the claims of many employees." *Quevedo* v. *Macy's Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (quoting *Concepcion*, 563 U.S. at 350). "Just as '[a]rbitration is poorly suited to the higher stakes of

class litigation,' it is also poorly suited to the higher stakes of a collective PAGA action." *Id.* (quoting *Concepcion*, 563 U.S. at 350). Those risks are only heightened by the limited appellate review of arbitration awards. Thus, "[d]efendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would 'go uncorrected' given the 'absence of multilayered review.'" *Id.* (quoting *Conception*, 563 U.S. at 350).

The significantly higher costs and exposure posed by representative actions place enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss. Indeed, avoiding the unfair "risk of 'in terrorem' settlements," is one of the primary reasons employers adopt bilateral employment arbitration programs. *Concepcion*, 563 U.S. at 350. The *Sakkab* majority, however, ignored the fact that imposing representative procedures on PAGA actions subject to arbitration leave employers vulnerable to the very same risks.

C. The *Sakkab* Majority's Distinctions Between Representative PAGA Actions and Class Actions Are Immaterial.

The *Sakkab* majority largely ignored the conflict between *Iskanian*'s rule and the goals of arbitration as envisioned by the FAA—speed, efficiency, procedural informality, and limited risk—and focused instead on technical distinctions between representative actions under PAGA and class actions under Rule 23. There certainly are differences between representative and class actions, but those differences are immaterial under *Concepcion*.

For example, the *Sakkab* majority made much of the fact that representative actions under PAGA—unlike class actions under Rule 23—impose fewer due process protections and do not require notice or opt-out rights for absent employees. *See Sakkab*, 803 F.3d at 435-36. But that approach conflicts with that of other circuit courts who recognize that *Concepcion*'s holding sweeps more broadly than Rule 23, and extends as well to waivers of collective actions under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., even though FLSA collective actions are not subject to Rule 23 and employees must opt in to join such actions. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013). And it ignores the fact that Rule 23 itself does not require opt-out rights for certain types of class actions. *See* Fed. R. Civ. P. 23(b)(1)-(2) and (c)(2)(a).

Moreover, because the FAA guarantees that contracting parties "may specify *with whom* they choose to arbitrate their disputes," *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (emphasis in original), arbitration agreements routinely prohibit joinder of claims by multiple claimants in a single action. *See, e.g.*, *Discover Bank*, 36 Cal. 4th at 153-54 (agreement prohibited not only class actions but any "join[der]" or "consolidat[ion]" of claims in arbitration). If a plaintiff who has agreed to bilateral arbitration with her employer may nonetheless assert in arbitration claims on behalf of numerous others, then the employer who agreed only to arbitrate with that employee is clearly subjected to a dispute resolution process to which it never agreed. *Cf. Stolt-Nielsen*, 559 U.S. at 684 ("[A] party may not

be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (emphasis in original)). And if, as this Court has held, the FAA requires enforcement of agreements prohibiting class actions, collective actions, joinder, and consolidation, then surely the FAA requires enforcement of agreements prohibiting representative actions.

Simply put, the central holding of *Concepcion* was that the arbitration envisioned and protected by the FAA is conventional *bilateral* arbitration. Bilateral arbitration is the benchmark against which this Court measured the *Discover Bank* rule, and the failure to allow the same speed, efficiency, and limited risk as bilateral arbitration is what created a conflict between the *Discover Bank* rule and the FAA. *Concepcion*, 563 U.S. at 348-51. For the very same reasons, non-consensual arbitration of representative PAGA claims is "not arbitration as envisioned by the FAA," "lacks its benefits," and "may not be required by state law." *Id.* at 351.

II. The Question Presented Is of Significant Practical Importance Because the *Iskanian* Rule Creates a Loophole in the FAA That Undermines Arbitration Programs to the Detriment of Employers and Employees.

In the absence of this Court's immediate intervention, the holdings in *Sakkab* and the decision below will leave open a gaping loophole in the FAA that undermines existing contractual expectations and discourages employers from adopting arbitration

programs for wage-and-hour claims, which benefit both employers and employees alike.

Relying on *Iskanian* and *Sakkab*, enterprising employees will plead — and have already begun to plead — their individual wage-and-hour claims as representative PAGA claims, thereby permitting them to end-run their otherwise binding agreements to arbitrate all employment-related claims on an individual basis. This is not mere speculation. Plaintiffs have "flooded the courts" with representative PAGA claims,[8] and that trend is sure to expand in the wake of the Ninth Circuit's erroneous decision.[9] Nor will there be anything confining the trend to claims arising under labor or employment laws. California and other states will be free to enact

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[8] Matthew M. Sonne and Kevin P. Jackson, *Towards a "Manageability" Standard in PAGA Discovery*, ABTL Report at 5 (Summer 2014); *see also* Goodman, *supra* note 5, at 415 ("Annual PAGA filings have increased over 200 percent in the last five years, and over 400 percent since 2004.").

[9] To estimate the number of recent PAGA-related case filings, counsel searched California state court dockets in Bloomberg Law using the following search terms: "private attorney general act" OR "PAGA" OR "private attorneys general act" OR "private attorney generals act" OR ("private attorney general" AND (labor n/20 2699) OR (labor n/20 2698)). That search yielded 583 results for 2013—the year before *Iskanian* was decided. But for 2016—the year after the Ninth Circuit upheld the *Iskanian* rule in *Sakkab*—that same search yielded more than double the number of results, with 1,234 search term hits. While not every result represents a separate claim filed under PAGA, the results show that many of them do represent distinct PAGA actions; thus, the results are indicative of the increasing frequency with which PAGA-related claims have been filed in recent years.

any manner of Private Attorney General Acts in areas where arbitration agreements are prevalent — and each one will poke yet another hole in the FAA. This Court must act to ensure that *Concepcion* and the federal policy favoring arbitration cannot be so easily evaded.

Allowing such widespread evasion of arbitration agreements would undermine the important policy goals embodied in the FAA. The FAA's "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339, reflects a recognition by both Congress and the courts that arbitration is a faster and cheaper alternative to litigation that benefits both businesses and individuals. Nearly a century ago, Congress enacted the FAA on the conviction that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."[10] Congress has since expanded upon the "many" benefits of arbitration, emphasizing that it "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices," and could even "relieve some of the burdens on

[10] H.R. Rep. No. 68-96, at 2 (1924). The Senate Report likewise stated that the FAA was needed "to avoid the delay and expense of litigation," and that arbitration benefited "corporate interests, as well as . . . individuals." S. Rep. No. 68-536, at 3 (1924).

overworked Federal courts." H.R. Rep. No. 97-542, at 13 (1982).

This Court has likewise repeatedly observed that "arbitration's advantages" are "helpful to individuals . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995); *see also Stolt-Nielsen*, 559 U.S. at 685 (noting that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, this Court has specifically recognized that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001).

Empirical evidence confirms what Congress and this Court have said for decades. *First*, studies show that "arbitration is faster than litigation." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572 (2005). Arbitration has been estimated to take "less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998); *see also* Sherwyn, *supra* at 1573 (same). For example, consumer arbitrations administered by the American Arbitration Association ("AAA") are typically

resolved in four to six months.[11] A similar study by the California Dispute Resolution Institute found that consumer and employment disputes were resolved in arbitration in an average of 116 days.[12] Cases in overcrowded federal and state courts take months and years longer to reach resolution. As of September 2016, the median time for a civil lawsuit filed in federal court to reach trial was 27 months — and over 53,000 civil cases were left pending for more than *three years*.[13] State courts — particularly in California — have caseloads that are even worse,[14] a

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[11] *See* Am. Arbitration Assoc., *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325.

[12] Calif. Disp. Resol. Inst., *Consumer and Employment Arbitration in California* 19 (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_Aug_6.pdf.

[13] *See* Admin. Office of the U.S. Courts, *Federal Court Management Statistics* (Sept. 2016), *available at* http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2016.

[14] *See* Nat'l Ctr. for State Courts, *Examining the Work of State Courts* 7 (2015) (reporting a total of 16.9 million new civil cases filed in state courts in 2013), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC_CSP_2015.ashx; *see also* Judicial Council of California, *Fact Sheet: California Judicial Branch* 3 (Oct. 2016) ("During 2014-2015, nearly 7 million cases were filed in [California superior] courts."), *available at* http://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

problem that has only been compounded in recent years by state budget cuts.[15]

Second, arbitration is far cheaper and more accessible for low-income plaintiffs than traditional litigation. In litigation, filing fees can be high[16] and the complexity of court procedures requires the help of a lawyer at substantial cost (either in the form of up-front fees or a contingency fee that substantially reduces the amount of any award). But under many employment arbitration agreements, arbitration often costs employees nothing at all, as the filing and attorneys' fees are shifted to the employer. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 77 (2003). Moreover, because of its informality and greater efficiency, arbitration is often less contentious than litigation, enabling employees to resolve disputes without damaging on-going relationships with their employers and coworkers. *See* H.R. Rep. No. 97-542, at 13. These streamlined procedures make arbitration cheaper for businesses as well, a savings that "lower[s] [businesses'] dispute-resolution costs," which, like any other cost savings, can result in "wage

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[15] *See, e.g.*, Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013, *available at* http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410.

[16] As of December 1, 2016, the fee for filing a civil claim in U.S. District Court for the Southern District of New York is $400. *See* http://www.nysd.uscourts.gov/fees.

increase[s]" for employees. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-57 (2006).

Third, employees tend to fare better in arbitration. Studies have shown that plaintiffs who arbitrate their claims are more likely to prevail than those who go to court. *See, e.g.*, Maltby, *supra* at 46. One study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than employees who litigated in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). A 2004 report from the National Workrights Institute compiled a number of employment arbitration studies and concluded that employees were 19% more likely to win in arbitration than in court.[17]

Employment arbitration programs confer real and substantial benefits. But if the Ninth Circuit's reasoning in *Sakkab* is allowed to stand (and spread), these benefits will be lost — to the detriment of

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[17] Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), *available at* goo.gl/nAqVXe. A more recent study of consumer claims in 2010 found that plaintiffs win relief 53.3% of the time, which is more favorable than the roughly 50% win rate among plaintiffs in state and federal court. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 897 (2010).

employees, businesses, and the economy as a whole. As this Court recognized in *Concepcion* and *Stolt-Nielsen*, arbitration agreements are by their very nature individualized, and imposing on them the procedures necessary to resolve aggregated claims would sacrifice so much of the expected cost savings, informality and expedition that, as a practical matter, no business would voluntarily enter into any such agreement. *See Concepcion*, 563 U.S. at 351 ("We find it hard to believe that defendants would" enter into agreements permitting class arbitration); *Stolt-Nielsen*, 559 U.S. at 685 ("[C]lass arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). Businesses faced with the prospect of forced collective or representative arbitration are likely to simply abandon arbitration programs for wage-and-hour claims altogether. If that occurs, then untold numbers of employment disputes that are routinely and effectively arbitrated each and every day will instead be diverted to already clogged state and federal court systems, to the benefit of no one. Without access to arbitration for these claims, employees would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court." Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict. Resol. 267, 267 (2008).

The FAA was enacted precisely to avoid these litigation-related inefficiencies and to combat the sort

of judicial hostility toward arbitration in decisions like *Iskanian* and *Sakkab* that only contribute to them. Review is urgently needed to bring California's state and federal courts in line with the FAA's controlling principles and to promote the uniform application of arbitration rights nationwide for the benefit of businesses and individuals alike.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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