No. 20-55140

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLOS RIVAS, in his capacity as
Private Attorney General Representative,

Plaintiff-Appellee,

v.

COVERALL NORTH AMERICA, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the
Central District of California, No. 8:18-cv-01007-JGB-KK,
The Honorable Jesus Bernal

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of defendant-appellant's petition for rehearing en banc. In support of this motion, the Chamber states as follows.

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements.

2. The Chamber's members regularly employ arbitration agreements. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than

litigation in court. Based on the principles embodied in the Federal Arbitration Act and the U.S. Supreme Court's consistent affirmation of the legal protection the FAA provides for arbitration agreements, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

3. The Chamber has a strong interest in rehearing en banc in the present case to ensure that the Federal Arbitration Act applies uniformly and accurately nationwide. In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015)—a case in which the Chamber participated as an amicus in support of the petition for rehearing en banc—a divided panel of this Court concluded that the FAA does not preempt a California judge-made rule known as the "*Iskanian* rule." That rule declares unenforceable any arbitration agreement requiring individualized arbitration of claims under California's Private Attorneys General Act of 2004 ("PAGA").

4. The panel in this case considered itself bound to follow *Sakkab*. But as Judge Bumatay powerfully explained in a concurring opinion, *Sakkab* "has been seriously undermined and should be revisited by our court en banc." Mem. 1 (Bumatay, J., concurring).

5. As the proposed brief explains, the Court should take up that invitation. *Sakkab*'s holding that the FAA does not preempt the *Iskanian* rule conflicts with the Supreme Court's most recent precedents interpreting the Act. And the rule's practical consequences are enormous: PAGA filings have increased dramatically in recent years as plaintiffs seek to evade enforcement of their arbitration agreements.

6. Pursuant to Ninth Circuit Rule 29-3, counsel for the Chamber states that counsel endeavored to obtain consent to the filing of this brief from all parties. Defendant-appellant consented to the filing of the brief. Plaintiff-appellee declined to consent, necessitating the filing of this motion.

Accordingly, the Chamber respectfully requests that the Court grant this motion and accept for filing its brief as *amicus curiae* in support of defendant-appellant's petition for rehearing en banc.

Dated: February 1, 2021

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(g), undersigned counsel certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) and Circuit Rule 27-1 because it contains 501 words, including footnotes and excluding the parts of the motion exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 1, 2021 /s/ Andrew J. Pincus

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Andrew J. Pincus

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements.[1]

The Chamber's members regularly employ arbitration agreements. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the principles embodied in the Federal

[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Arbitration Act and the U.S. Supreme Court's consistent affirmation of the legal protection the FAA provides for arbitration agreements, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The Chamber has a strong interest in rehearing en banc in the present case to ensure that the Federal Arbitration Act applies uniformly and accurately nationwide. In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015), a divided panel of this Court concluded that the FAA does not preempt a California judge-made rule known as the "*Iskanian* rule."[2] That rule declares unenforceable any arbitration agreement requiring individualized arbitration of claims under California's Private Attorneys General Act of 2004 ("PAGA"). The panel in this case considered itself bound to follow *Sakkab*. But as Judge Bumatay powerfully explained in a concurring opinion, *Sakkab* "has been seriously undermined and should be revisited by our court en banc." Mem. 1 (Bumatay, J., concurring).

This Court should take up that invitation. *Sakkab*'s holding that the FAA does not preempt the *Iskanian* rule conflicts with the Supreme

[2] *See Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014).

Court's most recent precedents interpreting the Act. And the rule's practical consequences are enormous: PAGA filings have increased dramatically in recent years as plaintiffs seek to evade enforcement of their arbitration agreements.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Arbitration Act directs courts to "enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (emphasis added). As the Supreme Court has repeatedly made clear in recent years, the Act thus "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621; *see also Lamps Plus v. Varela*, 139 S. Ct. 1407, 1416 (2019) (the Act "envision[s]" an "individualized form of arbitration") (citing *Epic*, 138 S. Ct. at 1622-23). And the Act's protection of traditional bilateral arbitration means that "courts may not allow a contract defense to reshape traditional individual arbitration." *Epic*, 138 S. Ct. at 1623.

Notwithstanding these clear holdings, panels of this Court have allowed enterprising plaintiffs to circumvent the enforcement of their arbitration agreements by invoking PAGA, which authorizes an

"aggrieved employee" to recover civil penalties on a representative basis by raising alleged violations of California's Labor Code as to "himself or herself" and "other current or former employees." Cal. Labor Code § 2699(a). The divided panel in *Sakkab*—over the vigorous dissent of Judge N.R. Smith—relied on technical distinctions between representative PAGA actions and class actions under Rule 23 (or its state equivalents) to avoid *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the FAA's protection of individualized arbitration preempts a California rule nullifying arbitration agreements that do not permit class arbitration. And the panel in this case considered itself constrained by *Sakkab*.

But *Sakkab*'s cramped reading of the Federal Arbitration Act squarely conflicts with Supreme Court precedent. As Judge Bumatay explained, the "tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious." Mem. 5 (Bumatay, J., concurring). The Act's "saving clause[] offers no protection to state laws that interfere with parties' choice to engage in individual, bilateral arbitration." *Id.* at 6. Yet the holding in *Sakkab* "clearly does" just that, paving the way for an

employee to "always sidestep an arbitration agreement simply by filing a PAGA claim" on a representative basis. *Id.* at 3, 6.

The practical impact of this massive loophole in the enforcement of arbitration agreements underscores the urgent need for en banc review. PAGA claims were once an afterthought tacked onto putative employment class actions in California. But since the *Iskanian* decision seven years ago, PAGA filings have skyrocketed as plaintiffs' counsel seek to evade their clients' arbitration agreements. The result has been the effective invalidation of millions of workplace arbitration agreements protected by the Federal Arbitration Act, with severe repercussions for businesses with workers in California, the nation's most populous state. Continued application of *Iskanian* and *Sakkab* deprives both businesses and workers of the important benefits that traditional, bilateral arbitration provides.

In short, the "writing is on the wall": this Court's "precedent is in serious need of a course correction," and en banc review is needed to eliminate the "disharmony" between this Court's precedent and "the Supreme Court's." Mem. 3, 6 (Bumatay, J., concurring).

ARGUMENT

A. This Court's Decision In *Sakkab* Conflicts With The Federal Arbitration Act And Supreme Court Precedent.

1. Congress enacted the Federal Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted).

Just two Terms ago, in reversing one of this Court's decisions, the Supreme Court reiterated that the Act "envision[s]" an "individualized form of arbitration." *Lamps Plus*, 139 S. Ct. at 1416 (citing *Epic*, 138 S. Ct. at 1622-23; *Concepcion*, 563 U.S. at 349; *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010)). "In individual arbitration, 'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

This Court's *Sakkab* decision invalidating agreements requiring arbitration of PAGA claims on an individual basis rested on the premise

that representative PAGA claims differ significantly from Rule 23 class actions. As a result, *Sakkab* reasoned, such claims are not subject to the Supreme Court's holding in *Concepcion* that, under the FAA, state laws may not invalidate an arbitration agreement because it requires individualized adjudication and precludes class actions. *See* Mem. 4 (citing *Sakkab*, 803 F.3d at 436).

But the Supreme Court's subsequent precedents confirm that *Sakkab*'s interpretation of the Act, and of *Concepcion*, is wrong. Instead, *Concepcion* stands for the "essential insight" that "courts may not allow a contract defense to reshape *traditional individualized arbitration*." *Epic*, 138 S. Ct. at 1623 (emphasis added). And the *Epic* Court emphasized that this "essential" point governs regardless of the garb in which a contract defense is dressed: "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." *Id.* at 1623 (quoting *Concepcion*, 563 U.S. at 342).

In other words, States may not impose a "rule seeking to declare individualized arbitration proceedings off limits," because such a rule would "reshape traditional individualized arbitration." *Id.* at 1623. The Act, the Supreme Court has explained, "seems to protect pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621.

Accordingly, the Court's precedents teach that any "device[]" or "formula[] declaring arbitration against public policy" because of its "traditionally individualized and informal nature" runs afoul of the Act. *Epic*, 138 S. Ct. at 1621-23; *see also*, *e.g.*, *Lamps Plus*, 139 S. Ct. at 1417-19 (holding that the Federal Arbitration Act preempts use of the state-law *contra proferentem* canon to authorize class arbitration). A state-law rule that mandates arbitral proceedings that "would take much time and effort, and introduce new risks and costs for both sides" undermines "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness." *Epic*, 138 S. Ct. at 1623. If that were permissible, "arbitration would wind up looking like the litigation it was meant to displace." *Id.*

2. For several reasons, the *Iskanian* rule upheld in *Sakkab* is just such an impermissible "device."

First, representative PAGA claims, "by their very nature," are about, and on behalf of, employees *other* than the named plaintiff. Mem. 1 (Bumatay, J., concurring); *see also id.* at 5. Indeed, the California Supreme Court recently confirmed that the PAGA plaintiff's own Labor Code claim is *irrelevant* to adjudication of her representative PAGA action. In *Kim v. Reins International California, Inc.*, 459 P.3d 1123 (Cal. 2020) (cited at Mem. 4 n.3), that Court held that an employee who completely resolves her own wage-and-hour claims against her employer through a settlement remains an "aggrieved employee" who may still serve as a representative PAGA plaintiff and pursue remedies for alleged Labor Code violations on behalf of other employees. *Id.* at 1128-32. Put another way, *Kim* makes clear that representative PAGA actions focus on the claims of third parties who are not before the court.

Second, and relatedly, arbitration of a representative PAGA action is therefore inherently far slower and more costly than the individual, one-on-one arbitration envisioned and protected by the Federal Arbitration Act (and to which the parties agreed). *See Epic*, 138 S. Ct.

at 1623; *Sakkab*, 803 F.3d at 444-45 & n.4 (N.R. Smith, J., dissenting). Remedies in a representative PAGA action are assessed against the employer on a "per pay period" basis for *each* "aggrieved employee" affected by *each* claimed violation of the California Labor Code proven by the representative plaintiff. Cal. Labor Code § 2699(f)(2).

Thus, in contrast to an individual wage-and-hour dispute in which the arbitrator focuses solely on the individual circumstances of the claimant, an arbitrator presiding over a representative PAGA action "would have to make specific factual determinations regarding (1) the number of other employees affected by the labor code violations, and (2) the number of pay periods that *each* of the affected employees worked." *Sakkab*, 803 F.3d at 445 (N.R. Smith, J., dissenting). "Because of the high stakes involved in these determinations, both of these issues would likely be fiercely contested by parties." *Id.* And "[i]n arbitrations involving large companies," "the arbitrator would be required to make individual factual determinations regarding * * * hundreds or thousands of employees, none of whom are party to such arbitration." *Id.*

Experience already proves that arbitration of representative PAGA claims would be unwieldy and bear no resemblance to traditional individualized arbitration. In *Driscoll v. Granite Rock Co.*, 2011 WL 10366147 (Cal. Super. Ct. Sept. 20, 2011), for example, 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* Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 441 (2016).

Indeed, *Driscoll* understates the complexity of most PAGA actions, because that case involved a relatively small group of 200 current and former employees. *See* 2011 WL 10366147, at *1. The burdens of representative arbitration would multiply exponentially for larger PAGA actions, which often balloon to include thousands if not tens of thousands of absent employees.[3]

[3] *See, e.g., Sanchez v. McDonald's Restaurants of Cal., Inc.*, 2017 WL 4620746, at *2 (Cal. Sup. Ct. July 6, 2017) (nine-day bench trial for claims on behalf of approximately 10,000 employees at 119

Multiplying the work required to resolve an alleged Labor Code violation across hundreds, thousands, or even tens of thousands of absent employees plainly creates a proceeding that "reshape[s] traditional individualized arbitration." Mem. 6 (Bumatay, J., concurring) (quoting *Epic*, 139 S. Ct. at 1418).

Third, the procedures needed to resolve a representative PAGA arbitration will necessarily be far more complicated than those in bilateral arbitration. "In an individual arbitration, the employee already has access to all of his own employment records"; "[h]e knows how long he has been working for the employer"; and he "can easily determine how many pay periods he has been employed." *Sakkab*, 803 F.3d at 446 (N.R. Smith, J., dissenting). By contrast, in a representative PAGA action, "the individual employee does not have access to any of this information" for "the other potentially aggrieved

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restaurants); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *17 (N.D. Cal. May 13, 2015) (PAGA claim with "more than 10,000 class members"); *see also* Compl., *O'Bosky v. Starbucks Corp.*, 2015 WL 2254889, at *2 (Cal. Super. Ct. May 4, 2015) (approximately 65,000 employees); Defs.' Mot. to Strike, *Ortiz v. CVS Caremark Corp.*, 2014 WL 2445114, at *4 (N.D. Cal. Jan. 28, 2014) (more than 50,000 employees across 850 stores); Def.'s Opp'n to Class Certification, *Cline v. Kmart Corp.*, 2013 WL 2391711, at *1, 12 (N.D. Cal. May 13, 2013) (13,000 cashiers at 101 stores statewide).

employees," and the "discovery necessary to obtain these documents from the employer would be significant and substantially more complex than discovery regarding only the employee's individual claims." *Id.* at 446-47.

Indeed, the *Sakkab* majority was mistaken in its speculation that representative PAGA claims will not require extensive discovery as in class actions. In support of that speculation, the majority cited a California Court of Appeal decision denying an employee extensive statewide discovery near the outset of his representative PAGA action. 803 F.3d at 439 (citing *Williams v. Super. Ct.*, 236 Cal.App.4th 1462, 1476 (2015)). But the California Supreme Court subsequently *reversed* that decision, holding that "a civil litigant's right to discovery is broad" and that California public policy "support[s] extending PAGA discovery *as broadly as class action discovery has been extended*." *Williams v. Super. Ct.*, 398 P.3d 69, 81 (Cal. 2017) (emphasis added).

That development fatally undermines the *Sakkab* majority's reasoning: The Supreme Court has already held that class-wide discovery is incompatible with arbitration "as envisioned by the FAA." *Concepcion*, 563 U.S. at 351.

Fourth, the arbitration of representative PAGA actions "greatly increases the risk to employers." *Sakkab*, 803 F.3d at 447 (N.R. Smith, J., dissenting) (citing *Concepcion*, 563 U.S. at 350). The civil penalties available in a representative PAGA action may total many millions of dollars when sought by reference to hundreds or thousands of potentially affected employees for pay periods extending over multiple years. "Even a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013). Indeed, in some PAGA cases, the potential fines that an employer faces are substantially *higher* than the actual damages that would have been awarded had the suit been brought as a class action. *See* Goodman, *supra*, at 415.

These outsized civil penalties pose the same "unacceptable" risk of "devastating loss" that arises "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Concepcion*, 563 U.S. at 350; *see also Sakkab*, 803 F.3d at 448 (N.R. Smith, J., dissenting) ("the concerns expressed in *Concepcion* are just as real in the present case"). As one observer has explained, "[t]he

possibility of a 'blackmail settlement' looms even larger in PAGA actions [than in class actions]. * * * The threat of expensive litigation * * * will compel settlement for many employers and can work as a type of 'legalized blackmail.'" Goodman, *supra*, at 447-48.

Finally, as Judge Bumatay noted, there are "serious doubts" about whether the *Iskanian* rule is a generally applicable contract defense that treats arbitration agreements the same as other contracts. Mem. 6 n.2 (Bumatay, J., concurring); *accord Sakkab*, 803 F.3d at 442 n.1 (N.R. Smith, dissenting). After all, the *Iskanian* rule has been uniquely applied to prevent the enforcement of bilateral 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 bears no resemblance to generally applicable common law doctrines such as fraud, duress, or mutual mistake.

In sum, representative PAGA actions are every bit as incompatible with the "fundamental attributes of arbitration" as the class or collective actions at issue in *Epic* and *Concepcion*. *Concepcion*, 563 U.S. at 344. And *Epic* leaves no doubt that state law cannot

demand the availability of arbitrations on a representative basis, because that result "clearly" "interfere[s] with the parties' choice to engage in individual, bilateral arbitration." Mem. 6 (Bumatay, J., concurring).

B. The Federal Preemption Question Presented Is Exceptionally Important.

Rehearing en banc is also warranted because of the tremendous practical importance of the question whether the Federal Arbitration Act preempts California's *Iskanian* rule.

The large number of PAGA actions that have engulfed the California courts since the *Iskanian* and *Sakkab* decisions powerfully illustrates how plaintiffs' lawyers have seized on PAGA as a means of evading the Supreme Court's holdings in *Epic* and *Concepcion*.

PAGA claims formerly were brought, if at all, only on "the coattails of traditional class claims," largely because plaintiffs did not want to rely principally on a cause of action requiring them to remit 75% of their recovery to the State. Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 01, at 1-2 (2013) (noting the "strong incentive" for plaintiffs to

prefer class claims over PAGA claims because of the allocation of PAGA proceeds); *see* Cal. Labor Code § 2699(i) (requiring that plaintiffs remit 75% of any penalties they recover to the State). Even when plaintiffs tacked on PAGA claims to complaints asserting other claims under federal and state labor law, court-approved settlements in those cases reveal that the parties agreed to allocate only a tiny fraction of the recovery to the PAGA claims.[4]

But the volume of PAGA claims increased dramatically after the *Sakkab* decision—and the reason is clear. "The fact that [representative] PAGA claims cannot be waived by agreements to arbitrate" despite the Federal Arbitration Act "contributes heavily to the prevalence of these suits." Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56

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[4] *See*, *e.g.*, *Franco v. Ruiz Food Prods., Inc.*, 2012 WL 5941801, at *2 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, at *7 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie v. Fed. Express Corp.*, 2012 WL 2930201, at *4 (C.D. Cal. 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu v. Wells Fargo Inv., LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) ($10,000 allocated to PAGA claim out of $6.9 million settlement); *see also Nordstrom Comm'n Cases*, 186 Cal.App.4th 576, 589 (Cal. Ct. App. 2010) (upholding multimillion dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

Santa Clara L. Rev. 413, 415 (2016). PAGA is thus "a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agreements." Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://perma.cc/X3N7-LN4A.

The numbers speak for themselves. In 2005, plaintiffs filed 759 PAGA claims. Emily Green, *An alternative to employee class actions*, L.A. Daily Journal (Apr. 16, 2014). By 2017—after *Sakkab*—plaintiffs' notices of intent to file PAGA actions more than quadrupled, to 3,250.[5] Another study found that approximately "15 PAGA notice letters" are filed each *day*. Jathan Janove, *More California Employers Are Getting Hit With PAGA Claims*, Society for Human Resource Management (Mar. 26, 2019), http://bit.ly/2Zb1zP1; *see also* Suzy Lee, *"We've Received A PAGA Notice, Now What?" An Employer's 10-Step Guide*, Fisher

[5] Since September 2016, plaintiffs in PAGA cases have been required to file PAGA notices with the California Labor and Workforce Development Agency ("LWDA") through an online platform. *See* California Department of Industrial Relations, *Private Attorneys General Act (PAGA) Case Search*, https://cadir.secure.force.com/PagaSearch/.

Phillips (July 1, 2019), https://bit.ly/2LWR7cK (reporting that "over 5,700" PAGA notices were filed with the LWDA in 2018).

California's state labor agency itself projected in April 2019 that over 6,000 PAGA notices would be filed with the agency in the 2019/2020 fiscal year and that the number would continue to increase each fiscal year, topping 7,200 in fiscal year 2022/2023. Cal. Department of Industrial Relations, *Budget Change Proposal – PAGA Unit Staffing Alignment* 7 (April 2, 2019), https://bit.ly/3ca0NLn.

This flood of PAGA claims has undermined the "real benefits to the enforcement of arbitration provisions" calling for traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001); *see also*, *e.g.*, *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, the Supreme Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 123 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991)). On the

contrary, the Court emphasized that the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.*

Empirical evidence supports these observations. Arbitration typically is more efficient than litigation, allowing employees to resolve their claims more quickly than they would in court. *See, e.g.*, Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5, 11–12 (2019), available at https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf ("[E]mployee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days . . . . In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days . . . ."); 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) (reporting findings that arbitration was 33% faster than analogous litigation).

In addition, employee-claimants obtain outcomes in arbitration equal to—if not better than—outcomes in litigation. Indeed, a recent study conducted on behalf of the Chamber's Institute for Legal Reform found that employees were *three times* more likely to win in arbitration than in court. Pham, *supra*, at 5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." *Id.* at 5-6, 9-10.

As another scholar found, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original). Rather, arbitration is generally "favorable to employees as compared with court litigation." *Id.*; *see also* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998).

In short, arbitration of workplace substantially benefits businesses and workers alike. But if *Sakkab* is allowed to stand,

Californians will lose these benefits—to the detriment of employees, businesses, and the state's entire economy.

This Court should act now to end that harm instead of compelling yet another intervention by the U.S. Supreme Court. As Judge Bumatay stated: "Both *Epic Systems* and *Lamps Plus* required the Supreme Court to step in and correct our saving-clause decisions—two times in the course of two terms. We should listen to what the Court is telling us and revisit our precedent before again being forced to do so." Mem. 6 (Bumatay, J., concurring).

CONCLUSION

Rehearing en banc should be granted.

Dated: February 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 29-2, undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains 4,104 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 1, 2021

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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