No. 20-1573

In the Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three 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, like this one, that raise issues of concern to the Nation's business community.[1]

Many of 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 (FAA) and this Court's consistent affirmation of the legal protections that the FAA provides for arbitration agreements, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

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[1] Pursuant to Rule 37.6, 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 made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of the Chamber's intention to file this brief over 10 days prior to the due date and all parties have consented to the filing of this brief.

The Chamber has a strong interest in this Court's review and reversal of the decision below to ensure that the FAA's pro-arbitration mandate applies uniformly nationwide. Currently, California courts and the Ninth Circuit are flouting the FAA's protection of agreements to arbitrate on an individualized basis.

In *Iskanian* v. *CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that any arbitration agreement requiring the individualized arbitration of claims brought under California's Private Attorneys General Act of 2004 (PAGA) is unenforceable as contrary to California's public policy. The court went on to say that the FAA is not implicated because (in that court's view) PAGA claims are the equivalent of *qui tam* actions, and therefore belong to the State rather than the aggrieved employees. *Id.* at 148-53. Then in *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015), a divided panel of the Ninth Circuit agreed that the *Iskanian* rule is not preempted by the FAA.

The decisions in *Iskanian* and *Sakkab* have precluded the application of countless arbitration agreements—significantly eroding the benefits of bilateral arbitration as an alternative to litigation—and will continue to do so absent this Court's intervention. Indeed, the *Iskanian* rule's practical consequences are enormous: PAGA filings have increased dramatically in recent years as plaintiffs invoke the statute in order to evade enforcement of their arbitration agreements. The result is that, in California, workplace arbitration agreements are increasingly becoming a nullity.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case brings before the Court one of the most significant chapters in the long and well-documented history of California courts inventing new "devices and formulas" aimed at circumventing arbitration agreements and the liberal federal policy favoring arbitration embodied by the FAA. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011) (quotation marks omitted); see also, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47 (2015); *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); 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).

The FAA 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). As this Court has repeatedly made clear in recent years, the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621; see also *Lamps Plus, Inc.* 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 FAA's protection of traditional bilateral arbitration means that "courts may not allow a contract defense to reshape traditional individualized arbitration." *Epic*, 138 S. Ct. at 1623.

Notwithstanding these clear holdings, the California appellate courts and the Ninth Circuit have allowed enterprising plaintiffs to circumvent their arbitration agreements by asserting claims against their employers under PAGA. That state law authorizes an "aggrieved employee" to recover civil penalties from his current or former employer on a representative basis by raising alleged violations of California's Labor Code experienced by "himself or herself" and "other current or former employees." Cal. Labor Code § 2699(a).

The California Supreme Court in *Iskanian* refused to enforce bilateral arbitration agreements with respect to representative PAGA claims. It analogized PAGA lawsuits to *qui tam* actions on behalf of the State—and held for that reason that an arbitration agreement's requirement of individualized arbitration was unenforceable notwithstanding this Court's determination in *Concepcion* that the FAA protects agreements requiring one-on-one arbitration. *Iskanian*, 327 P.3d at 152-53. The state court reached that conclusion even though it recognized that PAGA claims typically seek class-wide relief, with the aggrieved employee suing on behalf of himself or herself and hundreds or thousands of other employees. And it drew that conclusion even though the State lacks the power to control a PAGA claim: if a plaintiff wishes to pursue (or to settle) his PAGA claim over the State's objection, PAGA allows him to do so.

One year later, the Ninth Circuit adopted a similarly flawed reading of the FAA. Rather than embrace the *Iskanian* court's misguided *qui tam* analogy (perhaps because it recognized that the statute does not in reality provide for any meaningful control by the

State), the divided panel in *Sakkab* declared *Concepcion* inapplicable by relying on formal distinctions between representative PAGA actions and class actions under Rule 23. *Sakkab*, 803 F.3d at 436. But the relevant features of the claims are the same—they are brought by employees against their employers on behalf of not only themselves, but also others similarly situated.

Iskanian and *Sakkab* defy this Court's precedents by interfering with parties' agreements to resolve disputes through individual, bilateral arbitration. This Court's decision in *Epic* makes that defiance all the more clear, explaining that *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). But that is exactly the effect of the *Iskanian* rule. It allows individuals to circumvent their arbitration agreements and instead pursue class-wide relief under PAGA. That rule impermissibly "reshape[s] traditional individualized arbitration." *Ibid.*

Nor does the *Iskanian* court's attempt to analogize PAGA claims to *qui tam* actions justify its rule. Even assuming that the interest of the State in the litigation were relevant, the unique features of PAGA confirm that private PAGA litigation far more closely resembles a class or collective action than a *qui tam* one. Unlike in *qui tam* actions where a private party may step in to represent the State's interests subject to the oversight and control of the State, the PAGA plaintiff—not the State—has control over the case. Also unlike in *qui tam* actions, the PAGA plaintiff is representing the interests of other third parties—the other aggrieved employees.

Although the Ninth Circuit in *Sakkab* defended the *Iskanian* rule from FAA preemption on other (misguided) grounds, another panel of that court recently explained that these differences between PAGA and *qui tam* actions "undermine[] the notion that the aggrieved [PAGA plaintiff] is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Magadia* v. *Wal-Mart Assocs., Inc.*, --- F.3d ----, 2021 WL 2176584, at *6-7 (9th Cir. May 28, 2021) (Bumatay, J.).

Despite the glaring conflict between California's treatment of PAGA claims and this Court's reasoning in *Epic* and *Concepcion*, the California courts and the Ninth Circuit have made crystal clear that they will not revisit the *Iskanian* rule. In this case, like so many others, the California Court of Appeal considered itself bound by *Iskanian*, Pet. App. 5, and the California Supreme Court denied review, see Pet. 28-29.

The Ninth Circuit recently declined to revisit *Sakkab* despite Judge Bumatay's warnings that the "tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious" and that the Ninth Circuit's approach to FAA preemption is in "disharmony" with this Court's precedents and "is in serious need of a course correction." *Rivas* v. *Coverall N. Am., Inc.*, 842 F. App'x 55, 58-59 (9th Cir. 2021) (Bumatay, J., concurring).[2]

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[2] The defendant in *Rivas* has indicated that it plans to seek this Court's review. See Dkt. No. 46, *Rivas* v. *Coverall N. Am., Inc.*, No. 20-55140 (9th Cir. Apr. 15, 2021) (staying mandate pending disposition of a petition for a writ of certiorari). This Court may wish to address the preemption issue presented here in the context of a case arising from the Ninth Circuit; if so, *Rivas* would present an excellent vehicle.

The practical impact of the massive loophole in the enforcement of arbitration agreements created by the *Iskanian* rule underscores the urgent need for this Court's 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 results have been the effective invalidation of millions of workplace arbitration agreements that should have been protected by the FAA and severe adverse consequences for businesses with workers in California, the nation's most populous state. Continued application of the *Iskanian* rule deprives both businesses and workers of the important benefits that traditional, bilateral arbitration provides.

This Court's review is therefore essential.

ARGUMENT

I. The Preemption Question Is Exceptionally Important And Impacts Countless Arbitration Agreements.

The large number of PAGA actions that have engulfed the California courts since *Iskanian* and *Sakkab* powerfully illustrate how plaintiffs' lawyers have seized on PAGA as a means of evading this Court's holdings in *Epic* and *Concepcion*. The tremendous practical importance of the issue necessitates this Court's intervention.

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 laws, court-approved settlements in those cases reveal that the parties agreed to allocate only a tiny fraction of the recovery to the PAGA claims.[3]

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

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[3] See, *e.g.*, *Franco* v. *Ruiz Food Prods., Inc.*, 2012 WL 5941801, at *2 (E.D. Cal. Nov. 27, 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. Oct. 31, 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. July 2, 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu* v. *Wells Fargo Invs., LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 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 (2010) (upholding multimillion dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

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 only 759 PAGA claims. Emily Green, *State law may serve as substitute for employee class actions*, L.A. Daily J. (Apr. 17, 2014). By 2017—after *Iskanian* and *Sakkab*—plaintiffs' notices of intent to file PAGA actions more than quadrupled, to 3,250.[4] 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 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

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[4] 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 Cal. Dep't of Industrial Relations, *Private Attorneys General Act (PAGA) Case Search*, https://cadir.secure.force.com/PagaSearch/.

that the number would continue to increase each fiscal year, topping 7,200 in fiscal year 2022/2023. Cal. Dep't of Industrial Relations, *Budget Change Proposal – PAGA Unit Staffing Alignment* 7 (Apr. 2, 2019), https://bit.ly/3ca0NLn.

In addition, each PAGA claim can involve hundreds, thousands, or even tens of thousands of absent employees.[5] That reality underscores the immense burdens associated with representative litigation of thousands of PAGA claims.

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, this 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

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[5] See, *e.g.*, *Sanchez* v. *McDonald's Rests. 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 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. 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).

U.S. at 123. On the contrary, this 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." *Ibid.*

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 & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5, 11–12 (2019), https://instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration ("Employee-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—the outcomes in litigation. A recent study released by 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." *Ibid.*; see also Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998).

In short, the arbitration of workplace disputes substantially benefits businesses and workers alike. But if the *Iskanian* rule is allowed to stand, Californians will lose these benefits—to the detriment of employees, businesses, and the state's entire economy.

II. This Court's Review Is Necessary Because Neither The California Courts Nor The Ninth Circuit Will Correct The *Iskanian* Rule.

A. The FAA forbids California from refusing to enforce bilateral arbitration agreements with respect to representative PAGA claims.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements."

EEOC v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted).

Just two Terms ago, this Court made clear 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. *AnimalFeeds 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.'" *Ibid.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Accordingly, the FAA "seems to protect pretty absolutely" arbitration agreements that have two essential features. *Epic*, 138 S. Ct. at 1619. Agreements that (1) require the resolution of claims in arbitration, rather than through litigation in court, and (2) require "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621.

Yet the *Iskanian* rule declares such agreements unenforceable, as against California public policy, to the extent that they prevent employees from asserting representative PAGA claims. The result is that any California employee can sidestep his or her agreement to individualized arbitration, and bring a lawsuit in court, simply by filing a representative PAGA action. Employers, in turn, are deprived of the benefits of their bilateral arbitration agreements and saddled with representative litigation entailing the same burdens that accompany class or collective actions.

2. *Iskanian*—and the continued adherence to it by California courts and the Ninth Circuit—represents a thinly veiled effort to circumvent this Court's

holdings, which prohibit States from conditioning the enforceability of arbitration agreements on the availability of class or collective actions.

The FAA preempts state-law rules that "interfere[]" with the "traditionally individualized and informal nature of arbitration." *Epic*, 138 S. Ct. at 1622-23. A State therefore may not invalidate an arbitration agreement on the ground that it fails to permit class or collective actions, because such a rule would "reshape traditional individualized arbitration." *Id.* at 1623.

Epic, which involved collective actions, makes clear that this FAA principle is not limited to class actions under Rule 23 or its state equivalents. Rather, this "essential insight" 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." *Epic* 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342).

3. For several reasons, the *Iskanian* rule is just such an impermissible "device," because it disregards bilateral arbitration agreements when employees present representative PAGA claims—thus plainly overriding the parties' choice, protected by the FAA, of one-on-one arbitration.

First, representative PAGA claims, by their very nature, are about, and seek relief on behalf of, third party employees *other* than the named plaintiff. The California Supreme Court recently confirmed that the continuing viability of the PAGA plaintiff's own Labor

Code claim is not necessary to adjudication of her representative PAGA action. In *Kim* v. *Reins International California, Inc.*, 459 P.3d 1123 (Cal. 2020), 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. *Kim* makes clear that representative PAGA actions focus on the claims of third parties who are not before the court. The Ninth Circuit recently came to the same conclusion, explaining that "PAGA explicitly * * * implicates the interests of nonparty aggrieved employees." *Magadia*, 2021 WL 2176584, at *6.

Second, and relatedly, resolving a representative PAGA action is inherently far slower and more costly than the individual, one-on-one arbitration envisioned and protected by the FAA (and to which the parties agreed). See *Epic*, 138 S. Ct. at 1623. 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, resolving representative PAGA actions requires "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." *Ibid.* And resolving them requires "individual factual determinations regarding * * * hundreds or thousands of employees." *Ibid.*

Experience already proves that resolving representative PAGA claims is an unwieldy process that bears 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 Goodman, *supra*, at 441.

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 can multiply exponentially for larger PAGA actions, which often balloon to include thousands if not tens of thousands of absent employees. See page 10 & note 5, *supra*.

Third, the procedures needed to resolve a representative PAGA action are necessarily 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 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.

The California Supreme Court has confirmed as much, holding 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). But this Court has already held that class-wide discovery is incompatible with arbitration "as envisioned by the FAA." *Concepcion*, 563 U.S. at 351.

Finally, representative PAGA actions "greatly increase[] risks to defendants." *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]." Goodman, *supra*, at 447-48.

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 States cannot displace bilateral arbitration agreements by demanding the availability of representative litigation, as California has done through the *Iskanian* rule.[6]

B. *Iskanian*'s attempt to shield PAGA claims from the FAA conflicts with this Court's precedents.

In a transparent effort to evade *Concepcion*, the *Iskanian* court concluded that "a PAGA claim lies outside the FAA's coverage" "because it is not a dispute between an employer and an employee arising out of their contractual relationship." 327 P.3d at 151. Instead, that court said, a PAGA claim "is a dispute between an employer and the *state*"—with "aggrieved employees" serving as "agents" of the state. *Ibid.*

But that description is dubious. As a factual matter, a PAGA claim is brought by the aggrieved employee against his or her employer concerning the

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[6] It is no answer to say that companies can carve out representative PAGA claims for litigation in court. The same was true of the class actions at issue in *Concepcion*. See 563 U.S. at 346, 351. But in either setting, a regime in which companies must choose between arbitrating representative PAGA claims or resolving those claims in a parallel litigation proceeding is a poor substitute for "arbitration as envisioned by the FAA" and "therefore may not be required by state law." *Id.* at 351.

terms or conditions of employment, so it *is* a "dispute between an employer and an employee arising out of their contractual relationship."

A PAGA claim brought by a private plaintiff thus bears no resemblance to the government enforcement action at issue in *Waffle House*, the case from which *Iskanian* attempted to draw support. See 327 P.3d at 151. Critical to *Waffle House*'s determination that the employee's arbitration agreement did not apply was the fact that the *government* agency *itself* was pursuing the enforcement action and controlled the litigation. See 534 U.S. at 291-94; see also *Preston* v. *Ferrer*, 552 U.S. 346, 359 (2008) (observing that in *Waffle House*, "the Court addressed the role of an agency * * * as prosecutor, pursuing an enforcement action *in its own name*") (emphasis added).

This Court stressed that "the EEOC is in command of the process" and that the "statute clearly makes the EEOC the master of its own case." *Waffle House*, 534 U.S. at 291. By contrast, the Court explained, if the publicly accountable agency had lacked direct and exclusive control over the case—for example, "[i]f it were true that the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]"—then the employee's arbitration agreement could have barred the agency from pursuing employee-specific relief. *Ibid.*

Under PAGA—which, of course, stands for the *Private* Attorneys General Act—the plaintiff who agreed to arbitration *does* exercise unfettered control over the prosecution of the claim, subject to minimal government oversight or control. See Cal. Labor Code § 2699.3(a). Among other things, the private PAGA plaintiff:

- controls the allegations in the complaint;
- defines the set of employees that he or she seeks to represent; and
- may settle the claims without the State's approval.[7]

As Justice Chin observed in his concurrence in *Iskanian*, "to the extent [*Waffle House*] is relevant," it "actually *does* suggest that the FAA preempts the majority's rule." *Iskanian*, 327 P.3d at 158 (Chin, J., concurring) (quotation marks and alterations omitted).[8] *Waffle House* held that the employee's arbitration agreement did not encompass the EEOC's enforcement action *at all* because government agency brought and controlled the action, and the employee's arbitration agreement could not bind the agency under those circumstances. 534 U.S. at 291-94. But *Iskanian* permits an aggrieved employee to "bind" the government by pursuing PAGA claims in arbitration if the parties so choose. See 327 P.3d at 155 ("Iskanian must proceed with bilateral arbitration on his individual damages claims, and CLS must answer the representative PAGA claims in some forum."); see also *Sakkab*, 803 F.3d at 440 (remanding for determination of "where Sakkab's representative PAGA claims

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[7] Prior to the June 2016 amendments to PAGA, private litigants were not even required to notify the State of a proposed PAGA settlement. The state agency must now be given notice of a proposed settlement, but the settlement is still subject only to the court's approval. See Cal. Labor Code § 2699(l)(2).

[8] Justice Chin nonetheless concurred because, in his view, the *Iskanian* rule was permissible under the effective-vindication exception. 327 P.3d at 157. That view is incorrect; this Court's precedents make clear that the effective-vindication exception simply does not apply to state-law claims. See *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

should be resolved"); *Valdez* v. *Terminix Int'l Co. Ltd. P'ship*, 681 F. App'x 592, 594 (9th Cir. 2017) ("*Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a [representative] PAGA claim in arbitration.").

In other words, *Iskanian* holds that representative PAGA actions belong to the State just enough to prevent application of this Court's decision in *Concepcion*, but not enough to prevent the employee and employer from agreeing to arbitrate a PAGA claim. That conclusion is untenable and amounts to little more than a blatant misuse of *Waffle House*.

Nor could the *Iskanian* court draw support from its analogy to *qui tam* actions. The analogy is flawed from the outset: In contrast to the role that the federal government is authorized to play in federal *qui tam* litigation (see 31 U.S.C. § 3730(b)-(c)), California has little control over the conduct of a PAGA action brought by a private plaintiff—and certainly nowhere close to the control that would be required to satisfy *Waffle House*.

In fact, the Ninth Circuit recently recognized that PAGA actions are materially distinct from traditional *qui tam* actions. *Magadia*, 2021 WL 2176584, at *6-7. Unlike traditional *qui tam* actions, where the State retains partial control over the claims and can choose to intervene, "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Id.* at *7. In other words, "once California elects not to issue a citation" for the alleged Labor Code violation, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee," who may pursue her private PAGA claim even if the State disagrees with it. *Ibid.* Moreover,

and "wholly unique" among purported *qui tam* actions, PAGA plaintiffs are allowed to assert not just the interests of the State, but "the interests of other third parties"—i.e., other aggrieved employees—who are bound by the PAGA judgment just like members of a class. *Id*. at *6-7. The Ninth Circuit concluded that these attributes "undermine[] the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id*. at *7.

Thus, even assuming that there were a narrow exception to valid arbitration agreements for employees seeking to sue their employers as *qui tam* relators—an exception that this Court has never recognized—PAGA claims would not fit within that exception.

The *Iskanian* court acknowledged that a State may not "circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D"—conceding that such an arrangement is "tantamount to a private class action" that is incompatible with arbitration under the FAA. 327 P.3d at 152. But the calculus does not change merely because the State asserts a generalized enforcement interest in the private litigation. California's policy interests in deputizing private attorneys general to aid in the enforcement of its laws do not permit the State to render unenforceable a plaintiff's otherwise-applicable arbitration agreement. Under the Supremacy Clause, federal law overrides state policy, not the other way around. And this Court could not have been more direct in holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351.

Finally, the *Iskanian* court's effort to imbue PAGA claims with the State's authority by pointing out that 75% of the recovery goes to the State (see 327 P.3d at 146) both misses the point and proves far too much. It misses the point because the division of civil penalties under PAGA has nothing to do with who is *controlling* the litigation—which *Waffle House* makes clear is the determinative factor. 534 U.S. at 291. And it proves far too much because the fact that the State obtains a portion of recovered penalties is no basis for exempting private claims from arbitration.

For instance, a number of States have enacted laws requiring that as much as 75% of a punitive-damages award won by a private plaintiff be distributed to the State or its agencies.[9] Yet this Court has long held that agreements to arbitrate punitive-damages claims are fully enforceable under the FAA. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995).

In short, *Iskanian* represents the very type of "judicial hostility to arbitration" that the FAA was designed to prevent. The *Iskanian* rule is irreconcilable with *Epic* and *Concepcion*, and this Court's intervention is needed to restore uniform application of the FAA.

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[9] *E.g.*, Alaska Stat. § 09.17.020(j); Ga. Code Ann. § 51-12-5.1(e)(2); 735 Ill. Comp. Stat. Ann. 5/2-1207; Ind. Code Ann. § 34-51-3-6(c); Iowa Code Ann. § 668A.1(2)(b); Or. Rev. Stat. Ann. § 31.735(1); Utah Code Ann. § 78B-8-201(3)(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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