No. 13-55184

In the United States Court of Appeals for the Ninth Circuit

SHUKRI SAKKAB, an individual on behalf of himself and on behalf of all persons similarly situated,

APPELLANT,

v.

LUXOTTICA RETAIL NORTH AMERICA, INC., an Ohio corporation,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(CIV. NO. 3:12-cv-436) (The Honorable Gonzalo P. Curiel, J.)

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND CALIFORNIA CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and Rule 29-2 of the Ninth Circuit Local Rules, the Chamber of Commerce of the United States of America, Retail Litigation Center, Inc. and California Chamber of Commerce respectfully request leave to file the accompanying amicus brief in support of Defendant-Appellee's petition for rehearing en banc. Counsel for Defendant-Appellee consents to this filing. Counsel for Plaintiff-Appellant responded to a request for consent by stating that he "does not oppose or object."[1]

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States 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. 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 arbitration agreements.

[1] Amici affirm that no counsel for a party authored the accompanying brief in whole or in part and no one other than amici, their members, or their counsel contributed any money to fund its preparation or submission.

The Retail Litigation Center, Inc. is a public policy organization that advocates on behalf of the retail industry. The Center's members include many of the country's leading retailers, which employ millions of workers throughout the United States and account for billions of dollars in annual sales. Through its legal advocacy, the Center seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

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, the CalChamber has been the voice of California business. While the CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business 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, the Center, 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. Many of Amici's members include arbitration agreements in their employment contracts 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 Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in the face of contrary state law. A divided panel of this Court held that, notwithstanding the FAA, California law may prohibit a bilateral arbitration agreement 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 on the State's behalf for labor law violations potentially affecting large numbers of employees. The panel majority's decision 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 resolution of the issue en banc.

ARGUMENT

Amici's participation in this appeal is desirable and will benefit the Court through Amici's broad perspective and extensive experience on arbitration issues. The Chamber, the Center, and CalChamber regularly file briefs in cases addressing the enforceability of arbitration agreements under the FAA, including *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2011); *Kilgore* v. *KeyBank, N.A.*, 718 F.3d 1052 (9th Cir. 2013) (en banc) (the Chamber filed an amicus brief and participated in oral argument); and *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014) (same).[2] The Chamber and the Center were already granted leave to file an amicus brief at the panel stage of this litigation. (*See* Dkt. Entry No. 59.)

Here, Amici represent that the accompanying brief is submitted in good faith to ensure that the complex legal issues raised by the panel's

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[2] The Chamber's most recent briefs in arbitration cases are available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

decision—and the implications of that decision on the business community—are thoughtfully presented for the Court's consideration.

CONCLUSION

For the reasons set forth above, the Court should grant leave to file the accompanying amicus brief and should direct the Clerk to accept the proposed brief for filing.

RESPECTFULLY SUBMITTED,

S/ BRENDAN P. CULLEN

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November 23, 2015

CERTIFICATE OF FILING AND SERVICE

I, Brendan P. Cullen, counsel for amici curiae, certify that, on November 23, 2015, a copy of the foregoing Motion of the Chamber of Commerce of the United States of America, Retail Litigation Center Inc. and California Chamber of Commerce for Leave to File Brief As Amici Curiae In Support of Appellee's Petition For Rehearing En Banc was filed electronically through the appellate CM/ECF system with the Clerk of Court. All counsel of record in this case are registered CM/ECF users.

s/ BRENDAN P. CULLEN
BRENDAN P. CULLEN

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RULE 26.1 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.

The Retail Litigation Center, Inc. is a 501(c)(6) membership association that has no parent company. No publicly held corporation owns a ten percent or greater ownership interest in the organization.

The California Chamber of Commerce is a non-profit business association organized under the laws of California. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, the Chamber of Commerce of the United States of America, Retail Litigation Center, Inc., and California Chamber of Commerce respectfully submit this brief amicus curiae in support of Defendant-Appellee's petition for rehearing en banc.[1]

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[1] Amici affirm that no counsel for a party authored this brief in whole or in part and no one other than amici, their members, or their counsel contributed any money to fund its preparation or submission.

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litigation. Many of Amici's members include arbitration agreements in their employment contracts 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 Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., in the face of contrary state law. A divided panel of this Court held that, notwithstanding the FAA, California law may prohibit a bilateral arbitration agreement 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 on the State's behalf for labor law violations potentially affecting large numbers of employees. The panel majority's decision 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 resolution of the issue en banc.

SUMMARY OF ARGUMENT

Plaintiff-Appellant Shukri Sakkab agreed to arbitrate any disputes with his employer on an individual basis, and expressly waived his right to participate in any class or representative actions arising out of his employment. He now seeks to circumvent that agreement by asserting representative claims under PAGA on behalf of more than 200 fellow employees. Prior to 2011, Sakkab's representative employment claims likely would have been brought as a class action, and Sakkab would have attempted to avoid arbitration by invoking California's so-called "*Discover Bank*" rule, which prohibited the waiver of class adjudication as a matter of state law.[2] But the Supreme Court rejected this gambit in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), holding that state law rules—like *Discover Bank*—that require class or representative adjudication despite the parties' agreement to arbitrate on an individual basis interfere with the fundamental attributes of arbitration and are thus preempted under the FAA.

Unable to invoke *Discover Bank*'s anti-waiver rule to bring a class action, Sakkab seeks instead the functionally identical result of representing

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

a large group of employees through a representative PAGA claim. And rather than invoking the *Discover Bank* rule to avoid his agreement to arbitrate, he has invoked the judge-made rule announced in *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), which likewise prohibits the waiver of representative employment claims under PAGA as a matter of state law. Sakkab's attempt to pour old wine in new bottles is part of an increasing trend among PAGA 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 *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 the FAA by interfering with a fundamental attribute of arbitration. 131 S. Ct. at 1748. The *Iskanian* rule satisfies neither of these requirements.

First, the *Iskanian* rule is not generally applicable because the defense applies only to certain claims (PAGA claims) in certain types of contracts (employment dispute resolution agreements). This rule applies uniquely and predominantly in the context of arbitration agreements and must yield to the FAA.

Second, the *Iskanian* rule interferes with the same fundamental attributes of arbitration as the *Discover Bank* rule at issue in *Concepcion*. As Judge Smith explained in his dissent, "[t]he *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion*": it makes dispute resolution slower and more costly, it increases procedural formality, and it heightens risks to defendants. *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 444 (9th Cir. 2015) (Smith, J., dissenting). The panel 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 the Supreme Court's reasoning in *Concepcion*.

In the end, the panel majority's decision flatly ignores the central teaching of *Concepcion*: bilateral dispute resolution is a fundamental attribute of arbitration. *Iskanian*'s holding that PAGA claims cannot be limited to bilateral arbitration is thus a rule that PAGA claims cannot be

subjected to arbitration in the manner envisioned by the FAA. This Court should hear this case en banc to eliminate the direct conflict between the panel's decision and binding Supreme Court precedent.

ARGUMENT

I. En Banc Review Is Warranted Because The Panel Majority's Decision Is Inconsistent With The FAA And The Supreme Court's Decision In *Concepcion*.

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. That provision reflects a "liberal federal policy favoring arbitration," *Concepcion*, 131 S. Ct. at 1745, and requires courts rigorously to enforce agreements to arbitrate "according to their terms." *Mortensen* v. *Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013).

The FAA's broad command that courts enforce arbitration 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). The Supreme 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*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs.*, 517 U.S. at 687); *see Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Section 2 thus saves state-law contract defenses from preemption only if they are "generally applicable" to "any contract." *Doctor's Assocs., Inc.*, 517 U.S. at 687. But even where a general state-law rule would preclude arbitration, it cannot survive preemption if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. 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.'" *Mortensen*, 722 F.3d at 1159 (quoting *Concepcion*, 131 S. Ct. at 1747-48). Thus, in *Concepcion*, the Court explained that California's *Discover Bank* rule was preempted because requiring the availability of classwide

arbitration, as opposed to bilateral arbitration, sacrifices the very speed, efficiency, and informality that causes parties to agree to arbitrate disputes. *Concepcion*, 131 S. Ct. at 1751-52.

Here, the *Iskanian* rule fails on both scores: it is not a generally applicable defense within the meaning of Section 2, and it squarely conflicts with the fundamental attributes of arbitration protected by the FAA. The *Iskanian* rule is therefore preempted.

A. The *Iskanian* Rule Is Not A Generally Applicable Contractual Defense Within The Meaning Of The FAA's Savings Clause.

As an initial matter, the panel majority was wrong to conclude that the *Iskanian* rule qualifies as a "generally applicable" contract defense because it "appl[ies] equally to arbitration and non-arbitration agreements." *Sakkab*, 803 F.3d at 432. This Court has squarely held that to be a "ground[] . . . for the revocation of *any contract*," a state-law defense must do more than apply equally to arbitration and non-arbitration agreements—it must apply generally to *any* type of contract. *See, e.g.*, *Ting* v. *AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (defense under California's Consumer Legal Remedies Act is not one of general applicability because it applies only to noncommercial consumer contracts); *Bradley* v. *Harris Research, Inc.*, 275

F.3d 884, 889-90 (9th Cir. 2001) (defense under the California Business & Professions Code is not one of general applicability because it applies only to forum selection clauses in franchise agreements).[3]

This case is indistinguishable from *Ting* and *Bradley*. The panel majority did not contend that the *Iskanian* rule applies generally to all types of contracts, nor could it have done so. The *Iskanian* 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. Simply put, 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 scope of the FAA's savings clause.

The panel majority held that *Ting* and *Bradley* had been impliedly overruled because *Discover Bank*'s anti-waiver rule "applied to a narrow

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[3] The First and Second Circuits agree that Section 2's savings clause does not preserve state-law defenses that apply only to particular types of provisions in particular types of contracts. *See KKW Enters., Inc.* v. *Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999); *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998).

class of consumer contracts," and yet the Supreme Court in *Concepcion* "strongly implied that the rule was a 'generally applicable contract defense.'" *Sakkab*, 803 F.3d at 433. Not so. If anything, the *Concepcion* Court's discussion strongly implied the exact opposite. *See Cruz* v. *Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011) (*Concepcion* "implied that although the [California anti-waiver] rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases").

At most, however, *Concepcion* merely *assumed* without deciding that the defense was generally applicable (as the plaintiffs had argued), and then held that the California rule was preempted in any event because it conflicted with the FAA's objectives. *See Concepcion*, 131 S. Ct. at 1746-48. Such an assumption *arguendo* is obviously no basis for a panel to set aside this Circuit's controlling decisions in *Ting* and *Bradley*.[4]

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[4] Indeed, the logic underlying *Ting* and *Bradley* has carried over into this Court's post-*Concepcion* decisions. In *Mortensen*, for example, this Court held that state-law rules that have a "disproportionate effect on arbitration [are] displaced by the FAA." 722 F.3d at 1159. *Iskanian*'s PAGA-specific rule unquestionably has a "disproportionate" impact on employment

B. The *Iskanian* Rule Plainly Conflicts With A Fundamental Attribute Of Arbitration And Is Therefore Preempted By The FAA.

Beyond the fact that the *Iskanian* rule is not a generally applicable contractual defense, it clearly undermines the FAA's core objectives of protecting arbitration that is fast, efficient, and informal. As Judge Smith explained in dissent, 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 *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. The *Iskanian* rule thus "interferes with the fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Id*. Indeed, as Judge Smith correctly observed, the panel majority's evident "judicial hostility" to arbitration is precisely what the FAA was enacted to counteract. *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013).

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arbitration agreements, since it is difficult to imagine any other contractual context in which a waiver of PAGA claims would be at issue.

1. Representative PAGA Actions And Class Actions Are Equally Incompatible With Arbitration As Envisioned By The FAA.

As Judge Smith forcefully argued in dissent, "[t]he *Iskanian* rule burdens arbitration in the same three ways identified in *Concepcion*." *Sakkab*, 803 F.3d at 444. 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 review that exists in a judicial forum, which is especially important in a case that threatens damages attributable to hundreds or thousands of absent claimants. *Concepcion*, 131 S. Ct. at 1751-52.

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*, 131 S. Ct. at 1749 ("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.*, 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 "expense and manageability concerns" that representative PAGA actions inevitably raise. Matthew M. Sonne & Kevin P. Jackson, *Towards a "Manageability" Standard in PAGA Discovery*, ABTL Report at 6 (Summer 2014). 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 only grow for larger PAGA actions. *See e.g.*, 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); Def.'s Opp'n to Class Certification, *Cline* v. *Kmart Corp.*, No. 11-02575-WHA, 2013 WL 2391711, *12 (N.D. Cal. May 13, 2013) (addressing a PAGA "class" of 13,000 cashiers statewide).

In addition to being far 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. 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 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*, 131 S. Ct. at 1750, more formal procedures likely will be necessary to protect absent employees' privacy interests. And even assuming the parties can manage discovery, the

problems of proof and case management may be so complex as to be practically "unmanageab[le]." *Ortiz* v. *CVS Caremark Corp.*, 2014 WL 1117614, at *4 (N.D. Cal. Mar. 19, 2014).

In addition to eliminating the benefits of bilateral arbitration (speed, efficiency, and procedural simplicity), arbitration of representative claims would also 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*, 131 S. Ct. at 1752). "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*, 131 S. Ct. at 1752). 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*, 131 S. Ct. at 1752).

2. The Panel Majority's Distinctions Between Representative PAGA Actions And Class Actions Are Immaterial.

The panel 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. That formalistic approach contravenes the logic of *Concepcion*. There are differences between representative and class actions, but those differences are immaterial under *Concepcion*.

For example, the panel 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 as other circuits have recognized, *Concepcion*'s holding sweeps more broadly than Rule 23. It extends as well to waivers of collective actions under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, *see Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013), even though FLSA collective actions are not subject to Rule 23 and employees must opt in to join such actions. 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 added), 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 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 the Supreme 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*, 131 S. Ct. at 1750-52. 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 1753.

II. En Banc Review Is Warranted Because The Panel Majority's Decision Opens A Massive Loophole In The FAA, Which Must Be Closed Immediately.

If allowed to stand, the panel majority's decision will open a gaping loophole in the FAA. Employees will 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 already have "flooded the courts" with representative PAGA claims, Sonne & Jackson, *supra*, at 5, and that trend is sure to expand exponentially in the wake of the panel majority's erroneous decision. Nor will there be any confining the trend to labor and employment claims. California and other States will be free to enact any manner of Private Attorney General Acts — and each one will poke yet another hole in the FAA. The federal policy favoring arbitration and the Supreme Court's decision in *Concepcion* cannot be so easily evaded.

The FAA was enacted precisely to combat the sort of judicial hostility toward arbitration manifested in the panel majority's decision, and the Supreme Court has been forced repeatedly to grant review in cases that continue to disregard the preemptive effect of the FAA. *See, e.g.*,

Zaborowski v. *MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 27 (2015); *Imburgia* v. *DIRECTV, Inc.*, 225 Cal. App. 4th 338 (2014), *cert. granted*, 135 S. Ct. 1547 (2015). The panel majority's decision is just such a case and en banc review is urgently needed to bring this Court's law in line with the FAA's controlling principles.

CONCLUSION

For the reasons set forth above, appellees' petition for rehearing en banc should be granted.

RESPECTFULLY SUBMITTED,

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November 23, 2015

CERTIFICATE OF COMPLIANCE

I, Brendan P. Cullen, counsel for amici curiae, certify, pursuant to Rules 29(d) and 32(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Local Rule 29-2(c)(2), that the foregoing Brief of Amici Curiae the Chamber of Commerce of the United States of America, Retail Litigation Center Inc., and California Chamber of Commerce In Support of Appellee's Petition For Rehearing En Banc is proportionally spaced, has a typeface of 14 points or more using Microsoft Word (2010) Century Expanded font, and contains 3,865 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

s/ BRENDAN P. CULLEN
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November 23, 2015

CERTIFICATE OF SERVICE

I, Brendan P. Cullen, counsel for amici curiae, certify that, on November 23, 2015, a copy of the foregoing Brief of Amici Curiae the Chamber of Commerce of the United States of America, Retail Litigation Center Inc., and California Chamber of Commerce In Support of Appellee's Petition For Rehearing En Banc was filed electronically through the appellate CM/ECF system with the Clerk of Court. All counsel of record in this case are registered CM/ECF users.

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