No. 20-1573

In the Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI 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]

The California Chamber of Commerce (CalChamber) has more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus* briefs.

on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Many of *amici*'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, *amici*'s members have structured millions of contractual relationships around arbitration agreements.

Amici have a strong interest in this Court's reversal of the decision below to ensure that the FAA's pro-arbitration mandate applies uniformly nationwide. The decisions in *Iskanian* v. *CLS Transportation L.A., LLC*, 327 P.3d 129 (Cal. 2014), *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), and their progeny have precluded the enforcement of millions of arbitration agreements—significantly eroding the benefits of bilateral arbitration as an alternative to litigation. Reversal is critical to end this circumvention of the FAA and this Court's precedents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case brings before the Court a new, and extremely significant, chapter in the long and well-documented history of California courts inventing new "devices and formulas" aimed at circumventing arbitration agreements and the strong 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). Because the Act protects an "individualized form of arbitration," *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) (citing *Epic*, 138 S. Ct. at 1622-23)), "courts may not allow a contract defense to reshape traditional individualized arbitration," *Epic*, 138 S. Ct. at 1623.

Despite these clear holdings, the California appellate courts and the Ninth Circuit have allowed plaintiffs asserting Private Attorneys General Act (PAGA) claims to circumvent agreements requiring individualized arbitration.

PAGA authorizes an "aggrieved employee" to recover civil penalties 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). These claims, brought by a single "representative" plaintiff, routinely seek recovery for Labor Code violations allegedly suffered by hundreds, thousands, or tens of thousands of employees.

The California Supreme Court in *Iskanian* announced a state-law rule barring enforcement of agreements waiving an employee's ability to assert representative PAGA claims. It then analogized PAGA claims to government enforcement actions and *qui tam* lawsuits—and held for that reason that agreements for individualized arbitration are unenforceable with respect to representative PAGA claims, notwithstanding the *Concepcion* Court's holding that the FAA protects agreements requiring one-on-one arbitration. *Iskanian*, 327 P.3d at 152-53.

But—as this Court explained in holding that a private party's arbitration agreement did not apply to a government enforcement action in *EEOC* v. *Waffle House*, 534 U.S. 279 (2002)—the defining characteristic of a government enforcement action is that it is brought and controlled by government officials. Even in a federal *qui tam* action, where a private party may step in to represent the government's interests, the suit is subject to the oversight and control of the government. PAGA lawsuits, by contrast, are initiated and controlled by the private party; the State cannot exercise any control once the claim is brought. *Iskanian*'s rationale for circumventing the FAA is unsupportable.

The Ninth Circuit adopted a similarly flawed reading of the FAA. Ignoring the *Iskanian* court's misguided government-enforcement analogy, the divided panel in *Sakkab* declared *Concepcion* inapplicable by relying on formal distinctions between representative PAGA actions and class actions under Rule 23. In fact, the relevant features of PAGA claims and class actions are the same—they are brought by employees against their employers on behalf of not only the named employees, but also others similarly situated. And representative PAGA claims have the same complexity and high stakes as the class arbitrations rejected in *Concepcion* as incompatible with the FAA.

This Court's decision in *Epic* makes even more clear the flaws in *Sakkab*'s reasoning, explaining that *Concepcion* stands for the "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration." 138 S. Ct. at 1623. That is the precise effect of *Sakkab*: it conditions the enforcement of arbitration agreements on the availability of representative PAGA claims—allowing individuals to circumvent their agreements for individual arbitration and instead pursue broad representative relief under PAGA.

Finally, the massive practical impact of the loophole created by *Iskanian* and *Sakkab* underscores the adverse consequences for enforceability of arbitration agreements that would result if either of those rulings were permitted to stand.

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 that should have been protected by the FAA and severe adverse consequences for businesses with workers in California.

If *Iskanian* and *Sakkab* were upheld, other States hostile to arbitration would inevitably follow California's roadmap. And that roadmap is not limited to the employment context—States could enact copycat statutes governing other areas of law, such as consumer-protection laws, invalidating hundreds of millions more arbitration agreements. Indeed, the Ninth Circuit has already applied *Sakkab* in refusing to hold preempted a California law requiring arbitration of consumer claims seeking the equivalent of class-wide relief.

This Court should reaffirm the FAA's protection of individualized arbitration and hold that the FAA preempts California's state-law rule refusing to enforce bilateral arbitration agreements with respect to representative PAGA claims.

ARGUMENT

I. The FAA Preempts California's Refusal To Enforce Arbitration Agreements With Respect To Representative PAGA Claims.

Iskanian and *Sakkab* violate the FAA and this Court's precedents.

A. The FAA requires enforcement of agreements requiring individualized arbitration and prohibiting assertion of representative PAGA claims.

The Ninth Circuit in *Sakkab* attempted to distinguish representative PAGA claims from the class-action device at issue in *Concepcion*. But representative PAGA claims are at least as incompatible—if not more so—with the individual, one-on-one arbitration protected by the FAA.

1. Representative PAGA claims are incompatible with traditional, one-on-one arbitration.

This Court has repeatedly made clear that the FAA "protect[s] pretty absolutely" arbitration agreements that require "one-on-one arbitration" using "individualized * * * procedures." *Epic*, 138 S. Ct. at 1619, 1621; see also *Concepcion*, 563 U.S. at 344; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010). That protection enables parties agreeing to "individual arbitration" to "'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.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

The FAA preempts state-law rules that "interfere[]" with this "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 prohibits procedures other than individualized arbitration.

Epic, which involved opt-in collective actions under the Fair Labor Standards Act, explains that this

FAA principle is not limited to the class actions under Federal Rule of Civil Procedure 23 addressed in *Concepcion*. Rather, this "essential insight" governs regardless of the garb in which the state-law 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).

Iskanian's state-law holding—that California law bars enforcement of the parties' agreement to engage in individualized arbitration when employees assert representative PAGA claims—plainly overrides the parties' choice of one-on-one arbitration. The Ninth Circuit nonetheless held in *Sakkab* that the FAA does not preempt California's rule because (in that court's view) representative PAGA actions are materially different from class or collective actions.

That determination is wrong. Representative PAGA actions in fact have the very characteristics that this Court has cited in explaining why class and collective actions are incompatible with the FAA's protection of individualized arbitration. They require a focus on third parties that is antithetical to a "traditional individualized" or "one-on-one" arbitration. *Epic*, 138 S. Ct. at 1619, 1623. They "'make the process slower, more costly, and more likely to generate procedural morass than final judgment.'" *Id.* at 1623 (quoting *Concepcion*, 563 U.S. at 347-48). They require complex procedures "incompatible with arbitration" to resolve. *Concepcion*, 563 U.S. at 351. And they "greatly increase[] risks to defendants." *Id.* at 350.

Conditioning the enforcement of arbitration agreements on the availability of representative PAGA actions therefore is just as preempted as the state-law rule in *Concepcion* that conditioned enforcement on the availability of class actions.

a. Representative PAGA claims, by their very nature, "interfere with one of arbitration's fundamental attributes," *Epic*, 138 S. Ct. at 1622, because they necessarily involve arguments relating to, and seek relief on behalf of, large numbers of third-party employees *in addition to* the named plaintiff. That is why the claim is "representative"—the named plaintiff is seeking recovery on behalf of others.

Often, as in this case (see Pet. Br. 27-28), the representative PAGA plaintiff cites Labor Code violations that she allegedly suffered and seeks to represent all other employees claiming injury from the same violations. Resolving such claims requires assessment of the factual and legal situation of each of those absent third parties—to determine whether and to what extent each alleged Labor Code violation applies to each employee within a potentially wide range of employees.

But PAGA goes much further—permitting a representative plaintiff to pursue penalties for Labor Code violations that the plaintiff did not personally experience. In *Huff* v. *Securitas Security Services USA, Inc.*, 233 Cal. Rptr. 3d 502 (Ct. App. 2018), the California Court of Appeal explained "that *any* Labor Code penalties recoverable by state authorities may be recovered in a PAGA action by a person who was employed by the alleged violator" so long as that private plaintiff was "affected by at least *one* of the violations alleged in the complaint." *Id*. at 507 (emphasis

added); see also *id*. at 509 ("not being injured by a particular statutory violation presents no bar to a [PAGA] plaintiff pursuing penalties for that violation").[2]

In addition, even if a PAGA plaintiff's own Labor Code claim is no longer viable, that plaintiff can still pursue a representative action. In *Kim* v. *Reins International California, Inc.*, 459 P.3d 1123 (Cal. 2020), the 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.

Representative PAGA actions thus necessarily will involve determinations regarding Labor Code violations allegedly suffered by third parties who are not before the court. Indeed, even the Ninth Circuit has recognized this reality, stating that "PAGA explicitly * * * implicates the interests of nonparty aggrieved employees." *Magadia*, 999 F.3d at 676.

b. Just as the "fundamental change to the arbitration process" resulting from a class or collective arbitration "would 'sacrifice the principal advantage of arbitration—its informality—and make the process slower, more costly, and more likely to generate procedural morass than final judgment,'" *Epic*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 347-48), so

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[2] In federal court, Article III independently constrains the ability of plaintiffs to pursue penalties for asserted Labor Code violations that they did not personally experience. See *Magadia* v. *Wal-Mart Assocs., Inc.*, 999 F.3d 668, 674-78 (9th Cir. 2021). But *Huff* makes clear that no such limitation applies in California state courts.

too would arbitration of a representative PAGA action.

Experience in the California courts demonstrates that resolving representative PAGA claims requires an unwieldy process that bears no resemblance to traditional individualized arbitration.

The California Court of Appeal recently recognized that "PAGA claims may well present *more significant* manageability concerns than those involved in class actions," requiring "dozens, hundreds, or thousands of minitrials involving diverse questions." *Wesson* v. *Staples the Office Superstore, LLC*, 283 Cal. Rptr. 3d 846, 859-60 (Ct. App. 2021) (emphasis added). The "parties agreed" in *Wesson* that litigating the alleged Labor Code violations—which were asserted on behalf of 346 employees—and the defendant's affirmative defenses to each employee's claim "would require a trial spanning *several years* with *many hundreds* of witnesses." *Id.* at 866 (emphasis added).

In *Driscoll* v. *Granite Rock Co.*, 2011 WL 10366147 (Cal. Super. Ct. Sept. 20, 2011), the parties proceeded to a bench trial on representative PAGA claims. That bench trial lasted 14 days and involved 55 witnesses and 285 exhibits, including expert witnesses to prove violations as to each employee. *Id.* at *1.

If anything, *Wesson* and *Driscoll* understate the complexity of most PAGA actions, because those cases involved relatively small groups of 346 and 200 current and former employees. See *Wesson*, 283 Cal. Rptr. 3d at 866; *Driscoll*, 2011 WL 10366147, at *1. The burdens multiply exponentially for larger PAGA

actions, which often include alleged violations involving thousands, if not tens of thousands, of absent employees, "each of whom may *have markedly different experiences* relevant to the alleged [Labor Code] violations," *Wesson*, 283 Cal. Rptr. 3d at 859 (emphasis added).[3]

The assessment of remedies in a representative PAGA action adds to the complexity. Remedies are assessed against the employer on a "per pay period" basis for *each* "aggrieved employee" affected by *each* claimed violation 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

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[3] See, *e.g.*, *Sanchez* v. *McDonald's Rests. of Cal., Inc.*, 2017 WL 4620746, at *2 (Cal. Super. 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 *1-2 (N.D. Cal. May 13, 2013) (13,000 cashiers at 101 stores statewide).

would likely be fiercely contested by parties." *Ibid.* And resolving them requires "individual factual determinations regarding * * * *hundreds or thousands* of employees." *Ibid.* (emphasis added).[4]

Resolving claims of alleged Labor Code violations across hundreds, thousands, or even tens of thousands of absent employees thus creates a proceeding that is dramatically different from the individualized dispute resolution protected by the FAA. Conditioning enforcement of an arbitration provision on agreement to resolve these representative claims in arbitration would necessarily and dramatically "reshape traditional individualized arbitration." *Rivas* v. *Coverall N. Am., Inc.*, 842 F. App'x 55, 59 (9th Cir. 2021) (Bumatay, J., concurring) (quoting *Epic*, 138 S. Ct. at 1623), *petition for cert. filed* (U.S. Aug. 24, 2021) (No. 21-268). And that is precisely the outcome that this Court held incompatible with the FAA in *Epic* and *Concepcion*.

c. Relatedly, the complex procedures needed to resolve a representative PAGA action transform the proceeding into one that bears no resemblance to the individualized arbitration "envisioned by the FAA" and therefore "lacks its benefits." *Concepcion*, 563 U.S. at 351.

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[4] Arbitration is more efficient than litigation, but resolution of a representative PAGA claim in arbitration would still require assessment of each alleged violation with respect to each of the employees that the named plaintiff "represents." It is the need to address the situation of those third parties—demonstrated by the court cases just discussed—that is incompatible with one-to-one 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.

Moreover, both the claimant and the employer often will require evidence from the third-party employees to determine whether the employer is liable for each asserted Labor Code violation as to each employee. Employee-specific evidence is particularly necessary when there is "great variation" among the employees' circumstances. *Wesson*, 283 Cal. Rptr. 3d at 865.

The California Supreme Court has confirmed the extensive discovery required to adjudicate a representative PAGA claim, 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). That holding alone makes a compelling case for FAA preemption: This Court has already held that class-wide discovery or another "discovery process rivaling that in litigation" is incompatible with arbitration "as envisioned by the FAA" and "therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.

d. Representative PAGA actions also "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 for 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 are substantially *higher* than the actual damages that would have been awarded had the suit been brought as a class action. See Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016).

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. And the risk is even greater in the context of representative PAGA arbitrations because an arbitrator's decision will often be effectively unreviewable. See *Concepcion*, 563 U.S. at 350-51.

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.[5]

2. California's rule prohibiting waivers of representative PAGA actions is preempted for the additional reason that it is not a ground for revocation of any contract.

In addition to conflicting with *Epic* and *Concepcion*, California's rule refusing to enforce arbitration agreements waiving representative PAGA claims is not saved from preemption by Section 2's saving clause because it is not a ground for "*revocation* of any contract." 9 U.S.C. § 2 (emphasis added); see Pet. Br. 33-35; *Rivas*, 842 F. App'x at 58, 59 n.2 (Bumatay, J., concurring). Because the rule bars enforcement of agreements specifying individualized arbitration and falls outside the savings clause, it is preempted by Section 2's requirement that arbitration agreements be enforced according to their terms.

Justice Thomas has explained that the FAA's saving clause is limited to grounds concerning "the for-

[5] As petitioner notes (Br. 15 n.1), *Iskanian* declined to decide whether an employee may bring an "individual PAGA claim[]" or whether PAGA actions can only be representative. 327 P.3d at 383. But even if California law required all PAGA actions to be brought on a representative basis, such a policy choice must give way to the FAA. In rejecting similar policy justifications advanced in *Concepcion*, this Court unequivocally held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 351. A "[S]tate may not insulate causes of action [from arbitration under the FAA] by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action." *Sakkab*, 803 F.3d at 450 (N.R. Smith, J., dissenting).

mation of the arbitration agreement," not "public-policy defense[s]." *Epic*, 138 S. Ct. at 1632-33 (Thomas, J., concurring) (quotation marks omitted); see also *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (Thomas, J., concurring); *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring). And in *Epic*, the Court expressly "[p]ut to the side" whether this interpretation of the saving clause is the correct one. 138 S. Ct. at 1622.

Grounds for revoking a contract, "such as fraud, duress, or mutual mistake," *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring), address whether the contract was properly formed. The *Iskanian* rule, by contrast, is a rule of enforceability—the California court held that public policy bars enforcement of contracts waiving representative PAGA claims—and therefore does not fall within the interpretation of the saving clause outlined in Justice Thomas's concurring opinions. Indeed, the *Iskanian* rule is a specialized defense that uniquely prevents the waiver of a single type of claim (representative claims under PAGA) in a single type of contract (dispute resolution agreements with employees)—underscoring that it does not qualify as a generally applicable defense for the revocation of any contract permitted by Section 2's savings clause.

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

The California Supreme Court adopted a different approach to evading *Concepcion*. It held 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.*

The *Iskanian* court attempted to draw support from *Waffle House*, which held that the EEOC could not be prevented from bringing an enforcement action seeking employee-specific relief by an arbitration agreement signed by that employee. See *Iskanian*, 327 P.3d at 151.

To begin with, the question in *Waffle House* was whether an individual's arbitration agreement restricted a lawsuit brought by a non-signatory—the EEOC. Here, the issue is very different: whether the arbitration agreement binds the individual who signed it. The FAA provides a clear answer to that question: arbitration agreements must be enforced according to their terms.

That is why the *Waffle House* Court stressed that the statute governing EEOC enforcement actions "clearly makes the EEOC the master of its own case." 534 U.S. at 291. By contrast, the Court explained, if the government 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.*

The Court's focus on who institutes and controls the litigation in determining whether the FAA requires enforcement of an arbitration agreement makes sense: if the party with the power to decide whether to assert the claim, and control its prosecution, has entered into an arbitration agreement, then

the arbitration agreement binds that party with respect to actions relating to such claims and must be enforced according to its terms.

Under PAGA, the State neither initiates nor controls the litigation. Instead, it is the *plaintiff* who agreed to arbitration who exercises unfettered control over the prosecution of the claim, subject to minimal government oversight or control. See Cal. Labor Code § 2699.3(a). The State's sole power is to prevent the filing of a PAGA claim—but *only* if the State initiates its own proceedings. Specifically, the party seeking to assert a PAGA claim must notify the State and wait 65 days; if the State issues a citation against the employer after receiving notice of the alleged Labor Code violations, the private party cannot assert the claim. *Ibid.*; see Pet. Br. 8.

Otherwise, if the agency simply fails to act within the statutory time period; or does not intend to investigate; or investigates but chooses not to issue a citation, the private PAGA plaintiff can initiate a lawsuit, and no state official can stop the case—or exercise even a modicum of control over it. Pet. Br. 8. Among other things, the private PAGA plaintiff:

- makes the decision whether to assert the claim;
- 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.

The lack of any state involvement or supervision wholly undermines the notion that the private party is in any way a state "agent."[6]

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).[7]

Iskanian is inconsistent with *Waffle House* for the additional reason that the California court permitted an aggrieved employee to agree to arbitrate *representative* PAGA claims 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 (re-

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[6] 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).

[7] Justice Chin nonetheless concurred because, in his view, the *Iskanian* rule was permissible based on statements in this Court's opinions indicating that the FAA might not permit enforcement of arbitration agreements that preclude effective vindication of the underlying claim. 327 P.3d at 157. But this Court's precedents make clear that the effective-vindication exception simply does not apply to state-law claims. See *American Express*, 570 U.S. at 235. Even the dissent in *American Express*, which would have read the exception more broadly with respect to federal statutory claims, recognized that a "*state* law * * * could not possibly implicate the effective-vindication rule," because "[w]e have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA. 570 U.S. at 252 (Kagan, J., dissenting).

manding for determination of "where Sakkab's representative PAGA claims 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.").

Iskanian contradicts itself by concluding that a private party can agree to arbitrate PAGA claims—without the State's consent. Representative PAGA actions cannot on the one hand belong to the State enough to prevent application of this Court's decision in *Concepcion*, but on the other be sufficiently within the control of the private party to enable her to agree to arbitrate a representative PAGA claim. That conclusion amounts to little more than a blatant misuse of *Waffle House* to justify the court's unwillingness to apply *Concepcion*.

Nor could the *Iskanian* court draw support from its analogy to *qui tam* actions. To begin with, in the federal context, several courts have required enforcement of the relator's arbitration agreement, holding that there is no "inherent conflict" between the False Claims Act and the FAA.[8]

Moreover, any dispute on that score is immaterial here: whether *Congress* has overridden the FAA's generally applicable rule with respect to *federal qui tam* actions is wholly irrelevant to the arbitrability of *state* PAGA claims. The "inherent conflict exception[]" to the enforcement of arbitration agreements is the flip

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[8] See *Deck* v. *Miami Jacobs Bus. Coll. Co.*, 2013 WL 394875, at *6-7 (S.D. Ohio Jan. 31, 2013) (collecting cases criticizing the contrary decision in *Nguyen* v. *City of Cleveland*, 121 F. Supp. 2d 643 (N.D. Ohio 2000)); Pet. Br. 40 (noting the "unsettled" status of arbitration agreements in federal *qui tam* cases).

"side[] of the same coin" as the effective-vindication exception—and both "are reserved for claims brought under federal statutes." *Ferguson* v. *Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013); see *American Express*, 570 U.S. at 235; note 7, *supra*.

As the dissent in *Sakkab* put it, "[u]nder *Concepcion*, if a state rule authorizing a *qui tam* action frustrated the purposes or objectives of the FAA, that rule would certainly be invalidated." 803 F.3d at 449 n.7 (N.R. Smith, J., dissenting).[9]

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) misses the point. The division of civil penalties under PAGA has nothing to do with who institutes and controls the litigation—which *Waffle House* makes clear is the determinative factor. 534 U.S. at 291.

The California Supreme Court is of course entitled to determine how PAGA actions or PAGA plaintiffs are labeled as a matter of state law. But a label cannot change the reality that respondent's participation is

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[9] In all events, the *Iskanian* court's *qui tam* analogy is fundamentally flawed. In contrast to the government's role in federal *qui tam* litigation or litigation under California's False Claims Act, see note 10, *infra*, "the State has no authority to intervene in a [PAGA] case brought by an aggrieved employee," who may pursue her PAGA claim even if the State disagrees with it, *Magadia*, 999 F.3d at 677.

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—claims under PAGA's unique structure would not qualify for that exception. See Pet. Br. 40-42.

required to institute and prosecute this representative PAGA action, and respondent in her arbitration agreement expressly agreed to arbitrate "any dispute arising out of or relating to [her] employment" and that "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a * * * representative or private attorney general action." JA 86, 89-90.

The question here is one of federal law—whether the FAA's mandate to enforce arbitration agreements "according to their terms," including to "enforce the parties' chosen arbitration procedures," *Epic*, 138 S. Ct. at 1621, means that a party bound by an agreement cannot act inconsistently with that agreement. The Court's analysis in *Waffle House* provides clear guidance that when, as here, participation of the signatory is required to institute and prosecute the claim, she is bound by the arbitration agreement.[10]

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[10] Alternatively, California's state-law characterization of PAGA claims cannot provide a basis for refusing to enforce the arbitration agreement's prohibition on representative actions because it does not qualify under Section 2's savings clause as a ground for "revocation of any contract." Just like the state court's construction of the phrase "law of your state" in *DIRECTV,* 577 U.S. at 58, the California Supreme Court's characterization of PAGA claims "does not place arbitration contracts 'on equal footing with all other contracts.'"

In other contexts where California characterizes claims as belonging to the State, such as under California's False Claims Act, Cal. Gov't Code § 12652, the State has the authority to intervene and "take primary responsibility for maintaining the action"—including the authority to "dismiss or settle the action without the qui tam plaintiff's consent"—and the action may not be dismissed by the *qui tam* plaintiff without the State's approval, *Campbell* v. *Regents of Univ. of Cal.*, 106 P.3d 976, 985 (Cal. 2005). Applying the same label in the absence of those controls

II. *Iskanian* And *Sakkab* Have Invalidated Countless Arbitration Agreements And, If Permitted To Stand, Will Open The Door To Wholesale Circumvention Of The FAA.

Reversal is critical to prevent California from continuing to deprive businesses and workers alike of the benefits of arbitration and to prevent other States from following California down that misguided path.

Iskanian and *Sakkab* have effectively eviscerated agreements providing for individualized arbitration in the employment context. Making matters worse, the Ninth Circuit has extended *Sakkab* to the consumer context, undermining millions of additional arbitration agreements. If *Iskanian* and *Sakkab* are permitted to stand, the PAGA model threatens to expand to other States and areas of the law. And the immediate and far-reaching impact will be to deprive businesses and individuals alike of the benefits of arbitration.

A. Plaintiffs' lawyers have flooded the courts with PAGA claims to avoid individual arbitration.

The large number of PAGA actions that have engulfed the California courts since *Iskanian* and *Sakkab* powerfully illustrates how plaintiffs' lawyers have seized on PAGA as a means of evading this Court's holdings in *Epic* and *Concepcion* protecting traditional "one-to-one" arbitration.

Before *Iskanian*, PAGA claims were brought, if at all, only on "the coattails of traditional class claims,"

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shows that, as in *DIRECTV*, *Iskanian* invented a special state-law rule for the purpose of evading this Court's decision in *Concepcion*.

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).

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.[11]

But as petitioner explains (Br. 45-47), the volume of PAGA claims increased dramatically after the *Iskanian* and *Sakkab* decisions. 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." Goodman, *supra*, at 415.

Reversal of the judgment below and ordering enforcement of the parties' arbitration agreement would

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[11] 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); *Garcia* v. *Gordon Trucking, Inc.*, 2012 WL 5364575, at *7 (E.D. Cal. Oct. 31, 2012) ($10,000 out of $3.7 million); *McKenzie* v. *Fed. Express Corp.*, 2012 WL 2930201, at *4 (C.D. Cal. July 2, 2012) ($82,500 out of $8.25 million); *Chu* v. *Wells Fargo Invs., LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) ($10,000 out of $6.9 million); see also *Nordstrom Comm'n Cases*, 112 Cal. Rptr. 3d 27, 37-38 (Ct. App. 2010) (upholding multimillion dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

preserve the benefits of arbitration for businesses and workers alike. See pages 28-31, *infra*. And reversal would not eliminate the ability of either the State or private parties like respondent to obtain relief for alleged violations of California's Labor Code. California can enforce its wage-and-hour laws by filing its own enforcement action. Workers, in turn, remain free to pursue their own disputes in individualized arbitration seeking relief for violations that affect them personally.

B. If upheld, *Iskanian* and *Sakkab* could be employed broadly to block enforcement of arbitration agreements.

If *Iskanian* and *Sakkab* are permitted to stand, their adverse consequences—the broad invalidation of arbitration agreements—are likely to spread to other States and to other areas of the law. Indeed, many observers hostile to arbitration have suggested that PAGA provides a model that other States should adopt in order to avoid this Court's protection of traditional individualized arbitration in *Epic* and *Concepcion*.

One commentator, for example, has urged other States to enact PAGA-like statutes for the specific purpose of circumventing "binding arbitration clauses." Aaron Blumenthal, *Circumventing* Concepcion: *Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699, 744 (2015). And a law professor has described PAGA claims as a model for "private aggregate enforcement of * * * employment laws without triggering FAA preemption or vulnerability to contractual class waivers." Janet Cooper Alexander, *To*

Skin A Cat: Qui Tam Actions As A State Legislative Response to Concepcion, 46 U. Mich. J. L. Reform 1203, 1208-09 (2013).

Likewise, while PAGA itself is limited to employment claims, the reasoning in *Sakkab* already has been applied by the Ninth Circuit in the consumer context—effectively invalidating millions of consumer arbitration agreements.

The California Supreme Court has held that, as a matter of "California public policy," agreements for individualized arbitration may not foreclose individuals from seeking so-called "public injunctions" under California's consumer-protection statutes, injunctions that are "designed to prevent further harm to the public at large rather than to redress or prevent injury to [the] plaintiff." *McGill* v. *Citibank, N.A.*, 393 P.3d 85, 86, 89-90, 96 (Cal. 2017) (quotation marks omitted). Like a representative PAGA claim, a public-injunction request must seek relief on behalf of absent third parties *other than* the claimant. As a matter of California law, "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff * * * does not constitute public injunctive relief." *Id.* at 90. And like a representative PAGA claim, a public-injunction request imposes massive risks on defendants. A public injunction can force a defendant to alter its practices, products, or services for every one of its California customers—and, because businesses that operate in multiple States often cannot create California-specific goods and services, perhaps all of its customers nationwide.

In holding that the FAA does not preempt the *McGill* rule, the Ninth Circuit relied on its prior reasoning in *Sakkab*, stating that "our decision in *Sakkab*

all but decides this case" and is "squarely on point." *Blair* v. *Rent-A-Center, Inc.*, 928 F.3d 819, 825, 828 (9th Cir. 2019); see also *id.* at 827-31 (repeatedly citing *Sakkab*). Indeed, the Ninth Circuit concluded that there was no relevant "distinction between arbitrating PAGA claims and arbitrating public injunctive claims" for purposes of FAA preemption. *Id.* at 829. And the court insisted that the *Sakkab* court's purported "distinction between substantive and procedural complexity is relevant to the preemption analysis" in the consumer setting as well, and suffices to distinguish *Concepcion*. *Ibid.* The court thus concluded (incorrectly) that "[l]ike the *Iskanian* rule, the *McGill* rule does not 'mandate procedures that interfere with arbitration.'" *Id.* at 830 (quoting *Sakkab*, 803 F.3d at 437).

In short, upholding *Sakkab* will have the pernicious effect of encouraging States to engage in further improper evasions of enormous numbers of workplace *and* consumer arbitration agreements.

C. Upholding *Iskanian* and *Sakkab* would deprive businesses and individuals of the benefits of arbitration.

The 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."). As explained above (at 7-16), representative PAGA actions inflict huge litigation costs.

Moreover, the use of PAGA claims to avoid arbitration of employment-related disputes deprives employees and employers of the benefits of arbitration.

Employee claimants obtain outcomes in arbitration equal to—if not better than—the outcomes in litigation. A 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. Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5-7 (2019), https://bit.ly/3GMVyxV (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The Chamber 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).

Arbitration also typically is more efficient than litigation, allowing employees to resolve their claims more quickly than they would in court. See Maltby, 30 Colum. Hum. Rts. L. Rev. at 55 (average resolution time for employment arbitration was 8.6 months—

approximately half the average resolution time in court); see also, *e.g.*, Pham, *supra*, at 5-6, 11-12 (reporting that average resolution for arbitration was approximately 100 days faster than litigation); 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); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions).

Respondent may argue that representative PAGA claims benefit employees because they provide the equivalent of class-wide relief. But that policy argument is inapposite here, for the same reason that it could not prevail in *Epic* and *Concepcion*.

There also are serious questions about the extent to which PAGA claims actually benefit employees.

In the class-action context, commentators have recognized that class actions seeking statutory damages for alleged technical statutory violations primarily benefit lawyers and "clearly do[] not achieve the[ir] compensatory goals." Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* 2, 5, 22 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), https://ssrn.com/abstract=2726905; see also Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 111-15 (2009). PAGA actions lack the procedural protections of class actions—such as court assessment of the adequacy of

the plaintiff and counsel and of the appropriateness of "class" treatment, as well as notice and opt-out for absent employees—and therefore provide an even greater opportunity for abuse.

It therefore is no surprise that many PAGA claims do not address any real harm to employees and instead appear to be designed to extract settlements and collect attorneys' fees. Among the flood of PAGA claims, for example, are suits seeking massive statutory penalties for alleged technical errors in employees' pay stubs.[12] And, as petitioner notes (Br. 48), settlements in these and other PAGA cases benefit the lawyers much more than the employees.[13]

The arbitration of workplace disputes benefits businesses and workers alike. But if the judgment below is affirmed, Californians will be permanently deprived of these benefits—to the detriment of employees, consumers, businesses, and the state's entire economy.

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[12] See, *e.g.*, *Mays* v. *Wal-Mart Stores, Inc.*, 804 F. App'x 641, 643-44 (9th Cir. 2020) ("Walmart" instead of "Wal-Mart Stores, Inc."); *Clarke* v. *First Transit, Inc.*, 2010 WL 11459322, at *2 (C.D. Cal. Aug. 11, 2010) ("First Transit" instead of "First Transit Transportation, LLC"); *Jones* v. *Longs Drug Stores California, Inc.*, 2010 WL 11508656, at *1 (S.D. Cal. Sept. 13, 2010) ("Longs Drug Stores" instead of "Longs Drug Stores California, Inc.").

[13] See, *e.g.*, Dorothy Atkins, *Safeway's $1.45M PAGA Deal Over Pay Stubs Gets Initial OK*, Law360 (Aug. 16, 2019), https://bit.ly/34fWNaP (counsel would recover up to $483,333 and workers would receive an average of $23.19); Dorothy Atkins, *Walgreens' $15M PAGA Deal Ending Seating Suit Gets OK'd*, Law360 (Aug. 6, 2019), https://bit.ly/3gnmx7r (counsel collected $5.8 million); Dorothy Atkins, *Target's $9M PAGA Deal Ending Seating Suits OK'd*, Law360 (July 24, 2018), https://bit.ly/34fXdxV (lawyers collected $3.9 million and cashiers received about $13 each).

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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