No. 21-268

In the Supreme Court of the United States

COVERALL NORTH AMERICA, INC.,
Petitioner,

v.

CARLOS RIVAS, IN HIS CAPACITY AS PRIVATE ATTORNEY GENERAL REPRESENTATIVE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL RETAIL FEDERATION 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]

Established in 1911, the National Retail Federation (NRF) is the world's largest retail trade association. Retail is by far the largest private-sector employer in the United States. It supports one in four U.S. jobs—approximately 52 million American workers—and contributes $3.9 trillion to annual GDP. NRF regularly files *amicus curiae* briefs in cases that raise issues of substantial importance to the retail industry.

Many of *amici*'s members regularly employ arbitration agreements. Arbitration allows them to resolve disputes promptly and efficiently while avoiding

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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. Counsel of record for all parties received notice of the 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 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 review and reversal of the decision below to ensure that the FAA's pro-arbitration mandate applies uniformly nationwide. Currently, the Ninth Circuit and California state courts 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 to PAGA claims—significantly eroding the benefits of bilateral arbitration as an alternative to litiga-

tion—and will continue to do so absent this Court's intervention. Indeed, the practical consequences of *Iskanian* and *Sakkab* 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).

Notwithstanding these clear holdings, the Ninth Circuit and the California state courts 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 brought on behalf of groups of employees. 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.

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 provide for any meaningful control of PAGA actions 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 in fact, 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. And PAGA claims have the same complexity and high stakes as the class actions addressed in *Concepcion*.

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 as Judge Bumatay explained in his concurring opinion in this case, the holding in *Sakkab* "clearly does" just that, paving the way for an employee to "always sidestep an arbitration agreement simply by filing a PAGA claim" on a representative basis. Pet. App. 7, 10.

The California Court of Appeal recently confirmed that PAGA claims can often prove "unmanageable." *Wesson* v. *Staples the Office Superstore, LLC*, --- Cal. Rptr. 3d ----, 2021 WL 4099059, at *11 (Sept. 9, 2021). Affirming the trial court's decision to strike a PAGA claim that would have required a years-long trial to resolve, the court recognized that "PAGA claims may well present *more* significant manageability concerns than those involved in class actions." *Ibid.* (emphasis added). That is because a PAGA claim may "cover a vast number of employees, each of whom may have markedly different experiences relevant to the alleged violations," resulting in "dozens, hundreds, or thousands of minitrials involving diverse questions." *Ibid.*

Despite the glaring conflict between California's treatment of PAGA claims and this Court's reasoning in *Epic* and *Concepcion*, the Ninth Circuit and California courts have repeatedly refused to revisit the *Iskanian* rule. In this case, the Ninth Circuit declined to reconsider *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." Pet. App. 7, 10.[2]

The practical impact of the massive loophole in the enforcement of arbitration agreements created by *Iskanian* and *Sakkab* 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 have recognized that they provide a route for evading 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, the nation's most populous state. Continued application of *Iskanian* and *Sakkab* deprives both businesses and workers of

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[2] As another pending petition demonstrates, California's state courts have also refused to revisit *Iskanian*. See *Viking River Cruises, Inc.* v. *Moriana*, No. 20-1573 (docketed May 13, 2021). If this Court prefers to address the preemption issue in the context of a case arising from the Ninth Circuit, this case would be an appropriate vehicle for resolving the question presented.

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.

Before *Iskanian* and *Sakkab*, PAGA claims 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]

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. 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

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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).

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 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

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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/.

[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*

burdens associated with litigating thousands of PAGA claims in which one individual asserts claims on behalf of a huge number of workers.

This flood of PAGA claims has undermined the "real benefits to the enforcement of arbitration provisions" that provide for traditional, bilateral arbitration, which include "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."). For the reasons just discussed, representative PAGA actions inflict gigantic litigation costs.

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

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 ("Em-

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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).

ployee-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—and often 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 *Iskanian* and *Sakkab* are allowed to stand, Californians will lose these benefits—to the detriment of employees, businesses, and the state's entire economy.

II. *Sakkab* And The Decision Below Conflict With The FAA And This Court's Precedent.

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).

In recent years, this Court has repeatedly made clear that the FAA "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)).

Thus, the FAA "seems to protect pretty absolutely" arbitration agreements that require "one-on-one arbitration" using "individualized * * * procedures." *Epic*, 138 S. Ct. at 1619, 1621. These characteristics ensure that "individual arbitration" is a proceeding in which "'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.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

But 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—because state and federal courts in California hold such claims non-arbitrable when the parties' agreement requires individualized arbitration. 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. The *Iskanian* rule upheld in *Sakkab*—and the continued adherence to it by the Ninth Circuit and the California courts—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 judi-

cial 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. The *Iskanian/Sakkab* rule is just such an impermissible "device," because it invalidates the parties' agreement to engage in bilateral arbitration when employees present representative PAGA claims—thus plainly overriding the parties' choice, protected by the FAA, of one-on-one arbitration. Representative PAGA claims bear no resemblance to individualized disputes; rather, they closely resemble the class and collective actions that this Court has held are *not* individualized.

First, representative PAGA claims, "by their very nature," involve, and seek relief on behalf of, third party employees *other* than the named plaintiff. Pet. App. 5 (Bumatay, J., concurring). The California Supreme Court recently confirmed that fact by holding that a plaintiff who has no Labor Code claim of her own may nonetheless maintain a PAGA action on behalf of others.

In *Kim* v. *Reins International California, Inc.*, 459 P.3d 1123 (Cal. 2020), that court determined that an employee who completely resolves her own wage-and-hour claims against her employer through a settlement nevertheless remains an "aggrieved employee" and 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* thus makes clear that representative PAGA actions inherently involve 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* v. *Wal-Mart Assocs., Inc.*, 999 F.3d 668, 676 (9th Cir. 2021).

Second, and relatedly, resolving a representative PAGA action is inherently far slower and more complex 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.*, "each of whom may have *markedly different experiences* relevant to the alleged Labor Code violations," *Wesson*, 2021 WL 4099059, at *11 (emphasis added).

Experience already proves that resolving representative PAGA claims is an unwieldy process that

bears no resemblance to traditional individualized arbitration. In *Wesson*, for example, the "parties agreed that individualized litigation" of the alleged Labor Code violations—which were asserted on behalf of 346 employees, including the defendant's affirmative defenses to each employee's claim, "would require a trial spanning *several years* with *many hundreds* of witnesses." 2021 WL 4099059, at *15 (emphasis added). For that reason, the court of appeal explained, the "trial court reasonably concluded that such a trial would 'not meet any definition of manageability'" for a proceeding in court. *Ibid.* And 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.

Indeed, *Wesson* and *Driscoll* understate the complexity of most PAGA actions, because those cases involved, respectively, relatively small groups of 346 and 200 current and former employees. See *Wesson*, 2021 WL 4099059, at *2; *Driscoll*, 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 9 & note 5, *supra*.

Requiring resolution of an alleged Labor Code violation across a group of hundreds, thousands, or even tens of thousands of absent employees creates a proceeding that closely resembles a class or collective action, and 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 "reshape traditional individualized

arbitration." Pet. App. 9 (Bumatay, J., concurring) (quoting *Epic*, 139 S. Ct. at 1418). And that is precisely what this Court prohibited in *Epic* and *Concepcion*.

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.

Fourth, 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.

Finally, as Judge Bumatay noted, there are "serious doubts" about whether the *Iskanian* rule is a generally applicable contract defense that treats arbitration agreements the same as other contracts. Pet. App. 10 n.2 (Bumatay, J., concurring); accord *Sakkab*, 803 F.3d at 442 n.1 (N.R. Smith, dissenting). After all, the *Iskanian* rule has been uniquely applied to prevent the enforcement of bilateral arbitration agreements. The rule prevents the waiver of a single type of claim (representative claims under PAGA) in a single type of contract (dispute resolution agreements with employees). That type of specialized defense bears no resemblance to generally applicable common law doctrines such as fraud, duress, or mutual mistake.

In sum, representative PAGA actions are every bit as incompatible with the "fundamental attributes of arbitration" as the class or collective actions at issue in *Epic* and *Concepcion*. *Concepcion*, 563 U.S. at 344. And *Epic* leaves no doubt that States cannot displace bilateral arbitration agreements by demanding the availability of representative litigation, because that result "clearly" "interfere[s] with the parties' choice to engage in individual, bilateral arbitration." Pet. App. 10 (Bumatay, J., concurring).

This Court's intervention is needed to restore uniform application of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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