No. 20-1573

IN THE

Supreme Court of the United States

VIKING RIVER CRUISES, INC.,

Petitioner,

v.

ANGIE MORIANA,

Respondent.

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

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Deborah White
RETAIL LITIGATION
CENTER, INC.
99 M Street, SE
Washington, DC 20003

Eric F. Citron
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The Status Quo Creates Intolerable Inconsistency Across Jurisdictions 6

II. Additional Delay May Frustrate Effective Review Of The *Iskanian* Rule 10

III. The *Iskanian* Rule Is Plainly Wrong 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) .... *passim*

Contreras v. Superior Ct. of L.A. Cnty.,
275 Cal. Rptr. 3d 741 (Ct. App. 2021) 12

Correia v. NB Baker Elec., Inc.,
244 Cal. Rptr. 3d 177 (Ct. App. 2019) 9

DirecTV, Inc. v. Imburgia,
577 U.S. 47 (2015) 11

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 15

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) .... *passim*

Iskanian v. CLS Transp. L.A., LLC,
327 P.3d 129 (Cal. 2014) .... *passim*

Kirtsaeng v. John Wiley & Sons, Inc.,
568 U.S. 519 (2013) 1

Lamps Plus, Inc., v. Varela,
139 S. Ct. 1407 (2019) 8, 11, 17

Magadia v. Wal-Mart Assocs.,
--- F.3d ----, 2021 WL 2176584
(9th Cir. 2021) 13, 15

Preston v. Ferrer,
552 U.S. 346 (2008) 17

Rivas v. Coverall N. Am., Inc.,
842 Fed. Appx. 55 (9th Cir. 2021).................. 7, 8, 10

Rivera v. UHS of Del., Inc.,
705 Fed. Appx. 593 (9th Cir. 2017)........................ 11

Rosales v. Uber Techs., Inc.,
278 Cal. Rptr. 3d 285 (Ct. App. 2021) 12

Sakkab v. Luxottica Retail N. Am., Inc.,
803 F.3d 425 (9th Cir. 2015) 7, 8, 10, 11

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 1

Valdez v. Terminix Int'l Co.,
681 Fed. Appx. 592 (9th Cir. 2017) 9

Rules

Sup. Ct. R. 37.6 1

Other Authorities

Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020), https://www.law360.com/articles/1245815 3

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

RLC members have a strong interest in seeing the Court take up the question presented in this petition. The California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles*, *LLC*, 327 P.3d 129 (Cal. 2014) prevents employers and employees from agreeing that all of their potential claims against each other should be resolved through bilateral arbitration;

---

[1] Counsel for all parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

employees are deprived of the power to make such an agreement with respect to potential claims under the California Private Attorneys General Act ("PAGA"), no matter how much they might want to trade the right to bring that representative claim for other benefits. As this case vividly demonstrates, it does not matter how avowedly the parties may prefer arbitration. Here, the contractual provision waiving court claims in favor of arbitration described PAGA actions with particularity and included a checkbox allowing the employee to opt out of the arbitration agreement at her discretion, and yet it made no difference.

California has, in effect, placed its own labor-law claims outside the scope of the Federal Arbitration Act ("FAA") by simply designating a part of the recovery as the property of the State. And that is a huge proportion of national labor-law claims: Current U.S. Bureau of Labor Statistics figures indicate that over 11% of all nonfarm employees in the United States are in California. That means that, when it comes to one of the most critical areas of law for retailers in the Nation's most economically critical State, there might as well not be an FAA at all.

The Court should not permit this divergence between California and the rest of the States to remain in place. In practice, the situation is no different from one in which there is a deep and entrenched circuit conflict: Nationwide firms like the RLC's members must learn to accommodate themselves to one set of rules in one jurisdiction, and a different set in another, with no end in sight, despite an on-point federal statute prescribing a single nationwide approach to enforce freely chosen arbitration agreements. And as the petitioner ably explains, the *Iskanian* rule is in the

teeth of this Court's decisions in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), precisely because it exempts a set of representative claims from the force of the FAA even though those claims are in effect indistinguishable from the other "class" or "collective" claims that this Court has prevented states from placing "off limits" when it comes to agreeing to "individualized arbitration." Absent this Court's intervention, the only way a uniform, nationwide approach to individualized arbitration agreements will emerge is if other States follow California's lead and begin ignoring this Court's precedents as well.[2]

Accordingly, the Court should not delay review on this issue any longer. Although the California Court of Appeal felt compelled to issue an opinion in this case in light of *Epic*—and to explicitly flag its powerlessness to diverge from *Iskanian* absent a squarely applicable holding from either this Court or the California Supreme Court, *see* Pet. App. 5 n.1—the on-the-ground reality is that fewer and fewer cases will raise this issue in published opinions going forward. The California Supreme Court has shown no interest in reconsidering *Iskanian*, and the California courts of appeal are thus increasingly likely to simply slough these cases off without any formal opinion. Meanwhile, companies like the RLC's members will have an ever-decreasing incentive to even try to bring these cases forward, facing the certainty of a loss at every level in the

---

[2] This is not an idle concern: At least five States have recently considered adopting PAGA-like statutes that mirror the California model. Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020), https://www.law360.com/articles/1245815.

California court system, and the uncertainty that the Court will ever grant on an issue it has denied before—no matter how clearly its own, evolving precedents signal that California has it wrong.

This case, which petitioner was no doubt willing to press through the California court system because of this Court's new decision in *Epic*, thus represents an excellent vehicle for the question presented. *Amicus* thus strongly urges the Court to grant this petition, reverse the *Iskanian* rule, and restore nationwide consistency to the rule that the FAA protects the rights of both employers and employees to affirmatively choose bilateral arbitration over other means of resolving their disputes.

SUMMARY OF ARGUMENT

This brief includes three central points.

First, we explain that the status quo—with California alone permitted to insulate representative claims from bilateral arbitration agreements—creates intolerable inconsistency across different jurisdictions of the precise kind this Court routinely addresses through a petition for certiorari. This inconsistency is unfair to businesses (and employees) located in California vis-à-vis their competitors in other States, and it is inconsistent with the nationwide policy Congress adopted in the FAA. And, indeed, because of different approaches in the state and federal courts in California, the status quo causes the exact same arbitration agreement between the same two parties to have different consequences depending on where suit is brought. This is the kind of tension within the application of federal law that is appropriate for this Court to resolve.

Second, we emphasize that, if the Court is interested in reviewing the *Iskanian* rule—and it should be—then the time to do so is now. The settlement dynamics created by California's carve out from the FAA for PAGA claims means that fewer and fewer vehicles will reach this Court—particularly as companies begin to believe that this Court will not grant review at the end of the line. And the vehicles that do reach this Court are likely to present esoteric twists on the question presented, rather than the direct challenge to *Iskanian* that is well-presented here. Accordingly, the Court should not delay any further in considering whether the California courts' approach to arbitration for PAGA claims conflicts with this Court's precedents and the congressional policy embodied in the FAA.

Third, and finally, we explain that California's approach is clearly incorrect. It violates not only this Court's recent precedents like *Concepcion*, but even older cases that stand for the relatively uncontroversial proposition that States cannot exempt particular kinds of claims from bilateral arbitration agreements without running afoul of the FAA. Nor is there any substance to the excuse that these claims partially "belong" to the State: PAGA leaves the claim entirely in the hands of the employee and is indistinguishable in practice from a statute allowing employees to buy a "Get Out of Your Bilateral Arbitration Agreement Free" card at the price of 75 percent of their winnings. The tension between *Iskanian* and this Court's cases is palpable, and ultimately requires resolution. And so this Court should grant certiorari, and resolve that tension now in favor of its own well-settled approach.

ARGUMENT

I. The Status Quo Creates Intolerable Inconsistency Across Jurisdictions.

Nationwide companies like the national retailers who are the RLC's members depend on nationwide rules to regularize their business practices across jurisdictions. To be sure, not every question has a nationwide answer: Some questions, including some substantive employment law issues, are set by state laws that vary from one location to the next. But that is not how congressional policymaking is supposed to play out. When Congress decides to create a single national regime for something like arbitration—and does so with expressly preemptive language like the FAA contains—businesses have every right and every reason to believe that the chosen policy will prevail in every jurisdiction where they operate. Indeed, the Supremacy Clause demands it.

Typically, the main obstacle to that result is a lack of uniformity in the courts that interpret a federal law. For example, if the federal courts of appeals do not interpret a statute the same way—or do not resolve tensions between multiple statutes the same way—then the public policy outcome created by the very same congressional actions may be different or even opposite in different parts of the country. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620-21 (2018) (describing circuit disagreement and nationwide "confusion" that precipitated grant of certiorari).

That kind of disagreement creates at least two related problems that this Court exists in part to resolve. The first—which is especially important in the business context—is the prospect of interfirm unfairness:

If the rule in the Fourth Circuit is good for certain businesses, and the opposite approach in the Ninth Circuit is bad for them, then local firms subject to the Fourth Circuit's rule will have a leg up on their competitors in the Ninth Circuit, and vice versa. The second—which can be particularly problematic for nationwide firms—is confusion: The result of a certain business practice may be one thing in one jurisdiction and another elsewhere, even though that practice should ostensibly be governed everywhere by the same federal statute. This is, of course, why this Court looks primarily to the presence of a disagreement among the circuits in deciding whether to grant a petition for certiorari—because resolving these disagreements and restoring a uniform meaning to nationwide congressional policies is the right approach to the interpretation of national legislation, and something only this Court can do.

To be sure, there is no prospect of a true "circuit split" arising over the rule under *Iskanian v. CLS Transportation Los Angeles*, *LLC*, 327 P.3d 129 (Cal. 2014) and the application of the FAA to California's PAGA. But that is only because PAGA is an esoteric statute and both the California Supreme Court and Ninth Circuit have already erroneously decided to uphold the *Iskanian* rule notwithstanding *Epic* and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *See* Pet. App. 5 (California Court of Appeal concluding that *Iskanian* "remains good law" after *Epic*); *id.* at 1 (California Supreme Court denying review); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015) ("[T]he *Iskanian* rule does not conflict with the FAA[.]"); *Rivas v. Coverall N. Am.*, *Inc.*, 842 Fed. Appx. 55, 56-57 (9th Cir. 2021)

(holding that *Epic* did not "expand[] upon *Concepcion* in such a way as to abrogate *Sakkab*").

These rules are entrenched and are unlikely to change, no matter how clearly this Court's existing cases may signal that California's approach to PAGA is a poor fit for its FAA jurisprudence, unless this Court affirmatively steps in. For example, in one recent case, the Ninth Circuit rejected a motion to compel arbitration because of that court's pre-existing precedent, while Judge Bumatay concurred to stress that "the writing is on the wall that the Court disfavors our approach." *Rivas*, 842 Fed. Appx. at 58 (Bumatay, J., concurring); *see also id.* at 59 (calling *Sakkab* "good—but severely hobbled—law"). Likewise, the California Court of Appeal in this very case seemed to recognize that the *Iskanian* rule is skating on thin ice given that this Court's cases appear arrayed against it. *See* Pet. App. 5 n.1. And yet, like the *en banc* Ninth Circuit, the California Supreme Court appears uninterested in reconciling its approach with what this Court has said about state circumvention of bilateral arbitration agreements in *Concepcion*, *Epic*, and *Lamps Plus, Inc., v. Varela*, 139 S. Ct. 1407 (2019). The rule that applies to PAGA is therefore set, and not susceptible to any kind of disagreement among the lower courts—even if judges on those courts (correctly) recognize that the rule is wrong.

This is not to say that there is not some important confusion created by the *Iskanian* rule. For example, while the Ninth Circuit and California Supreme Court apparently agree that PAGA claims cannot be forced into *bilateral* arbitration, they disagree about whether a representative PAGA claim must remain in court (as the state courts have held) or are instead eligible for

representative arbitration (as the federal courts hold). *See, e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 189-90 (Ct. App. 2019) (holding that, "[w]ithout the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim," and identifying contrary conclusions in local federal courts); *compare Valdez v. Terminix Int'l Co.*, 681 Fed. Appx. 592, 594 (9th Cir. 2017) (reaching opposite conclusion and holding that "PAGA claims are eligible for arbitration"). Accordingly, even *within* California, businesses face uncertainty about what kind of agreement they are making with their employees: No matter what the contracting parties want, their arbitration agreements are chameleons whose colors will only be determined once the forum chosen for a future PAGA claim is known.

Meanwhile, although a traditional circuit split over the *Iskanian* rule may be impossible, the status quo is not at all dissimilar from the kind of disagreement this Court ordinarily resolves. As it stands, it is possible for employers and employees in essentially every other State in the Union to take the FAA at face value and agree that *any* dispute that arises between them will head to bilateral arbitration rather than being pursued as a class or representative matter (or, really, any kind of matter) in court. But that isn't the rule in California. There, and only there, the same arbitration agreement—one that the employee freely chose in the clearest possible way and that expressly forecloses the litigation of representative "private attorney general" claims in court—will have no effect. This means retailers with employees in California do

not benefit from the federal policy favoring arbitration agreements under the FAA in the same way as their competitors located exclusively in other States. And it likewise means that, despite the FAA's guarantee of uniformity, nationwide retailers cannot count on the same outcome from the same agreement if an employee's complaint arises in California rather than New York. Indeed, as explained above, they cannot even count on the same agreement between the *same two parties* meaning the same thing in state and federal court. And that is just the kind of unfairness and inconsistency that this Court should grant certiorari to correct.

II. Additional Delay May Frustrate Effective Review Of The *Iskanian* Rule.

As the petition makes clear, there have been very strong arguments against the *Iskanian* rule dating back to this Court's decision a decade ago in *Concepcion*. *See* Pet. 21-23. Indeed, federal judges have given powerful voice to those same arguments, including Judge N.R. Smith in *Sakkab*, *see* 803 F.3d at 443 (N.R. Smith, J., dissenting), and more recently Judge Bumatay in *Rivas*. Until recently, the obvious tension Judge Bumatay identified in *Rivas* has given companies facing an ever-surging wave of PAGA demands some hope that either the California Supreme Court or the Ninth Circuit might see the error in their approaches and reconsider in light of this Court's repeated precedents—every one of which has underscored *Concepcion*'s firm insistence that states not frustrate parties' access to bilateral arbitration agreed to by the parties *ex ante*. And, to this point, that has kept a steady stream of potential PAGA vehicles before this Court.

But the longer this Court makes that river run, the greater the chance that it will eventually run dry. In this regard, each unsuccessful effort to encourage a critical self-examination by the state and federal courts in California, and to seek review of their obstinacy in this Court, breeds more and more skepticism that the next effort will prevail (while simultaneously breeding more and more obstinacy in the California state and federal courts). After this Court denied review in *Iskanian* and the divided Ninth Circuit adopted its rule in *Sakkab*, both courts were asked to reconsider after *DirecTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). Both declined in the most summary fashion. *See*, *e.g.*, *Rivera v. UHS of Del., Inc.*, 705 Fed. Appx. 593 (9th Cir. 2017) (declining to reconsider *Sakkab* in two-paragraph, unpublished decision). And the same pattern has now been repeated with *Epic* and *Lamps Plus*. If this latest effort to obtain this Court's review comes to naught, the Court can be confident that the lower courts will see no reason to change their ways, and the companies facing those courts as hurdles will be appropriately discouraged from trying the same tactic again and again.

That is particularly so because running doomed motions to compel arbitration up the flagpole in the unfriendly California courts—the price of admission for an uncertain certiorari petition in this Court—is a costly proposition. It requires a motion and reply in the trial court, an appeal brief and reply in the California Court of Appeal, and a petition to the California Supreme Court, all of which must be carefully litigated to avoid creating vehicle problems or independent and adequate state law grounds for denial. All the while, litigation on the underlying claims is typically moving

forward in the trial court, requiring companies to hire an entirely different set of attorneys to pursue a motion to compel all the way up the appellate court chain. Firms are thus unlikely to prosecute motions to compel for the mere chance to try a recreational petition for certiorari. Instead, if they are likely to bring any such motions at all (an increasingly uncertain proposition), they are more likely to litigate cases in which there are esoteric issues or special arguments for why a motion to compel is appropriate notwithstanding PAGA and the *Iskanian* rule—cases that will not squarely raise the question about *Iskanian* this Court needs to decide.[3] Ideal vehicles like this one—where "[t]here is just a single claim …, it seeks representational relief in direct contravention of the clear terms of the arbitration agreement, and [the employee] disclaimed her ability to bring PAGA representational claims by name in a provision that gave her an express opportunity to opt out," Pet. 17, are certain to become fewer and further between.

And that is not all: The risk of disappearing vehicles increases when one recognizes that the whole

[3] For example, firms like Uber and Lyft have recently and unsuccessfully sought to enforce their arbitration agreements by arguing that those agreements require an arbitrator to decide the threshold issue of whether the complainant is even a PAGA-eligible "aggrieved employee" rather than an independent contractor in the first place. *See, e.g.*, *Rosales v. Uber Techs., Inc.*, 278 Cal. Rptr. 3d 285 (Ct. App. 2021); *Contreras v. Superior Ct. of L.A. Cnty.*, 275 Cal. Rptr. 3d 741, 748-52 (Ct. App. 2021) (collecting other precedents). It would be counterproductive for this Court's first encounter with the *Iskanian* rule to occur in a case where the parties and their briefing are fixated on such a sub-sublevel issue. But more and more vehicles will take this form as litigants become convinced that *Iskanian* itself is an immovable object.

point of the PAGA demand that plaintiffs' lawyers are increasingly leveling in these cases is usually to extract a favorable settlement at the earliest stages of litigation. In that gambit, the cost of prosecuting the motion to compel all the way up to this Court functions as just one more cost imposed upon the defendant by a PAGA claim that should have been foreclosed by the plaintiff's *ex ante* election of bilateral arbitration. And these costs are layered on top of the already astronomical statutory penalties that PAGA threatens, often in connection with "violations" that would otherwise have marginal if any monetary value to the "aggrieved" employees. The resulting pressure to settle before any motion to compel arbitration becomes a vehicle for this Court to entertain is enormous.

Indeed, just consider the decision confronting employers from a decision-theory perspective. On the one hand, although the odds of losing are uncertain, the stakes of litigating a representative PAGA claim to judgment are fairly catastrophic because of the potential for massively multiplied statutory penalties. *See, e.g.*, *Magadia v. Wal-Mart Assocs.*, --- F.3d ----, 2021 WL 2176584, at *2 (9th Cir. 2021) (noting that district court awarded *$100 million in damages* based on two alleged, technical errors on employee wage statements that court of appeals eventually found to comply with California law). Conversely, the costs associated with litigating a motion to compel all the way to this Court are certain, while the apparent odds of success are already low and seem to be declining. Meanwhile, settlement is particularly attractive to plaintiffs' attorneys (and employers) because the parties can agree to structure the settlement fund to be primarily aimed at (otherwise class-action-ineligible) non-PAGA claims,

so that more of the money finds its way to employees rather than the State. Under those circumstances, economists would predict with confidence that businesses will usually hedge against the long-tail risk of a huge judgment and settle well before they sink unnecessary costs into litigating an unlikely, multi-stage motion to compel and petition for certiorari. And the RLC's members will regretfully tell you that those economists are right.

The upshot is that, if this Court denies review here, fewer and fewer motions to compel arbitration of PAGA claims will be brought at all, let alone brought all the way to this Court for review. If the Court believes the *Iskanian* rule will ever merit its consideration, the time for that consideration is now.

III. The *Iskanian* Rule Is Plainly Wrong.

The arguments that *Iskanian* conflicts with *Concepcion* and *Epic* are well developed in the petition and in the opinions from respected federal judges already cited above. But to these already convincing sources, *amicus* must add the following two points.

First, there is nothing but airy fluff underlying the theory that *Iskanian* does not conflict with the FAA because a PAGA claim is essentially "a dispute between an employer and the *state*" that is litigated by the employee as an "agent" of California. *See Iskanian*, 327 P.3d at 151. Critically, the State remains entirely free to litigate its own claims for violations against any employer who violates California labor laws, and in fact, the State declining to do so is a *precondition* for an employee to litigate a PAGA claim. But after that, the employee has "a permanent, *full* assignment of California's interest" in controlling the

suit, which is not true of traditional *qui tam* actions. *See, e.g.*, *Magadia*, 2021 WL 2176584, at *7. There is thus no sense in which PAGA claims should be regarded as belonging to the State, nor is there any way that an employee's bilateral arbitration agreement could frustrate the State's interest in actually enforcing its laws. In this regard, the California Supreme Court seems to have taken the exact opposite of the right lesson from this Court's decision in *EEOC v. Waffle House, Inc.*, which holds only that a public enforcer can prosecute a claim against an employer *itself* even when the underlying employee claim is subject to a bilateral arbitration agreement. 534 U.S. 279, 297-98 (2002).

Instead of being a claim belonging to the State and prosecuted by the employee as a state agent, a PAGA "claim" is better understood as a procedural mechanism that the State offers to aggrieved employees in exchange for a bounty: Assuming the State passes on its own right of first refusal, employees can litigate claims *otherwise belonging to themselves and others* as representative claims so long as they send 75 percent of the returns to the State. That mechanism offends the FAA twice over because it allows the employee to avoid not only their own arbitration agreement but potentially the arbitration agreements of all the other implicated employees as well, without the direct involvement of any state actor whatsoever. In effect, PAGA is indistinguishable from a statute passed by the California legislature allowing employees to buy a "Get Out of Your Bilateral Arbitration Agreement Free" card at the price of 75 percent of their winnings. Such a law would obviously run afoul of the FAA's prohibition against state-law rules that resist or are

designed to frustrate the federal policy in favor of enforcing arbitration agreements. *See Epic*, 138 S. Ct. at 1622 (explaining that "'defenses that apply only to arbitration'" or "that target arbitration … by more subtle methods, such as by 'interfering with fundamental attributes of arbitration'" are invalid under the FAA) (citation and brackets omitted).

Second, as this case vividly demonstrates, there should be no illusion that *Iskanian* does anything other than invalidate agreements that are *expressly* and *consciously* entered into by parties who have every intention of choosing bilateral arbitration over representative actions before they know what disputes might arise and whose leverage might be increased by the ability to go to court. The agreement here mentioned PAGA by name and included a checkbox where the employee could choose—at her unilateral election—to opt out of the arbitration provision altogether. That shows quite clearly that *Iskanian* rejects bilateral arbitration as such and refuses to give force to the employee's *ex ante* agreement no matter how knowing and intentional it might be. Indeed, a bilateral arbitration agreement could appear in a bespoke employment contract drafted by a company's incoming general counsel to govern the terms of her own employment and would *still* be unenforceable under *Iskanian* if that employee eventually discovers that it is in her interest to bring a representative action rather than abide by the contract she drafted herself.

To state this result is to acknowledge its inconsistency with *Concepcion*, *Epic*, and FAA cases of even older vintage. Here, there can be no conceit that PAGA claims should escape an agreement to substitute representative litigation with bilateral

arbitration because of a neutral rule of state contract law, as in *Lamps Plus*. *See* 139 S. Ct. at 1414-15. Nor is there any argument that PAGA claims are exempted by a federal agency's interpretation of a different federal statute, as in *Epic*. *See* 138 S. Ct. at 1629-30. Indeed, unlike in *Concepcion* itself, the *Iskanian* rule does not even *purport* to sound in a ground that "exist[s] at law or in equity for the revocation of any contract," FAA §2, such as the unconscionability doctrine. *See Concepcion*, 563 U.S. at 341 (discussing but rejecting plaintiffs' argument that "the *Discover Bank* rule" that *Concepcion* rejected had "its origins in California's unconscionability doctrine").[4] Instead, this is just the "straightforward" situation where "state law prohibits outright the arbitration of a particular type of claim," and so "[t]he conflicting rule is displaced by the FAA." *Id.* (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). *Concepcion*'s holding that state laws requiring classwide dispute resolution "stand as an obstacle to the accomplishment of the FAA's objectives," *id.* at 343, thus helps to clarify the problem with *Iskanian*, but is not even necessary to invalidate it.

Accordingly, the simple reality is that the *Iskanian* rule conflicts with the text of the FAA itself, without the further gloss of obstacle preemption. And it should not be imagined that this conflict helps the aggrieved employees who are initiating these

---

[4] Notably, the *Iskanian* rule is explicitly rooted in the same state-law provisions that served as the basis for the *Discover Bank* rule invalidated in *Concepcion*—California Civil Code sections 1668 and 3513. *See Iskanian*, 327 P.3d at 148-49; *Concepcion*, 563 U.S. at 340. That both rules derive from the same state statutes is a particularly strong indication that they must stand or fall together.

complaints: Many would recover far more money for themselves if their lawyers were inclined to focus on their bilateral claims (which can be brought through the efficient mechanism of arbitration), rather than representative claims for PAGA penalties that will amount to little for the individual plaintiff and *lots* of fees for their counsel. If California wants to ensure that these claims are litigated, it has lots of options that do not run afoul of Congress's policy empowering employers and employees to choose bilateral arbitration *ex ante*, including hiring more enforcers and bringing the cases itself or empowering other private individuals who have not signed such agreements. But respect for the parties' agreement and the text of the FAA prevent the State from merely stamping one kind of claim with its imprimatur and thereby insulating it from a freely chosen arbitration agreement.

In short, *Iskanian* is not correct under the text of the statute or this Court's precedents, and allowing it to stand any longer is corrosive. This Court should grant certiorari now, and reverse.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Deborah White
RETAIL LITIGATION CENTER, INC.
99 M Street, SE
Washington, DC 20003

Eric F. Citron
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

June 14, 2021