No. 20-1573

In the
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondent agreed to arbitrate "any dispute" arising from her Viking employment and further agreed that the arbitration would be bilateral, *i.e.*, with no "class, collective, representative or private attorney general action" asserted. Undeterred, Respondent went to court to pursue a "representative action" under California's Private Attorneys Generals Act (PAGA) alleging Labor Code violations on behalf of herself and other "aggrieved current and former employees," and the California courts rejected Viking's motion to compel arbitration, applying California's *Iskanian* rule. Had Respondent brought a class or collective action seeking comparable relief based on identical allegations, the Federal Arbitration Act, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), would have plainly required holding Respondent to her agreement to arbitrate bilaterally. There is no basis for a different result when it comes to representative PAGA claims—which are no more compatible with the essentially bilateral nature of arbitration, yet have exploded in recent years in a so-far-successful effort to evade the FAA, *Concepcion*, and *Epic*. As numerous *amici* attest, the time to end this massive evasion is now.

Instead of disputing the issue's importance, the sheer volume of PAGA litigation, or the absence of any obstacles to review, Respondent defends *Iskanian* on the merits and emphasizes that this Court has denied prior petitions seeking its demise. But her principal argument—that *Concepcion* and *Epic* involved waivers of procedural mechanisms to enforce

substantive rights, whereas her agreement waives her substantive right to bring a PAGA claim altogether—fails because PAGA does not create substantive rights. PAGA is a procedural statute that, like Rule 23 or the FLSA's collective-action provision, permits an employee to pursue relief on behalf of others—*viz.*, for violations of the substantive sections of the California Labor Code. The arbitration agreement here leaves Respondent free to arbitrate any asserted violations of the Labor Code as to herself, but simply preserves the essentially bilateral nature of arbitration. Thus, the conflict with *Concepcion* and *Epic* is clear.

Relatedly, Respondent repeatedly distinguishes between "agreements to arbitrate" and "agreements waiving PAGA claims," but the distinction is illusory. The agreement here is no more an "agreement waiving PAGA claims" than the agreement in *Concepcion* was an "agreement waiving class-action claims" or the agreement in *Epic* was an "agreement waiving collective-action claims." All three are agreements to resolve disputes via bilateral arbitration, and the FAA protects those agreements "pretty absolutely." *Epic*, 138 S.Ct. at 1621. California cannot defeat that nearly absolute protection by purporting to create an inherently representational action that can never be waived. The FAA trumps state efforts that "interfer[e] with fundamental attributes of arbitration" no matter how they are labeled. *Id.* at 1622. Nor do the prior denials provide a basis for denying certiorari here. The problem has now metastasized—with PAGA demands filed at a 15-a-day clip, as class and collective actions migrate to California and PAGA—and *Epic* has removed any plausible basis to defend *Iskanian*. This Court should grant plenary review now.

I. The Decision Below Conflicts With The FAA And This Court's Precedents.

A. Under *Concepcion* and *Epic*, the FAA Preempts the *Iskanian* Rule.

Respondent's contention that the FAA does not preempt the *Iskanian* rule rests on a faulty premise: that PAGA confers substantive rights. From that premise, Respondent insists that this case does not conflict with *Concepcion* and *Epic* because the arbitration agreements in those cases waived only procedural mechanisms and left the underlying substantive rights intact. Respondent contends that, by contrast, the arbitration agreement here waives a distinct "statutory right of action," and the FAA does not require enforcement of agreements that waive substantive statutory rights. Opp.i, 15-16, 17-19, 24.

The problem with this argument is fundamental: PAGA "does not create … any … substantive rights." *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). PAGA is "a procedural statute" that, like Rule 23 or the FLSA's collective-action provision, allows plaintiffs to pursue collective relief for violations of other, substantive provisions—in PAGA's case, the substantive provisions of the California Labor Code. *Id.* Just as in *Concepcion* and *Epic*, enforcing the parties' arbitration agreement will leave Respondent's substantive rights entirely intact. Respondent can still arbitrate any alleged violations of the Labor Code. The agreement merely governs *how* the parties will resolve disputes about their substantive rights, namely, via *bilateral* arbitration.

Accordingly, when Respondent repeatedly complains that enforcing her arbitration agreement will "foreclose[] any assertion of a PAGA claim, in any manner, in any forum," Opp.15-16; *see also id.* at 1, 13, 14, 17, that is no different from the plaintiffs in *Concepcion* and *Epic* complaining that their arbitration agreements precluded them from asserting a "class-action claim" or a "collective-action claim," in any manner, in any forum. What all of these plaintiffs, including Respondent, are complaining about is that they agreed to resolve disputes via bilateral arbitration, which inherently precludes representational claims of all kinds. *Cf. Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) ("The class-action waiver merely limits arbitration to the two contracting parties.").

Of course, even if PAGA could be conceptualized as conferring a substantive right to pursue representational relief, it would make no difference. If a state created a new claim and declared that it could be pursued only as a class action, it would not trump the FAA or evade *Concepcion*. Any effort to apply that law to defeat a bilateral arbitration agreement would be straightforwardly preempted under the reasoning of *Concepcion*. 563 U.S. at 342-44. There is no reason for a different result if a state creates a claim and declares that it can be litigated only as a representative PAGA action. While Respondent invokes a supposed rule that "the FAA does not require enforcement of arbitration agreements that *expressly* waive statutory claims," Opp.18, that rule applies only to waivers of "federal statutory right[s]," not state-law ones. *Italian Colors*, 570 U.S. at 235. If Congress ever passed a statute that purported to

create a claim that could only be pursued collectively, this Court would need to apply its rules for reconciling two federal statutes. But when a state statute conflicts with federal law, the Supremacy Clause provides the means for reconciling the two laws, and a state law that purports to require collective pursuit is no match for the FAA and this Court's cases protecting bilateral arbitration and preventing state efforts to interfere with fundamental characteristics of arbitration, including and especially its bilateral nature.

Respondent argues that enforcing her agreement to bilateral arbitration would "impose" a "waiver on a governmental body that is not party to the agreement," Opp.19, and thereby "interfere with" California's police power, Opp.21; *see also* Opp.33 (claiming that Viking seeks to "evade the State's penalty claims"). That is nonsense. Nothing that happens here will affect California's ability to enforce its wage-and-hour laws against Viking, including by filing an enforcement action alleging the exact same violations that Respondent alleges here. *Cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 292 (2002). The only result of enforcing the parties' agreement is that *Respondent herself* will be required to honor her own promise to arbitrate on an individualized, bilateral basis, notwithstanding *Iskanian*.

Respondent misses the mark when she argues that *Iskanian* does not "reflect hostility to arbitration." Opp.21. The relevant inquiry under *Concepcion* and *Epic* is whether the state-law rule "interfere[s] with a fundamental attribute of arbitration" by permitting a party to an arbitration agreement "to demand

classwide proceedings despite the traditionally individualized and informal nature of arbitration." *Epic*, 138 S.Ct. at 1622-23. The *Iskanian* rule does exactly that, mandating the availability of a representative PAGA action despite the parties' agreement to resolve their disputes in individualized, bilateral arbitration. Whether the rule results from hostility to arbitration or hostility to a fundamental aspect of arbitration, like its bilateral nature, it is preempted.

Respondent claims that PAGA proceedings *are* bilateral, in the formalistic sense that the other employees on whose behalf she seeks relief are not technically parties to the litigation. Opp.23. That may make PAGA litigation more pernicious than class or collective actions—as it raises the prospect of liability being imposed for violations that the "party" before the court did not even suffer—but it does not make PAGA representative claims any more compatible with bilateral arbitration. That is why the agreement to arbitrate bilaterally here expressly precluded PAGA actions along with all other forms of representational litigation.

Unable to credibly argue that PAGA actions are meaningfully different from class and collective actions, Respondent retreats to the claim that representative PAGA actions are compatible with traditional, individualized arbitration—even though this Court has held that class actions and collective actions are not. Opp.24-26. That argument blinks reality. The possibility that any employer could face liability to its entire workforce is utterly antithetical to the notion of *bilateral* arbitration. And the informal

nature and proceedings that typify bilateral arbitration are a misfit for the workforce-wide stakes of PAGA litigation. In fact, the *Iskanian* rule undermines traditional arbitration in the same three ways identified in *Concepcion*: representative PAGA actions are slower, more costly, and more likely to generate procedural morass, *Concepcion*, 563 U.S. at 348; they involve procedural complexities far exceeding those in bilateral arbitration, *id.* at 348-49; and they "increase[] risks to defendants" to such a degree that it is "hard to believe that defendants would bet the company with no effective means of review," *id.* at 350-51; *see also* Chamber.14-18; *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 444-48 (9th Cir. 2015) (N.R. Smith, J., dissenting). Risking liability to the many in proceedings designed to resolve individual claims quickly and efficiently is not what the parties agreed to. Representative PAGA actions are thus every bit as incompatible with the "fundamental attributes of arbitration" as the class or collective actions at issue in *Concepcion* and *Epic*.

B. *Iskanian*'s Holding That the FAA Does Not Apply to PAGA Claims Conflicts With This Court's Precedents.

The California Supreme Court attempted to shield the *Iskanian* rule from preemption by asserting that "a PAGA claim lies outside the FAA's coverage." *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 151 (Cal. 2014). That holding plainly conflicts with this Court's precedents. *See* Pet.21-25. Unwilling to fully embrace (or defend) that holding, Respondent insists that *Iskanian*'s actual holding was that "[a]n agreement must leave open 'some forum' for the

assertion of a PAGA claim." Opp.27. But that was *Iskanian*'s state-law holding, and to the extent it means that representative PAGA claims must survive an agreement to arbitrate bilaterally, that state-law holding is plainly incompatible with (and preempted by) the FAA. *Iskanian* purported to avoid that result with its federal-law holding—the one at issue here—that "a PAGA claim lies outside the FAA's coverage." 327 P.3d at 151.

Respondent argues that this federal-law holding "is best understood" as actually meaning that "an *agreement waiving PAGA claims*" is outside the FAA's coverage because the FAA applies only to "agreements to arbitrate," not agreements that "waive" PAGA claims. Opp.28. But Respondent's distinction between "agreements to arbitrate" and "waivers of PAGA claims" is illusory. An agreement to resolve disputes via bilateral arbitration is necessarily an agreement *not* to resolve disputes via class action, collective action, *or* a representative PAGA action. A bilateral arbitration agreement forgoing those alternatives is no more one "waiving PAGA claims" than the arbitration agreement in *Concepcion* was an agreement "waiving class-action claims."

Respondent contends that the lower courts correctly refused to compel arbitration because the "arbitration agreement explicitly prohibits arbitration of [PAGA] claims," *id.* at 30, and "the FAA prohibits courts from compelling parties to arbitrate matters that they have expressly agreed not to arbitrate," *id.* at 3. Respondent is again incorrect. The parties agreed to arbitrate "any dispute" arising out of Respondent's employment. CA.App.92. This is

undoubtedly such a dispute. The fact that the arbitration agreement calls for bilateral arbitration (and thus precludes representative PAGA claims as well as class and collective actions) is a reason why an arbitrator would promptly dismiss Respondent's representative PAGA claims, but it does not mean that the dispute should not be arbitrated. *Cf. Laster v. T-Mobile USA, Inc.*, 2012 WL 1681762, at *4 (S.D. Cal. May 9, 2012) (on remand from *Concepcion*, granting motion to compel arbitration despite presence of class-action claims).

Backpedaling even further, Respondent argues that *Iskanian* could not have literally meant that "a PAGA claim lies outside the FAA's coverage" because it supposedly left open the possibility that California courts would enforce an agreement to arbitrate representative PAGA claims. Opp.28-29. Respondent is doubly mistaken. First, the possibility that California might enforce agreements to arbitrate representative PAGA claims as a matter of state law would have no bearing on its misguided outside-the-FAA's-coverage theory of preemption. Second, California courts have taken *Iskanian*'s holding at face value, refusing to enforce even express agreements to arbitrate representative PAGA claims. *See, e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal.Rptr.3d 177, 189-90 (Cal. Ct. App. 2019). Simply put, in California, PAGA claims are truly "outside the FAA's coverage," which is plainly contrary to federal law.

II. The Question Presented Is Enormously Consequential And Warrants The Court's Review.

Respondent does not deny, and numerous *amici* confirm, that representational litigation in the face of bilateral-arbitration agreements continues unabated in California, having simply migrated from class and collective actions to PAGA actions following *Concepcion* and *Epic*. Pet.25-29; Restaurants.18-21; Retailers.6-10; CarDealers.5-9; Chamber.7-12. Respondent cannot deny that 15 PAGA demands are lodged every day or that PAGA litigation has exploded in the wake of *Concepcion* and *Epic*. And nothing in Respondent's brief identifies any obstacle to repackaging a class or collective action into a representative PAGA action or cites any case where such an effort has been unsuccessful. *See* Pet.26-27.

Respondent downplays the impact of representative PAGA actions—and seeks to distinguish *Concepcion* and *Epic*—by noting that plaintiffs can "only" pursue statutory penalties rather than the compensatory damages available in class or collective actions. Opp.32. But that is hardly a virtue, given the size and scope of the penalties. Statutory penalties of $100 or $200 *per violation*, *see* Cal. Lab. Code §2699(f)(2), will generally dwarf whatever paltry compensatory damages would result from trivial Labor Code foot-faults like not including "the start date for the pay period" on a pay stub, *Munoz v. Chipotle Mexican Grill, Inc.*, 189 Cal.Rptr.3d 134, 136 (Cal. Ct. App. 2015), or omitting the "last four digits of an employee's Social Security number" on a wage statement, *Lopez v. Friant & Assocs., LLC*, 224

Cal.Rptr.3d 1, 4 (Cal. Ct. App. 2017). Indeed, as this Court knows, the possibility of seeking statutory damages on behalf of an entire workforce or class creates a powerful incentive to litigate, even when there are no actual damages. *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2201-02 (2021). Worse still, unlike class or collective actions, a PAGA action "allows … a person affected by at least one Labor Code violation committed by an employer … to pursue penalties for *all* the Labor Code violations committed by that employer," even if different from the violation affecting the plaintiff. *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502, 504 (Cal. Ct. App. 2018) (emphasis added). That potential liability from violations that the litigant did not even suffer herself gives rise to an even greater "risk of 'in terrorem' settlements." *Concepcion*, 563 U.S. at 350.

Respondent argues that certiorari is unwarranted because this Court has denied past petitions seeking review of the *Iskanian* rule. Opp.1-2, 10-11, 14. But those petitions suffered from obvious vehicle problems not present here. *See, e.g.*, Br.in.Opp.15, *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110 (U.S. May 15, 2017) (identifying threshold obstacles because petitioner's "motion to compel arbitration was granted"); Br.in.Opp.16-17, *CarMax Auto Superstores Cal., LLC v. Areso*, No. 15-236 (U.S. Nov. 12, 2015) (same). Furthermore, all but one petition predated *Epic*, and in that case, the effect of *Epic* on the *Iskanian* rule was neither pressed nor passed on in the lower state courts, depriving this Court of jurisdiction to address the issue. *See PennyMac Fin. Servs., Inc. v. Smigelski*, 140 S.Ct. 223 (2019); *Smigelski v.*

PennyMac Fin. Servs., Inc., 2018 WL 6629406 (Cal. Ct. App. Dec. 19, 2018).*

In all events, the passage of time—and the migration of class and collective actions into PAGA claims—has simply underscored that *Iskanian* is fundamentally incompatible with the FAA, *Concepcion*, and *Epic*. The strong showing of *amicus* support here gives the lie to any suggestion that the question is settled or stale. The *Iskanian* rule continues to disrupt employers across all sectors of California's (and the Nation's) economy, creating disuniformity in an area where Congress established a uniform nationwide rule. Respondent presses the lack of a traditional split in the lower courts, but that did not prevent this Court from granting review in *Concepcion* to review California's less-sweeping "*Discover Bank* rule," *see* 563 U.S. at 338; *see also Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012), and should not prevent this Court from reviewing California's equally infirm *Iskanian* rule here. The only difference is that here the California courts have had the benefit of *Concepcion* and *Epic* and still have not taken the hint. The only way to bring California into line with the FAA and this Court's precedents is to grant plenary review.

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* Respondent's attempt to characterize the pre-*Epic* petition in *Five Star Senior Living Inc. v. Mandviwala*, 138 S.Ct. 2680 (2018), as a post-*Epic* petition, Opp.14, is especially rich, given that the brief in opposition there—filed by Respondent's counsel here—urged this Court to deny review to give California courts time to consider *Epic*'s impact on *Iskanian*. *See* Br.in.Opp.19 n.3, *Mandviwala*, No. 17-1357 (U.S. May 22, 2018). The case also suffered from multiple vehicle issues not present here. *See id.* at 17-19.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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