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 FOR PETITIONER

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QUESTION PRESENTED

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), this Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements are fully enforceable under the Federal Arbitration Act ("FAA"). Courts are not free to disregard or "reshape traditional individualized arbitration" by applying rules that demand collective or representational adjudication of certain claims. *Epic*, 138 S.Ct. at 1623. The FAA allows the parties not only to choose arbitration but to retain the benefits of arbitration by maintaining its traditional, bilateral form. While California courts follow *Concepcion* and *Epic* when a party to an individualized arbitration agreement tries to assert class-action claims, they refuse to do so when a party to such an agreement asserts representative claims under the California Private Attorneys General Act ("PAGA"), which—like a class action—allows aggrieved employees to seek monetary awards on a representative basis on behalf of other employees. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). As a result, *Concepcion* and *Epic* have not caused bilateral arbitration to flourish in California, as this Court intended, but have merely caused FAA-defying representational litigation to shift form.

The question presented is:

Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

CORPORATE DISCLOSURE STATEMENT

Petitioner Viking River Cruises, Inc. is wholly owned by Viking River Cruises (Bermuda) Ltd., and Viking Holdings Ltd. is the ultimate corporate parent of Viking River Cruises (Bermuda) Ltd. Viking River Cruises, Inc., Viking River Cruises (Bermuda) Ltd., and Viking Holdings Ltd. are not publicly traded. However, TPG, Inc. indirectly controls 10% or more of the stock/equity of Viking Holdings Ltd., and, as of January 2022, TPG, Inc. became a publicly traded company.

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INTRODUCTION

The parties agreed to resolve any future disputes through bilateral arbitration. In other words, they agreed not just to arbitrate their disputes, but to do so on an individualized basis, rather than on a class or representative basis. Nevertheless, Respondent sued Petitioner in court and asserted a claim on behalf of hundreds of others, while contending that the arbitration agreement is unenforceable under California law. The lower courts agreed, holding that, under California law, the agreement to proceed via bilateral arbitration is unenforceable and that this state-law contract defense is not preempted by the Federal Arbitration Act ("FAA").

If that fact pattern sounds familiar, it should: It describes the facts that led to this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the FAA preempts California state law precluding bilateral arbitration, and it equally describes the facts here. The only notable factual difference between *Concepcion* and this case is that here, instead of pursuing a class action, Respondent seeks to pursue litigation on behalf of hundreds of other individuals under California's Private Attorneys General Act ("PAGA"). The only notable legal difference is that the lower courts had less excuse to get it wrong this time around, as they had the benefit of both *Concepcion* and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018)—making their disregard of the agreement to arbitrate bilaterally more obviously incorrect.

Concepcion and *Epic* hold that "courts may not" disregard bilateral arbitration agreements or "reshape

traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic*, 138 S.Ct. at 1623. California nonetheless persists in doing just that through the "*Iskanian* rule"—named after the case that spawned it—which mandates the availability of representative PAGA claims even when a plaintiff agrees in advance to resolve disputes through individualized arbitration. But there is no meaningful distinction between the class action in *Concepcion*, the collective action in *Epic*, and representative PAGA actions like the one here. Each one involves a plaintiff who insists that her right to inject claims implicating others into the dispute trumps her agreement to arbitrate bilaterally. Each effort is equally preempted by the FAA. Indeed, if anything, representative PAGA actions are even less compatible with traditional bilateral arbitration, and the *Iskanian* decision is even more obviously incompatible with the FAA. Class actions are at least constrained by requirements like typicality and commonality, while under PAGA an employee who experienced one Labor Code violation may assert other violations that did not impact her *at all*. Moreover, while the California no-class-waiver rule invalidated in *Concepcion* at least purported to be grounded in generally applicable rules of unconscionability, *Iskanian* simply declares PAGA representational claims incompatible with bilateral arbitration and "outside the FAA's coverage." *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 151 (Cal. 2014).

The *Iskanian* rule has denied California employers the benefits of agreed-upon bilateral arbitration and the guarantees of the FAA. In

California, the real-world impact of *Concepcion* and *Epic* has not been increased bilateral arbitration, but the redirection of the efforts of would-be class-action lawyers into making PAGA demands at a 17-a-day clip, initiating lawsuits implicating tens of thousands of employees at a time, and extracting millions of dollars from employers for whom representative PAGA claims have become another tax for doing business in California. That cannot be what this Court intended in *Concepcion* and *Epic* or what Congress intended in the FAA. This Court should once again reverse California's efforts to evade the FAA and reaffirm that the FAA preempts state laws that interfere with fundamental aspects of arbitration.

OPINIONS BELOW

The California Court of Appeal's opinion is available at 2020 WL 5584508 and reproduced at Pet.App.2-7. The judgment of the Superior Court of Los Angeles County is unpublished and reproduced at Pet.App.8-17.

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on December 9, 2020. A petition was timely filed thereafter. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

A. The Federal Arbitration Act

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration," *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000), and to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344. That purpose is evident throughout the FAA. Section 2, the Act's primary substantive provision, declares that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable" absent narrow circumstances. 9 U.S.C. §2. Section 3 requires courts to stay litigation of arbitrable claims "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §3. And Section 4 emphasizes the court's duty to compel arbitration "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §4. Together, these provisions embody an overarching federal policy "to ensure that private agreements to arbitrate are enforced *according to their terms*." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (emphasis added).

Parties are thus able not only to agree to arbitrate, but also to "specify by contract the rules under which that arbitration will be conducted." *Volt*

Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989). The FAA requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted," and it preempts state-law rules that would interfere with such enforcement. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citations, alterations, and emphasis omitted). In particular, the FAA preempts state laws that are hostile not just to arbitration in general but to arbitration's key traditional characteristics, such as its bilateral nature. "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344.

Section 2's final phrase, often referred to as its "saving clause," permits courts to deny enforcement of arbitration agreements based on "grounds as exist at law or in equity for the revocation of any contract." The saving clause is textually narrower than Section 2's principal clause, which provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable." Moreover, as this Court has repeatedly held, the saving clause "offers no refuge" for defenses that disfavor arbitration or "that target arbitration … by more subtle methods, such as by interfering with fundamental attributes of arbitration," including its bilateral nature. *Epic*, 138 S.Ct. at 1622.

B. California's Private Attorneys General Act

PAGA allows an employee to seek monetary awards on behalf of herself and other past or present employees of the same employer. Like Rule 23 of the Federal Rules of Civil Procedure or the collective-action provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b), PAGA does not confer any "substantive rights" or "impose any legal obligations." *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). The substantive law is provided by California's notoriously prolix Labor Code. There is no such thing as a "violation of PAGA." Rather, PAGA is "simply a procedural statute" that permits an employee to pursue specified penalties on behalf of herself or others for violations of substantive sections of the Labor Code. *Id.*

Specifically, PAGA authorizes an "aggrieved employee" to "recover[]" civil penalties from an employer for violations of California's Labor Code in situations where a state enforcement agency could bring such a claim. Cal. Lab. Code §2699(a). An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* §2699(c).

An employee commencing a PAGA action may seek civil penalties not only for Labor Code violations she experienced herself, but also for distinct Labor Code violations against other employees of the same employer. *See* Cal. Lab. Code §2699(a) (authorizing civil action "brought by an aggrieved employee on behalf of himself or herself and other current or former

employees"); *id.* §2699(g)(1). The California Supreme Court has taken an "expansive approach" to this aspect of PAGA, such that PAGA actions are more sweeping, and less truly representative, than class actions. *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020). For example, an employee "subjected to at least one unlawful practice" has "standing," in the non-Article-III sense, "to serve as PAGA representative[] even if [she] did not personally experience each and every alleged violation" visited upon other employees. *Id.* That is, provided the named employee alleges that she was "affected by at least one Labor Code violation," PAGA allows her to "pursue penalties for all the Labor Code violations committed by that employer," even if different from the violation allegedly affecting her. *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502, 504 (Ct. App. 2018). Indeed, "a plaintiff's inability to obtain individual relief is not necessarily fatal to the maintenance of" a representative PAGA claim. *Kim*, 459 P.3d at 1130; *see also Johnson v. Maxim Healthcare Servs., Inc.*, 281 Cal.Rptr.3d 478, 482 (Ct. App. 2021), *review denied*, (Nov. 10, 2021) (holding that plaintiff whose individual Labor Code claim would be time-barred can still pursue representative PAGA claim).

PAGA authorizes civil penalties that can quickly pile up: $100 "for each aggrieved employee per pay period" for the first violation of a particular Labor Code provision, and $200 "for each aggrieved employee per pay period" for any subsequent violation (unless the underlying Labor Code provision provides for a different civil penalty). Cal. Lab. Code §2699(f)(2). The affected employees share 25% of any

civil penalties assessed for violations aggrieving them personally and must remit the remaining 75% to the state. *Id.* §2699(i). Thus, if an employee prevails on a PAGA action seeking redress for a first-time violation affecting 100 employees, each affected employee receives $25. *See, e.g., Moorer v. Noble L.A. Events, Inc.*, 244 Cal.Rptr.3d 219, 223-24 (Ct. App. 2019). A prevailing employee is "entitled to an award of reasonable attorney's fees and costs." Cal. Lab. Code §2699(g)(1).

Before filing a PAGA suit, the plaintiff must give written notice of the alleged Labor Code violations to the state's Labor and Workforce Development Agency ("LWDA"). *Id.* §2699.3(a)(1)(A). If the LWDA either notifies the employee that it does not intend to investigate or simply fails to respond within 65 days, the employee is free to commence a PAGA action. *Id.* §2699.3(a)(2)(A). Likewise, an employee is free to bring a PAGA action if the agency indicates an intent to investigate but "determines that no citation will be issued" or fails to take any action within the prescribed time period. *Id.* §2699.3(a)(2)(B). Once the action is commenced, the private plaintiff controls the litigation in its entirety; neither the LWDA nor any other state component or state actor can direct the litigation or seek to dismiss the employee's action. Any settlement is subject only to the court's, not the state's, approval. *Id.* §2699(*l*)(2).

C. *Iskanian* and *Sakkab*

Under California law, a pre-dispute agreement in which an employee agrees to arbitrate all claims bilaterally and forgo a representative PAGA action is treated as a waiver of the PAGA action and deemed

unenforceable as against public policy; the PAGA claim asserting disparate violations affecting multiple employees must be allowed to proceed, notwithstanding the express agreement to arbitrate bilaterally. That rule was established by *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), where the California Supreme Court addressed the enforceability of an arbitration agreement in which an employee and employer agreed to resolve all future disputes by bilateral arbitration. The employee, despite his agreement to arbitrate on an individualized basis, filed a lawsuit seeking to pursue both a class action and a representative PAGA action.

The court began by addressing the class-action waiver, explaining that its prior decisions deemed most class-action waivers unenforceable. *See id.* at 133-37. It recognized, however, that in light of this Court's decision in *Concepcion*, the FAA preempted state-law doctrines deeming class-action waivers unenforceable. *Id.* at 135-37. In particular, it explained that under *Concepcion*, a state-law rule mandating the availability of class arbitration would override the parties' agreement to preserve the traditional benefits of arbitration by arbitrating on a bilateral basis, and therefore "the FAA preempts [our] rule against employment class waivers." *Id.* at 135-36.

The court then addressed the PAGA action. The court determined that a contract in which an employee agrees to forgo representative PAGA claims by agreeing to bilateral arbitration is tantamount to a waiver of the PAGA claim and is "unenforceable as a matter of state law." *Id.* at 149. The court's concern

was not that either the arbitration agreement or the express waiver of collective proceedings was procured by duress or improper means, but that an agreement to forgo representative PAGA claims in favor of bilateral arbitration, even if freely entered, is "contrary to public policy" because it would "disable one of the primary mechanisms for enforcing the Labor Code." *Id.* The California Supreme Court demurred on whether there was such a thing as an individual PAGA action (*i.e.*, an action that sought PAGA's civil penalties only on behalf of an individual employee), but held that an agreement to forgo pursuit of representative PAGA claims on behalf of other employees constituted an impermissible waiver of a statutory right because individualized arbitration "will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." *Id.* at 148-49. The court acknowledged that an individual employee could permissibly waive her ability to pursue a PAGA action after the fact, but nonetheless concluded that an *ex ante* waiver as part of an agreement to arbitrate bilaterally was against California public policy. *Id.* at 152.

Having found an agreement to forgo representative PAGA actions in favor of bilateral arbitration contrary to state public policy, the court recognized that "a state law rule, however laudable, may not be enforced if it is preempted by the FAA" under *Concepcion*. *Id.* at 149. The court nonetheless purported to distinguish *Concepcion* and avoid FAA preemption by characterizing a private plaintiff's PAGA claim as belonging to the state rather than to the aggrieved employee who files and controls it:

"[T]he rule against PAGA waivers does not frustrate the FAA's objectives because … the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state." *Id.* For that reason, the court opined that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. The court supported its conclusion by citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), in which this Court held that an action actually brought by the Equal Employment Opportunity Commission ("EEOC") to vindicate an injury to an employee was not precluded by an arbitration agreement signed by the employee, in light of the EEOC's near-total control of the action.

After *Iskanian*, a divided panel of the Ninth Circuit concluded that "the FAA does not preempt the *Iskanian* rule." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015). The *Sakkab* majority did not mention, much less embrace, *Iskanian*'s rationale for avoiding FAA preemption (that "a PAGA claim lies outside the FAA's coverage") or its invocation of *Waffle House*. Instead, the *Sakkab* majority embraced a different theory (not advanced in *Iskanian*) and held that "[t]he *Iskanian* rule does not conflict with [the FAA's] purposes" because, in its view, representative PAGA actions are less incompatible with traditional arbitration than the class arbitrations this Court addressed in *Concepcion*. *Id.* at 433-34. The "critically important distinction," according to the Ninth Circuit, is that PAGA claims are not governed by Rule 23, and thus "do not require the formal procedures of class arbitrations." *Id.* at 436.

Judge N. Randy Smith dissented, concluding that the panel majority "essentially ignore[d] the Supreme Court's direction in *Concepcion*." *Id.* at 440. Judge Smith observed that the *Iskanian* rule—like the *Discover Bank* rule invalidated in *Concepcion*—"interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration." *Id.* at 444. He noted that "[t]he *Iskanian* rule … makes the process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk." *Id.* Judge Smith concluded: "Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same [in prior cases], and were subsequently reversed in *Concepcion*. The majority now walks that same path." *Id.* at 450.

D. Factual and Procedural Background

Petitioner Viking River Cruises, Inc. ("Viking") offers and sells voyages on one of the world's leading ocean and river cruise lines with a fleet of more than 70 state-of-the-art vessels providing exceptional travel experiences around the globe. Respondent Angie Moriana worked for Viking as a sales representative in Los Angeles from approximately May 31, 2016 to June 15, 2017. JA12.

Before beginning her employment, Moriana agreed to resolve all future employment-related disputes with Viking via bilateral arbitration. She agreed to arbitrate "any dispute arising out of or relating to your employment." JA86. The agreement specified that, subject to enumerated exceptions not

implicated here, "arbitration will replace going before … a court for a judge or jury trial." JA87. Next, under the heading, "How Arbitration Proceedings Are Conducted," the agreement provided that, in arbitration, the parties would use individualized rather than class, collective, representative, or private attorney general action procedures:

> There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions ("Class Action Waiver").

JA90.

The agreement explicitly permitted Moriana to opt out of that provision, stating: "you may opt out of the Class Action Waiver by clicking this box [ ] before you click below." JA90. Moriana chose not to opt out, however, leaving the box unchecked and accepting the full agreement. JA76.

After her employment ended, Moriana filed a PAGA action against Viking in state court. Moriana's filing sought the precise kind of employer-wide, non-bilateral PAGA relief she agreed to forgo in her arbitration agreement. As she stated on the very first page of her complaint: "This is a representative action seeking recovery of civil penalties under the Private Attorneys General Act of 2004 ('PAGA')." JA10. The complaint further asserted: "Plaintiff Angie Moriana, *on behalf of all aggrieved employees*, brings this

representative PAGA action pursuant to violations of the Labor Code, seeking penalties for the violations alleged herein." JA12 (emphasis added).

In her sole claim, Moriana sought civil penalties under PAGA and alleged numerous underlying violations of the Labor Code on behalf of herself and hundreds of other "aggrieved current and former employees," described as "including but not limited to Ocean Specialists, Outbound Sales Agents, Inbound Sales Agents, Travel Agent Desk, Inside Sales, Direct Sales, Group Sales, Reservation Sales Agents, and/or Air Department Agents, as well as any other job title with substantially similar duties and responsibilities." JA10-11. The alleged Labor Code violations included failure to comply with provisions governing minimum wages, overtime wages, meal periods, rest periods, timing of pay, and pay statements. JA11-12. With one exception (concerning the alleged failure to timely pay her final wages after her employment ended, in violation of Labor Code §§201-202), Moriana's complaint did not allege that she personally experienced the purported Labor Code violations. Instead, for each supposed violation, she merely alleged that "certain aggrieved employees" were affected. JA23, 24, 26, 28. Nevertheless, "on behalf of the aggrieved employees," Moriana sought "recovery of all applicable civil penalties" for all Labor Code violations. JA16, 35 (capitalization altered); Pet.App.3.

Citing the parties' arbitration agreement and this Court's post-*Iskanian* decision in *Epic*, Viking moved to compel bilateral arbitration and to stay the court proceedings. The trial court denied the motion, and

the California Court of Appeal affirmed. The Court of Appeal cited *Iskanian* for the proposition that "an arbitration agreement that include[s] a waiver of an employee's right to bring a representative PAGA action in any forum violate[s] public policy" because "a PAGA representative action is a type of qui tam action and … the state is always the real party in interest in the suit." Pet.App.4. The court considered and rejected Viking's argument that this Court's decision in *Epic* effectively abrogated *Iskanian*, holding that *Iskanian* "remains good law" notwithstanding "*Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims." Pet.App.5. The California Supreme Court denied Viking's petition for review. Pet.App.1.[1]

SUMMARY OF ARGUMENT

The FAA requires the enforcement of arbitration agreements according to their terms, and the terms of the arbitration agreement here could not be clearer. Moriana not only agreed to arbitrate all disputes arising out of her employment with Viking, but she expressly agreed to arbitrate bilaterally by agreeing to

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[1] Because Moriana filed only a representative PAGA claim on behalf of a wide range of Viking employees, and the courts below refused to compel arbitration of that representative claim, the parties have not had to address whether Moriana could have recovered the civil penalties provided by PAGA, in addition to the remedies provided directly by the Labor Code, for any Labor Code violations that affected her individually. As noted, *Iskanian* demurred on whether such an "individual PAGA claim" even exists, and nothing in *Iskanian* or the decisions below turns on that question, as the incompatibility of representative PAGA claims and bilateral arbitration was the linchpin of *Iskanian*'s holding that PAGA waivers violated California public policy.

waive all collective proceedings, including PAGA actions by name. The California Supreme Court in *Iskanian* deemed the agreement to forgo representative PAGA claims in favor of bilateral arbitration inconsistent with California public policy. But that is simply not a prerogative states enjoy under the FAA. If the state legislature had made clear in PAGA itself that California viewed claims under the statute as inconsistent with and impervious to agreements to arbitrate bilaterally, such a no-bilateral-arbitration proviso would be obviously preempted. The result is no different if the proviso issues from the California Supreme Court. This Court has repeatedly made clear that state laws that target arbitration in general, or traditional bilateral arbitration in particular, for disfavored treatment are preempted by the FAA.

The Ninth Circuit, but not the California Supreme Court, tried to escape preemption and distinguish *Concepcion* on the theory that PAGA representative claims do not pose the same risks to arbitration proceedings as class actions. If anything, the disconnect with traditional bilateral arbitration is even greater when it comes to PAGA claims. A single employee filing a representative PAGA claim can proceed on behalf of hundreds or thousands of other employees even without satisfying requirements like typicality and commonality that impose modest restraints on the class-action process. Indeed, as long as an employee can point to one Labor Code violation that affected her directly, she can raise all manner of violations that affected only other employees. As a result, the scope and stakes of employer-wide PAGA proceedings are fundamentally different from the

disputes the parties agreed to arbitrate and fundamentally incompatible with the parties' agreements to proceed via streamlined, traditional bilateral arbitration.

The California Supreme Court, but not the Ninth Circuit, attempted to shield the *Iskanian* rule from invalidation by the FAA by likening a PAGA action to the EEOC claim in *Waffle House* or a traditional *qui tam* action, and asserting that "a PAGA claim lies outside the FAA's coverage." *Iskanian*, 327 P.3d at 151. But the situation here is nothing like *Waffle House*. There, the party initiating and controlling the litigation (the EEOC) had never signed an arbitration agreement. Here, by contrast, the party initiating and controlling the litigation (Moriana) is the same person who signed the arbitration agreement and declined to opt out of the class-action/PAGA waiver. The *Iskanian* court's attempted analogy to *qui tam* actions is equally unavailing, as PAGA actions lack the fundamental features of *qui tam* actions and states are not free to exempt state statutes from the FAA by labeling them *qui tam* actions. In the end, *Iskanian*'s effort to classify PAGA actions as "outside the FAA's coverage" just makes the preemption problem here unmistakable.

Rather than faithfully apply *Concepcion* and *Epic* to other forms of representational litigation posing the same, if not greater, risks, California has limited those decisions to class and collective actions and freed representational PAGA suits from the fetters of the FAA. Under *Iskanian*, plaintiffs who should be arbitrating their individual claims pursuant to the agreements they signed are instead just amending

their class-action complaints to assert representative PAGA claims and proceeding as if *Concepcion* and *Epic* never happened. Whereas PAGA was rarely invoked before *Concepcion*, plaintiffs' lawyers are now filing more than 17 PAGA notices *every day*, seeking massive civil penalties (or quick settlements) in circumstances where all would admit that the arbitration agreements foreclose a class action. At bottom, the question here is whether California may circumvent *Concepcion* and *Epic* by authorizing functionally identical representative actions and declaring such actions "outside the FAA's coverage." The FAA and this Court's cases provide a clear answer to that question and require reversal.

ARGUMENT

I. The FAA Requires Enforcement Of The Parties' Agreement To Arbitrate Bilaterally By Expressly Agreeing To Forgo Collective Proceedings, Including PAGA Actions.

A. The FAA Requires Enforcement of Arbitration Agreements According to Their Terms, Especially When Those Terms Preserve Bilateral Arbitration.

There is no ambiguity here about whether the parties agreed to resolve any disputes arising out of Moriana's employment via bilateral arbitration. The parties' arbitration agreement was explicit that it covered "any dispute arising out of or relating to" Moriana's employment, and that "arbitration will replace going before … a court." JA86-87. The agreement was equally explicit that the arbitration would be *bilateral*, with all modes of collective proceeding and relief expressly precluded. In

addressing "How Arbitration Proceedings Are Conducted," the parties agreed that "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action." JA89. That provision reflects the commonsense reality, confirmed by this Court on multiple occasions, that parties can, and often do, permissibly conclude that the streamlined and informal nature of arbitration is a poor fit for the heightened stakes and procedural complications of litigation implicating hundreds or thousands of individuals.

Under the FAA, the parties' unambiguous agreement to arbitrate bilaterally and forgo PAGA claims and other forms of collective litigation must be enforced according to its terms. Indeed, the cardinal lesson of both the FAA's text and this Court's FAA precedents is that arbitration agreements must be enforced *in accordance with their terms*, especially when those terms are designed to preserve the traditional bilateral nature of arbitration.

The "principal purpose" of the FAA, "readily apparent from [its] text," is to ensure that private arbitration agreements are enforced "according to their terms." *Concepcion*, 563 U.S. at 344. As *Concepcion* made clear, that overriding congressional purpose is evident in multiple sections of the FAA that compel courts, long hostile to arbitration, not just to respect arbitration agreements, but to enforce them "in accordance with the terms of the agreement." *Id.* (quoting 9 U.S.C. §§3, 4 and citing 9 U.S.C. §2). The FAA requires courts to respect the parties' agreement on all manner of terms, including "specifying with

whom [the parties] will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1416 (2019). "Whatever [the parties] settle on, the task for courts and arbitrators at bottom remains the same: to give effect to the intent of the parties." *Id.*

Nowhere is the FAA's requirement to honor the terms of the parties' agreement more important than when those terms reinforce the traditional bilateral nature of arbitration by expressly forgoing class actions and other modes of collective proceedings often deemed incompatible—by the parties and this Court alike—with the basic nature of arbitration. Thus, this Court has repeatedly enforced arbitration agreements that expressly waive or foreclose class actions and collective proceedings and even refused to infer such unusual forms of arbitration absent provisions making the intent to deviate from the norm of bilateral arbitration clear.

For example, in *Concepcion*, this Court enforced the class-action waiver provision in the parties' arbitration agreement while invalidating California's "*Discover Bank* rule," which deemed most class-action waivers in consumer contracts unconscionable. 563 U.S. at 340. This Court held that the FAA preempted the *Discover Bank* rule, because by invalidating the parties' agreement to proceed via bilateral arbitration and forgo class actions, the rule interfered with "fundamental attributes of" such arbitration. *Id.* at 344. In traditional bilateral arbitration, the Court explained, "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." *Id.* at 348. By allowing a party to override the terms of the agreement and demand that arbitration proceed on a classwide basis instead, the *Discover Bank* rule "sacrific[ed] the principal advantage of arbitration—its informality—and ma[de] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. As a consequence, this Court enforced the parties' agreement in accordance with its terms, including the terms limiting the parties to bilateral arbitration to resolve their disputes.

This Court emphatically reaffirmed *Concepcion* in *Epic*. *Epic* involved three consolidated cases in which employees had agreed to resolve disputes with their employers through bilateral arbitration. The employees, seeking to pursue class or FLSA collective actions, argued that contractual provisions limiting them to bilateral arbitration were illegal under the National Labor Relations Act, which they claimed privileged collective actions by unionized employees and provided a "ground[]" that "exist[s] at law … for the revocation of any contract." 9 U.S.C. §2. This Court rejected the argument, reaffirming that "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic*, 138 S.Ct. at 1619. The Court concluded by emphasizing *Concepcion*'s "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures," and by cautioning that "we must be alert to new devices and

formulas" that aim to interfere with arbitration's essential attributes. *Id.* at 1623.

This Court went one step further in *Lamps Plus,* holding that the teachings of *Concepcion* and *Epic* apply even when the parties' agreement is *ambiguous* with respect to bilateral arbitration. 139 S.Ct. at 1419. In *Lamps Plus*, the Ninth Circuit applied the generally applicable contract doctrine of *contra proferentem*, under which ambiguity is resolved against the drafter, to find that an ambiguous agreement authorized classwide arbitration. *Id.* at 1414-15. This Court reversed, holding that the FAA preempted the application of *contra proferentem* for the same reasons as in *Concepcion* and *Epic*—namely, because "it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings without the parties' consent." *Id.* at 1418. Given the "fundamental difference between class arbitration and the individualized form of arbitration envisioned by the FAA," applying *contra proferentem* "interfere[d] with fundamental attributes of arbitration." *Id.* at 1416, 1418.

B. The *Iskanian* Rule Is Preempted.

1. In light of the clarity with which the FAA requires courts to enforce the terms of the parties' agreement, and the clarity with which this Court's precedents establish that this principle applies with especial force to terms that reinforce the traditional bilateral nature of arbitration, this should have been an open-and-shut case for enforcing the parties' agreement to forgo collective litigation, including via PAGA. *See, e.g.*, *Epic*, 138 S.Ct. at 1621 (noting that the clarity of arbitration agreement's terms and FAA's

direction to enforce those terms "would seem to resolve any argument under the Arbitration Act"). Indeed, the California Supreme Court recognized in *Iskanian* that *Concepcion* left it with no choice but to enforce the parties' class-action waiver. There is no valid basis for a different result when it comes to representative PAGA claims.

There are only two possible bases for refusing to enforce the parties' agreement to forgo PAGA claims in favor of bilateral arbitration, and both are squarely foreclosed by *Concepcion* and *Epic*. To the extent *Iskanian* purports to be a general rule of contract law that fits within the saving clause of Section 2 of the FAA, that effort fails for all the reasons this Court articulated in *Concepcion* and *Epic*. A rule that targets traditional features of arbitration, like its bilateral nature, is not the kind of arbitration-neutral and general rule saved by Section 2. Indeed, the *Iskanian* decision itself (as opposed to the Ninth Circuit's reconceptualization of it in *Sakkab*) never claimed otherwise. And to the extent that *Iskanian* stands for the proposition that PAGA claims are simply incompatible with bilateral arbitration as a matter of state law (or otherwise "outside the FAA's coverage"), that bold effort to have state law override federal law favoring bilateral arbitration is even more obviously preempted, as *Concepcion* itself made clear. At bottom, there is no meaningful difference between the class action at issue in *Concepcion*, the collective actions at issue in *Epic*, and the representative PAGA action at issue here, and no basis for finding an agreement to forgo the first two forms of collective action enforceable, but not the third.

All three types of representative actions are exceptions to "the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Just as class and collective actions are procedural devices that permit plaintiffs to prosecute claims and obtain monetary relief on behalf of other class or collective members, PAGA is a procedural statute that allows a plaintiff to sue "on behalf of himself or herself and other current or former employees," authorizing recovery of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation," Cal. Lab. Code §2699(a), (f)(2). Indeed, PAGA goes one very large step beyond Rule 23 and the FLSA by allowing a plaintiff aggrieved by one violation to pursue relief for other violations that did not affect her personally, greatly expanding the potential scope of the action. *Kim*, 459 P.3d at 1133.

Underscoring the similarity of class, collective, and employer-wide PAGA actions, California employers seeking to obtain the benefits of traditional bilateral arbitration often seek an express waiver of all three forms of non-bilateral litigation, often in a single provision. That was true in *Epic* and *Iskanian*, and it is true here. In *Epic*, the plaintiff "waive[d] the right to participate in or receive money or any other relief from any *class, collective, or representative proceeding*." Br. for Petitioner 7, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. filed June 9, 2017) (emphasis added). Likewise, in *Iskanian*, the agreement waived all class, collective, and representative proceedings,

and the Court found that the waiver encompassed representative PAGA claims. 327 P.3d at 133. Here, Moriana was even more explicit, waiving her right to bring "a *class, collective, representative, or private attorney general action*." JA89 (emphasis added). The grouping of these waivers "indicates that one waiver, without the other, would not be sufficient to create the type of arbitration desired by the parties," *Sakkab*, 803 F.3d at 443 (N.R. Smith, J., dissenting)—namely, traditional, individualized, bilateral, and streamlined arbitration.

Given the similarity of class, collective, and PAGA actions, the holdings of *Concepcion* and *Epic* apply directly here and make clear beyond cavil that the *Iskanian* rule is incompatible with the FAA and not the kind of state-law ruled saved by Section 2. The central teaching of those cases is that courts may not utilize state-law contract defenses to "declare individualized arbitration proceedings off limits" when the parties agreed to individualized arbitration proceedings. *Epic*, 138 S.Ct. at 1623. This "essential insight" does not depend on the particular non-bilateral action the plaintiff seeks to pursue in violation of the arbitration agreement's express terms, as "like cases should generally be treated alike." *Id.* In short, the *Iskanian* rule that waivers of PAGA claims in favor of bilateral arbitration are inconsistent with state policy is foreclosed by the FAA for all the same reasons that this Court vindicated bilateral arbitration in *Concepcion* and *Epic*.

2. As noted, the *Iskanian* court itself did not rest its decision on a claim that representative PAGA claims are more compatible with traditional

arbitration than class actions or FLSA collective actions. Instead, it embraced the view that the unusual nature of PAGA claims took them entirely "outside the FAA's coverage." The Ninth Circuit majority in *Sakkab*, by contrast, refused to embrace *Iskanian*'s reasoning, but defended its result by claiming that arbitrating PAGA representative claims is less problematic than class arbitration. That reasoning is deeply flawed. The specific features of representative PAGA claims only underscore that they share the same essential elements as class and collective actions, and, if anything, are even less compatible with traditional bilateral arbitration.[2]

First, by mandating the availability of employer-wide PAGA proceedings, the *Iskanian* rule vastly expands the scope of employment disputes, making their resolution "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. In contrast to bilateral arbitration where an arbitrator can proceed swiftly to

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[2] Some California courts have held that even when parties expressly agree to arbitrate *representative* PAGA claims, such provisions are invalid because all PAGA disputes must be resolved in court. *See, e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal.Rptr.3d 177, 189-90 (Ct. App. 2019). *But see Valdez v. Terminix Int'l Co. L.P.*, 681 F.App'x 592, 594 (9th Cir. 2017) (holding that "PAGA claims are eligible for arbitration"). Moriana does not appear to embrace those holdings, *see* Br.in.Opp.29-30, but to the extent California law provides that not just efforts to preserve the bilateral features of arbitration, but even an express agreement to arbitrate representational PAGA claims must yield to state policies demanding the litigation of representational PAGA claims, such a comprehensive anti-arbitration policy would be preempted by the FAA *a fortiori*.

the merits of the plaintiff's individual claims, an arbitrator presiding over an employer-wide PAGA action must also make "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). Worse still, because an employer-wide PAGA action is not constrained by requirements like typicality and commonality, an arbitrator would be forced to address the merits of alleged Labor Code disputes that do not even implicate the individual employee who has agreed to bilateral arbitration. As with class arbitration, an arbitrator in a PAGA action "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes [implicating] hundreds or perhaps even thousands of parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

This case proves the point. Even though Moriana and Viking agreed to resolve disputes through bilateral arbitration, Moriana has asserted numerous violations of the Labor Code on behalf of herself and a wide range of other employees, "including but not limited to Ocean Specialists, Outbound Sales Agents, Inbound Sales Agents, Travel Agent Desk, Inside Sales, Direct Sales, Group Sales, Reservation Sales Agents, and/or Air Department Agents," or "any other job title with substantially similar duties and responsibilities." JA11. Resolving those claims would require an arbitrator to undertake factual and legal assessments for hundreds of absent employees employed in different capacities, paid on different scales, and subject to different policies—and to do so

for every alleged Labor Code violation and every pay period. Such unwieldy and outsized inquiries would plainly eliminate the "lower costs" and "greater efficiency and speed" that the parties chose individualized arbitration to ensure. *Concepcion*, 563 U.S. at 348.

The *Sakkab* majority opined that even if "representative PAGA actions take longer or cost more to arbitrate than other types of claims, the same could be said of any complex or fact-intensive claim," such as antitrust claims. 803 F.3d at 438. But such hypothetical individual claims are inherently complicated (and will likely be less complicated and more streamlined in arbitration). Here, by contrast, the underlying individual dispute between Moriana and Viking is quite straightforward and perfectly suited for arbitration. What creates the potential for unwieldy proceedings inappropriate for arbitration is PAGA—which, just like other collective proceedings, injects violations concerning hundreds of different employees into the dispute. When parties sensibly choose to forgo such complications in favor of bilateral arbitration, both the plain text of the FAA and this Court's precedents require honoring that agreement.

Second, consistent with their "expansive" scope, *Kim*, 459 P.3d at 1130, representative PAGA actions impose procedural burdens far exceeding those in bilateral arbitration. In bilateral arbitration, discovery is relatively simple because the employee typically has access to her own employment records, knows whether she has been affected by the Labor Code violations she is alleging, and can provide individual testimony to support her claims. But 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." *Sakkab*, 803 F.3d at 446-47 (N.R. Smith, J., dissenting). Indeed, the California Supreme Court has rejected efforts to rein in PAGA discovery, instead "extending PAGA discovery as broadly as class action discovery has been extended." *Williams v. Superior Ct.*, 398 P.3d 69, 81 (Cal. 2017).

The *Sakkab* majority suggested that PAGA actions are less procedurally complex than class actions because "unlike Rule 23(a), PAGA contains no requirements of [adequacy of representation], numerosity, commonality, or typicality." 803 F.3d at 436. That gets things backwards: Those protections are there to protect the defendant and potentially limit the scope for discovery. By obviating the need for inquiries that can defeat class proceedings or limit their scope, PAGA virtually guarantees the kind of wide-ranging inquiries and associated procedural complexities that parties could rationally agree defeat the basic benefits of bilateral arbitration. California courts have recognized as much, explaining that "PAGA claims may well present more significant manageability concerns than those involved in class actions" because "a PAGA claim can cover disparate groups of employees and involve different kinds of violations raising distinct questions." *Wesson v. Staples the Off. Superstore, LLC*, 283 Cal.Rptr.3d 846, 859-60 (Ct. App. 2021), *review denied*, (Dec. 22, 2021).

Accordingly, when it comes to representative PAGA arbitration, even more than with class or collective arbitration, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace." *Epic*, 138 S.Ct. at 1623.

Third, and perhaps most obviously, employer-wide PAGA actions "increase[] risks to defendants" to such an extent that it fundamentally alters the bargain the parties struck when they agreed to resolve their disputes bilaterally. In light of the limited judicial review available under the FAA, *see* 9 U.S.C. §10, and the significant damages awards that can result from class arbitration, this Court in *Concepcion* found it "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." 563 U.S. at 350-51. The same is true with respect to employer-wide PAGA claims, both because of their "expansive" nature, *Kim*, 459 P.3d at 1130, and because of PAGA's substantial civil penalties of $100 or $200 *per violation per pay period*, *see* Cal. Lab. Code §2699(f)(2), which 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 (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 (Ct. App. 2017).

In short, representative actions under PAGA are, if anything, less compatible with the fundamental attributes of arbitration than the class action at issue in *Concepcion* and the collective action at issue in *Epic*. The central lesson of those cases is that courts must "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic*, 138 S.Ct. at 1619. State-law rules prohibiting waivers that protect the bilateral nature of arbitration are not saved from preemption. Rather, those rules convert agreed-upon individualized arbitration into something that is "not arbitration as envisioned by the FAA" and cannot "be required by state law." *Concepcion*, 563 U.S. at 351.

3. The *Iskanian* rule is even more obviously preempted, and more obviously outside the FAA's saving clause, than the *Discover Bank* rule this Court found preempted in *Concepcion*. The *Discover Bank* rule at least purported to be an application of general contract-law principles of unconscionability. *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (concluding that some, but not all, class-action waivers "are unconscionable under California law and shall not be enforced"). The *Iskanian* rule is different. The California Supreme Court simply held that based on the statutory policies underlying PAGA, "it is contrary to public policy" for an employee to forgo a representative PAGA claim in favor of bilateral arbitration by agreeing "to waive the right to bring a PAGA action before any dispute arises." *Iskanian*, 327 P.3d at 149.

If the state legislature had done that in the text of PAGA, there would be no serious question that such a

provision would be preempted by the FAA. As this Court explained in *Concepcion*, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 563 U.S. at 341. Thus, a state statute that purports to provide that its cause of action is so important to the state that it cannot be relegated to arbitration would be found preempted in a heartbeat. It would reflect the precise hostility to arbitration that the FAA was designed to countermand. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (FAA preempts California law purporting to place licensing disputes outside the FAA's coverage); *Perry v. Thomas*, 482 U.S. 483, 484, 491-92 (1987) (FAA preempts California Labor Code provision purporting to apply "without regard to the existence of any private agreement to arbitrate"). Especially after *Concepcion* and *Epic*, a state statute that expressly proclaims that it is immune from *bilateral* arbitration would be equally preempted.

The result should be no different just because the proclamation comes from the state court, rather than the state legislature. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (rejecting West Virginia Supreme Court's effort to deem pre-dispute arbitration agreements unenforceable "as a matter of public policy under West Virginia law" when it comes to "claims of personal injury or wrongful death against nursing homes," because, in its view, "Congress did not intend for the FAA to be … applicable" to those claims); *Perry*, 482 U.S. at 492 n.9 (warning that contract-law defenses cannot be manipulated to "enable the court to effect what we hold today the state legislature cannot"). And the

Iskanian court simply analyzed the policy considerations underlying PAGA and concluded, much the way a state legislature could have concluded in the first instance (but for the FAA), that PAGA's important policies could not be achieved in bilateral arbitration. To be sure, the court invoked broader principles about invalidating contracts against public policy, but its reasoning was specific to representational PAGA claims and their fundamental incompatibility with bilateral arbitration. That conclusion is no less antithetical to the FAA than if it had come from the state legislature itself.

4. Section 2's saving clause does not protect the *Iskanian* rule for one final reason: the FAA's saving clause, by its terms, does not encompass defenses that do not go to the formation of the contract itself. The saving clause states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the *revocation* of any contract." 9 U.S.C. §2 (emphasis added). While this text states affirmatively that an arbitration agreement shall be "valid, irrevocable, and enforceable," the saving clause "does not parallel" those words "by referencing the grounds as exist for the 'invalidation, revocation, or nonenforcement' of any contract." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring). Instead, the clause "repeat[s] only one of the three concepts" and only saves laws that go to revocation. *Id.*

To be a ground for the "revocation" of any contract (as opposed to its non-enforcement or invalidation of the contract or particular terms), the ground must challenge the "formation of the agreement to

arbitrate, such as fraud, duress, or mutual mistake." *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring); *see Revocation, Black's Law Dictionary* (3d ed. 1933) (defining "revocation" as "destroying or making void"). Indeed, the contract principles this Court has referenced in connection with Section 2—fraud, duress, and unconscionability—all would typically allow for the entire arbitration agreement to be revoked, just like any other contract. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 547 (2008) (describing fraud and duress as "traditional grounds for the abrogation of [a] contract"); *Hume v. United States*, 132 U.S. 406, 414 (1889) (describing unconscionable contracts as ones "so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception"). In contrast, a state-law doctrine that deems particular terms, such as a PAGA waiver, simply inconsistent with the state's public policy is not within the terms of the saving clause. *See Epic*, 138 S.Ct 1612, 1633 (Thomas, J., concurring) (because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," it is not a ground for the *revocation* of the contract, and the saving clause does not apply).

This principle has particular force when the specific ground for refusing to enforce a provision within an arbitration agreement is its incompatibility with public policy. Unlike doctrines of mistake, duress, and unconscionability that can be meaningfully said to be principles of general applicability, the declaration that certain contractual provisions are against public policy is specific to the particular issue or topic addressed in the contract.

And when the issue or topic addressed is arbitration and preserving its bilateral nature, a declaration that such provisions violate the state's public policy is fundamentally incompatible with the whole thrust of the FAA. Such a determination is not a basis "for the revocation of any contract," 9 U.S.C. §2; it is just an assertion that compliance with a specific state policy is more important than the general policy of the FAA. That is a prerogative that neither state courts nor state legislatures enjoy under the FAA and the Supremacy Clause.

C. The FAA Applies To PAGA Claims.

The California Supreme Court never really attempted to justify the *Iskanian* rule as satisfying the terms of the FAA and its saving clause. Indeed, at the end of its state-law analysis and its conclusion that state law precluded waiving representative PAGA claims in favor of bilateral arbitration, *Iskanian* acknowledged that "a state law rule, however laudable, may not be enforced if it is preempted by the FAA" under *Concepcion*. 327 P.3d at 149. But *Iskanian* sought to evade *Concepcion* and the FAA altogether by asserting that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. The court posited that a PAGA claim does not involve private litigation at all, and is more akin to the EEOC's claim in *Waffle House* or a traditional *qui tam* action. This transparent effort to evade the FAA altogether—a maneuver not embraced by the *Sakkab* majority—is even more obviously flawed.

1. *Iskanian* attempted to draw support for its conclusion that PAGA actions fall outside the FAA from this Court's decision in *Waffle House*, but that

decision only underscores *Iskanian*'s error. In *Waffle House*, this Court held that the EEOC could not be compelled to arbitrate a civil enforcement action brought in its own name to redress violations of a specific employee's rights, even though the underlying employee was personally bound by an arbitration agreement. 534 U.S. at 297-98. This Court explained that the EEOC was not bound by the employee's arbitration agreement because the EEOC filed and controlled its own action and the EEOC never agreed to arbitrate the dispute. *Id.* at 291, 294.

The *Iskanian* court, purporting to avail itself of *Waffle House*, characterized a PAGA action as "a dispute between an employer and the *state*"—not "between an employer and an employee"—with aggrieved employees serving only as "agents" of the state, which did not agree to arbitrate. *Iskanian*, 327 P.3d at 151. The problems with this strained analogy are legion, starting with its premise. A PAGA action is very much "a dispute between an employer and an employee," *id.*, as this case demonstrates. No California official initiated this litigation; Moriana did, and she was entitled to initiate this litigation only because the state declined to bring suit. Moreover, there is simply no getting around the fact that here, in contrast to *Waffle House*, the person who initiated this litigation, *i.e.*, Moriana, also signed the arbitration agreement. When the same party signed the arbitration agreement and seeks to initiate litigation in contravention of its plain terms, *Waffle House* provides no safe harbor. The only relevant question is whether the dispute is within the scope of the arbitration agreement—*i.e.*, whether it arises out of the employment relationship between Moriana and

Viking. The dispute here plainly does, as a person may not bring a PAGA action unless he or she is "an aggrieved employee," Cal. Lab. Code §2699(a), defined as an employee against whom at least one of the alleged Labor Code violations was committed, *id.* §2699(c).

Far from justifying the decision below, *Waffle House* underscores that the arbitration agreement here and in other representative PAGA actions must be enforced. This Court held in *Waffle House* that the EEOC, proceeding on its own authority and in its own name, was not bound by an arbitration agreement signed by the employee on whose behalf it sought relief. That conclusion turned on the fact that the EEOC was "the master of its own case," with near-complete control over whether, when, and how to pursue relief. 534 U.S. at 290-91. The Court warned, however, that the result might be different if the employee-signatory could exercise some control over the EEOC's litigation—*e.g.*, if the "EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]." *Id.* at 291. But because it was the EEOC, and not the signatory employee, who controlled the litigation, the employee's arbitration agreement did not restrain the agency.

PAGA actions like Moriana's feature every problematic characteristic of that *Waffle House* hypothetical and then some. Moriana not only is the named plaintiff despite having personally signed the arbitration agreement, but also, like every PAGA plaintiff, she exercises virtually complete control over the action. Under PAGA, once the post-notice

administrative exhaustion period has transpired, the employee directs the litigation "without governmental supervision." *Iskanian*, 327 P.3d at 153; *cf. Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1062 (9th Cir. 2017) (holding that exception to automatic bankruptcy stay for government actions does not apply to PAGA claim because it is "under [the plaintiff's] control"). She has unfettered control over the content of her complaint, the violations she alleges, the "aggrieved employees" her PAGA claim encompasses, the theories of wrongdoing, and the remedy she seeks. Once she files her lawsuit, California "has no authority under PAGA to intervene," and the PAGA statute does not include any "procedural controls" that would allow California to assert authority over the case. *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021). Moriana, and not the state, can decide to waive the claim entirely (after it arises, but not *ex ante*), *Iskanian*, 327 P.3d at 149, or discontinue the litigation. Any settlement is subject only to the court's, not the state's, approval. Cal. Lab. Code §2699(*l*)(2). In short, from the moment a PAGA action is filed to the moment it concludes, the state is unable to exercise any control over it or direct it in any way. Thus, as the *Iskanian* concurrence acknowledged, far from supporting the *Iskanian* court's holding, *Waffle House* suggests "that the FAA preempts the [*Iskanian*] rule," because a PAGA plaintiff, not any California official, controls the litigation. *Iskanian*, 327 P.3d at 158 (Chin, J., concurring).

The state's interest in 75% of the PAGA recovery does not change the reality that the party who seeks to initiate litigation personally agreed to arbitrate

instead. That a monetary award is partially remitted to the state or serves broader public purposes makes no difference. *Waffle House* focuses on who initiates and controls the litigation, not who benefits from the relief. The fact that much of the relief the EEOC sought would inure to the benefit of the employee who agreed to arbitrate did not matter in *Waffle House*; what mattered was whether the party who initiated and controlled the litigation (*i.e.*, the EEOC) had agreed to arbitrate instead. Moreover, punitive damages advance the public interest, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), and several states require plaintiffs to give a portion of punitive-damages awards to the state,[3] but that does not make private agreements to arbitrate punitive-damages claims any less enforceable, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995). Similarly, this Court has likened an antitrust plaintiff to "a private attorney-general," with treble damages serving public purposes like deterrence rather than strictly compensating the plaintiff, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985), but that does not mean that private agreements to arbitrate antitrust claims are unenforceable, even when the constraints of bilateral arbitration make vindication of the public interest in competition extremely difficult, *see Italian Colors*, 570 U.S. at 238.

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[3] *E.g.*, Alaska Stat. §09.17.020(j); Ga. Code Ann. §51-12-5.1(e)(2); 735 Ill. Comp. Stat. Ann. 5/2-1207; Ind. Code Ann. §34-51-3-6(c); Iowa Code Ann. §668A.1(2)(b); Or. Rev. Stat. Ann. §31.735(1); Utah Code Ann. §78B-8-201(3)(a).

2. The *Iskanian* court's characterization of a PAGA claim as "a type of *qui tam* action" fares no better. *See Iskanian*, 327 P.3d at 148, 150-51. As an initial matter, that characterization, even if accurate, would not suffice to take PAGA claims "outside the FAA's coverage" for at least two reasons. First, the effect a relator's agreement to arbitrate has on a *qui tam* action under the False Claims Act ("FCA") is unsettled. *See, e.g.*, *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 794 (9th Cir. 2017) (noting that question was "interesting" but resolving case on other grounds); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 325 (4th Cir. 2001) (holding arbitration is not inconsistent with the FCA or the government's enforcement interests).[4] Second, even if this Court ultimately were to hold the FAA inapplicable to the FCA, that reconciliation of two federal statutes would not mean that comparable *state* statutes would fall outside the FAA. While Congress can exempt certain federal actions from the FAA just by making its intent sufficiently clear, neither state legislatures nor state courts have the same prerogative.

In all events, a state cannot avoid the FAA simply by attaching a *qui tam* label to an action that the named plaintiff (who personally signed the arbitration contract) fully controls. Whatever rule would apply in the case of a true *qui tam* action like an FCA claim, PAGA is fundamentally different. Unlike *qui tam*

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[4] The dearth of precedent is likely attributable to the fact that FCA claims are typically outside the scope of the issues that parties to an employment contract agree to arbitrate. *See, e.g.*, *Welch*, 871 F.3d at 800.

actions, a PAGA plaintiff represents her own interests (and other aggrieved employees), with liability and relief determined not according to whether the defendant's conduct affected the government, but according to whether the defendant's conduct affected the PAGA plaintiff and other "aggrieved employees." *Compare* 31 U.S.C. §3729 (providing for "3 times the amount of damages which the Government sustains"), *with* Cal. Lab. Code §2699(f)(2) (providing for penalties "for each aggrieved employee per pay period"), *and id.* §2699(c) (defining "aggrieved employee" as an employee "against whom one or more of the alleged violations was committed"); *see also* Cal. Senate Judiciary Comm., *Report on SB796*, at 6 (Apr. 22, 2003) ("[A] private action under [PAGA] would be brought by the employee on behalf of himself or herself or others … instead of on behalf of the general public."). This feature directly "conflicts with *qui tam*'s underlying assignment theory—that the real interest is the government's, which the government assigns to a private citizen to prosecute on its behalf." *Magadia*, 999 F.3d at 676.

Moreover, "a traditional *qui tam* action acts only as a *partial* assignment of the Government's claim," leaving the government free to "take complete control of the case if it wishes." *Id.* at 677. Under the FCA, for example, the federal government can intervene in a suit, can obtain a stay of the relator's attempts to undertake discovery, and can dismiss or settle the suit over the objections of the relator. *See* 31 U.S.C. §3730(b).[5] By contrast, "PAGA represents a

[5] The federal government's ability to intervene creates the possibility that a relator's arbitration agreement would govern

permanent, *full* assignment of California's interest to the aggrieved employee," *Magadia*, 999 F.3d at 677, with the state precluded from intervening in or otherwise supervising the litigation. Thus, not only is attaching a *qui tam* label to a state cause of action insufficient to take it outside of the FAA, but it would constitute mislabeling when it comes to PAGA, which does not share the key characteristics that create a debatable question when it comes to the FCA.

In the end, what is relevant here is not what label state courts attach to PAGA, but that Moriana agreed to arbitrate "any dispute" arising out of her employment. This is undoubtedly such a dispute. Indeed, the first prerequisite for bringing a PAGA action is that an individual be an "aggrieved employee" who has suffered at least one Labor Code violation. When, as here, "contracting parties agree to include [certain] claims … within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Mastrobuono*, 514 U.S. at 58 (emphasis omitted). That well-established principle is sufficient to decide this case. California is free to attach any label it wishes on PAGA for state-law purposes, but that label is insufficient to free the state from the scope of the FAA. For purposes of the FAA, what matters is not labels, but that someone who has signed

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absent the federal government's intervention, but not bind the federal government (a non-signatory to the agreement) if it intervenes. That is plainly not a possibility under PAGA, where the state can never intervene and the suit is always controlled and prosecuted by an employee who has agreed to arbitrate.

an arbitration agreement is seeking to litigate claims that fall squarely within the ambit of that agreement.

II. The *Iskanian* Rule Has Effectively Nullified *Concepcion* And *Epic* In California.

Rather than faithfully apply *Concepcion* and *Epic* to PAGA claims, California has limited those decisions to class actions and collective actions, while freeing PAGA suits that pose the same (if not greater) risks and are typically precluded in the same clause from the fetters of the FAA. The utterly predictable result has been that rather than allowing *Concepcion* and *Epic* to foster bilateral arbitration as this Court intended, California has simply caused the preferred form of arbitration-defying multilateral litigation to morph from class actions to employer-wide PAGA actions. Under *Iskanian*, plaintiffs who should be engaging in bilateral arbitration pursuant to the unambiguous terms of the agreements they signed can instead just replace the words "class action" in their pleadings with "PAGA action" and then proceed to litigate in court as if *Concepcion* and *Epic* never happened.

Iskanian itself demonstrates this maneuver in action, as the plaintiff alleged the exact same California Labor Code violations as both a class action and a PAGA action. 327 P.3d at 134. When *Concepcion* created an insuperable roadblock for his class-action claims, he simply turned to the PAGA claims and continued to litigate effectively the same case (without the need to satisfy the normal Rule 23 prerequisites). This is not an isolated phenomenon. In *Rosales v. Uber Technologies, Inc.*, 278 Cal.Rptr.3d 285 (Ct. App. 2021), *petition for cert. filed*, No. 21-526

(Oct. 6, 2021), for example, the plaintiff initially filed a class-action complaint, but when the defendant moved to compel arbitration, she replaced the class-action claim with a PAGA claim of the same scope. The court refused to compel arbitration of the PAGA claim, ruling that "[a]n employee cannot be compelled to submit any portion of his representative PAGA claim to arbitration." *Rosales v. Uber Techs., Inc.*, 2020 WL 10485886, at *3 (Cal. Super. Ct. Mar. 12, 2020). Likewise, in *Provost v. YourMechanic, Inc.*, 269 Cal.Rptr.3d 903 (Ct. App. 2020), the plaintiff filed a class-action lawsuit alleging multiple violations of California labor law. After this Court's decision in *Epic* and the defendant's invocation of a bilateral arbitration agreement, however, the plaintiff replaced the class-action claims with a PAGA claim based on the same allegations. The court denied the defendant's motion to compel arbitration of the PAGA claim, citing *Iskanian*. *See* Order 1-2, *Provost v. YourMechanic*, *Inc.*, No. 37-2017-00024056 (Cal. Super. Ct. Aug. 9, 2019).

The story is the same in federal court. In *Castillo v. Cava Mezze Grill, LLC*, 2018 WL 7501263 (C.D. Cal. Dec. 21, 2018), the plaintiff filed a class-action suit alleging multiple violations of California labor law. After the defendant invoked an agreement requiring individualized arbitration and waiving any "class action, collective action or any similar representative action," the court granted the defendant's motion to compel individualized arbitration of the class-action claims. *Id.* at *4-5. The plaintiff then sought leave to amend her suit to add a PAGA claim, *id.* at *5, which the court subsequently granted because, under *Iskanian*, "PAGA claims are not waivable," Order 4-5,

Castillo, No. 18-7994-MFW (C.D. Cal. Jan. 8, 2019), Dkt.24. In *Burrola v. United States Security Associates, Inc.*, 2019 WL 480575 (S.D. Cal. Feb. 7, 2019), the court compelled individualized arbitration of the plaintiff's class-action claims but granted the plaintiff's request to add a PAGA claim because, under *Iskanian*, a PAGA claim "is not subject to arbitration." *Id.* at *10. Likewise, in *Prasad v. Pinnacle Property Management Services, LLC*, 2018 WL 4586960 (N.D. Cal. Sept. 25, 2018), the court compelled individualized arbitration of the plaintiff's class-action claims but, citing *Iskanian*, granted plaintiff's request to add a PAGA claim "based on the same facts alleged in [the] original pleading." *Id.* at *2 n.3, *5-6. And so on. *Concepcion* and *Epic* have thus been transformed from powerful affirmations of the FAA and meaningful protections of contractual rights into little more than speed bumps that plaintiffs can overcome through barely-artful pleading.

The consequences of the *Iskanian* rule have been dramatic. Recent years have seen a massive surge in PAGA filings, as plaintiffs—or, more precisely, plaintiffs' lawyers—have realized that PAGA actions deliver all of the benefits of class actions with none of the FAA's (or even Rule 23's) limitations. Plaintiffs' lawyers openly admit as much, referring to PAGA as "an effective go around of the federal Supreme Court," Blumenthal Nordrehaug Bhowmik De Blouw LLP, *What Is The Private Attorney General's Act And Why Should California Workers Care?*, https://bit.ly/3ISstSl (last visited Jan. 31, 2022); lauding PAGA as "an essential weapon" "[a]s the nation's High Court shows increasing animus towards class actions," Bryan Schwartz & Cecilia Guevara

Zamora, *PAGA: A Decade of Victories*, Plaintiff Magazine 1 (Sept. 2014), https://bit.ly/3IJFq0A; and acknowledging that PAGA was rarely utilized before *Concepcion* but became a useful "alternative avenue" after *Iskanian*, which is why "PAGA actions … increased seemingly overnight," Glenn A. Danas, *Employee Perspective: PAGA 15 Years Later*, 33 Cal. Lab. & Emp. R., No. 4, July 2019, at 5.[6]

The annual number of PAGA notices has not just increased but exploded since *Concepcion*, from about 700 in 2005 to more than 6,500 in 2021. That explosion is not because employers have become ten times more likely to violate the Labor Code, but reflects PAGA's post-*Concepcion* status as a circumvention mechanism for the FAA and this Court's precedents.[7] California's state labor agency has projected that the numbers will continue to grow, forecasting that 7,200 PAGA notices will be filed in the 2022/2023 fiscal year. Cal. Dep't of Indus. Rels., *Budget Change Proposal – PAGA Unit Staffing Alignment* 7 (Apr. 2, 2019), https://bit.ly/3ca0NLn. The scope for ever-more PAGA notices is facilitated by both the Labor Code's regulation of virtually every minutiae of an employer's pay practices and the tendency of the California courts to extend the Labor

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[6] Some plaintiffs' lawyers are even less subtle. *See, e.g.*, *CA Lawyer Flaunts "MR PAGA" License Plate*, CABIA In The News (Jan. 27, 2020), https://bit.ly/3GcxBPh (reporting that named partner at "firm [that] ranks 4th in California for the number of PAGA claims it files" drove a Rolls Royce with a personalized "MR PAGA" license plate).

[7] The number of PAGA notices filed in any given year can be determined by searching the PAGA case search tool at https://cadir.secure.force.com/PagaSearch/PAGASearch.

Code extraterritorially, *see Ward v. United Airlines, Inc.*, 466 P.3d 309 (Cal. 2020). While not all of these notice letters lead to full-blown PAGA actions in court, many do—and the others often force employers into quick settlements to avoid the "small chance of a devastating loss." *Concepcion*, 563 U.S. at 350; *see, e.g.*, Joint Stipulation, *Castillo*, No. 18-7994-MFW (C.D. Cal. Jan. 10, 2020), Dkt.30 (noting settlement after court granted leave to file PAGA claim). Needless to say, when the principal use of a state statute has been to circumvent the FAA and this Court's FAA precedents, the statute's incompatibility with the FAA is plain.

Plaintiffs' lawyers' unbridled enthusiasm for PAGA is hardly surprising. Because employer-wide PAGA actions sweep so broadly and are not even encumbered by the traditional prerequisites for class certification, the size, scope, and potential monetary awards in a single PAGA action are staggering. *See, e.g.*, *Turrieta v. Lyft, Inc.*, 284 Cal.Rptr.3d 767 (Ct. App. 2021) (claims on behalf of 565,000 rideshare employees); Order And Final Judgment Approving Settlement, *Brown v. Wal-Mart Stores, Inc.*, No. 09-cv-3339 (N.D. Cal. Dec. 6, 2018), Dkt.292 (claims on behalf of over 100,000 current and former cashiers); *Sanchez* v. *McDonald's Rests. of Cal., Inc.*, 2017 WL 4620746, at *2 (Cal. Super. Ct. July 6, 2017) (approximately 10,000 employees at 119 restaurants); *Williams v. Superior Ct.*, 398 P.3d 69, 74-75 (Cal. 2017) (approximately 16,500 employees across 130 stores); Motion to Strike, *Ortiz v. CVS Caremark Corp.*, 2014 WL 2445114, at 2 (N.D. Cal. Jan. 28, 2014) (approximately 50,000 employees across 850 stores).

And while the aggrieved employees must hand over 75% of their recovery to the state, plaintiffs' lawyers usually take their cut off the top, collecting a percentage of the *gross* award instead of the portion the employees receive. This often leads to the lawyers taking home far more than the employees. In *Brown*, for example, the gross settlement amount was $65 million, with $10.7 million going to the employees and more than twice as much—$21.6 million—going toward attorneys' fees. *See* Order and Final Judgment, *Brown*, No. 09-cv-3339 (N.D. Cal. Mar. 28, 2019), Dkt.302.[8] Similarly, in *Price v. Uber Technologies, Inc.*, the gross settlement amount was $7.5 million, with $1.74 million going to the employees and $2.325 million to the lawyers. *See* Order Granting Joint Motion For Approval Of PAGA Settlement, *Price v. Uber Techs., Inc.*, No. BC554512 (Cal. Super. Ct. Jan. 18, 2018).

Finally, reversing the decision below would neither interfere with the state's interest in penalizing and deterring employers who violate California's labor laws, nor prevent individual employees from obtaining relief for violations of California's Labor Code. 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 Moriana alleges here. *See Wesson*, 283 Cal.Rptr.3d at 860 n.14 ("Preventing a plaintiff from using this procedure has no effect on the state's property rights."). Nothing that happens here will prevent individual employees who

[8] *Brown* also involved class-action claims, but only injunctive relief was granted on those claims.

did not agree to resolve disputes through bilateral arbitration—including by opting out of such an agreement, which Moriana declined—from pursuing a PAGA action. And nothing that happens here will prevent Moriana herself from pursuing relief for any Labor Code violations that actually affected her, as opposed to other employees. The only result of enforcing the parties' agreement is that Moriana will be required to honor her own promise to arbitrate on a bilateral basis, just like the individuals in *Concepcion* and *Epic* and just as the FAA requires.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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