No. 20-1573

IN THE
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF EMPLOYERS GROUP AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE

Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes in many different industries, which collectively employ nearly three million people. Employers Group seeks to enhance the predictability and fairness of the laws regulating employment relationships in California for the benefit of its employer members and the millions of individuals they employ.[1]

Because of its experience in employment matters, including appearances as amicus curiae in this Court, Employers Group is uniquely interested in both the impact and implications of the issues presented in employment cases such as this one. For decades, the California legislature has enacted laws, and courts in California have issued decisions, that flout the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., and this Court's jurisprudence regarding arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008). This case—applying a California Supreme Court rule that forecloses the bilateral arbitration of certain employment claims arising under California's Labor Code Private Attorneys General Act ("PAGA")—is the latest manifestation of Califor-

[1] Letters from both parties providing blanket consent for the filing of amicus briefs in this case are on file with the Clerk's office. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

nia's historic hostility to arbitration. That hostility flies in the face of this Court's precedents and the FAA. It also fails to "give effect to the contractual rights and expectations" of millions of California employers and employees, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotation omitted), each of which expected—and contracted for—the "speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013).

Amicus submits this brief to urge the Court to reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). The "principal purpose of" the FAA is "ensuring that private arbitration agreements are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

Giving effect to that purpose—and in response to the fact that the "judicial hostility towards arbitration that prompted the FAA" has continued to "manifest[] itself in a great variety of devices and formulas," *Concepcion*, 563 U.S. at 342 (quotations omitted)—this Court has repeatedly invalidated state rules that undermine agreements to arbitrate. Many such rules have emanated from California, with the California legislature and courts repeatedly attempting to evade the FAA's strictures, and this

Court repeatedly rejecting those efforts. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Concepcion*, 563 U.S. at 342; *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Preston*, 552 U.S. 346; *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

This case is the latest attempt by California to ignore the FAA and this Court's precedent. In *Concepcion* and *Epic*, this Court held that class- and collective-action waivers in arbitration agreements are enforceable and that the FAA preempts state-law rules that decline to enforce them. Yet California still applies precisely such a rule. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), the California Supreme Court held that representative-action waivers in arbitration agreements were unenforceable as applied to PAGA claims seeking to assert violations of *other* employees' rights because "a prohibition of *representative* claims frustrates the PAGA's objectives." *Id*. at 149. That rule is irreconcilable with *Concepcion* and *Epic*. Representative PAGA actions are no different than employment-law class or collective actions—the named plaintiff represents not just his or her own interests, but the interests of other non-party employees. And representative arbitration, no less than class or collective arbitration, is fundamentally inconsistent with the attributes of arbitration that the FAA is meant to protect. It is slower and more expensive; more procedurally complex; and creates unwarranted settlement pressure when compared to bargained-for bilateral arbitration procedures. *See Concepcion*, 563 U.S. at 348-51. States cannot preclude employ-

ees from agreeing not to arbitrate on a representative basis. That California has chosen to style PAGA claims as "representative" claims instead of "class" or "collective" claims makes no substantive difference.

Indeed, the California Supreme Court has never explained how its rule precluding employees from agreeing not to assert other employees' rights could be reconciled with the FAA or with this Court's cases. Neither has respondent. Instead, both have focused exclusively on *Iskanian*'s *separate* holding that PAGA claims cannot be completely waived because PAGA claims belong to the state. As respondent has framed the inquiry, "the agreement at issue purports to bar PAGA claims altogether, regardless of the forum." BIO 13. But that is not in fact the issue. Respondent agreed not to bring claims on a "representative" basis, and the issue is whether that agreement precludes her from representing other employees—*i.e.*, seeking penalties for violations sustained by non-party employees—as she seeks here. It does, and this is an easy case.

To be sure, there is some confusion in California's caselaw of its own making, spawned by *Iskanian*. "Representative" is at times used interchangeably to refer to an employee (i) acting as a proxy for the state, and (ii) seeking penalties on behalf of other employees. Indeed, as petitioner notes, the California Supreme Court has not addressed whether a PAGA plaintiff can elect to seek penalties only for violations suffered by her individually. *See* Br. for Petitioner at 15 n.1. It is really of no moment here, as the analysis under the FAA is rather simple. The FAA requires enforcement of the parties' agreement

for bilateral arbitration. If there can be an "individual PAGA claim," that claim can be compelled to arbitration and decided in that forum. Whether such a claim exists is a question of California law; this Court can leave that issue to the California Supreme Court. But if no such claim exists, the FAA compels dismissal under the parties' agreement because what California cannot do is create a "representative"- or "class"-only claim to circumvent the FAA. *See Concepcion*, 563 U.S. at 341.

California's PAGA-specific prohibition on agreements to arbitrate PAGA claims on a non-representative basis not only conflicts with this Court's cases, but also imposes the very harms that this Court has repeatedly warned against. In particular, "representative" PAGA claims seeking workforce-wide penalties create a massive "risk of 'in terrorem' settlements." *Concepcion*. 563 U.S. at 350. This concern is not merely theoretical—it has in fact materialized in recent years. PAGA claims seeking millions of dollars in penalties have skyrocketed in the wake of *Iskanian*, as enterprising plaintiffs (and their counsel) use PAGA "representative" actions as a procedural sleight of hand to avoid agreements to arbitrate bilaterally. These lawsuits, like class actions, exert enormous settlement pressure against businesses large and small—many relying on aggregate penalties for technical Labor Code violations—forcing them to pay up or take a bet-the-business gamble.

And it is not only large employers who are the targets of such threats—small businesses are, too, and it takes much less to exert this sort of settlement pressure on smaller businesses, who simply

cannot afford to take that gamble. One California small business owner, for example, was subject to a PAGA suit seeking $30 million in penalties because her business's paychecks listed the date the check was issued, instead of the dates the check covered (*i.e.*, 9/6/16 instead of 9/1/16-9/6/16)—truly a technical violation. Another small business spent over $100,000 in attorney's fees to respond to a letter asserting PAGA violations sent from a law firm that has filed over 800 similar claims. Small businesses obviously cannot withstand the sort of pressure imposed by even the threat of these kinds of suits, given the draconian penalties that are possible because PAGA plaintiffs are allowed to represent all employees, not just themselves.

Arbitration agreements of the sort at issue in this case serve to protect small businesses from such unwarranted litigation pressure, just as similar agreements mitigate similar pressures imposed by class action litigation. Federal law requires these agreements to be enforced, as this Court has repeatedly held. Yet California courts have simply ignored that federal-law obligation, as they have done repeatedly in the past. This Court should reverse.

ARGUMENT

I. CALIFORNIA'S PROHIBITION ON AGREEMENTS TO ARBITRATE ON A BILATERAL, NOT REPRESENTATIVE, BASIS IS FUNDAMENTALLY AT ODDS WITH THE FAA

Iskanian's rule prohibiting employees from agreeing not to represent other employees, including in arbitration, is preempted under this Court's prece-

dent because it operates as an obstacle to the FAA's objectives by undercutting the efficiency of bilateral arbitration. That conclusion resolves this case, because no one disputes that respondent's PAGA claim seeks penalties for violations sustained by other employees despite her agreement to arbitrate on a bilateral basis. The assertion in *Iskanian* that PAGA actions resemble *qui tam* actions is both irrelevant to the question presented and incorrect.

A. *Iskanian* Invalidated "Representative"-Action Waivers On State Policy Grounds

As noted above, the California Supreme Court in *Iskanian* confusingly used the term "representative" to describe "two distinct" features of a PAGA claim. *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 866 n.6 (2017). "*Iskanian* characterizes PAGA claims as representative because they are brought by employees acting as representatives—that is, as agents or proxies—of the state." *Id.* But "*Iskanian* also describes an employee's PAGA claim as representative when it seeks penalties on behalf of other employees." *Id.* Only the latter feature is relevant to the question presented here, which is whether respondent's agreement not to represent other employees in arbitration must be enforced.

1. As relevant here, the question in *Iskanian* was whether a California employer could enforce an arbitration agreement with a "representative action waiver." 327 P.3d at 133; *see id.* at 144. The California Supreme Court held that state policy precluded the waiver for two separate reasons. *Id.* at 148-49. First, *Iskanian* held that California statutes preclude "agreement[s] by employees to waive their

right to bring a PAGA action," whether in litigation or in arbitration. *Id.* at 149. For ease of reference, we will refer to this holding as *Iskanian*'s "no waiver" rule. Second, and of paramount importance here, *Iskanian* held that the representative-action waiver violated California public policy because "a prohibition of *representative* claims" in arbitration would "frustrate[] PAGA's objectives." *Id.*

"Representative" in this context meant Iskanian's right to sue not only for statutory violations to which he was subject but also for violations sustained by *other* employees. *See* Cal. Labor Code § 2699(a) (authorizing "an aggrieved employee [to file a claim] on behalf of himself or herself and other current or former employees"). In the California Supreme Court's view, "[a] single-claimant arbitration under the PAGA for individual penalties 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," and thus was impermissible under California public policy. *Iskanian*, 327 P.3d at 149 (quotations omitted).

Put simply, the California Supreme Court held that PAGA claims were unwaivable (regardless of the forum) *and* that an employee could not waive in arbitration the right to bring a PAGA claim in a "representative" capacity—*i.e.*, to assert other employees' violations.

2. *Iskanian* also considered whether its blanket "no waiver" rule was preempted by the FAA. The answer was no, the California Supreme Court held, because PAGA claims are "representative." *Id.* at 152. But here, the word "representative" meant

something different: "[a] PAGA representative action is … a type of *qui tam* action" in which the plaintiff represents the state. *Id.* at 148. In the *Iskanian* court's view, "the 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.* at 149. Because a PAGA plaintiff represents the government, the California Supreme Court reasoned, "[a] PAGA claim lies outside the FAA's coverage." *Id.* at 151.

3. There is thus a disconnect between *Iskanian*'s holding that an employee cannot agree not to represent other employees and its FAA analysis. *Iskanian* held that the FAA does not apply to California's "no waiver" rule because a PAGA plaintiff represents the state. But *Iskanian* failed to evaluate under the FAA its separate holding that a PAGA plaintiff cannot agree not to represent other employees. The question in this case concerns this latter rule, for Moriana agreed to arbitrate on a bilateral, not representative, basis, and that agreement, if enforceable, would preclude her from representing other employees. That agreement is enforceable under the FAA and this Court's established precedent. *Iskanian*'s holdings that plaintiffs cannot waive PAGA claims completely and that PAGA claims resemble *qui tam* actions under the False Claims Act ("FCA"), even if correct, are irrelevant.

B. California's Rule Prohibiting Employees From Agreeing Not To Assert Violations Against Other Employees Is Preempted

The critical feature of respondent's PAGA claim is that it demands relief not only for alleged violations of California's Labor Code that affected her personally, but also for those that affected hundreds of other employees. And the critical "*Iskanian* rule" is the California Supreme Court's holding that bilateral agreements to arbitrate on a non-representative basis may not be enforced when an employee brings PAGA claims seeking relief on behalf of herself and other employees. *Iskanian*, 327 P.3d at 148. This Court has held that state-created rules that stand as an obstacle to the accomplishment of the FAA's objectives, *see Epic*, 138 S. Ct. at 1622; *Concepcion*, 563 U.S. at 342, or selectively disfavor arbitration, *see Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV*, 577 U.S. 47, are preempted by the FAA. The California rule invalidating agreements not to pursue PAGA penalties on behalf of other employees violates both principles.

1. *California's rule precluding waiver of the right to seek PAGA penalties on behalf of other employees frustrates the purposes and objectives of the FAA*

Section 2 of the FAA provides that a written agreement to arbitrate "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. This last clause, the FAA's saving clause, is not without limit: "Although § 2's saving clause preserves generally applicable contract defenses,

nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. And that is what California's rule precluding employees from agreeing not to assert PAGA violations on behalf of other employees in arbitration does.

a. Just as arbitration agreements cannot be invalidated by "defenses that apply only to arbitration," they also cannot be invalidated by rules "that target arbitration … by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic*, 138 S. Ct. at 1622 (quotation omitted). One such attribute is arbitration's bilateral nature.

As this Court has repeatedly made clear, the FAA "envision[s]" an "individualized form of arbitration." *Lamps Plus*, 139 S. Ct. at 1416 ("recogniz[ing] the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA"); *accord Epic*, 138 S. Ct. at 1622 ("[B]y attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes."); *Concepcion*, 563 U.S. at 348 (noting that the "switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality"); *Stolt-Nielsen*, 559 U.S. at 685 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator"). The individualized nature of arbitration is essential to maintain "the virtues Congress originally saw in arbitra-

tion, its speed and simplicity and inexpensiveness," without which "arbitration would wind up looking like the litigation it was meant to displace." *Epic*, 138 S. Ct. at 1623.

This Court has already held that contract defenses "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures," *Concepcion,* 563 U.S. at 336, or collective ones, *Epic*, 138 S. Ct. at 1622, are inconsistent with the FAA. The FAA thus "seems to protect pretty absolutely" arbitration agreements that require "one-on-one arbitration" using "individualized rather than class or collective action procedures." *Id*. at 1619, 1621. In *Concepcion*, the Court explained that several overlapping features of class arbitrations operated to undercut the fundamental nature of bilateral arbitration—it makes the arbitration process slower and more costly; it creates procedural complexity inherent in adjudicating the interests of additional parties; and it greatly increases settlement pressure for defendants. 563 U.S. at 348-51. Requiring classwide arbitrations thus conflicted with the FAA.

b. The characteristics of class actions and collective actions this Court identified in *Concepcion* and *Epic* as incompatible with bilateral arbitration apply with equal force to "representative" PAGA claims asserting violations on behalf of other employees.

First, *Concepcion* explained that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final

judgment." 563 U.S. at 348. Parties agreeing to arbitrate bilaterally "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs, greater efficiency and speed," *id.* (quotation omitted), benefits that are lost in proceedings implicating the interests of additional parties.

The same is true of PAGA claims brought on behalf of other employees. Because an employee can bring PAGA claims even for violations that did not affect her personally, *see Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 750 (2018) (PAGA "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"), the arbitrator would also have to make specific determinations about the existence of each alleged violation—considering an entirely separate universe of evidence, irrelevant to the plaintiff's own claim. These "additional tasks and procedures necessarily make[] the process substantially slower, substantially more costly, and more likely to generate procedural morass than nonrepresentative, individual arbitration." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 444-45 (9th Cir. 2015) (Smith, J., dissenting).

And regardless of the type of violations alleged, the process is indisputably more labor-intensive, which was *Concepcion*'s concern. If a PAGA claimant is successful in proving that her employer violated the California Labor Code, civil penalties are assessed against the employer in many circumstances in the amount of "one hundred dollars ($100) for each aggrieved employee per pay period for the ini-

tial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Labor Code § 2699(f)(2). For a PAGA claim seeking relief only for the individual plaintiff, the arbitrator could rely on the employee herself to provide documentation of her own pay periods, and to provide personal knowledge of the violation at issue. But for a PAGA claim brought on behalf of absent employees, an arbitrator "would have to 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 444-45 (Smith, J., dissenting).

Second, and relatedly, *Concepcion* emphasized that the interests of additional parties create additional procedural complexity. *See* 563 U.S. at 349. Again, the same can be said of PAGA claims seeking relief for other employees. As just described, such claims implicate procedures that would not be necessary with a plaintiff seeking individual relief only. For claims seeking relief for Labor Code violations against other employees, "discovery [would be] necessary to obtain … documents from the employer" concerning those employees, and the processes would be "substantially more complex than discovery regarding only the employee's individual claims." *Sakkab*, 803 F.3d at 446-47 (Smith, J., dissenting). Of course, whatever procedures are necessary will become more onerous as the number of employees at issue increases—which could be hundreds, as in this case, *see* Pet. 14, or even thousands, *see* Br. for Petitioner at 47 (collecting cases); *see also O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1115 (N.D.

Cal. 2016) ("over 240,000" individuals); Compl., *O'Bosky v. Starbucks Corp.*, 2015 WL 2254889, at *2 (Cal. Super. Ct. May 4, 2015) (more than 65,000 employees).

Respondent notes that PAGA proceedings do not require the same formal procedural processes as class actions, including "class certification, notice, [and] opt-out rights." BIO 24-25. But it's not clear why this distinction matters. This Court's point about procedural requirements in *Concepcion* was not tethered to the specifics of Rule 23; *Epic* teaches as much. Recounting the procedural concerns voiced in *Concepcion*, this Court in *Epic* described the class-specific procedural formalities as concerning not so much because of their particular Rule 23 pedigree, but rather because they injected procedural complexity into an arbitration *that the parties had agreed would not be procedurally complex*. *See Epic*, 138 S. Ct. at 1623 (class-specific procedures "would take much time and effort, and introduce new risks and costs for both sides").

PAGA claims seeking relief for dozens, hundreds, thousands, or tens of thousands of employees are undoubtedly more procedurally complex than those seeking relief for an individual violation, whether or not governed by Rule 23 or its state-law analogue. Indeed, because PAGA claims seeking relief on behalf of other employees are *not* subject to the requirements of Rule 23, arbitration of such claims are likely to produce a proceeding even less efficient and more costly and procedurally complex than class arbitration. California courts have acknowledged this distinction, explaining that "PAGA claims may well present more significant manageability concerns

than those involved in class actions" because those claims "can cover disparate groups of employees and involve different kinds of violations raising distinct questions." *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746, 766 (2021); *cf.* Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 416 (2016) (explaining that "courts have been wary of encountering class action problems in PAGA suits").

Third, *Concepcion* explained that "class arbitration greatly increases risks to defendants." 563 U.S. at 350. Where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," it increases the pressure to settle instead of "bet[ting] the company with no effective means of review." *Id.* at 350-51.

The same is true in PAGA actions seeking relief on behalf of other employees. Given that the civil penalties available increase when sought by reference to hundreds or thousands of employees for multiple years, "[e]ven a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013). These outsized PAGA penalties pose the same "unacceptable" risk of "devastating loss" that arises "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," placing enormous pressure on defendants to settle. *Concepcion,* 563 U.S. at 350; *see also infra* Section II.

All three features of class arbitration discussed in *Concepcion* speak to one fundamental concern:

When the parties bargained for an efficient, one-on-one arbitration proceeding, inserting additional complexities into the equation robs them of the benefit of that bargain. That concern applies with equal force in the context of PAGA claims seeking relief on behalf of other employees.

2. *California's rule precluding waiver of the right to seek PAGA penalties on behalf of other employees is not a generally-applicable contract defense*

The *Iskanian* rule preventing employees from agreeing not to represent other employees also runs afoul of the FAA for a more basic reason: it does not even qualify as a "generally applicable contract defense" that would fall within the FAA's saving clause in the first place. Arbitration agreements cannot be voided "by defenses that apply only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 563 U.S. at 339. Rather, only "*generally applicable contract defenses*, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis added). The *Iskanian* rule precluding a PAGA plaintiff from agreeing not to represent other employees is not such a defense.

a. Here, California has prevented an agreement not to assert other employees' interests for a single type of claim (PAGA) in a single type of contract (employment dispute resolution agreements) based on policy concerns specific to arbitration. *See Iskanian*, 327 P.3d at 149 ("[A] single-claimant arbi-

tration under the PAGA for individual penalties 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." (quotations omitted)).

This type of specialized public-policy defense is nothing like the generally-applicable common law doctrines (*e.g.*, fraud, duress, or mutual mistake) encompassed within the FAA's savings clause. *See Sakkab*, 803 F.3d at 443 n.1 (Smith, J., dissenting) (expressing "serious doubts that the rule established by *Iskanian* falls into the same category as … common law contract defenses"); *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 59 n.2 (9th Cir. 2021) (Bumatay, J., concurring) (same); *see also Concepcion*, 563 U.S. at 352–55 (Thomas, J., concurring) ("Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.").

b. The rule is not "generally applicable" for another reason. Despite the California Supreme Court's "attempt to cast the rule in broader terms," *Kindred*, 137 S. Ct. at 1427, it has been uniquely applied to prevent the enforcement of bilateral arbitration agreements. In both *Kindred* and *DIRECTV*, the Court noted the lack of examples outside the arbitration context in which the rule had been applied. *See Kindred*, 137 S. Ct. at 1427 ("No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees."); *DIRECTV*, 577 U.S. at 57 (similar). So too with the *Iskanian* rule, which does not appear to

have been cited by any court outside the arbitration context.

This Court has repeatedly emphasized that selective targeting of arbitration agreements cannot be sustained, whether the state rule at issue disfavors arbitration outright or more "covertly." *Kindred*, 137 S. Ct. at 1426. California's scheme, applied uniquely in the context of arbitration agreements, acts as precisely the sort of covert attack on arbitration this Court has warned against.

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The first line of this Court's opinion in *Epic* sets forth the relevant question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" 138 S. Ct. at 1619. The answer was yes in *Epic* and *Concepcion*, and it is yes here for the same reasons.

C. Respondent's Attempt To Characterize PAGA Claims As *Qui Tam* Actions Is Both Irrelevant And Wrong

The question, then, is whether the notion that PAGA plaintiffs purportedly represent the state in some sense alters the analysis above. *Iskanian* never addressed that question—it evaluated only whether California's separate "no waiver" rule violated the FAA, and concluded that it did not because a PAGA plaintiff represents the state's interests in something loosely resembling a *qui tam* proceeding. 327 P.3d at 386. Like *Iskanian*, respondent mounts a vigorous defense of California's "no waiver" rule, arguing that "[i]t is perfectly coherent, and consistent with the terms and purposes of the FAA, to

recognize that an employee must be permitted to bring a PAGA representative claim *in some forum* because the State is not bound to a waiver to which it did not agree." BIO 19. In fact, she goes so far as to argue that "[t]his case is not about whether the FAA requires enforcement of an agreement providing for arbitration of a particular claim on an individual basis." *Id*. at 13.

But that is *exactly* what this case is about. Respondent agreed not to arbitrate on a representative basis, and that agreement, by its terms, precludes her from representing other employees. *Iskanian* held that "a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter" and thus agreements like respondent's are unenforceable as a matter of state policy. 327 P.3d at 149 (quotations omitted). *Iskanian*'s "no waiver" rule is simply irrelevant to *that* issue, as is *Iskanian*'s holding that the FAA does not preempt its "no waiver" rule because a PAGA plaintiff purportedly represents the state. That is because respondent's agreement not to arbitrate on a representative basis does not require her to waive her PAGA claim—all it requires is bilateral resolution of that claim. But even if it did, FAA preemption would still apply for the same reason the FAA would preempt a class-action-only statute: states cannot create claims and exempt them from arbitration or procedural devices that do the same.

1. Whether a PAGA plaintiff purportedly represents the state has no bearing on the entirely separate question whether the FAA preempts a state-law rule precluding employees from agreeing to seek

penalties only for violations that they themselves sustained. That much is evident from *Iskanian* itself. In *Iskanian,* the alleged governmental character of a PAGA claim was relevant only to the California Supreme Court's blanket "no waiver" rule, because, the court erroneously believed, governmental claims fall entirely "outside the FAA's coverage." 327 P.3d at 151. But *Iskanian* never justified its rule precluding employees from agreeing not to pursue other employees' violations on the government's interest, nor did it assert that such an interest might take *that* rule outside the scope of the FAA.[2]

Perhaps the argument is that respondent's agreement not to arbitrate on a representative basis *is* effectively a waiver of a PAGA claim outright. The argument would go something like this: PAGA claims cannot be litigated "individually"—a PAGA plaintiff is *required* to assert other employees' violations. If that is true, then an arbitration agreement waiving the right to assert a "representative" PAGA claim would de facto waive the employee's right to bring the claim at all. And that would implicate *Iskanian*'s "no waiver" rule under which a plaintiff cannot waive a claim that belongs to the government.

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[2] *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), is irrelevant for the same reason. *Iskanian* (incorrectly) cited *Waffle House* in support of its holding that the FAA did not preclude its "no waiver" rule. Moreover, *Waffle House* does not even support the California Supreme Court's reasoning because the party who sued here was the same one who signed the arbitration agreement, unlike in *Waffle House*. *See* Br. for Petitioner at 36-36.

If that is the argument, it is wrong for two reasons. First, the California Supreme Court has not decided that an employee cannot bring a PAGA claim seeking penalties only for violations that she herself sustained. *See Iskanian*, 327 P.3d at 148-49; *supra* at 4-5. The fact that all PAGA actions are inherently "representative" *on behalf of the state* says nothing about whether such actions must also necessarily be "representative" *on behalf of other employees*. On that score, the California Supreme Court has never held that PAGA plaintiffs are *required* to assert other employees' violations. *See Iskanian*, 327 P.3d at 151 (indicating that a PAGA action could "seek[] penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well." (quotations omitted)).

Nor would such a rule make sense. Like any enforcement agency, California's Labor and Workforce Development Agency surely can choose not to assert all employees' violations in a single action in the exercise of its discretion—and a PAGA plaintiff (by hypothesis) stands in the agency's shoes. Likewise, PAGA plaintiffs retain the right to define the set of aggrieved employees they represent, and nothing in the statute requires them to define that set as broadly as possible. The statute is permissive. Cal. Labor Code § 2699(a) (aggrieved employee "may" sue "on behalf of himself or herself and other current or former employees").

There is, in short, no reason why a PAGA plaintiff could not seek a remedy only for her own statutory violation, and thus be compelled to arbitrate that claim. That means that an agreement not to arbi-

trate on a representative basis does not preclude a PAGA plaintiff from arbitrating such a PAGA claim. And it means that the *Iskanian* court's argument—that PAGA's purported *qui tam* character precludes employees from agreeing not to *waive* claims representing the state—is a non sequitur, because the agreement does not require respondent to waive her claim or the state's claim. Again, that agreement only requires her to arbitrate that claim on behalf of herself and not other employees. Of course, whether such a claim exists in the first instance is a question of California law that can only be decided by the California Supreme Court. *See supra* at 4-5.

Second, even if a representative-action waiver precluding employees from seeking remedies on behalf of others *did* preclude PAGA claims altogether, the California rule would still be preempted for the same reason that a class-action-only statute would be preempted. A state cannot circumvent the FAA's requirements by creating a claim that can only be asserted in proceedings that are incompatible with arbitration. That type of rule would clearly disfavor arbitration by creating a claim that cannot be arbitrated at all. And a "rule prohibiting arbitration of a particular type of claim … is contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam); *see Concepcion*, 563 U.S. at 341 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); *see also Sakkab*, 803 F.3d at 450 (Smith, J., dissenting) ("A state may not insulate causes of action from arbitration by declaring that the purposes of the statute can only

be satisfied via class, representative, or collective action."). That is all the more true here, because PAGA is simply a procedural device for asserting underlying Labor Code violations.

Respondent implicitly recognizes as much, conceding that PAGA claims are not fundamentally at odds with arbitration and claiming instead that "*Iskanian* is not premised on objection to *bilateral* proceedings as long as [those proceedings] allow full assertion of PAGA claims." BIO 23. But in seeking to avoid one doctrinal issue, respondent runs headlong into another. "[F]ull assertion of PAGA claims," in respondent's view, includes assertion of claims seeking penalties on behalf of other employees. But to say that *Iskanian* does not preclude arbitration of PAGA claims via bilateral proceedings *so long as they aren't actually bilateral proceedings* runs counter to the FAA for the reasons discussed *supra* Section I.B.

2. The state's interest in PAGA claims is also irrelevant because "PAGA differs in significant respects from traditional *qui tam* statutes." *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 676 (9th Cir. 2021).

Most fundamentally, the nature of the government's injury is different. In *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that FCA relators assert the government's "proprietary injury," *id.* at 771, and thus have standing because the FCA "can reasonably regarding as effecting a partial assignment of the Government's damages claim," *id.* at 773. The same is not true of a PAGA claim. To be sure, 75%

of any recovery in a PAGA action goes to the state. Cal. Lab. Code § 2699(i). But a PAGA claim does not assert any proprietary injury *of the government's* but rather seeks to collect a statutory penalty for injuries sustained by the plaintiff and other employees. Whereas an FCA relator's injury flows from the government's, the government's injury (and recovery) in a PAGA case is purely derivative of the employees' injuries.

Another "atypical (if not wholly unique)" aspect of a PAGA claim is that it "implicates the interests of other third parties." *Magadia*, 999 F.3d at 676-77. PAGA plaintiffs may bring PAGA claims not only on behalf of themselves but also on behalf of "other current or former employees." Cal. Labor Code § 2699(a). And unlike the FCA, "PAGA requires that 'a portion of the penalty goes not only to the citizen bringing the suit but *to all employees affected* by the Labor Code violation.'" *Magadia*, 999 F.3d at 676 (quoting *Iskanian*, 327 P.3d at 148). As even the California Supreme Court has recognized, this feature of PAGA is a major departure from the "traditional criteria" for *qui tam* actions. *Iskanian*, 327 P.3d at 148.

PAGA litigation is also "an anomaly among modern *qui tam* statutes" because the government exercises no control over PAGA litigation. *Magadia*, 999 F.3d at 677. Once private PAGA litigation begins, "the State has no authority under PAGA to intervene," *id.*, and the plaintiff litigates "without governmental supervision," *Iskanian*, 327 P.3d at 153. A PAGA plaintiff can even settle her claim without government oversight. *Compare* Cal. Labor Code § 2699(*l*)(2) (no express right for state to comment on

settlement), *with id.* § 2699.3(b)(4) (expressly granting the state the right to comment on OSHA settlements). "PAGA thus lacks the 'procedural controls' necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains substantial authority over the case." *Magadia*, 999 F.3d at 677 (quotations omitted). By contrast, the federal government retains significant control over FCA litigation: it "can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed." *Id.* (citing 31 U.S.C. § 3730(b)-(f)). The "degree" to which the State cedes control of PAGA litigation "undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.*

All of these features demonstrate that a PAGA action—at least when brought on behalf of other employees—more closely resembles a class or collective action than a true government claim. So to the extent that issue is relevant even in theory, it makes no difference in fact—PAGA claims are not materially different than class or collective actions. And the FAA preempts rules precluding agreements not to arbitrate PAGA claims on a representative basis for the same reasons it preempts waivers of class or collective action claims.

II. EMPLOYERS (AND EMPLOYEES) ARE HARMED WHEN THEY CANNOT AGREE TO STREAMLINED ARBITRATION PROCEDURES

California's judge-made policy precluding employees from agreeing to resolve PAGA claims through bilateral arbitration not only violates the FAA, but also imposes real-world harm on amicus's members and other California employers—in particular small businesses.

1. Before *Iskanian*, PAGA claims were brought, if at all, on "the coattails of traditional class claims," because the requirement that plaintiffs turn over 75% of their recovery to the state made PAGA less attractive. *See* Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 1-2 (2013).

But PAGA actions seeking penalties on behalf of other employees skyrocketed in the wake of *Iskanian* as employees (and lawyers) sought to circumvent *Concepcion* and evade their agreements to arbitrate bilaterally. *See, e.g.*, Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103, 127-28 (2015) (plaintiffs have turned to PAGA as "a means … to avoid arbitration"); Tim Freudenberger *et al.*, *Trends in PAGA claims and what it means for California employer*s, Inside Counsel (Mar. 19, 2015) (in the wake of *Concepcion*, PAGA has become "a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agree-

ments"); Erin Coe, Iskanian *Ruling to Unleash Flood of PAGA Claims*, Law360 (June 24, 2014) (similar).

Data on the volume of PAGA litigation proves the point. In 2005, the year after PAGA was enacted, plaintiffs filed 759 PAGA notices—the precursor to litigation required by the statute. *See* Emily Green, *State Law May Serve As Substitute for Employee Class Actions*, Daily Journal (Apr. 17, 2014). By 2013, in the aftermath of *Concepcion* but prior to *Iskanian*, that number had already increased to 3,137. *Id.* And since *Iskanian*, the number has predictably continued to grow: Today, on average, more than 17 new PAGA notice letters are filed *every day*. *See* Br. for Petitioner at 18. The California Labor and Workforce Development Agency itself projected that more than 6,000 PAGA notices would be filed with the agency in fiscal year 2019-2020 and that the number would continue to increase, with more than 7,700 filed in fiscal year 2022-2023. *See* Cal. Department of Industrial Relations, Budget Change Proposal – PAGA Unit Staffing Alignment at 7 (April 2, 2019), https://bit.ly/3ca0NLn.

2. The increasing number of PAGA actions filed every year presents a significant risk to businesses across California, especially the thousands of small businesses represented by amicus.

PAGA suits asserting claims on behalf of other employees often exert "unacceptable" pressure on defendants to settle, due to the "small chance of a devastating loss." *Concepcion*, 563 U.S. at 350. Because PAGA exposes employers to civil penalties for every Labor Code violation, plaintiffs bringing PAGA claims frequently seek millions of dollars in penal-

ties. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 451 (2018) ("Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries.").

And while the eye-popping numbers for potential penalties generally apply to large companies, the devastating effect of PAGA suits are especially salient for small businesses, because a far smaller litigation risk would be sufficient to coerce defendants into settlement. A few examples illustrate the point:

California Assembly Member and small business owner Shannon Grove was subject to a PAGA suit claiming $30 million in penalties, which she ultimately settled for just under half a million dollars. The $30 million price tag came from Grove's purported failure to issue paychecks with inclusive dates—for instance, the paycheck would list the date the check was issued, instead of the dates the check covered (*i.e.*, 9/6/16 instead of 9/1/16-9/6/16). The violation: trivial; potential penalties: massive.[3]

Ken Monroe, the owner of a family-owned business that sells construction equipment, described being subject to a PAGA suit for allowing employees to decide when to take their lunch breaks, instead of adhering to state law requiring that hourly employees take a half-hour meal period after five hours of work. "As I learned the hard way," Monroe wrote, "these penalties can add up fast, easily reaching

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[3] *See* Ken Mashinchi, *Grove and Salas contend that PAGA lawsuits are killing Kern County businesses*, ABC 23 News (Sep. 6, 2016), https://www.turnto23.com/news/local-news/grove-and-salas-contend-that-paga-lawsuits-are-killing-kern-county-businesses.

hundreds of thousands of dollars for a small company like ours (and millions for larger businesses)." And "[l]ike virtually all companies that find themselves the target of a PAGA or class-action lawsuit," Monroe's business "negotiated a settlement rather than take the risk of losing in court and facing the onerous maximum penalties prescribed by the law."[4]

Another small business owner had received a letter asserting various PAGA violations from a law firm that has filed over 800 similar claims. "They throw those accusations at you and expect you to defend yourself and just bury you in paperwork. We've already spent well north of $100,000 in attorney fees and that doesn't include all the staff time to audit all the payroll records and time sheets," the business owner said.[5]

Voluntary agreements to arbitrate bilaterality can establish some predictability for these small businesses and other of amicus's members, preventing exposure to the in terrorem settlement risk caused by multiple sets of PAGA penalties. But by allowing PAGA to "function as a 'back-door' route to a class action lawsuit," California's rule "greatly in-

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[4] *See* Ken Monroe, *Op-Ed: Frivolous PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employers*, L.A. Times (Dec. 6, 2018), https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html.

[5] *See* Ken Monroe, *Another Voice: It's time to repeal PAGA now. The fate of small businesses hinges on it.*, Sacramento Business Journal (Oct. 14, 2021), https://www.bizjournals.com/sacramento/news/2021/10/14/paga-family-business-association.html.

creases the potential liability for an employer-defendant." Goodman, *supra,* at 420.

3. Without this Court's intervention, the harms described above are certain to spread beyond California's borders, and could disrupt arbitration agreements beyond the employment context.

A number of observers have urged other states to adopt similar statutes explicitly for the purpose of "bypass[ing] any arbitration agreement in a consumer contract." Aaron Blumenthal, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699, 742 (2015); Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to Concepcion*, 46 U. Mich. J.L. Reform 1203, 1208-09 (2013) (suggesting "ways [PAGA] could be adapted to authorize private aggregate enforcement of consumer and employment laws without triggering FAA preemption or vulnerability to contractual class waivers").

States have taken notice. "By the 2019-2020 legislative session, no fewer than nine other states were actively in the process of considering bills similar to PAGA, including Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont and Washington." Charles Thompson *et al.*, *Employers Must Brace For PAGA-Like Bills Across US*, Law360 (June 18, 2021); *see also* Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020) (describing the potential spread of PAGA laws across the country); Josh Eidelson, *California Helps Workers Sue Their Bosses.*

New York Has Noticed, Bloomberg (Sept. 29, 2017) (same).

And if this Court were to bless California's attempt to circumvent the FAA, PAGA-style laws could also be enacted in areas outside the employment context: States "could theoretically enact" statutes permitting such "claims for state tax violations" or "environmental law violations," for example. Lauren Picciallo, *Qui Tam Claims - A Way to Pierce the Federal Policy on Arbitration?: A Comment on* Sakkab v. Luxottica Retail North America Inc., 8 Y.B. On Arb. & Mediation 132, 139 (2016). States could thereby exempt categories of disputes entirely from arbitration, turning this Court's FAA jurisprudence upside-down.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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