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

REPLY BRIEF

DOUGLAS A. WICKHAM
IAN T. MAHER
LITTLER MENDELSON, P.C.
633 West Fifth Street
63rd Floor
Los Angeles, CA 90071

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
DARINA MERRIAM
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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REPLY BRIEF

Moriana agreed to arbitrate "any dispute" arising out of her employment and specifically agreed that the arbitration would be bilateral. JA86. Undeterred, she sought to leverage a single Labor-Code violation alleged to affect her personally to bring a PAGA claim in court "on behalf of all aggrieved employees." JA12. In justifying that double disregard of her agreement to arbitrate and to do so bilaterally, she relied on *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and its holding that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. Moriana now turns her back on *Iskanian*, relegating its reasoning to "an alternative basis for affirmance" at the back of her brief. Resp.Br.43-45. She likewise downplays the Ninth Circuit's reasoning in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), insisting that her argument "does not depend on section 2's saving clause." Resp.Br.38. Instead of defending the decisions that brought her here, Moriana attempts to recast her agreement to arbitrate bilaterally as an effort to "immunize" Viking from liability in any forum. *Id.* at 11.

The first of many problems with that argument is that the parties' agreement calls for bilateral arbitration of any dispute arising out of Moriana's employment, not immunity. While the agreement seeks to preserve the traditional, bilateral nature of arbitration by precluding Moriana from seeking relief for others via class actions, collective actions, or PAGA actions, Viking remains liable to Moriana in arbitration for any Labor-Code violation that affected her personally (and for other violations in litigation

brought by the state or other employees who opted out of the class-action/PAGA waiver). Simply put, the waiver of representative PAGA claims as part of an agreement for bilateral arbitration is no more an exculpatory clause (or less an arbitration agreement) than the class-action waiver enforced in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), or the collective-action waivers enforced in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

Moriana argues that *Concepcion* and *Epic* apply only to waivers of procedural mechanisms, but the California Supreme Court has squarely held that PAGA is procedural. She argues that employer-wide PAGA claims are compatible with traditional arbitration, but the chasm in terms of procedural complexity and potential liability between an arbitration of Moriana's own Labor-Code complaint and those of *all* her fellow employees is enormous. Moriana's claim that her final paycheck came too late is the stuff of bilateral arbitration. Disparate claims of virtually every Viking employee (or 565,000 Lyft drivers or 100,000 Wal-Mart workers, *see* Pet'r.Br.47) are wholly unsuited for streamlined arbitration with minimal appellate rights. And Moriana's brief effort to defend *Iskanian*'s actual reasoning founders on the undeniable fact that, in contrast to *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the party who initiated litigation here is the same party who agreed to arbitrate. The threat to bilateral arbitration from representative PAGA actions is plain and borne out by the explosion of PAGA litigation in the wake of *Concepcion* and *Epic*. This Court should reaffirm those precedents and reverse the decision below.

ARGUMENT

I. The FAA Requires Enforcement Of The Parties' Agreement.

A. The Parties' Agreement Does Not Exculpate Viking From Labor-Code Liability But Merely Requires Bilateral Arbitration.

Moriana does not deny that she agreed to arbitrate any employment-related dispute or that this is such a dispute. Those concessions suffice to resolve this case. Any complaint about whether her final paycheck complied with the Labor Code should have been pursued in bilateral arbitration, rather than providing the gateway for PAGA litigation seeking relief "on behalf of all aggrieved employees," *i.e.*, the precise kind of collective proceeding that she agreed to forgo. JA12; *see* Pet'r.Br.18-22.

Moriana nevertheless contends that the FAA does not require enforcing her agreement. In her view—but not that of the California Supreme Court or the Ninth Circuit—the agreement is not an arbitration pact enforceable under the FAA, but a forbidden effort to "contractually immunize" Viking "from state law liabilities." Resp.Br.11. The FAA, she continues, protects agreements to settle disputes by arbitration, but has nothing to say about this kind of exculpatory clause. *Id.* at 15-25.

Moriana's attempt to convert a protected effort to preserve bilateral arbitration into an unprotected exculpatory clause echoes the reasoning of a single concurring Justice in *Iskanian*, who rejected the majority's view as "a novel theory, devoid of case law support, that renders the FAA completely inapplicable

to PAGA claims." *Iskanian*, 327 P.3d at 157-58 (Chin, J., concurring). It also echoes the *unsuccessful* arguments of those resisting arbitration in *Concepcion* and *American Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 235 (2013). *See* Resp.Br.1, *Concepcion*, No. 09-893 (U.S. Sept. 29, 2010) (enforcing class-action waiver would "effectively exculpate" defendant); Resp.Br.19, *Italian Colors*, No. 12-133 (U.S. Jan. 23, 2013) ("the alternative to litigation is not arbitration, but nothing"). And it suffers the same basic flaw. The agreement here, like those in the earlier cases, does not contain an exculpatory clause or "contractually immuni[ze]" Viking from Labor-Code violations. Resp.Br.26. Instead, it contains sensible limits on introducing violations suffered by others in an effort to preserve the traditional streamlined and bilateral nature of arbitration. If that means certain claims will not be litigated or arbitrated because of the low stakes of the individual claim, that does not convert a bilateral arbitration agreement into an exculpatory clause or render the FAA inapplicable. "[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *Italian Colors*, 570 U.S. at 238 n.5; *see also id.* ("[T]he FAA … favor[s] the absence of litigation when that is the consequence of a class-action waiver.").

Under the arbitration agreement as written, Moriana can pursue individual relief directly under the Labor Code for the one violation that she specifically alleges actually affected her (and any others she identifies that injured her personally). She can recover any actual damages, a statutory penalty if the violation is willful, interest, reasonable attorneys'

fees, and costs. *See* Cal. Lab. Code §§201(a), 203(a), 218.5(a), 218.6. She simply cannot use that one violation as a gateway to litigate violations suffered by other employees and to obtain relief for them. In that regard, the agreement operates just like the agreements in *Concepcion* and *Epic*; it preserves the bilateral nature of arbitration without immunizing Labor-Code violations or exonerating Viking. Moreover, the agreement leaves California free to enforce its wage-and-hour laws against Viking, including through an enforcement action alleging the same violations she alleges here. Pet'r.Br.48. And it allows other Viking employees who (unlike Moriana) opted out of the class-action/PAGA waiver to pursue an employer-wide PAGA action identical to her action here. *Id.* at 48-49. In short, the agreement is perfectly suited to preserve bilateral arbitration, and a complete failure when it comes to allowing Viking to violate the Labor Code with impunity.

Moriana asserts that certain civil penalties for Labor-Code violations are available only in representative PAGA actions and that by precluding representative PAGA actions Viking improperly insulates itself from those civil penalties. That argument is factually flawed and legally irrelevant. First, if Moriana had pursued the Labor-Code violation that affected her personally in bilateral arbitration, she likely could have recovered a civil penalty on top of the other remedies for the violation. *See, e.g.*, *Claimant v. Respondent*, 2015 WL 10489631 (AAA Nov. 12, 2015) (arbitrating single-employee PAGA claims); *Claimant v. Respondent*, 2013 WL 3810904 (AAA May 9, 2013) (same). The availability of a civil penalty would turn on whether an individual

PAGA claim exists (an unsettled question under California law, which would have been a question for the arbitrator) or whether Viking even resisted the effort to impose a $100 civil penalty. *See* n.2, *infra*. The only reason we do not know the definitive answer to the availability of a civil penalty in bilateral arbitration is that Moriana never gave bilateral arbitration a chance, and instead sought to litigate a representative action "on behalf of all aggrieved employees." JA12; *see* Pet'r.Br.15 n.1. In contrast, we do know the answer to the question whether the agreement "immunizes" Viking from civil penalties for Labor-Code violations, including the alleged violation vis-à-vis Moriana. The answer is plainly no; the state could recover those civil penalties, as could other employees who opted out of the class-action/PAGA waiver.

But even if California has created (or some other state creates) an anomalous statute that allows the recovery of certain penalties only via class or representative actions, it would not follow that such novelties would evade *Concepcion*, *Epic*, and the FAA. To the contrary, the federal policy favoring arbitration in its traditional, bilateral form would still control. While Congress can simply exempt certain statutes from the FAA, states do not enjoy the same luxury under the Supremacy Clause.[1] It is already settled

[1] While Moriana repeatedly invokes *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), for the supposed rule that "an arbitration agreement cannot … waive an entire statutory cause of action," Resp.Br.19-20, that rule applies only to waivers of "federal statutory right[s]," not state-law ones. *Italian Colors*, 570 U.S. at 235. When it comes to state efforts to

that states cannot evade the FAA by simply declaring the state policy behind the statute as too important not to be vindicated in court. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012); *Perry v. Thomas*, 482 U.S. 483, 491-92 (1987). And states cannot accomplish the same result indirectly either by labeling the action a "qui tam" proceeding or by limiting certain forms of relief to class actions or representative proceedings (and then declaring class-action waivers against public policy because they "immunize" against those gerrymandered remedies).[2]

Moriana claims that Viking's request for an order "dismissing [her] representative claim" shows that it intended to "strip" her of her "statutory PAGA rights" rather than resolve the parties' dispute by arbitration.

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insulate a state law from bilateral arbitration, the FAA and the Supremacy Clause supply the rule of decision.

[2] Moriana asserts that the agreement here precludes individual PAGA claims, Resp.Br.13-14, but that is far from clear (and the lack of clarity is a direct result of Moriana's failure to give bilateral arbitration a chance). The agreement includes a provision denominated a "Class Action Waiver," which bars any "class, collective, representative or private attorney general action." JA89-90. Given the clause's subject matter, there is every reason to think it precludes only employer-wide PAGA claims, and not an individual claim for a civil penalty. In all events, if anything turns on whether Viking would argue that Moriana is not entitled to a $100 civil penalty in the event she proves in bilateral arbitration that Viking violated the Labor Code in delaying her final check, Viking is happy to represent to this Court that it will not make that argument in the bilateral arbitration. What matters to Viking (and its numerous *amici*) is not whether employees who agree to arbitrate bilaterally can recover modest individual civil penalties on top of damages, but whether they can fundamentally transform the proceedings and recover penalties for the benefit of countless other employees.

Resp.Br.14. But that tells only half the story. Viking requested not just an order dismissing Moriana's representative claim but also an order "compelling Plaintiff to submit her PAGA claim to binding arbitration on an individual basis" and "staying this action … pending completion of arbitration." JA66. Moriana successfully resisted that relief and is demonstrably wrong in claiming that Viking sought immunity; Viking sought only what the parties agreed to—resolution of Moriana's dispute via bilateral arbitration.

The most Moriana can claim, then, is that Viking seeks to preclude her from pursuing civil penalties *on behalf of others* in any forum in order to preserve the Viking-Moriana agreement to arbitrate bilaterally. That is not remotely problematic. *See, e.g.*, *Epic*, 138 S.Ct. at 1619 ("Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."). It is precisely the relief this Court granted to the defendants in *Concepcion* and *Epic*. This Court did not treat the collective-action waivers in those cases as if they were stand-alone exculpatory clauses, but as valid and enforceable components of an agreement to resolve disputes via bilateral arbitration. There is no cause to treat the class-action/PAGA waiver here differently.[3]

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[3] Moriana appears to resist the notion that PAGA plaintiffs act on behalf of other employees. *See, e.g.*, Resp.Br.8 n.1. But PAGA's text is crystal-clear: it authorizes "a civil action … on behalf of" the plaintiff "and other current or former employees." Cal. Lab. Code §2699(a). And PAGA plaintiffs quite literally act on behalf of other employees, obtaining relief distributed to other employees that precludes those employees from pursuing their

Moriana tries to distinguish *Concepcion* by claiming that the right to bring a class action is "procedural" while the right to bring a PAGA action is "substantive." Resp.Br.22-25. But the California Supreme Court has squarely held otherwise, explaining that PAGA "is simply a procedural statute" and "does not create property rights or any other substantive rights." *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). Moriana insists that Viking "misconstrues" *Amalgamated,* which she views as addressing only the assignability of PAGA claims, Resp.Br.23, but *Amalgamated* could not have been clearer that PAGA claims are non-assignable precisely *because* PAGA "does not create … substantive rights," 209 P.3d at 943; *accord Wesson v. Staples the Off. Superstore, LLC*, 283 Cal.Rptr.3d 846, 859 (Ct. App. 2021). California agrees. Citing *Amalgamated*, the state recently argued that "PAGA is simply a procedural device; it does not confer substantive rights on aggrieved employees." Mot.9, *Tabola v. Uber Techs., Inc.*, No. CGC-16-550992 (Cal. Super. Ct. filed Sept. 22, 2020).

Moriana grudgingly admits that PAGA "is 'procedural' … in the sense that it" does not "directly regulat[e] primary conduct." Resp.Br.23. But that is the only sense that matters here. Once it is clear that waiving representative PAGA claims does not immunize Viking's primary conduct, but does prevent the facts, circumstances, and recoveries of other employees from being injected into what the parties

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own PAGA actions. *See Arias v. Superior Ct.*, 209 P.3d 923, 933 (Cal. 2009).

agreed should be bilateral arbitration, it is plain that the FAA—and *Concepcion* and *Epic*—are fully applicable without regard to any metaphysical questions concerning whether PAGA is procedural for other purposes, including *Erie*.

B. The FAA's Saving Clause Provides No Refuge for the *Iskanian* Rule.

1. Moriana eventually embraces the Ninth Circuit's reasoning in *Sakkab* and suggests that employer-wide PAGA claims are more compatible with the fundamental attributes of bilateral arbitration than class and collective actions. Resp.Br.25-37. At the outset, Moriana insists that employer-wide PAGA proceedings, unlike class and collective actions, *are* bilateral. *Id.* at 29. But Moriana's own complaint belies that characterization and confirms that her claims are multilateral (and unsuitable for bilateral arbitration) in every material respect. She did not limit herself to her own bilateral complaint that her final paycheck was later than the Labor Code prescribed, which makes only a cameo appearance, JA34, in her 23-page complaint, JA10-41. She did not even limit her claim to a class of others who suffered the same allegedly tardy final paycheck. Instead, she used her own discrete complaint about the timing of her final paycheck as a gateway to litigate a whole host of Labor-Code violations "on behalf of" Viking's entire salesforce, "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." JA12, JA10-

11. The idea that there is anything "bilateral" about such a sprawling complaint blinks reality.

Moriana cannot deny that "[a] PAGA action may … cover a vast number of employees, each of whom may have markedly different experiences relevant to the alleged violations." *Wesson*, 283 Cal.Rptr.3d at 859; *see also* Chamber.9-13; WLF.10. She nonetheless claims that the resulting complexity is comparable to proving up an antitrust conspiracy or RICO enterprise, or other complex requirements of claims routinely subject to bilateral arbitration. Resp.Br.26-28. There is, however, a fundamental difference. The complexity here stems not from what a plaintiff must prove for individual recovery in a bilateral proceeding (which in Moriana's case would be entirely straightforward), but from what Moriana must prove to allow the entire workforce to recover. The latter raises far greater complexities than even more complicated bilateral claims in terms of the need for third-party discovery. To take just one concrete example, Moriana's complaint envisions an exhaustive examination of the entire salesforce's e-mails, computer records, and correspondence to determine whether employees engaged in work during meal and rest periods. JA24-26. Allowing workforce-wide recovery also requires mechanisms to ensure absent employees are identified and receive their recovery. Such efforts often require a complex claims-administration process that mirrors the procedures employed in class actions but bears no resemblances to the practices in a typical bilateral action no matter how complex. *See, e.g.*, Settlement Agreement 8-15, *Brown v. Wal-Mart Stores, Inc.*, No. 09-cv-3339 (N.D. Cal. Nov. 28, 2018), Dkt.288-2; Joint Stipulation for

Settlement 8-14, *Garrett v. Bank of America*, No. RG13699027 (Cal. Super. Ct. Oct. 21, 2016).

Indeed, in some respects, employer-wide PAGA actions are even less suitable for bilateral arbitration than class actions because in a PAGA action there is no requirement that the litigating employee be typical or that the issues she raises be common to all employees. Moriana views those inquiries as a source of procedural complexity that make PAGA actions more suitable for arbitration. But those requirements (and comparable limits on FLSA collective actions) are the principal checks to ensure that the experiences of the plaintiff are sufficiently representative of the experiences of other employees that the entire dispute can be resolved "in one stroke" by adjudicating the plaintiff's case. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). They are also the principal protection against a class action becoming a sprawling inquiry into everything and anything an employer may have done to violate the Labor Code. *Cf. id.* If the only way to insist on arbitration is to accept a company-wide examination unconstrained by either the limits on class actions or the procedural and appellate protections provided in litigation, very few employers will agree to arbitrate.

A recent California Supreme Court decision provides a concrete example of the complexity and scope of a PAGA action unconstrained by the limits on class actions. In *Williams v. Superior Court*, 398 P.3d 69 (Cal. 2017), the PAGA plaintiff—one employee in one Marshalls location—sought civil penalties on behalf of all of Marshalls' "nonexempt California employee[s]," without regard to store location, job

title, or any other limiting factor. Instead of being able to quickly and simply resolve a bilateral dispute about one employee's meal and rest periods, Marshalls was ordered to supply the name, address, telephone number, and company employment history for 16,500 individual employees—and all that only "as a first step to identifying other aggrieved employees and obtaining admissible evidence of the violations and policies alleged in the complaint," to say nothing of arguing and adjudicating the alleged violations. *Id.* at 77. The California Supreme Court rejected Marshalls' efforts to limit the scope of discovery, instead "extending PAGA discovery as broadly as class action discovery has been extended." *Id.* at 81.[4]

In the end, it is immaterial whether employer-wide PAGA actions are less compatible with bilateral arbitration than class actions or just nearly as incompatible. They are plainly far different from truly bilateral disputes, and there is no reason to construe a waiver that forswears class, collective, and representative PAGA actions alike as anything other than a good-faith and fully enforceable agreement to preserve bilateral arbitration.

Moriana suggests that this Court should recognize an exception to *Concepcion* for "bilateral,

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[4] Moriana suggests that "an arbitrator could presumably restrict the scope of a PAGA claim to ensure its manageability," Resp.Br.33 n.9, but the parties themselves restricted the scope of the proceedings here by agreeing to bilateral arbitration and a class-action/PAGA waiver. Given the FAA's direction to enforce arbitration agreements "according to their terms," *Concepcion*, 563 U.S. at 344, there is no basis for ignoring the parties' agreement in hopes that an arbitrator will improvise a different limit when the inevitable manageability problems surface.

representative proceedings involving employment disputes," Resp.Br.36, because some federal statutes roughly contemporaneous with the FAA provided for arbitration between an employer and a union and this Court has endorsed labor arbitration, *id.* at 34-37. But *Epic* (not to mention *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)) should have laid to rest any argument for employment-law exceptionalism. Moreover, while this Court has "endors[ed] arbitration of representative labor claims" pursuant to collective bargaining agreements, Resp.Br.37, those decisions simply stand for the principle that arbitration agreements should be enforced according to their terms: Parties may choose "to arbitrate on a classwide [or other non-bilateral] basis," *Epic*, 138 S.Ct. at 1623, but should not have such non-traditional arbitration procedures forced on them "*without the parties' consent*," *id.* (emphasis added). Finally, a host of labor-law regulations govern when and how a union may arbitrate on behalf of union members. There is nothing analogous under PAGA, where any employee can appoint himself the representative of the entire workforce.

2. The *Iskanian* rule is even more obviously preempted than the *Discover Bank* rule at issue in *Concepcion* because rather than purporting to apply general principles for invalidating contracts like unconscionability, *Iskanian* simply deemed the PAGA waiver incompatible with California public policy, which favors employer-wide PAGA claims over agreements to arbitrate bilaterally. But after *Concepcion* and *Epic*, a state is no more free to declare a statute incompatible with bilateral arbitration than to declare a state statute too important to be

vindicated anywhere but the courts. *See, e.g.*, *Perry*, 482 U.S. at 491-92; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); Pet'r.Br.31-33.

Moriana insists that *Iskanian* rests on two generally applicable state-law principles—deeming unenforceable "any contract that exempts anyone from responsibility for legal violations," and "any contract that … waives the protection of a law established for a public purpose." Resp.Br.39. The former just reprises Moriana's unsuccessful effort to convert an agreement to preserve bilateral arbitration into an exculpatory clause. As already noted, Viking remains responsible to abide by the Labor Code, which can be enforced by Moriana in bilateral arbitration and by the state (and any employees who opted out of the class-action/PAGA waiver) in court. Indeed, *Iskanian* itself acknowledged that class-action/PAGA waivers do not foreclose aggrieved plaintiffs from filing "individual claims for Labor Code violations in separate arbitrations." *Iskanian*, 327 P.3d at 149. *Iskanian* nonetheless held that enforcing a bilateral arbitration agreement would "frustrate[] the PAGA's objectives" and insufficiently "punish and deter employer practices." *Id.* But that naked effort to elevate state policy favoring maximum enforcement over the federal policy favoring arbitration in its traditional bilateral form is a non-starter under the Supremacy Clause.

The same goes for the second principle, which simply attempts to elevate the state's preference for having its "chosen agent," which is to say every employee in the state, unencumbered in bringing a representative PAGA claim on behalf of everyone in

the workplace. This policy is hardly neutral when it comes to arbitration. While *Iskanian* held that it was "contrary to public policy … to … requir[e] employees to waive the right to bring a PAGA action before any dispute arises," *id.*, it equally acknowledged that employees *can* waive that right *after* a dispute arises—and deprive the state of its "chosen agent" in the process, *see id.*; CJAC.Br.18-22.[5] But the essence of an arbitration agreement, and the core of what the FAA protects, is an irrevocable *ex ante* agreement to settle disputes out of court. *See, e.g.*, *Concepcion*, 563 U.S. at 344. A state cannot disfavor those kinds of agreements, while authorizing post-hoc settlements of the exact same claims, without discriminating against arbitration and its defining characteristics. *Id.* at 344-45. Put differently, the fact that California allows the state to be deprived of its "chosen agent" to facilitate *settlement* (an undoubtedly salutary *state* policy), but not to facilitate the settlement of disputes via *arbitration* (a statutorily protected *federal* policy), underscores the obvious preemption problem and gives the lie to any claim that the *Iskanian* rule is an arbitration-neutral anti-waiver rule.

3. Section 2's saving clause does not protect the *Iskanian* rule for one final reason: the saving clause does not encompass defenses, like public-policy defenses, that do not go to the formation of the contract. Pet'r.Br.33-35; *see, e.g., Concepcion*, 563 U.S. at 353 (Thomas, J., concurring); *accord Epic*, 138 S.Ct.

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[5] In fact, Iskanian himself eventually dismissed his own PAGA action *with prejudice*. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 2016 WL 10706257, at *2 (Cal. Super. Ct. June 17, 2016).

at 1632-33 (Thomas, J, concurring).[6] Moriana offers a different conception of Section 2—one this Court has already rejected. According to Moriana, the saving clause does not relate to contract formation *at all*, let alone exclusively. In her view, the FAA addresses defects in contract formation at an implicit Step Zero, such that the text of "section 2 assumes the existence of a [validly formed] contract" under state law, and the saving clause "only comes into play" to save "generally applicable contract-law doctrines that permit a party to elect not to be bound by a contractual provision" in

[6] Moriana observes in a footnote that "under Justice Thomas's stated view," the FAA has no application in state court, Resp.Br.21 n.3, but she does not actually embrace or advance that position, nor has she done so at any point in this litigation. Because that issue was neither pressed nor passed on below, nor pressed in this Court, there is no reason for any Justice to refrain from addressing whether the logic of *Concepcion*, *Epic*, and *Lamps Plus* applies to a waiver of employer-wide PAGA claims in an agreement for bilateral arbitration. *See Lamps Plus v. Varela*, 139 S.Ct. 1407, 1419-20 (2019) (Thomas, J., concurring) (joining Court's opinion despite previously expressed reservations about doctrine applied "because it correctly applies our FAA precedents"); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 34 (2008) (Thomas, J., concurring) (no need to reconsider precedent because "neither party has asked us to do so here"). That course makes particular sense here because this is not a situation, like a case involving due-process limits on punitive damages, where applying the Court's precedents would ask a Justice to undertake an arguably incoherent task or apply law that he thinks does not exist. Every member of the Court would address the question here in a case arising in federal court, and nothing about the scope of *Concepcion*, *Epic*, or *Lamps Plus* turns on whether a case arises in state or federal court.

a validly formed contract, including, conveniently, public-policy defenses. Resp.Br.40-41.

This Court rejected an identical argument—that "[t]he FAA's statutory framework applies only *after* a court has determined that a valid arbitration agreement was formed"—in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1428 (2017). Moreover, this Court has repeatedly made clear that the saving clause encompasses defenses that go to contract formation. *See, e.g.*, *id.*; *Concepcion*, 563 U.S. at 339; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). Moriana's theory of the saving clause is thus incompatible with the entire line of this Court's saving-clause precedents. And with nothing to save California's public-policy objection to a validly formed bilateral arbitration agreement, the clear direction of §2 is to enforce the parties' agreement as written, class-action/PAGA waiver and all.

C. The FAA Applies to PAGA Claims.

The California Supreme Court attempted to shield the *Iskanian* rule from FAA preemption by declaring that "a PAGA claim lies outside the FAA's coverage." *Iskanian*, 327 P.3d at 151. Moriana tellingly waits until page 43 of her 49-page brief to defend that dubious rationale. When she finally does, she argues that the "focus" of this Court's decision in *Waffle House* was "on *whose claim* was at issue." Resp.Br.45. She contends that what matters is whether the lawsuit's real party in interest agreed to arbitrate. *Id.* And because California is the real party in interest here and the state never agreed to arbitrate, Moriana's arbitration agreement cannot be enforced here. *Id.*

That is very nearly the opposite of what this Court held in *Waffle House*. The real party in interest in *Waffle House* was Eric Baker, the Waffle House employee who signed an arbitration agreement and stood to benefit from the EEOC's suit. The Court held that despite all that, there was no basis to compel arbitration because the litigation plaintiff (*i.e.*, the EEOC) had never agreed to arbitrate. Here, of course, the party initiating litigation, and controlling that litigation, is the self-same party that signed the arbitration agreement. Nothing in *Waffle House* remotely supports declining to enforce the arbitration agreement under those circumstances. Indeed, the Court suggested that the agreement would have been enforceable if the statute gave the employee-signatory more control over the litigation, 534 U.S. at 291, and here Moriana controls the litigation.[7]

Moriana claims that enforcing her agreement would function as "a waiver of [California's] statutory remedies." Resp.Br.44. That is nonsense. Nothing that happens here will affect California's ability to enforce its wage-and-hour laws against Viking,

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[7] According to Moriana, Viking was "mistaken" to assert that "the State cannot intervene in a PAGA action," because the state can still intervene under California's general civil procedure rules. Resp.Br.32 n.6. But Moriana mischaracterizes Viking's argument. Viking noted, accurately, that in contrast to the federal government's rights under the FCA, California "has no authority *under PAGA* to intervene." Pet'r.Br.38 (emphasis added). While the state may still "appl[y]" for intervention in a PAGA action like any other would-be party, Cal. Code Civ. P. §387, such an intervention effort is a *rara avis*; Viking has identified just two successful efforts, and even those did not put the state in control of the litigation.

including by filing an enforcement action alleging the same violations Moriana alleges here or by deputizing some other aggrieved employee to serve as its "agent" in a PAGA action. *See Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020) ("The state can deputize anyone it likes to pursue its claim."). Enforcing the agreement would leave California's rights and remedies perfectly intact; it would simply preclude Moriana from violating her promise to arbitrate on an individualized, bilateral basis.

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

Moriana does not deny, and numerous *amici* confirm, that representational litigation in the face of bilateral arbitration agreements continues unabated in California, having simply migrated from class and collective actions to PAGA claims following *Concepcion* and *Epic*. Pet'r.Br.43-49; *see* Resp.Br.47 (acknowledging that "employees who are barred from pursuing classwide relief may turn to PAGA"); CELC.10; Employers.28; CABIA.6. Moriana does not deny that 17 PAGA demands are lodged every day or that PAGA litigation exploded in the wake of *Concepcion* and *Epic*. CNCDA.6-11. And Moriana does not deny that plaintiffs in state and federal court regularly repackage class actions as employer-wide PAGA actions when defendants invoke bilateral arbitration agreements. Pet'r.Br.43-45; Uber.14; RLC.3.

Moriana downplays the impact of employer-wide PAGA actions by noting that plaintiffs are "limited" to civil penalties rather than the compensatory damages available in class or collective actions. Resp.Br.46.

But the size and scope of the penalties—$100 or $200 per violation per pay period across an entire workforce, *see* Cal. Lab. Code §2699(f)(2)—dwarf the actual damages suffered by employees as a result of relatively trivial violations of California's notoriously prolix Labor Code. *See* Pet'r.Br.30 (collecting examples). Moreover, what drives the explosion of lawsuits is not what employees recover, but what their lawyers stand to gain, which in the case of PAGA is often far more than the employees. *Id.* at 45-48. As this Court knows, the possibility of seeking statutory damages, plus attorneys' fees, on behalf of an entire workforce or class creates a powerful incentive to litigate, even when there are *no* actual damages. *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2201-02 (2021). That has proven particularly true under PAGA. PAGA lawyers are not driving Rolls Royces because the pay-outs are "limited."

Moriana argues that the *Iskanian* rule should be upheld because of California's policy judgment that its labor enforcement agency "lacks adequate resources" to enforce the state's labor laws. Resp.Br.47. But that says more about California's Labor Code than about its resources. Most states have far less than California's $200 billion in annual tax revenues to put toward labor-code enforcement and yet get by without a PAGA analog. To be sure, California is entitled to a different policy view than its sister sovereigns, but it is not entitled to have that view displace Congress' contrary views about bilateral arbitration.

Moriana's slippery slope arguments, *id.* at 47-49, lose their force when one "distinguish[es] between real threat and mere shadow." *Van Orden v. Perry*, 545

U.S. 677, 704 (2005) (Breyer, J., concurring). Moriana's suggestion that her PAGA waiver could encompass all claims eligible for fee-shifting, Resp.Br.48, is fanciful at best. No one would read the "Class Action Waiver"'s reference to "class, collective, representative or private attorney general action[s]," JA89-90, to apply to statutes authorizing fee-shifting in bilateral proceedings. When a California employer uses the phrase "private attorney general actions" in a "Class Action Waiver," it uses it as a term-of-art to capture the PAGA claims being filed at a 17-a-day clip, and nothing else.

Moriana's other examples—covering everything from ERISA claims to *qui tam* suits to derivative actions—are easily dispatched. Most involve contexts in which the plaintiff and defendant are unlikely to have an arbitration agreement or even be in contractual privity. It would be the rare case, for example, in which an individual shareholder pursuing a derivative action would be in contractual privity with the director or officer against whom she files suit. And even those False Claims Act relators who worked for the defendant are unlikely to have arbitration agreements encompassing the subject matter of an FCA suit. *See* Pet'r.Br.40 n.4. In addition, Moriana's examples involve settings where the plaintiff pursues relief on behalf of a single entity such as a corporation, plan, or trust. The relief typically would involve disgorgement to that entity, not payments to thousands of employees via a claims-administration process borrowed from class action law. Finally, many of her examples involve federal causes of action where this Court could reconcile any competing demands between the two co-equal federal statutes. All that

said, if it turns out that there is some other kind of proceeding that poses the same risks to bilateral arbitration as class and collective actions and employer-wide PAGA claims, enforcing agreements that preserve the traditional nature of arbitration would be no hardship.

While Moriana's parade of horribles is entirely hypothetical, the parallels between class and collective actions and representative PAGA claims (and the tendency of *Iskanian* to eliminate any practical effect of *Concepcion* and *Epic*) are real. All three are forms of representational litigation arising from procedural devices that not only allow plaintiffs to prosecute claims and obtain monetary relief on behalf of others but implicate procedural complexities and heightened stakes that render such claims a poor fit for bilateral arbitration. All three are typically addressed in a single provision designed to preserve the bilateral arbitration to which the parties agreed. And agreements to forgo all three in lieu of bilateral arbitration should be enforced, despite state-law rules to the contrary, in light of the FAA's clear command to enforce "arbitration agreements according to their terms." *Concepcion*, 563 U.S. at 344. The time has come to end California's circumvention of this Court's precedents, reaffirm that the FAA preempts state laws that interfere with bilateral arbitration, and enforce the parties' agreement here.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

DOUGLAS A. WICKHAM
IAN T. MAHER
LITTLER MENDELSON, P.C.
633 West Fifth Street
63rd Floor
Los Angeles, CA 90071

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
DARINA MERRIAM
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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