No. 21–268

In The

Supreme Court of the United States

COVERALL NORTH AMERICA, INC.,
Petitioner,

v.

CARLOS RIVAS,
Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION & WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts.

Washington Legal Foundation (WLF) is a nonprofit, public interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law.

ALF and WLF regularly appear as *amici curiae* to support the rights of parties to enter into binding arbitration agreements as an expedient, inexpensive, and efficient alternative to civil litigation. *See, e.g.*,

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[1] No party's counsel authored this *amicus* brief in whole or in part. No one, other than Atlantic Legal Foundation and Washington Legal Foundation, their members, or their counsel contributed money to prepare or submit this brief. After timely notice, all parties consented in writing to the filing of this brief.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013). Both *amici* have addressed in particular the hostility of California courts to the Federal Arbitration Act (FAA) and the enforceability of arbitration agreements. And WLF's publishing arm often produces articles and other educational materials on arbitration. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Setting the Record Straight About the Benefits of Pre-Dispute Arbitration*, WLF Legal Backgrounder (June 7, 2019), https://bit.ly/2R0AcZi.

The FAA requires courts to enforce arbitration agreements strictly according to their terms. This case is the latest in a long line of decisions from California state and federal courts refusing to follow the FAA's directive requiring arbitration contracts to be enforced as written. The Ninth Circuit declined to enforce a representative-action waiver in the parties' arbitration agreement based on *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429, 431 (9th Cir. 2015). *Iskanian* held that representative claims under California's Private Attorneys General Act (PAGA) are not subject to the FAA because they are considered qui tam actions in which individual workers pursue public (not private) claims for relief, and therefore courts need not enforce PAGA representative-action waivers. *Sakkab* agreed that the FAA did not preempt the *Iskanian* rule. California courts and the Ninth Circuit have refused to revisit these determinations—despite this Court's intervening decision in *Epic*, which eroded the foundation on

which *Iskanian* and *Sakkab* rest. In other words, by repackaging a class or collective action as one under PAGA, employees evade this Court's FAA precedent in *Epic* and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which requires the enforcement of an arbitration agreement's representative-action waiver. The Ninth Circuit's refusal to apply the FAA to enforce the PAGA representative-action waiver here flouts the Supremacy Clause and conflicts with this Court's precedent and many lower court decisions that afford the FAA preemptive effect, including in cases involving public claims.

The FAA "establish[ed] a uniform federal law over contracts which fall within its scope." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). ALF and WLF seek uniform application of the FAA nationwide to ensure that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, individually, and cost-effectively. The decision below thwarts these goals. ALF and WLF have a significant interest in whether the underlying state law is preempted by the FAA, much as the FAA has negated many other state-law rules and policies evincing California state and federal courts' deep hostility to arbitration.

SUMMARY OF ARGUMENT

California state and federal courts have long exhibited hostility to arbitration. *See, e.g., Concepcion*, 563 U.S. at 342. Again and again—in a line of cases stretching back decades, *e.g.*, *Perry v.*

Thomas, 482 U.S. 483 (1987); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Concepcion*, 563 U.S. 333; *DIRECTV*, 577 U.S. 47; *Epic*, 138 S. Ct. 1612; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)—this Court has rebuffed rules and policies adopted by state or federal courts in California that impede arbitration or otherwise frustrate the objectives of the FAA.

This case involves the interplay between the FAA and California's PAGA, which permits an "aggrieved employee" to "bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Arias v. Superior Ct.*, 209 P.3d 923, 930 (Cal. 2009).

In *Iskanian*, the California Supreme Court held that California public policy precludes the enforcement of an arbitration agreement's PAGA representative-action waiver. *Iskanian* concluded that the FAA did not preempt this prohibition because PAGA claims are not subject to the FAA as it has been interpreted by this Court. The *Iskanian* court analogized PAGA claims to qui tam actions in which individual workers pursue public (not private) claims belonging to the State. Shortly after, in *Sakkab*, the Ninth Circuit agreed that the FAA did not preempt the *Iskanian* rule. Applying *Iskanian* and *Sakkab*, the district court here refused to enforce the PAGA representative-action waiver in Petitioner's arbitration agreement with Respondent. The Ninth Circuit affirmed.

Petitioner catalogs how California state and federal courts deploy *Iskanian* to defeat arbitration

agreements they perceive as undesirable. In *Iskanian* and its progeny, including *Sakkab*, courts in California have reshaped the law to obstruct traditional individualized arbitration. Pet. 17-18. First, though PAGA claims are brought by individuals, *Iskanian* conceptualized a PAGA claim as one for purely public (not private) relief. Second, by analogizing a PAGA claim to a federal qui tam action, *Iskanian* insisted that PAGA claims belong to the State and are brought on its behalf. *Iskanian* relied on these twin rationales to conclude that PAGA claims are not subject to the FAA. *Sakkab* accepted this characterization of PAGA claims at face value and relied on it to conclude that the *Iskanian* rule is a generally applicable contract defense protected from preemption by the FAA's saving clause.

Federal courts, however, are not bound by the California Supreme Court's insistence that PAGA creates a "public" qui tam claim belonging to the State. While California courts are free to apply this "public" qui tam label to PAGA claims as a matter of state law, federal courts must look beyond such labels to assess whether, under the Supremacy Clause, the FAA preempts the *Iskanian* rule. An examination of how PAGA claims operate in practice confirms they are wholly controlled by the named plaintiffs (and their counsel) rather than the State. Given that the plaintiff employee, rather than the State, is the undisputed master of a PAGA claim, the FAA requires the enforcement of the PAGA representative-action waiver in that plaintiff's arbitration agreement.

Moreover, even assuming that the California Supreme Court's characterization of a PAGA claim as

a public qui tam claim is genuine, it does not follow that a PAGA claim is free from scrutiny under the FAA when parties choose to arbitrate their disputes.

Public claims that belong to a government are subject to the FAA; this Court held as much in *Epic*, though that holding has been widely misunderstood in California. So too, qui tam claims are subject to the FAA; in holding otherwise, California state courts have broken from federal decisions and reasoning that apply the FAA to qui tam actions under the federal False Claims Act. The Ninth Circuit's acceptance of the qui tam label California courts have affixed to PAGA claims has exacerbated this conflict. In sum, Petitioner's case offers this Court an ideal opportunity to explain that public and qui tam claims do not occupy a unique FAA-free zone, as the *Iskanian* court believed. Without this Court's intervention, the divisions among lower court judges will undermine the FAA's uniform application.

ARGUMENT

I. REVIEW IS NECESSARY TO HARMONIZE THE DIVERGENT VIEWS OF STATE AND FEDERAL JUDGES ON WHETHER PAGA CLAIMS ARE SUBJECT TO THE FAA.

A. *Iskanian* held that PAGA claims fall outside the FAA's coverage.

In *Iskanian*, the California Supreme Court refused to enforce a provision in an arbitration agreement that waived the plaintiff's ability to seek relief

on a classwide or representative basis for a PAGA claim. The court held the FAA did not preempt this rule.

The employee in that case had brought class action claims on behalf of himself and similarly situated employees, as well as a representative PAGA claim. *Iskanian*, 327 P.3d at 133. And the employee had signed an arbitration agreement in which all parties "expressly intend[ed] and agree[d] that class action and representative action procedures shall not be asserted." *Id.*

Applying the FAA and *Concepcion*, the California Supreme Court enforced the arbitration agreement as to the class claims. *Iskanian*, 327 P.3d at 135–37. But the court treated the representative PAGA claim differently. The court determined that enforcing the arbitration agreement as to the PAGA claim would frustrate state public policy. The court ultimately held that the FAA did not preempt California's prohibition against PAGA representative-action waivers because the FAA was inapplicable. *Id.* at 149–51.

The California Supreme Court advanced two related justifications for this view that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. First, believing that "the FAA aims to ensure an efficient forum for the resolution of private disputes," *id.* at 149, the court distinguished *private* claims (subject to the FAA) from *public* claims (not subject to the FAA), *id.* at 149–50. Second, the court characterized a PAGA claim as "fundamentally a law enforcement action de-

signed to protect the public"—"a type of *qui tam* action" like those under the federal False Claims Act (FCA)—that was therefore "unwaivable." *Id.* at 147–48. In the *Iskanian* court's view, "a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." *Id.* at 149. (The California Supreme Court later explained that a PAGA claim seeks neither individual nor classwide relief. *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1131 (Cal. 2020).)

B. Ninth Circuit judges have questioned or disagreed with *Iskanian* and *Sakkab*.

The next year, a Ninth Circuit panel held that the FAA does not preempt *Iskanian*'s rule barring PAGA representative-action waivers in arbitration agreements. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429, 431 (9th Cir. 2015). In doing so, the Ninth Circuit reasoned that PAGA representative actions differ from class actions and thus are not subject to this Court's precedent requiring the enforcement of class-action waivers. *Id.* at 436–39. The court arrived at this conclusion by accepting *Iskanian*'s characterization of PAGA claims as qui tam actions brought by the named plaintiff as a proxy for the State's labor law enforcement agencies. *Id.* at 435-36, 439-40 (relying on this characterization to distinguish between PAGA and class proceedings). But the Ninth Circuit did not speak with one voice in *Sakkab*, and tensions have bubbled up in later cases.

Judge N. Randy Smith dissented in *Sakkab*: "the *Iskanian* rule interferes with the fundamental

attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 444 (N. R. Smith, J., dissenting). He questioned *Iskanian*'s dichotomy between class and PAGA claims—the root of the public-private distinction—since both claims allow individuals to sue on behalf of other people and entities. *Id.* at 442–43. Ultimately, he concluded that *Iskanian*'s invocation of "state policy grounds to support its decision" was "an obstacle to the objectives of the FAA." *Id.* at 449.

The Ninth Circuit later cast doubt on a core aspect of *Iskanian*'s reasoning. Central to *Iskanian*'s public-private distinction is the notion that a PAGA claim belongs to the State, which is "always *the* real party in interest in the suit." *Iskanian*, 327 P.3d at 148 (emphasis added). But when, two years after *Sakkab*, a PAGA plaintiff raised this point as a reason to apply the "actions 'by a governmental unit'" exception to the automatic bankruptcy stay when suing a debtor under PAGA, the Ninth Circuit rejected the point. *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1059, 1061 (9th Cir. 2017). The decision reveals that a PAGA plaintiff's claim is not truly as "public" as the *Iskanian* and *Sakkab* courts had imagined: "Porter's [PAGA] claim against Nabors was filed by Porter, and it remains under his control." *Id.* at 1062.

More recently, the Ninth Circuit further undermined *Iskanian* by distinguishing PAGA claims from federal qui tam claims in *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 674-78 (9th Cir. 2021). A "PAGA [claim] represents a permanent, *full* assignment of California's interest to the aggrieved employee," while qui tam claims under the FCA involve

a *partial* assignment; PAGA also "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." *Id.* at 677. The court held that a "complete assignment to this degree—an anomaly among modern *qui tam* statutes—undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests" of the aggrieved employees implicated by the PAGA claim. *Id.* Since PAGA claims "depart from the traditional criteria of *qui tam* statutes," the court decided that uninjured plaintiffs lack Article III standing to maintain PAGA claims. *Id.* at 678.

Tensions surrounding the *Iskanian* rule were recently exacerbated by this case. Noting this Court's recent applications of the FAA in *Epic* and *Lamps Plus*, the majority in this case admitted that "tension exists between Supreme Court case law and *Sakkab*." Pet. App. 3. Although the court concluded that *Sakkab* remained good law, the panel majority tacitly acknowledged that this Court's cases send "strong[ ] signals" that *Sakkab* and later Ninth Circuit "precedent is wrong." *Id.* In a concurrence, Judge Patrick Bumatay went even further: "our precedent is in serious need of a course correction." Pet. App. 7. "The tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious." Pet. App. 9. Judge Bumatay concluded that *Iskanian* "clearly" undermines "parties' choice to engage in individual, bilateral arbitration" and therefore "runs afoul of the FAA and must be preempted." Pet. App. 10.

* * *

These disputes between state and federal judges in California involve an important federal statute. The disputes show no signs of abating, and only this Court can resolve them. If anything, disputes over the relationship between PAGA and the FAA are metastasizing as California state and federal courts push *Iskanian*'s reasoning to logical endpoints that conflict with this Court's decisions.

II. CALIFORNIA COURTS' DEFENSE OF THE *ISKANIAN* RULE HAS EXPOSED OTHER TENSIONS IN THE CASE LAW, CEMENTING THE NEED FOR REVIEW.

A. California courts dispute whether this Court has already held that "public" claims are subject to the FAA.

California courts defend *Iskanian*'s refusal to apply the FAA on the basis that a PAGA claim "is a governmental claim." *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 187 (Ct. App. 2019); *accord, e.g.*, *Collie v. Icee Co.*, 266 Cal. Rptr. 3d 145, 147–48 (Ct. App. 2020) (collecting cases), *review denied* (Cal. Nov. 10, 2020). By describing a PAGA claim as "a state law enforcement action," these courts have distinguished *Epic* as applying the FAA to class claims and Fair Labor Standards Act collective claims, rather than to "a governmental claim" like a PAGA claim. *Correia*, 244 Cal. Rptr. 3d at 188.

But even indulging California courts' view that PAGA claims are governmental claims, it does not follow that the FAA is inapplicable. Indeed, this Court sought to resolve this issue in one of the three cases consolidated in the *Epic* decision, which is yet another reason that certiorari is appropriate. *See* Sup. Ct. R. 10(c) ("a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

In *Epic*'s final sentence, 138 S. Ct. at 1632, this Court affirmed the Fifth Circuit's decision in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Murphy Oil* was a government enforcement action brought on behalf of the National Labor Relations Board; it was not initiated by a private employee as an individual or class action. The Board's General Counsel issued an administrative complaint accusing an employer of violating the National Labor Relations Act by asking employees to agree to individual arbitration of any employment disputes. *Murphy Oil*, 808 F.3d at 1016. The General Counsel pursued NLRA claims only the government could prosecute—statutory public rights to collective action that are "enforced one way: by the Board, through its processes." *Murphy Oil USA, Inc. & Hobson*, 361 NLRB 774, 774–75, 780–82 (2014). Applying the NLRA, the Board ruled that the employer had committed unfair labor practices by inducing employees to waive representative proceedings through its arbitration agreements. *See id*. Nothing in the FAA compelled a contrary conclusion, the Board thought, because the General Counsel sought to vindicate rights "enforced solely by the Board—there is no private right of action under

the [NLRA]." *Id.* at 781–82. The Fifth Circuit reviewed the Board's decision, applied the FAA, and reversed: the employer "did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court." *Murphy Oil*, 808 F.3d at 1015. In construing the FAA and NLRA harmoniously—to "have 'equal importance in our review' of employment arbitration contracts"—the Fifth Circuit unmistakably applied the FAA to a government-initiated enforcement action. *Id.*

The Fifth Circuit's decision, affirmed in *Epic*, 138 S. Ct. at 1632, cannot be squared with the reasoning in *Iskanian* and its progeny—that the FAA does not govern an arbitration agreement's representative-action waiver because a PAGA claim is a public law-enforcement action. In refusing to abide by the FAA's mandate because no private right of action was implicated, *Murphy Oil*, 361 NLRB at 781–82, the Board fastened onto the same public-private distinction that persuaded the California Supreme Court not to apply the FAA to PAGA claims in *Iskanian*. But the Fifth Circuit overturned that determination—a decision this Court affirmed in *Epic*.

It is true that *Murphy Oil* concerned claims belonging to the *federal* government, while PAGA claims belong to a *state* government. But this distinction cannot support an argument that state claims evade FAA scrutiny while federal claims do not. *See McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850, 862 n.5 (S.D. Cal. 2019), *reconsidered on other grounds*, No. 18-CV-1794-CAB-LL, 2020 WL 4582687, at *1–*2 (S.D. Cal. Aug. 10, 2020). *Epic* affirmed applying the

FAA to an enforcement action brought by the *federal* government, so the FAA must apply with even greater force to enforcement actions brought on behalf of a *state* government. After all, state law "must give way" to the FAA, *Perry*, 482 U.S. at 491, which is supreme federal law, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21–22 (2012); *see Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting) ("We have no earthly interest (quite the contrary) in vindicating [state] law."); *Sakkab*, 803 F.3d at 433 n.9 ("The 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute, does not extend to state statutes.").

Perhaps because of its brevity, however, the legal effect of this Court's disposition of *Murphy Oil* has eluded California courts' understanding. *See Olson v. Lyft, Inc.*, 270 Cal. Rptr. 3d 739, 748–49 (Ct. App. 2020) ("*Murphy Oil* did not involve the 'enforcement rights' of the NLRB"; "Nor is it correct to characterize *Murphy Oil* as a 'government enforcement action'"; "the NLRB was not pursuing public claims").

In sum, while the Fifth Circuit applied the FAA to claims brought by a governmental unit (and was affirmed), California courts hold that the FAA is inapplicable to PAGA claims that belong to the State government. Only this Court can resolve the apparent confusion in the lower courts over this Court's disposition in *Murphy Oil*. *Iskanian*'s fate hangs in the balance.

B. California courts deny that qui tam claims are subject to the FAA, in tension with federal decisions.

As explained, California courts will not apply the FAA to PAGA claims—even a willing employee and a willing employer could not reach an agreement to bilaterally arbitrate a pending PAGA action. The California Supreme Court has justified this state of affairs by comparing PAGA claims to FCA qui tam actions and suggesting the FAA does not supplant the qui tam mechanism. *Iskanian*, 327 P.3d at 148, 151–52. Based on this qui tam analogy, California courts insist that PAGA claims "fall outside the FAA's purview." *Correia*, 244 Cal. Rptr. 3d at 185.

But lower courts are divided on whether the FAA requires arbitration of qui tam and analogous PAGA claims. The division stems from a disagreement about whether there are one or two "real parties in interest" entitled to steer qui tam litigation. *Id.* at 179, 189–91.

When a relator files an FCA qui tam claim, the government is a real party in interest because of its underlying stake in redressing the alleged fraud. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932–34 (2009). But the government is not the only real party in interest. As this Court has explained, the FCA effectively assigns part of the government's claim to the relator, making the relator an interested party with a right to pursue the claim. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000). Given this partial assignment, the government and the relator are "both

real parties in interest," *Eisenstein*, 556 U.S. at 934, meaning that each may assert "legal rights of their own," *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008) (emphasis omitted).

Applying this logic, some courts hold that a relator who has agreed to arbitration can be compelled to arbitrate his qui tam claim. *E.g.*, *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at *6–*8 (S.D. Ohio Jan. 31, 2013). Translating this approach to PAGA, the Ninth Circuit has concluded that "an individual employee can pursue a PAGA claim in arbitration" and "can bind the state to an arbitral forum." *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 681 F. App'x 592, 594 (9th Cir. 2017); *see, e.g.*, *Bradford v. Pro. Tech. Sec. Servs. Inc. (Protech)*, No. 20-CV-02242-WHO, 2020 WL 2747767, at *6 n.6 (N.D. Cal. May 27, 2020) (applying this approach after *Iskanian* and *Correia*); *see also* Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 Pepp. Disp. Resol. L.J. 203, 207–08 (2015) (acknowledging a split of authority, but concluding that "qui tam claims are arbitrable under prevailing Supreme Court precedent"); *cf. United States v. Bankers Ins. Co.*, 245 F.3d 315, 325 (4th Cir. 2001) ("Statutory civil claims are subject to the arbitration process"; there is "no valid basis for placing the FCA claim in a different category").

California courts take the opposite approach by insisting that the State is the *sole* real party in interest in a PAGA action. *Correia*, 244 Cal. Rptr. 3d at 179, 189–91. They acknowledge "that several federal courts have reached a different conclusion." *Id.* at 179,

190. But California courts consider those federal cases to be "unpersuasive," so they follow conflicting decisions suggesting the federal government is the sole real party in interest in a federal qui tam action. *Id.* at 179, 189–91 (citing, for example, *Mikes v. Strauss*, 889 F. Supp. 746, 755 (S.D.N.Y. 1995) ("Since the government was not a party to the [arbitration] Agreement, . . . we are not convinced that plaintiff, suing on the government's behalf, is necessarily bound by its terms.")).

California courts reason that a PAGA claim belongs to the government and that "[t]here is no individual component to a PAGA action." *Kim*, 459 P.3d at 1131. This reasoning misses the point. A PAGA plaintiff wields significant influence over the government's claim—far more than an FCA relator. "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee" and "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. It makes no sense to say the aggrieved employee receives full control over the litigation of a PAGA claim, yet cannot elect arbitration. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) (indicating FAA may apply to governmental claim where litigation could have been "dictated" by individual who agreed to arbitration and government was not "the master of its own case"); *see also Iskanian*, 327 P.3d at 159 (Chin, J., concurring) (explaining that *Waffle House* "casts considerable doubt on the majority's view that the FAA permits either California or its courts to declare

private agreements to arbitrate PAGA claims categorically unenforceable").

The analysis should not change when a particular arbitration agreement includes a PAGA representative action waiver. Such a waiver will not immunize a lawless company from liability. Since PAGA is a procedural mechanism that does not create a substantive claim, "[p]reventing a plaintiff from using this [PAGA] procedure has no effect on the state's property rights" in civil penalties. *Wesson v. Staples The Office Superstore, LLC*, 283 Cal. Rptr. 3d 846, 860 n.14 (Ct. App. 2021), *petition for review filed* (Cal. Oct. 19, 2021). "[T]he State remains entitled to recover civil penalties for any Labor Code violations by the employer, subject to the applicable statute of limitations." *Id.* Relief may also be sought in an action by a different PAGA proxy (a fellow aggrieved worker) who did not consent to arbitration. *See Williams v. Superior Ct.*, 398 P.3d 69, 79 (Cal. 2017); *see also Sakkab*, 803 F.3d at 449 (N. R. Smith, J., dissenting) (explaining that "any employee not subject to an arbitration agreement waiving such [representative PAGA] actions is free to bring a PAGA claim," and that nothing prevents the State "from raising the labor violations on its own").

Because PAGA is a purely procedural statute allowing certain workers to recover penalties that could otherwise be sought by state agencies, *Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009), the State cannot, as a matter of its own public policy, override the FAA's mandate by dictating that any *particular* aggrieved employee may invoke PAGA's representative-action

procedure, *Sakkab*, 803 F.3d at 449 (N.R. Smith, J., dissenting). Thus, it violates the FAA for California to adopt rules and procedures favoring one or more plaintiffs by enabling them to exploit PAGA's procedure after they enter into arbitration agreements waiving representative actions. *See Epic*, 138 S. Ct. at 1621 (holding the FAA "seems to protect pretty absolutely" an agreement providing for individualized rather than representative procedures).

Sakkab's acceptance of *Iskanian*'s "qui tam" label for PAGA claims—and the Ninth Circuit's refusal to revisit *Sakkab* in this case—further exacerbate the conflict between state and federal courts over the interplay between the FAA and PAGA claims. *Sakkab*'s majority opinion decided that the FAA's saving clause preserved the *Iskanian* rule from preemption under *Concepcion* because the rule was a generally applicable contract defense. 803 F.3d at 433–40. The majority arrived at this conclusion by relying on *Iskanian*'s characterization of PAGA claims as qui tam actions brought by the plaintiff solely as a proxy for the State. *Id.* at 435-36, 439-40.

This holding conflicts with Ninth Circuit case law examining how PAGA operates in practice. States cannot circumvent the Constitution through mere labels, *NAACP v. Button*, 371 U.S. 415, 429 (1963), and courts therefore look behind the labels affixed by States to see how state measures operate in practice, *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940). Consistent with this principle, Ninth Circuit decisions issued after *Sakkab* have looked beyond the qui tam label to ascertain how PAGA claims

operate in practice and concluded they materially differ from true government actions. *See, e.g.*, *Magadia*, 999 F.3d at 674-78; *Porter*, 854 F.3d at 1059-63. These decisions conflict with *Sakkab*'s uncritical reliance on *Iskanian*'s qui tam label for PAGA claims as a basis for circumventing the FAA.

Sakkab also widens the growing division between state and federal courts over whether parties can be compelled to arbitrate PAGA claims even under *Iskanian*'s framework. *Sakkab* acknowledged that the FAA "preempts state laws prohibiting the arbitration of specific types of claims," but held the FAA did not preempt the *Iskanian* rule on this basis because the rule did not prohibit the arbitration of PAGA claims. 804 F.3d at 434. The Ninth Circuit adheres to that view to this day. *E.g.*, *Valdez*, 681 F. App'x at 594. By contrast, as Judge Bumatay emphasized below, California courts do not permit the arbitration of PAGA claims under *Iskanian*. Pet. App. 7 & n.1; *see also, e.g.*, *Brooks v. AmeriHome Mortg. Co., LLC*, 260 Cal. Rptr. 3d 428, 432 (Ct. App. 2020) ("a PAGA claim is nonarbitrable"). There is thus serious tension regarding the soundness of the Ninth Circuit's refusal to recognize that the FAA preempts this categorical prohibition.

* * *

In sum, branding a PAGA claim a qui tam action should not insulate a PAGA claim from the FAA's mandate. California courts' contrary approach conflicts with federal decisions. By accepting at face value California courts' qui tam label for PAGA claims and refusing to hold that the FAA preempts

the *Iskanian* rule, Ninth Circuit decisions (including this case) have widened this conflict in the law. This Court should resolve the conflict by granting the petition in this case.

CONCLUSION

The Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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