No. _____

In the
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

The question presented is:

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

CORPORATE DISCLOSURE STATEMENT

Petitioner Viking River Cruises, Inc. is wholly owned by Viking River Cruises (Bermuda) Ltd. Viking River Cruises, Inc. and Viking River Cruises (Bermuda) Ltd are not publicly traded, and no publicly held company owns 10% or more of Petitioner's or Viking River Cruises (Bermuda) Ltd's stock/equity.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the California Superior Court for the County of Los Angeles, the California Court of Appeal, and the California Supreme Court:

- *Moriana v. Viking River Cruises, Inc.*, No. BC687325 (Cal. Super. Ct.), order issued Mar. 7, 2019;
- *Moriana v. Viking River Cruises, Inc.*, No. B297327 (Cal. Ct. App.), judgment issued Sept. 18, 2020;
- *Moriana v. Viking River Cruises, Inc.*, No. S265257 (Cal.), petition for review denied Dec. 9, 2020.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

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

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

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

traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic*, 138 S.Ct. at 1623. California nonetheless persists in doing just that through the "*Iskanian* rule"—named after the case that spawned it—which mandates the availability of representative PAGA claims in court even when a plaintiff agrees in advance to resolve disputes through individualized arbitration. But there is no meaningful distinction between the class action in *Concepcion*, the collective action in *Epic*, and the representative PAGA action here. Each one involves a plaintiff who insists that her right to litigate on behalf of others trumps her agreement to arbitrate individually. Each effort is equally preempted by the FAA.

This Court's intervention is warranted, both to reaffirm the FAA and the national policy in favor of arbitration and to ensure that *Concepcion* and *Epic* actually promote bilateral arbitration, rather than simply causing representational litigation by those who agreed to arbitrate individually to migrate to PAGA. In the wake of those decisions, California plaintiffs have pivoted away from class and collective actions and toward PAGA actions, finding in the latter a procedural device that, in the view of the California courts, delivers all of the benefits of a class action with none of the FAA's limitations. Under *Iskanian*, neither *Concepcion* nor *Epic* nor the FAA itself imposes any restraint on plaintiffs alleging violations of the California Labor Code on behalf of hundreds, even though they agreed to arbitrate, not litigate, and to do so individually, not as a representative.

This case is an ideal vehicle to review and reject the *Iskanian* rule. While past petitions have presented the same question, those petitions almost all predated *Epic*, where this Court reaffirmed *Concepcion* and made clear beyond cavil that it extends beyond the class-action context. The California Supreme Court has had ample opportunity to reverse course in light of *Epic*, but has instead repeatedly refused to do so. Furthermore, this case is free of any vehicle issues or complications, as Respondent asserted just one claim (the PAGA claim), and the arbitration agreement foreclosed PAGA claims by name and offered Respondent an opt-out option, which she declined.

Finally, there is no doubt about the importance and recurring nature of the issue. Employers in California—who employ more than 10% of the nation's workforce—are facing an onslaught of PAGA representative claims, which have exploded in quantity since *Concepcion* rejected other avenues for evading agreements to arbitrate individually. More than 15 PAGA notice letters are submitted *every day*, and PAGA actions filed by employees who agreed to arbitrate individually, but nonetheless are litigating representatively, threaten millions of dollars in liability and have become a cost of doing business in California. These developments have denied employers of the benefit of their bargains and the efficiencies of bilateral arbitration. This Court's plenary review is necessary to ensure that *Concepcion* and *Epic* retain their force and that the federal policy favoring arbitration is not so easily undermined.

OPINIONS BELOW

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

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on December 9, 2020. On March 19, 2020, this Court extended the deadline to file any certiorari petition due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

A. The FAA and this Court's Decisions in *Concepcion* and *Epic*

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration," *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 89

(2000), and to "establish[] a liberal federal policy favoring arbitration agreements," *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). Section 2, the Act's primary substantive provision, states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. This provision requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted," and preempts state-law rules that would interfere with such enforcement. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citations, alterations, and emphasis omitted). The FAA's "overarching purpose" is to allow parties to opt into "efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344-45. In most cases, that will mean that an agreement to arbitrate is an agreement to arbitrate on an individual basis, without introducing the equities of other parties or the complications of representational proceedings.

Section 2's final phrase, often referred to as its "saving clause," permits courts to apply "generally applicable contract defenses, such as fraud, duress, or unconscionability," to invalidate arbitration agreements. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The saving clause reflects the basic principle that arbitration agreements, just like other contracts, should not be enforced if they were procured by fraud or other means universally recognized as vitiating consent. *Id.* The saving clause does not, however, allow states to invalidate

arbitration agreements through "defenses that apply only to arbitration" or "that target arbitration … by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic*, 138 S.Ct. at 1622 (alteration omitted).

This Court has emphasized the latter point—*i.e.*, that the FAA preempts state-law rules that interfere with the parties' ability to choose the efficiency and informality of *bilateral* arbitration—in two recent cases. First, in *Concepcion*, this Court addressed California's "*Discover Bank* rule," which prohibited "most collective-arbitration waivers in consumer contracts" as "unconscionable." 563 U.S. at 340. This Court held that the FAA preempted the *Discover Bank* rule. While the rule did not target arbitration specifically—it prohibited class-action waivers in litigation and arbitration alike—its application to an arbitration agreement where the parties had agreed to bilateral arbitration interfered with "fundamental attributes of" such arbitration. *Id.* at 344. In traditional bilateral arbitration, the Court explained, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Id.* at 348. By allowing any party to demand (after the fact) that arbitration proceed on a classwide basis instead, the *Discover Bank* rule "sacrific[ed] the principal advantage of arbitration—its informality—and ma[de] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 347, 348. Because it stood "as an obstacle to the accomplishment of the FAA's

objectives," the *Discover Bank* rule was preempted. *Id.* at 343.

This Court emphatically reaffirmed *Concepcion*'s holding in *Epic*. *Epic* involved three consolidated cases in which employees had agreed to resolve disputes with their employers through bilateral arbitration. The employees, seeking to pursue class or collective actions, argued that contractual provisions requiring bilateral arbitration of employment disputes are illegal under the National Labor Relations Act and that such illegality is a "ground[]" that "exists at law … for the revocation of any contract." 9 U.S.C. §2. This Court rejected the argument, holding that the FAA's saving clause does not apply because the employees were not arguing that their arbitration agreements were extracted by "fraud or duress or in some other unconscionable way that would render *any* contract unenforceable." 138 S.Ct. at 1622. Rather, they objected to the agreements "precisely because they require individualized arbitration proceedings instead of class or collective ones." *Id.* The Court reaffirmed that, in the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619. And it concluded by emphasizing *Concepcion*'s "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures," and by cautioning that "we must be alert to new devices and formulas" that aim to interfere with arbitration's essential attributes. *Id.* at 1623.

B. California's Private Attorneys General Act

PAGA allows an aggrieved employee to seek monetary awards on a representative basis on behalf of herself and other past or present employees of the same employer. Like Rule 23 of the Federal Rules of Civil Procedure, PAGA does not confer any substantive rights. *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). There is no such thing as a "violation of PAGA." Rather, PAGA is "a procedural statute" that permits aggrieved employees to pursue relief for violations of substantive sections of the Labor Code. *Id.* Specifically, PAGA authorizes an "aggrieved employee" to recover civil penalties for violations of California's Labor Code in situations where a state enforcement official could have—but chose not to—bring such a claim. Cal. Lab. Code §2699(a). An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* §2699(c).

An employee bringing a PAGA claim may seek monetary penalties not only for Labor Code violations committed against her, but also on a representative basis for similar infractions against other employees. *See* Cal. Lab. Code §2699(a); *see also id.* §2699(g)(1). Indeed, the employee may even pursue penalties on a representative basis for violations that did not affect her personally: As long as she alleges that she was "affected by at least one Labor Code violation," she may "pursue penalties for all the Labor Code violations committed by that employer." *Huff v.*

Securitas Sec. Servs. USA, Inc., 233 Cal.Rptr.3d 502, 504 (Cal. Ct. App. 2018).

Remedies for a PAGA claim are assessed against the employer on a "per pay period" basis for each "aggrieved employee" affected by each claimed violation of the California Labor Code. Cal. Lab. Code §2699(f)(2). PAGA authorizes a penalty of $100 per aggrieved employee per pay period for the first violation, and $200 per aggrieved employee per pay period for any subsequent violation (unless the underlying provision of the Labor Code provides for a different civil penalty). *Id.* The employees keep 25% of any civil penalties recovered and remit the remaining 75% to the State. *Id.* §2699(i). A prevailing employee also is "entitled to an award of reasonable attorney's fees and costs." *Id.* §2699(g)(1).

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

C. *Iskanian* and *Sakkab*

Under California law, a pre-dispute agreement in which an employee agrees to arbitrate all claims individually and to forgo her right to pursue a representative PAGA action is unenforceable as against public policy. That rule was established by *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), where the California Supreme Court addressed the enforceability of an arbitration agreement in which an employee and employer agreed to resolve all future disputes by bilateral arbitration. Despite his agreement to arbitrate on an individualized basis, the plaintiff filed a lawsuit seeking to pursue both a class action and a representative PAGA action. The court allowed the latter to proceed despite *Concepcion*.

The California Supreme Court began with the class-action waiver, explaining that its prior decision in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), deemed most class-action waivers in employment contracts unenforceable. *See Iskanian*, 327 P.3d at 133-37. It recognized, however, that in light of this Court's intervening decision in *Concepcion*, the FAA preempted the *Gentry* rule. *Id.* at 135-37.

The court then addressed the PAGA action. The court determined that an agreement to bilateral arbitration in which an employee agrees to forgo PAGA claims is "unenforceable as a matter of state law." 327 P.3d at 149. It opined that such an agreement is "contrary to public policy" because allowing employees to waive their statutory right to file a representative PAGA claim would "disable one

of the primary mechanisms for enforcing the Labor Code." *Id.*

The court then concluded that the FAA *did not* preempt the state-law prohibition on representative PAGA waivers, despite *Concepcion*. *Id.* at 149-53. The court purported to evade FAA preemption by characterizing a private plaintiff's PAGA claim as belonging to the state rather than to the aggrieved employee who actually files and controls the claim: "[T]he rule against PAGA waivers does not frustrate the FAA's objectives because … the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state." *Id.* at 149. For that reason, the court opined that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. The court supported its conclusion by citing *EEOC v. Waffle House*, 534 U.S. 279 (2002), in which this Court held that an action actually brought by the Equal Employment Opportunity Commission ("EEOC") to vindicate injury to an employee was not precluded by the employee's arbitration agreement.

After *Iskanian*, a divided panel of the Ninth Circuit agreed that "the FAA does not preempt the *Iskanian* rule." *Sakkab v. Luxottica N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015). The *Sakkab* majority did not embrace *Iskanian*'s actual reasoning on FAA preemption or its reliance on *Waffle House*. Instead, the *Sakkab* majority held that "[t]he *Iskanian* rule does not conflict with [the FAA's] purposes" because, in its view, representative PAGA actions are not as incompatible with traditional arbitration as class actions. *Id.* at 433-34. The "critically important

distinction," according to the Ninth Circuit, is that PAGA claims are not governed by Rule 23, and thus "do not require the formal procedures of class arbitrations." *Id.* at 436.

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

D. Factual and Procedural Background

Petitioner Viking River Cruises, Inc. ("Viking") offers and sells voyages on one of the world's leading ocean and river cruise lines that has a fleet of more than 70 state-of-the-art vessels providing exceptional travel experiences around the globe. Respondent Angie Moriana worked for Viking as a sales representative in Los Angeles from approximately May 31, 2016 to June 15, 2017. CA.App.10.

Before beginning her employment, Moriana agreed to resolve all future employment-related disputes with Viking via bilateral arbitration. Specifically, she entered into an agreement providing that it would apply to "any dispute arising out of or relating to your employment." CA.App.92. The agreement further stated that, subject to enumerated exceptions not implicated here, "arbitration will replace going before … a court for a judge or jury trial." CA.App.92. Next, under the heading, "How Arbitration Proceedings Are Conducted," the agreement provided that, in arbitration, the parties would use individualized rather than class, collective, representative, or private attorney general action procedures:

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

CA.App.93.

The agreement explicitly permitted Moriana to opt out of the foregoing waivers, stating: "you may opt out of the Class Action Waiver by clicking this box [ ] before you click below." CA.App.94. Moriana chose not to opt out, however, leaving the box unchecked and accepting the agreement. CA.App.87.

After her employment ended, Moriana filed a "representative action seeking recovery of civil

penalties" under PAGA against Viking. CA.App.9. Moriana's filing sought the precise kind of in-court representational relief she agreed to forgo in her arbitration agreement. In her sole claim, Moriana alleged numerous underlying violations of the California Labor Code and, invoking PAGA, sought relief on behalf of hundreds of other "aggrieved current and former employees," described as "including but not limited to Ocean Specialists, Outbound Sales Agents, Inbound Sales Agents, Travel Agent Desk, Inside Sales, Direct Sales, Group Sales, Reservation Sales Agents, and/or Air Department Agents, as well as any other job title with substantially similar duties and responsibilities." CA.App.9. Thus, Moriana asserted a single cause of action under PAGA "on behalf of the aggrieved employees," with "the aggrieved employees seek[ing] recovery of all applicable civil penalties." CA.App.13, 26 (capitalization altered); App.3.

Citing the parties' arbitration agreement, and this Court's post-*Iskanian* decision in *Epic*, Viking moved to compel individualized arbitration and to stay the court proceedings. The trial court denied the motion, holding that Moriana's "representative PAGA claims cannot be compelled to arbitration under California law." App.17.

The California Court of Appeal affirmed. The court cited *Iskanian* for the proposition that "an arbitration agreement that include[s] a waiver of an employee's right to bring a representative PAGA action in any forum violate[s] public policy" because "a PAGA representative action is a type of qui tam action and … the state is always the real party in interest in

the suit." App.4. The court considered and rejected Viking's argument that this Court's decision in *Epic* effectively abrogated *Iskanian* and required FAA preemption. It noted that "[s]ince *Epic*, … California courts continue to find private predispute waivers of PAGA claims unenforceable," because "[t]he cause of action in *Epic* 'differs fundamentally from a PAGA claim' in that the real party in interest in a PAGA claim is the state." App.5 (quoting *Correia v. NB Baker Electric, Inc.*, 244 Cal.Rptr.3d 177, 187 (Cal. Ct. App. 2019)). Accordingly, the court determined that *Iskanian* "remains good law" notwithstanding "*Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims." App.5. In a footnote, the court observed that it "must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently." App.5 n.1.

The California Supreme Court denied Viking's petition for review. App.1.

REASONS FOR GRANTING THE PETITION

The decision below confirms that the *Iskanian* rule and its obvious incompatibility with the FAA is a problem only this Court can fix. No matter how palpable the tension between that state-law rule and this Court's teaching in FAA cases like *Epic*, California will keep applying *Iskanian* and denying California employers the benefit of their bargains unless and until this Court intervenes. The *Iskanian* rule cannot be reconciled with this Court's cases. Representational PAGA claims are no more compatible with traditional bilateral arbitration agreements and the characteristic features of

arbitration than class actions. Indeed, the only material difference between class actions and representational PAGA claims is that the California Supreme Court had no choice but to follow *Concepcion* when it came to the former. And any effort to rely on *Waffle House* fails for the fundamental reason that PAGA proceedings are initiated by the very person who agreed to arbitrate bilaterally, not by a government agency that was a stranger to the agreement. The California courts' efforts to distinguish *Concepcion* and now *Epic* cannot withstand serious scrutiny, but they have denied California employers the benefits of bilateral arbitration and the guarantees of the FAA. Indeed, while *Concepcion* and *Epic* guarantee employers elsewhere the benefit of their bargains, in California they have simply caused representational litigation in defiance of bilateral arbitration agreements to migrate from class and collective actions to PAGA litigation.

The time is right for this Court to put an end to this unfairness by reviewing and rejecting the *Iskanian* rule. The decision below and its refusal to budge in light of *Epic* make clear that no matter how clearly this Court underscores the importance of the FAA and enforcing parties' agreements to arbitrate bilaterally, the California courts will stick with *Iskanian* unless and until this Court directs them otherwise. Only this Court can check California's insistence that there is something special about representative PAGA actions that places them outside the scope of *Concepcion*, outside the scope of *Epic*, and outside the scope of the FAA. Moreover, this case provides an ideal vehicle for definitively resolving the

fate of the *Iskanian* rule. There is just a single claim here, it seeks representational relief in direct contravention of the clear terms of the arbitration agreement, and Moriana disclaimed her ability to bring PAGA representational claims by name in a provision that gave her an express opportunity to opt out. There is no unfairness to holding her to the terms of her bargain, and the FAA requires nothing less. Finally, the stakes are higher than ever: emboldened by the California Supreme Court's refusal to revisit *Iskanian* even after *Epic*, plaintiffs (and their lawyers) are subjecting employers to an ever-increasing onslaught of representative PAGA claims. In California, the real-world impact of *Concepcion* and *Epic* has not been increased bilateral arbitration, but the redirection of the efforts of would-be class-action lawyers into making PAGA demands at a 15-a-day clip. That cannot be what this Court intended in *Concepcion* and *Epic* or what Congress intended in the FAA. The time is ripe for this Court's review.

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

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

The FAA preempts the *Iskanian* rule for the same reasons it preempted the defenses addressed in *Concepcion* and *Epic*. There is no meaningful difference between the class action at issue in *Concepcion*, the collective actions at issue in *Epic*, and the representative action at issue here. All three are exceptions to "the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.

338, 348 (2011). Just as class and collective actions permit plaintiffs to prosecute claims and collect damages on behalf of other class or collective members, PAGA authorizes a plaintiff to sue "on behalf of himself or herself and other current or former employees," authorizing recovery of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Lab. Code §2699(a), (f)(2).

All three forms of representational litigation involve procedural complexities and heightened stakes that are a poor fit for the streamlined and informal nature of traditional arbitration. That is why California employers seeking to obtain the benefits of traditional bilateral arbitration often seek an express waiver of all three forms of representational litigation to ensure that arbitration proceeds individually. Underscoring their similarity, waivers of all three types of actions are often included in the same provisions. That was true in *Epic* and it is true here. In *Epic*, the plaintiff "waive[d] the right to participate in or receive money or any other relief from any *class, collective, or representative proceeding*." Br. for Petitioner 7, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. filed June 9, 2017) (emphasis added). Likewise, Moriana waived her right to bring "a *class, collective, representative, or private attorney general action*." CA.App.93 (emphasis added). The grouping of these waivers "indicates that one waiver, without the other, would not be sufficient to create the type of arbitration desired by the parties," *Sakkab*, 803 F.3d at 443 (N.R. Smith, J., dissenting)—namely, traditional,

individualized, bilateral, and streamlined arbitration. Indeed, these three forms of representational litigation are sufficiently fungible that experience has shown that "one waiver, without the other," does not increase the incidence of bilateral arbitration, but simply changes the form of representational litigation to which an employer is subject.

Given the similarity of class, collective, and representative actions, the holdings of *Concepcion* and *Epic* apply directly here and make clear beyond cavil that the *Iskanian* rule is incompatible with the FAA and this Court's precedents. The central teaching of those precedents is that courts may not utilize contract defenses to "declare individualized arbitration proceedings off limits." *Epic*, 138 S.Ct. at 1623. Whether they emanate from a state-law unconscionability doctrine or competing federal policies, such defenses cannot trump parties' ability to agree to the kind of streamlined bilateral arbitration that is characteristic of arbitration and fully protected by the FAA. Yet that is exactly what the *Iskanian* rule does—it declares individualized arbitration off-limits with respect to PAGA claims, notwithstanding the parties' clear agreement to resolve their disputes bilaterally. Just like the repudiated defenses in *Concepcion* and *Epic*, "the *Iskanian* rule interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration"—*i.e.*, to arbitrate on an individualized basis—and therefore "interferes with the fundamental attributes of arbitration." *Sakkab*, 803 F.3d at 444 (N.R. Smith, J., dissenting).

In light of the similarities between class-action, collective-action, and representative-action waivers, it should come as no surprise that the reasoning of *Concepcion* and *Epic* forecloses the *Iskanian* rule. The FAA generally allows private parties to structure their arbitration agreements as they see fit. And an agreement to preserve the traditional benefits of arbitration by preserving arbitration in its traditional form—individual proceedings with none of the complexities or outsized stakes of representational proceedings—is not remotely problematic. A rule that purports to override such private agreements based on the supposition that particular forms of representational litigation are particularly important is not remotely compatible with the FAA. That is the clear teaching of *Concepcion* and *Epic*, and the *Iskanian* rule conflicts with those precedents. That alone suffices to justify this Court's review.

The specific features of PAGA claims underscore that permitting such representative claims *ex post* creates a vastly different dynamic than an employer would have expected in agreeing to bilateral, individualized arbitration. For example, a single employee filing a representative PAGA claim can seek to proceed on behalf of hundreds or thousands (or more) of other employees. *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110 (N.D. Cal. 2016) (addressing PAGA claim filed on behalf of hundreds of thousands of individuals). This case is no exception, as Moriana has asserted as part of her PAGA claim nine underlying Labor Code violations on behalf of herself and hundreds of others, from "Ocean Specialists" to "Air Department Agents" to "any other job title with substantially similar duties." In fact,

PAGA permits a plaintiff to allege Labor Code violations that *did not even affect her*; it "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." *Huff*, 233 Cal.Rptr.3d at 504 (emphasis added). Accounting for multiple years of multiple violations affecting hundreds or thousands of employees, a single representative PAGA claim can thus subject an employer to extraordinary potential liability. That enormous increased risk, to which the parties did not agree—and indeed specifically contracted to avoid—fundamentally alters the bargain the parties struck, gives rise to the same "risk of 'in terrorem' settlements" that this Court decried in *Concepcion*, and manifestly frustrates the purposes of the FAA. 563 U.S. at 350.

The central lesson of *Concepcion* and *Epic* is that, under the FAA, courts must "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic*, 138 S.Ct. at 1619. State-law rules prohibiting class-action, collective-action, or, as here, representative-action waivers—including PAGA waivers—all convert the agreed-upon individualized arbitration into something that is "not arbitration as envisioned by the FAA" and cannot "be required by state law." *Concepcion*, 563 U.S. at 351.

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

The California Supreme Court attempted to evade the clear teaching of *Concepcion* and shield the

Iskanian rule from preemption by asserting that "a PAGA claim lies outside the FAA's coverage." *Iskanian*, 327 P.3d at 151. According to that court, the FAA does not apply to PAGA claims because such a claim is "not a dispute between an employer and an employee arising out of their contractual relationship," but rather "is a dispute between an employer and the *state*"—with aggrieved employees serving as "agents" of the state. *Id.* That transparent effort to avoid the FAA's preemptive effect conflicts with this Court's cases, which squarely hold that states may not categorically place specific claims beyond the FAA's reach by conceptualizing them as particularly intertwined with state interests. What matters is whether the party who signed the arbitration agreement is seeking to litigate claims in contravention of the agreement. When that occurs—and it has plainly occurred here—the precise nature of the claims that the signatory seeks to pursue in contravention of the agreement does not matter.

As the Court explained in *Concepcion*, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 563 U.S. at 341. Applying that rule, the Court has turned back state efforts to place specific claims outside the FAA's scope. In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012), for example, a West Virginia court held that the FAA did not require enforcement of "arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes" because, in its view, "Congress did not intend for the FAA to be … applicable" to those claims. *Id.* at 531-32. In a

unanimous holding, this Court summarily vacated that decision, explaining that the FAA "includes no exception for personal-injury or wrongful-death claims" and that "a categorical rule prohibiting arbitration of a particular type of claim … is contrary to the … FAA." *Id.* at 532-33.

The same outcome is warranted here. As it freely admitted, the California Supreme Court has taken the view that "a PAGA claim lies outside the FAA's coverage." *Iskanian*, 327 P.3d at 151. On the basis of that view, it held that although the FAA required Iskanian to individually arbitrate his *class-action* claims, *id.* at 137, it did not require him to individually arbitrate his substantively identical representative *PAGA* claims, *id.* at 153. This Court's cases clearly forbid such differential treatment: The FAA "includes no exception" for PAGA actions, *Marmet*, 565 U.S. at 531-32, undermining any basis for the California court's categorical rule exempting PAGA actions from the FAA's preemptive scope.

The *Iskanian* court attempted to draw support from this Court's decision in *Waffle House*, but that decision only underscores the California Supreme Court's error. In *Waffle House*, this Court held that the EEOC could not be compelled to arbitrate a civil enforcement action that it brought in its own name to redress violations of a specific employee's rights, even though that employee was personally bound by an arbitration agreement. 534 U.S. at 297-98. This Court explained that the EEOC was not bound by the employee's arbitration agreement for the simple reason that the EEOC did not agree to arbitrate the dispute. *Id.* at 291. Indeed, the Court suggested that

the arbitration agreement would likely still have constrained the EEOC if the employee who signed the agreement and stood to benefit from the EEOC's enforcement action could exercise some control over the litigation—*i.e.*, if the "EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]." *Id.* at 291.

Attempting to avail itself of that decision, the *Iskanian* court declared that a plaintiff's representative PAGA action was not a "private dispute" governed by the FAA but one akin to the EEOC-filed enforcement action in *Waffle House*. *Iskanian*, 327 P.3d at 150-51. But *Waffle House* is completely inapposite for the simple reason that no California official initiated this litigation; Moriana did. And Moriana signed the arbitration agreement. When the same party who signed the arbitration agreement seeks to initiate litigation in contravention of the plain terms of that agreement, *Waffle House* provides no safe harbor. Indeed, not only is *Waffle House* plainly distinguishable—because here, the plaintiff (Moriana) is *both* the litigation-initiator and the arbitration-agreement-signatory—but *Waffle House* actually suggests "that the FAA preempts the [*Iskanian*] rule," because Moriana, and not any California official, exercises substantial control over the litigation. *Id.* at 158 (Chin, J., concurring).

That conclusion is unaffected by the fact that California characterizes a PAGA action as one "on behalf of the state" or because it requires PAGA plaintiffs to deposit 75% of the money they collect in the state's coffers. *Iskanian*, 327 P.3d at 133. As a

matter of state law, states may characterize state-law causes of action however they like and may impose whatever restrictions they deem desirable. But in cases to which it applies, the FAA displaces any such rules if their application would "interfere[] with fundamental attributes of arbitration." *Epic*, 138 S.Ct. at 1622. Thus, while California may be free to embrace the legal fiction that PAGA plaintiffs are state actors and to create special state-law rules as a result (for example, particular rules of standing just for them, *see Huff*, 233 Cal.Rptr.3d at 504), it may not rely on that characterization to refuse to enforce a plaintiff's agreement to resolve employment disputes via individualized, bilateral arbitration consistent with the FAA. If "contracting parties agree to include [certain] claims … within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (emphasis omitted). Allowing state courts to utilize a state-law legal construct to circumvent the FAA is the complete opposite of "rigorously" enforcing "arbitration agreements according to their terms." *Epic*, 138 S.Ct. at 1621.

II. The Question Presented Warrants The Court's Review In This Case.

This Court's intervention is warranted, both to repudiate this blatant effort to evade the FAA and to ensure the continued vitality of *Concepcion* and *Epic*. The California Supreme Court's reaction to *Concepcion* was to engage in damage control. Rather than faithfully apply *Concepcion* to other materially

identical forms of representational litigation, California has limited it to class actions and freed representational PAGA suits from the fetters of the FAA. The utterly predictable result has been that rather than allowing *Concepcion* to foster bilateral arbitration as this Court intended, California has simply caused the preferred form of agreement-defying representational litigation to morph from class actions to PAGA actions. Under the *Iskanian* rule, plaintiffs who should be arbitrating their individual claims under *Concepcion* and *Epic* pursuant to the agreements they signed can instead just replace the words "class action" in their pleadings with "PAGA representative action" and then proceed to litigate in court as if *Concepcion* and *Epic* never happened.

Numerous recent examples abound. For instance, in *Castillo v. Cava Mezze Grill, LLC*, 2018 WL 7501263 (C.D. Cal. Dec. 21, 2018), the plaintiff filed a class-action suit alleging multiple violations of California labor law. After the defendant invoked an agreement requiring individualized arbitration and waiving any "class action, collective action or any similar representative action," the court granted the defendant's motion to compel individualized arbitration of the class-action claims. *Id.* at *4-5. The plaintiff, however, sought leave to amend her suit to add a PAGA claim, *id.*, which the court subsequently granted because, under *Iskanian*, "PAGA claims are not waivable." *See* Order 4-5, *Castillo*, No. 18-7994-MFW (C.D. Cal. Jan. 8, 2019), Dkt.24. In *Burrola v. United States Security Associates, Inc.*, 2019 WL 480575 (S.D. Cal. Feb. 7, 2019), the court compelled individualized arbitration of the plaintiff's class-action

claims but granted the plaintiff's request to add a PAGA claim because, under *Iskanian*, a PAGA claim "is not subject to arbitration." *Id.* at *10. Likewise, in *Prasad v. Pinnacle Property Management Services, LLC*, 2018 WL 4586960 (N.D. Cal. Sept. 25, 2018), the court compelled individualized arbitration of the plaintiff's class-action claims but, citing *Iskanian*, granted plaintiff's request to add a PAGA claim "based on the same facts alleged in [the] original pleading." *Id.* at *2 n.3, *5-6. And so on. *Concepcion* and *Epic* have thus been transformed from powerful affirmations of the FAA and meaningful protections of contractual rights into little more than speed bumps that plaintiffs can overcome through barely-artful pleading.

The consequences have been dramatic. Recent years have seen an explosion in PAGA filings, as plaintiffs—or, more precisely, plaintiffs' lawyers—have realized that PAGA representative actions deliver all of the benefits of class actions without any of the FAA's restrictions. *See* Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://bit.ly/3eoN9Vo ("[PAGA] is a particularly attractive vehicle for plaintiffs' attorneys to bring claims … in the wake of [*Concepcion*]."). The annual number of PAGA notices has exploded from about 700 in 2005 to more than 6,000 in 2020—not because employees are entering into fewer bilateral arbitration agreements or because employers are violating the Labor Code more often, but because PAGA provides a clear route to circumvent the FAA and this Court's cases. *See, e.g.*, Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Society

for Human Resource Management (Mar. 26, 2019), https://bit.ly/3tmapro (noting that more than 15 new PAGA notice letters are filed *every day*). While not all of these notice letters lead to full-blown representative PAGA actions in court, many do—and the others often force employers into quick settlements to avoid the "small chance of a devastating loss," *Concepcion*, 563 U.S. at 350, an outcome even more likely when PAGA claims result in full-blown litigation. *See, e.g.*, Joint Stipulation, *Castillo*, No. 18-7994-MFW (C.D. Cal. Jan. 10, 2020), Dkt.30 (noting settlement after court granted leave to file PAGA claim).

The sharp growth in PAGA claims is also evident by looking at California appellate decisions, many of which, in just the three years since *Epic*, have affirmed decisions refusing to enforce representative PAGA waivers, notwithstanding arguments that the *Iskanian* rule is irreconcilable with *Epic*. *See, e.g.*, *Contreras v. Superior Ct.*, No. B307025, 275 Cal.Rptr.3d 741 (Cal. Ct. App. 2021); *Schofield v. Skip Transp., Inc.*, No. A159241, 2021 WL 688615 (Cal. Ct. App. Feb. 23, 2021); *Santana v. Postmates, Inc.*, No. B296413, 2021 WL 302644 (Cal. Ct. App. Jan. 29, 2021), *review filed* (Mar. 10, 2021); *Rimler v. Postmates Inc.*, No. A156450, 2020 WL 7237900 (Cal. Ct. App. Dec. 9, 2020), *review denied* (Feb. 24, 2021); *Provost v. YourMechanic, Inc.*, 269 Cal.Rptr.3d 903 (Cal. Ct. App. 2020), *review denied* (Jan. 20, 2021); *Olson v. Lyft, Inc.*, 270 Cal.Rptr.3d 739 (Cal. Ct. App. 2020); *Collie v. Icee Co.*, 266 Cal.Rptr.3d 145 (Cal. Ct. App. 2020), *review denied* (Nov. 10, 2020); *Correia*, 244 Cal.Rptr.3d 177; *Ramos v. Superior Ct.*, 239 Cal.Rptr.3d 679 (Cal. Ct. App. 2018), *as modified* (Nov. 28, 2018). As these decisions indicate, moreover,

the California Supreme Court has had ample opportunity to revisit *Iskanian* in light of *Epic*, but it has repeatedly declined to do so. *See, e.g.*, *Rimler*, 2020 WL 7237900, *review denied* (Feb. 24, 2021); *Provost*, 269 Cal.Rptr.3d 903, *review denied* (Jan. 20, 2021); App.1.

This Court has not hesitated to intervene when states so openly defy the FAA and when the stakes are as high as they are here. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), … [i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012).

Indeed, if certiorari was warranted in *Concepcion*, it is certainly warranted here: Whereas the *Discover Bank* rule applied only to a tiny subset of class-action waivers—those included "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," 563 U.S. at 340—the *Iskanian* rule applies across-the-board to *all* PAGA waivers in *all* employment disputes across the entire state—and not just any state, but California, which is home to more than 10% of the entire American workforce. *See Civilian labor force and unemployment by state and selected area*, U.S. Bureau of Labor Statistics, https://bit.ly/2PPyYPZ (last modified Apr. 16, 2021).

Finally, this case presents an ideal opportunity for the Court to review and reject the *Iskanian* rule. Although past petitions have presented this question, all but one predated *Epic*, and they suffered from vehicle problems. Here, by contrast, there is only a single PAGA claim, the arbitration agreement waived the right to pursue a PAGA claim by name, and Moriana had the ability to opt-out of that provision but declined. This petition is thus an ideal vehicle for this Court to address the *Iskanian* rule.

Moreover, by refusing to budge in light of *Epic*, the decision below makes clear that nothing short of plenary review by this Court will bring the California courts into line. This Court's cases make clear that state-law policies cannot trump the FAA's policy favoring holding parties to their bargain when they agree to traditional forms of bilateral arbitration that expressly foreclose resort to representational litigation in lieu of individual arbitration. Enforcing those agreements and the FAA when it comes to class and collective actions, but not representational PAGA actions, makes no sense. It does little to promote the actual policies of the FAA, and it simply causes the form of contractually foreclosed representational litigation to morph. California has had ample opportunities to bring coherence to its law and ample hints from this Court that it needs to do so. The time for subtlety and suggestions has passed. This Court needs to grant review and make clear that all three forms of representational litigation are subject to the FAA and the same basic rules.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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