No. 20-1573

IN THE

# Supreme Court of the United States

VIKING RIVER CRUISES, INC.,

*Petitioner,*

v.

ANGIE MORIANA,

*Respondent.*

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

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Federal Arbitration Act requires state courts to enforce a waiver of a statutory right of action to collect penalties on behalf of a state, in violation of neutral principles of state law prohibiting such a waiver, if the waiver is set forth in an arbitration agreement.

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## INTRODUCTION

California's Private Attorneys General Act, or PAGA, creates a right of action in which individual employees bring actions on behalf of the State to recover penalties from employers for violations of California's Labor Code. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that the right to bring a PAGA action cannot be waived prospectively, whether in an arbitration agreement or any other type of contract. In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 429 (9th Cir. 2015), the Ninth Circuit agreed with the California Supreme Court that *Iskanian*'s neutral rule is not preempted by the Federal Arbitration Act (FAA) because it does not prohibit arbitration of specific types of claims or otherwise disfavor arbitration.

*Iskanian* and *Sakkab* do not conflict either with this Court's precedents or with decisions of other state supreme courts or federal courts of appeals. As a result, in the seven years since *Iskanian*, and the six years since *Sakkab*, this Court has repeatedly denied petitions for certiorari claiming those decisions were wrongly decided.

This case involves an intermediate California appellate court's routine application of *Iskanian* to a contract that purported to waive altogether an employee's right to bring any private attorney general action against her employer. The employer, Viking River Cruises, now seeks review in this Court, repeating the contentions presented in earlier unsuccessful petitions that *Iskanian* and *Sakkab* were wrongly decided.

Viking argues that review is now justified by this Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.

Ct. 1612 (2018). But nothing about that argument is new. The same year *Epic* was decided, the respondent in *Five Star Senior Living Inc. v. Mandviwala*, U.S. No. 17-1357, *cert. denied*, 138 S. Ct. 2680 (2018), explained that *Iskanian* and *Sakkab* are fully consistent with *Epic*: The rule that an employee may not be barred from pursuing a PAGA claim in any forum "does not provide 'that a contract is unenforceable *just because it requires bilateral arbitration*,' " and "does not 'target arbitration either by name or by more subtle methods.' " *Mandviwala*, Br. in Opp. 3, 22 (quoting *Epic*, 138 S. Ct. at 1623, 1622). The next year, in *PennyMac Financial Services, Inc. v. Smigelski*, 140 S. Ct. 223 (2019), the Court again denied a petition premised squarely on the assertion that *Iskanian* and *Sakkab* conflict with *Epic*. That argument, which no appellate court has accepted, has grown no stronger since then.

Viking also recycles the argument that *Iskanian* "prohibits outright the arbitration of a particular type of claim." Pet. 22 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)). *Iskanian*, however, did not hold that an agreement to arbitrate PAGA claims is unenforceable. It held "that representative PAGA claims may not be waived outright," but it did "not prohibit the arbitration of any type of claim." *Sakkab*, 803 F.3d at 434. Although some intermediate California courts have suggested that PAGA claims may be nonarbitrable, the California Supreme Court has never decided that question.

And in any event, *this* case does not present it. The lower courts did not refuse to enforce an *agreement to arbitrate* PAGA claims, because Viking's agreement unambiguously *prohibited* arbitration (as well as litigation in court) of *any* private attorney general claim.

In holding that the employee's PAGA claims must proceed in court, the lower court *gave effect* to the agreement's exclusion of private attorney general claims from arbitration and held the agreement invalid only insofar as it precluded PAGA claims completely. Because the FAA prohibits courts from compelling parties to arbitrate matters that they have expressly agreed not to arbitrate, the only remedy for the invalid waiver was to allow the claim to be litigated.

Viking's petition, like those that came before it, fails to come to grips with the central fact that California's rule that the right to bring PAGA claims cannot be waived is *not* an effort to "declare individualized arbitration proceedings off-limits." Pet. 19 (quoting *Epic*, 138 S. Ct. at 1623). Rather, Viking's invocation of the FAA is an attempt to avoid bilateral resolution of the State's claim for penalties through the representative chosen by California lawmakers—an individual aggrieved employee. Viking does not seek to compel arbitration of that claim, but to enforce a waiver of the right to bring the claim in any forum—something no decision of this Court has ever held that the FAA countenances, let alone requires.

## STATEMENT

### 1. PAGA

PAGA provides for enforcement of California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the State, with a share going to affected employees. Before PAGA's enactment, only the State could obtain such penalties. *See Iskanian*, 327 P.3d at 145–46. PAGA authorizes an "aggrieved employee" to recover penalties for Labor Code violations committed against her-

self and other employees in a representative civil action. Cal. Lab. Code § 2699(g). Penalties recovered under PAGA "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code …; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

"A PAGA representative action is … a type of *qui tam* action." *Iskanian*, 327 P.3d at 148. PAGA actions are commonly maintained by individual plaintiffs. *See Arias v. Super. Ct.*, 209 P.3d 923, 929–34 (Cal. 2009). They require neither class certification nor notice to other employees. *See id.* Other employees are bound by a PAGA adjudication *only* with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Id.* at 933. The effect of a PAGA judgment does not rest on the principles that make class action judgments binding on class members. *See Smith v. Bayer Corp.*, 564 U.S. 299, 312–13 (2011). Rather, it rests on a very different basis: "When a government agency is authorized to bring an action … a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party." *Arias*, 209 P.3d at 934.

PAGA reflects the legislature's determination that limitations on the State's enforcement resources render it "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies … retain primacy over private enforcement efforts." *Id.* at 929–30. "In a lawsuit brought under the act, the employee plaintiff represents the same legal right and

interest as state labor law enforcement agencies." *Id.* at 933. The action "is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the labor code." *Iskanian*, 327 P.3d at 151.

Because PAGA aims to deter and penalize Labor Code violations rather than compensate individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id.* Thus, "[a]ll PAGA claims," whether involving violations affecting one or a thousand employees, "are 'representative' actions in the sense that they are brought on the state's behalf." *ZB, N.A. v. Super. Ct.*, 448 P.3d 239, 243 (2019). Accordingly, the plaintiff may "seek any civil penalties the state can," *id.*, but the PAGA right of action does not provide a mechanism for seeking *compensatory* remedies, such as lost wages, either for the plaintiff or for other employees, *id.* at 245–52.

**2. *Iskanian***

The plaintiff in *Iskanian* filed both a putative class action and a representative claim under PAGA, based on alleged violations of California wage-and-hour laws. The defendant sought to compel arbitration under an agreement that barred both class actions and representative actions.

The California Supreme Court held the class action ban valid and enforceable. The court concluded that *Concepcion*, 563 U.S. 333, and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), required it to overrule its earlier decision in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), which had held

class bans in employment arbitration agreements unenforceable in some circumstances. *See Iskanian*, 327 P.3d at 133. The California court also anticipated this Court's ruling in *Epic* that federal labor laws do not preclude enforcement of class-action bans. *See id.* at 141. All seven justices, however, agreed that the agreement was unenforceable to the extent it left no forum in which the plaintiff could pursue a PAGA claim. The court began by holding that employment agreements in which employees prospectively waive the right to bring PAGA representative actions are unenforceable under state law. *See id.* at 149. The court then held that the FAA does not require enforcement of such purported waivers. *See id.* at 150–53.

The court's five-justice majority opinion on this point rested in part on the state-law holding that the real party in interest under PAGA is the State, on whose behalf the PAGA plaintiff seeks penalties. As the court observed, a PAGA action is by definition a representative action on the State's behalf. *See id.* at 151. Thus, enforcing an employment agreement banning representative actions would prevent the State from pursuing its claim through the agent authorized by law to represent it: the PAGA plaintiff. Because "a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency," *id.* at 149, and because the State is not a party to the agreement invoked to bar the claim, the court held that permitting the PAGA action to proceed would not conflict with the FAA's requirement that private arbitration agreements be enforced as between the parties, *id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Having held that the PAGA claims must be available in "some forum," *id.* at 155, the

court remanded for consideration of whether they would be arbitrated or litigated in court.

Justices Chin and Baxter, concurring in the judgment, set forth an alternate basis for the result. Invoking this Court's statements that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," *id.* at 157 (quoting *Am. Express*, 570 U.S. at 236), they concluded that holding prospective PAGA waivers unenforceable "does not run afoul of the FAA," *id.*

This Court denied certiorari in *Iskanian*, 574 U.S. 1121 (2015), and, soon after, in another case where the California Supreme Court had applied *Iskanian*. *Bridgestone Retail Operations, LLC v. Brown*, 575 U.S. 1037 (2015).

**3. *Sakkab***

In *Sakkab*, the Ninth Circuit agreed with the California Supreme Court that the FAA does not preempt *Iskanian*'s prohibition on waivers of the right to bring PAGA representative claims. 803 F.3d at 429 (M. Smith, J.). The court held that the *Iskanian* rule falls within the FAA's savings clause, which makes agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Applying this Court's teaching that "a state contract defense must be 'generally applicable' to be preserved by § 2's saving clause," 803 F.3d at 432 (quoting *Concepcion*, 563 U.S. at 339), the court held that the *Iskanian* rule is "generally applicable" because it "place[s] arbitration agreements on equal footing with non-arbitration agreements." *Id.* *Iskanian*, the court held, bars prospective waiver of PAGA claims, "regardless of

whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.*

*Sakkab* further concluded that *Iskanian* does not conflict with the FAA's purposes. The court recognized that the FAA's purpose is to overcome judicial hostility to arbitration and that it "therefore preempts state laws prohibiting the arbitration of specific types of claims." *Id.* at 434 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012), and *Preston v. Ferrer*, 552 U.S. 346, 356–59 (2008)). *Iskanian*, however, "expresses no preference" as to whether PAGA claims "are litigated or arbitrated." *Id. Iskanian* "provides only that representative PAGA claims may not be waived outright" and "does not prohibit the arbitration of any type of claim." *Id.*; *accord ZB*, 448 P.3d at 241 (explaining that *Iskanian* "held that a court may not enforce an employee's alleged predispute waiver of the right to bring a PAGA claim in any forum").

Further, *Sakkab* held that *Iskanian* does not "interfere[ ] with arbitration." 803 F.3d at 434 (quoting *Concepcion*, 563 U.S. at 346). *Iskanian*'s prohibition on PAGA waivers, the court explained, is unlike the rule at issue in *Concepcion*, under which bans on class-action procedures were deemed unconscionable. *Concepcion* held that rule preempted because it "'interefere[d] with fundamental attributes of arbitration,' by imposing formal classwide arbitration procedures on the parties against their will." *Id.* at 435 (quoting *Concepcion*, 563 U.S. at 344). By contrast, " 'fundamental[ ]' differences between PAGA actions and class actions" render *Concepcion*'s concerns inapplicable to the *Iskanian* rule. *Id.* (quoting *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014), *cert. denied*, 574 U.S. 1060 (2014)).

A class action, *Sakkab* elaborated, is a "procedural device" in which individual claims of multiple plaintiffs are adjudicated together, creating the necessity for formal procedures such as class certification, class-wide notice, and opt-out rights, to protect each class member's rights with respect to his individual claim. *Id*. "By contrast, a PAGA action is a statutory action" in which the State, represented by the employee who brings the action "as the proxy or agent of the state's labor law enforcement agencies," litigates one-on-one against the defendant to recover penalties "measured by the number of Labor Code violations committed by the employer." *Id*. (citations omitted). Because the plaintiff is not employing a procedure for aggregating claims belonging to other employees, but is pursuing the State's claims for penalties, "there is no need to protect absent employees' due process rights in PAGA arbitrations," and "PAGA arbitrations therefore do not require the formal procedures of class arbitrations." *Id*. at 436. Thus, the court continued, "prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs." *Id*. Enforcing such a waiver would not preserve fundamental attributes of arbitration, but would "effectively … limit the penalties an employee-plaintiff may recover on behalf of the state." *Id*.

*Sakkab* acknowledged that the liabilities defendants incur for PAGA violations may be large and that some defendants might hesitate to agree to arbitrate such claims. *Id*. at 437. The court reasoned, however, that "the FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." *Id*. "Nor … would the FAA require courts to enforce a provision

limiting a party's liability in such an action, even if that provision appeared in an arbitration agreement." *Id.* (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.)). Likewise, the FAA does not preempt a rule prohibiting parties "from opting out of the central feature of the PAGA's private enforcement scheme—the right to act as a private attorney general to recover the full measure of penalties the state could recover." *Id.* at 439.

Finally, the court invoked this Court's instruction that " '[i]n all pre-emption cases' we must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Here, the State exercised its "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State," *id.* (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)), by "creating a form of qui tam action" to supplement the State's limited enforcement resources. *Id.* "The FAA," the court concluded, "was not intended to preclude states from authorizing qui tam actions to enforce state law" or to "require courts to enforce agreements that severely limit the right to recover penalties" in such actions. *Id.* at 439–40.

The Ninth Circuit denied rehearing en banc in *Sakkab*, and no judge requested a vote on the petition.

Since *Sakkab*, this Court has denied certiorari in at least seven more cases seeking review of whether the FAA preempts *Iskanian*: *Smigelski*, 140 S. Ct. 223; *Mandviwala*, 138 S. Ct. 2680; *Prudential Overall Sup-*

*ply v. Betancourt*, 138 S. Ct. 556 (2017); *Bloomingdale's, Inc. v. Tanguilig*, 138 S. Ct. 356 (2017); *Bloomingdale's, Inc. v. Vitolo*, 137 S. Ct. 2267 (2017); *CarMax Auto Superstores Cal., LLC v. Areso*, 577 U.S. 1048 (2015); *Apple Am. Group, LLC v. Salazar*, 577 U.S. 1048 (2015).

**4. This Case**

Respondent Angie Moriana worked as a sales representative for petitioner Viking River Cruises. Ms. Moriana, together with other Viking employees, was subjected to violations of California's Labor Code including failure to pay all wages due; failure to pay overtime at the required rate; failure to provide meal and rest periods; failure to provide accurate, itemized wage statements, and other violations. Ms. Moriana filed this action under PAGA in a California state court in 2018. As Viking acknowledges, her operative complaint asserts only a PAGA claim seeking recovery of penalties for these violations.

Viking moved to compel arbitration, invoking an agreement Ms. Moriana had signed with a company that contracted to provide human resources services for Viking as a "co-employer." The agreement provides that any dispute arising out of Ms. Moriana's employment with Viking must be arbitrated. It further provides that "[t]here will be no right or authority for any dispute to be brought, heard, or arbitrated as a class, collective, representative or private attorney general action." Pet. App. 14. Viking acknowledged that *Iskanian* holds that such a waiver of the right to bring a representative or private attorney general action under PAGA is unenforceable as a matter of California law, but it argued that this Court's decision in *Epic* had effectively overruled *Iskanian*. The trial court

noted that California appellate decisions had held that *Epic* did not address the enforceability of an agreement, such as this one, barring a PAGA representative action in any forum, and, citing *Iskanian*, it denied Viking's motion. Pet. App. 16.

The California Court of Appeal affirmed in an unpublished opinion. Citing previous appellate decisions holding that *Epic* does not affect *Iskanian*'s holding that predispute waivers of PAGA claims are unenforceable, the court rejected Viking's argument that *Epic* effectively overruled *Iskanian*. *Iskanian*'s nonwaiver rule, the court held, is not an impermissible device to evade a valid requirement that individual claims be arbitrated, but a permissible rule aimed at preventing employers from escaping liability by "precluding PAGA actions in any forum." Pet. App. 6. The court also rejected Viking's argument that "Moriana's 'individual PAGA claim' should be compelled to arbitration." *Id*. The court explained that "[a]ll PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf." *Id*. (quoting *ZB*, 448 P.3d at 243). Because Moriana's complaint contained only a single cause of action for penalties under PAGA, *id*. at 7, the court held that she had brought only a "single representative claim," *id*. at 6, that fell within the agreement's unenforceable blanket waiver of all representative and private attorney general claims. She had "alleged no personal claim seeking compensation that might be individually arbitrated" under the agreement. *Id*. at 7.

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

## REASONS FOR DENYING THE WRIT

This case is not about whether the FAA requires enforcement of an agreement providing for arbitration of a particular claim on an individual basis. Rather, the agreement at issue purports to bar PAGA claims altogether, regardless of the forum. The lower courts agree that the FAA does not require enforcement of an arbitration clause that waives PAGA claims altogether rather than requiring their arbitration, and no decision of this Court has held that the FAA overrides state laws prohibiting waivers of specific rights of action. *Epic*, the principal decision on which Viking rests its request for review, holds that the FAA provides for enforcement of agreements by individuals to arbitrate their claims individually rather than collectively, but says nothing to suggest that the FAA requires enforcement of a waiver of an individual's right to pursue a unitary, representative claim on behalf of the State. Viking's petition merits review no more than did any of the previous petitions contending that *Iskanian* and *Sakkab* were erroneous.

### I. *Epic* does not support Viking's request for review.

The core holding of *Iskanian* that drove the outcome below is that an agreement, arbitration or otherwise, cannot prospectively waive an employee's right to bring a PAGA action in *some* forum. *Iskanian*, 327 P.3d at 155. Viking does not claim that there is any conflict among federal courts of appeals or state supreme courts over whether the FAA preempts that holding. It concedes that the Ninth Circuit agrees that the FAA does not preempt a rule that "only prohibits [parties] from opting out of the central feature of the PAGA's private enforcement scheme—the right to act

as a private attorney general to recover the full measure of penalties the state could recover." *Sakkab*, 803 F.3d at 439; *see* Pet. 11. Indeed, although PAGA claims may be brought outside California and the Ninth Circuit, *see*, *e.g.*, *Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174, 180 (2d Cir. 2015), no federal appellate or state supreme court has rejected *Iskanian*'s nonwaiver rule. Moreover, Viking cites no decisions of this Court holding that the FAA requires enforcement of an agreement that waives a claim rather than requiring its arbitration. And it acknowledges that this Court has repeatedly denied petitions for certiorari arguing that *Iskanian* and *Sakkab* erred in applying FAA preemption doctrine.

Viking asserts, however, that *Epic* now justifies review. According to Viking, "all but one" of the past petitions presenting the issue predated *Epic*. Pet. 30. In fact, a petition challenging *Iskanian* and *Sakkab* was pending when *Epic* was decided, and the relevance of *Epic* was discussed extensively in both the brief in opposition and the reply in that case. *See Mandviwala*, No. 17-1357, Br. in Opp. 3, 6, 19, 21, 22, 24, 25, 26, 27; Reply 1, 6, 9, 10, 12. This Court, however, did not think its opinion in *Epic* justified even an order granting, vacating, and remanding for further consideration—the usual course when there is a "reasonable probability" that an intervening decision of the Court may call into question the outcome below. *Greene v. Fisher*, 565 U.S. 34, 41 (2011). The following year, the petitioner in *Smigelski* invoked *Epic* as justification for either plenary review or a grant, vacatur, and remand. Again, and despite the absence of any self-evident "vehicle problems," Pet. 30, this Court denied certiorari without requesting a response. 140 S. Ct. 223.

As those denials reflect, Viking's contention that the Court has not had sufficient opportunity to consider this issue since issuing the decision in *Epic* is incorrect. And as the denials further reflect, *Iskanian* does not conflict with *Epic*. Indeed, in *Iskanian* itself, the California Supreme Court anticipated *Epic*'s holding and articulated its rationale: *Iskanian* rejected the argument that the National Labor Relations Act "prohibits contracts that compel employees to waive their right to participate in class proceedings to resolve wage claims." 327 P.3d at 138. *Iskanian* held that "a rule against class waivers" was incompatible with the FAA because it "interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice," and it further concluded that the NLRA does not "overrid[e] the FAA's mandate." *Id.* at 141, 142. That analysis exactly tracks this Court's reasoning in *Epic*. *See* 138 S. Ct. at 1621–26.

Moreover, *Epic*'s holding that collective proceedings that aggregate the separate claims of individuals are incompatible with "arbitration's fundamental attributes," *id.* at 1622, says nothing about whether state courts must enforce agreements that waive individuals' rights to assert unitary claims on behalf of a state in bilateral proceedings. The arbitration agreements at issue in *Epic*, like those in *Concepcion* before it, prohibited class or collective proceedings. But they did not bar an individual from asserting *any* claim that she could otherwise assert in a bilateral proceeding. In contrast, the agreements that *Iskanian* holds unenforceable do just that. Thus here, Viking's agreement is unenforceable under *Iskanian* because its prohibition of "private attorney general" claims forecloses

any assertion of a PAGA claim, in any manner, in any forum.[1]

*Iskanian*'s condemnation of such agreements does not "attack[ ] (only) the individualized nature of … arbitration proceedings." *Epic*, 138 S. Ct. at 1622. It attacks only the waiver of an individual's entitlement to pursue a particular claim and the concomitant waiver of the State's entitlement to pursue its claims through an individual authorized to do so under state law. *Epic* does not consider, let alone resolve, whether a state-law rule precluding such waivers violates the FAA, any more than do any of this Court's prior holdings, including *Concepcion*. Indeed, Viking points to nothing in *Epic* that adds materially to Viking's underlying argument that *Iskanian* conflicts with *Concepcion*. *See* Pet. 16–20; *see also Rivas v. Coverall N. Am., Inc.*, 842 F. Appx. 55, 56 (9th Cir. 2021). And that argument has been at the heart of every one of the petitions challenging *Iskanian* that this Court has denied, starting with *Iskanian* itself. *See Iskanian*, No. 14-241, Pet. i.

## II. *Iskanian* is fully consistent with this Court's precedents.

Beyond Viking's mistaken assertion that *Epic* is a game-changing decision, its request for review rests on its argument that *Iskanian* conflicts with this Court's FAA jurisprudence. Such arguments that lower courts have misapplied settled precedents "rarely" justify a grant of certiorari. S. Ct. R. 10. And as this Court's repeated rejection of petitions presenting the same arguments underscores, this case is not

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[1] Viking observes that Ms. Moriana could have opted out of the PAGA waiver, but *Iskanian*'s holding that a waiver of the right to bring a PAGA action is unenforceable does not depend on its voluntariness.

one of those rare instances. This Court's FAA decisions have never held that an arbitration agreement may be used as a vehicle to waive the right to assert a claim, let alone a claim on behalf of a state that is not a party to the agreement. Moreover, both *Iskanian* and *Sakkab* carefully follow and apply this Court's admonitions that state laws may not reflect hostility to arbitration or impose procedures incompatible with its fundamental attributes.

### A. This Court's FAA decisions do not require enforcement of agreements that bar assertion of statutory rights.

As the concurring Justices in *Iskanian* pointed out, this Court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims. The FAA makes agreements to arbitrate claims enforceable; it does not provide for enforcement of agreements that claims cannot be pursued at all. *See* 9 U.S.C. § 2. Allowing defendants to excuse themselves from liability for specific kinds of claims or particular forms of relief is not the FAA's objective.

This Court's decisions enforcing arbitration agreements thus repeatedly emphasize that arbitration involves choice of forum, not waiver of claims: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Waffle House*, 534 U.S. at 295, n.10; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am.*

*Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987).

An agreement to arbitrate is thus not "a prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). Indeed, this Court has agreed that an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies" would be "against public policy," *Mitsubishi*, 473 U.S. at 637, n.19—precisely *Iskanian*'s rationale.

In *American Express*, this Court held that a class-action ban in an arbitration agreement was enforceable despite its *practical* effect of making antitrust claims too costly for the plaintiffs, 570 U.S. at 238–39, but reiterated that the FAA does not require enforcement of arbitration agreements that *expressly* waive statutory claims and remedies. The Court explained that this principle "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.' " *Id.* at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). That principle, the Court added, "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id*.

The principle that the FAA does not require enforcement of agreements *forbidding* assertion of claims applies equally to state and federal claims. The Court's decisions, including *American Express*, have repeatedly stated that arbitration clauses may not waive claims, without suggesting that state-law claims differ in this respect. Indeed, in *Preston v. Ferrer*, this Court held that an arbitration agreement was

enforceable in part because the signatory "relinquishe[d] no substantive rights … California law may accord him." 552 U.S. at 359.

The non-waiver principle applies to state-law claims because the FAA makes agreements to *arbitrate* claims enforceable, 9 U.S.C. § 2, but does not authorize enforcement of agreements to *waive* claims regardless of their source. Thus, although federal law may not affirmatively *bar* the enforcement of a waiver of state-law claims in an arbitration clause, *see Sakkab*, 803 F.3d at 433 n.9, nothing in the FAA *requires* enforcement of such a waiver.

### B. This Court's decisions do not require enforcement of agreements that strip states of police power to authorize enforcement actions on their behalf.

*Iskanian* held—as a matter of state-law statutory construction—that the State is the "real party in interest" in PAGA actions. 327 P.3d at 151. The lion's share of the recovery goes to the State, which is bound by the outcome. An action for statutory penalties, whether brought by state officers or a PAGA qui tam plaintiff, is thus "a dispute between an employer and the *state*," acting "through its agents." *Id*. Enforcing a waiver of PAGA claims in an employment agreement would effectively impose that waiver on a governmental body that is not party to the agreement, preventing the State from asserting its claims through a representative authorized by law. It is perfectly coherent, and consistent with the terms and purposes of the FAA, to recognize that an employee must be permitted to bring a PAGA representative claim *in some forum* because the State is not bound to a waiver to which it did not agree. *See Iskanian*, 327 P.3d at 155.

None of this Court's decisions enforcing arbitration agreements suggests that such an agreement can waive the right to bring a claim on behalf of a state. As *Iskanian* correctly stated, this Court's "FAA jurisprudence—with one exception …—consists entirely of disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." 327 P.3d at 150. The "one exception," *Waffle House*, "does not support [the] contention that the FAA preempts a PAGA action." *Id.* at 151. Quite the contrary.

In PAGA cases, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract," or that it agreed to waive its claims, and "[i]t goes without saying that a contract cannot bind a nonparty." 534 U.S. at 294. As in *Waffle House*, allowing an arbitration agreement to preclude recovery of penalties for the State would "turn[ ] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." *Id.* at 295. "Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of *qui tam* action on behalf of the state for such remedies." *Iskanian*, 327 P.3d at 151.[2]

Holding that a federal statute aimed at enforcing agreements to resolve private disputes preempts a state's ability to assert its claims against those who

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[2] One of Viking's amici points out that some lower courts have held that qui tam plaintiffs under the federal False Claims Act may be compelled to arbitrate claims even though the United States is not a party to the arbitration agreement. *See* Wash. Legal Fdn. Br. 15. The amicus, however, cites no authority suggesting an arbitration agreement can *waive* the right to bring a False Claims Act qui tam action.

violate its laws would violate fundamental preemption principles. "[T]he historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." *Iskanian*, 327 P.3d at 152 (quoting *Arizona v. United States*, 567 U.S. 387, 400 (2012)). Enforcing wage-and-hour laws falls squarely within those police powers, and the structure of a state's law enforcement authority is central to its sovereignty. *Id.* (citing *Metro. Life*, 471 U.S. at 756; *Printz v. United States*, 521 U.S. 898, 928 (1997)).

The FAA's purpose is to render arbitration agreements in contracts affecting commerce enforceable as between contracting parties. It embodies no manifest purpose to interfere with "*the state's* interest in penalizing and deterring employers who violate California's labor laws." *Iskanian*, 327 P.3d at 152. The FAA does not allow parties to contract out of liabilities for penalties imposed by state law, and thus a state's choice to grant citizens non-waivable claims to enforce those liabilities does not conflict with FAA.

### C. *Iskanian* and *Sakkab* do not reflect hostility to arbitration.

*Iskanian* does not place arbitration agreements on an "unequal 'footing'" with other contracts, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), and does not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). As *Sakkab* recognizes, *Iskanian* provides even-handedly that an employment agreement may not prospectively forbid employees to bring PAGA actions, whether or not the prohibition is

in an arbitration clause. 803 F.3d at 432–33; *see Iskanian*, 327 P.3d at 133, 148–49.

That rule does not run afoul of this Court's disapproval of rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic*, 138 S. Ct. at 1622 (citation omitted); *accord Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *see also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015). *Iskanian* does not "target arbitration either by name or by more subtle methods." *Epic*, 138 S. Ct. at 1622. Rather, it comports with the FAA's "'equal-treatment' rule for arbitration contracts," *id.*, and falls well within the principle that the FAA does not preempt state laws concerning the "enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9.

Moreover, unlike in *Kindred*, where it was difficult to imagine how the state rule at issue could apply to anything but an arbitration agreement, it is not "utterly fanciful" to posit that, if PAGA waivers were permissible, they would appear outside of arbitration clauses. 137 S. Ct. at 1427. It is not only likely, but inevitable, that if employers were given the power to opt out of PAGA liability through employment agreements, they would do so regardless of whether they also wished to require arbitration of other claims. Thus, *Iskanian* does not "rely on the uniqueness of an agreement to arbitrate as [its] basis." *Id.* at 1426 (citation omitted). Allowing employers to use arbitration agreements to extract waivers of PAGA claims that cannot be obtained through other employment agreements would uniquely *favor* arbitration agreements, an outcome the FAA neither requires nor allows.

The *Iskanian* anti-waiver rule, moreover, does not disfavor agreements based on whether they have "the defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426. In particular, the rule does not "impermissibly disfavor[ ] arbitration" by targeting its bilateral nature and rendering a contract "unenforceable *just because it requires bilateral arbitration*." *Epic*, 138 S. Ct. at 1623. As *Iskanian* explains, "[r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." 327 P.3d at 152. Arbitration as to private rights proceeds wholly unaltered by *Iskanian*. The employer must only leave open some forum in which a PAGA qui tam plaintiff may pursue the State's claims for penalties. *See id*.

Moreover, if parties agreed to arbitrate PAGA representative claims for penalties on behalf of the State, the proceedings would remain bilateral ones between individual plaintiffs (acting as representatives of the State) and defendants. *See Arias*, 209 P.2d at 929–34; *see also Sakkab*, 803 F.3d at 435–39. Although the recovery sought in a PAGA action encompasses "penalties … measured by the number of Labor Code violations committed by the employer," *Sakkab*, 803 F.3d at 435, a PAGA action, whether in litigation or arbitration, remains a one-on-one proceeding between the State, represented by the plaintiff, and the defendant. *Id*. Thus, *Iskanian* is not premised on objection to *bilateral* proceedings as long as they allow full assertion of PAGA claims. *See Epic*, 138 S. Ct. at 1623.

In short, *Iskanian* is not "tailor-made to arbitration agreements," *Kindred*, 137 S. Ct. at 1427, but to employment agreements *waiving* PAGA claims. Such

waivers are in no sense a "primary characteristic of an arbitration agreement." *Id.* Indeed, this Court has repeatedly warned against "confus[ing] an agreement to arbitrate … statutory claims with a prospective waiver of the statutory right." *Pyett*, 556 U.S. at 265. Prohibiting a prospective waiver of a statutory right of action does not disfavor a primary characteristic of *arbitration* or otherwise "interfere with one of arbitration's fundamental attributes." *Epic*, 138 S. Ct. at 1622.

### D. *Iskanian* does not impose procedures incompatible with arbitration.

The *Iskanian* rule also does not effectively impose procedures incompatible with arbitration, as did the prohibitions of class-action waivers addressed in *Concepcion* and *Epic*. *Sakkab* thoroughly explained how PAGA claims are consistent with arbitration's fundamental attributes, and Viking's disagreement with that analysis provides no reason for granting review.

In *Concepcion*, this Court held that California's rule against consumer contracts banning class actions "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA," 563 U.S. at 344, because it effectively "allow[ed] any party to a consumer contract to demand" classwide arbitration. *Id*. at 346. The Court held that classwide arbitration conflicted with the FAA because it fundamentally changed the nature of arbitration, requiring complex, formal procedures attributable to the inclusion of absent class members. *Id*. at 346–51.

As explained above, however, PAGA cases are not class actions, but bilateral proceedings. The due-process protections of class certification, notice, opt-out rights, and other procedures that concerned the Court

in *Concepcion*, 563 U.S. at 348–50, are not features of PAGA proceedings. *See Sakkab*, 803 F.3d at 435–36. Thus, *Iskanian*'s anti-waiver rule does not conflict with "*Concepcion*'s essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic*, 138 S. Ct. at 1623.

Viking argues that PAGA claims involve complexity because they require addressing violations affecting multiple employees and their "heightened stakes" make them a "poor fit" for arbitration. Pet. 18. Viking's argument reduces to the proposition that if a state creates claims of liability that defendants find inconvenient or otherwise undesirable to arbitrate, the FAA entitles defendants to require prospective plaintiffs to waive those claims altogether. As *Sakkab* pointed out, however, *Concepcion* does not suggest that the FAA's purposes require transforming it into a vehicle for preempting state-law rights of action that involve large liabilities, are legally or factually complex, or may otherwise be unappealing for defendants to arbitrate. And no decision of this Court, or any state supreme court or federal court of appeals, has so held. This Court's decisions prohibit states from mandating procedures incompatible with arbitration, *see Epic*, 138 S. Ct. at 1622–23, not from creating claims that parties may not *want* to arbitrate, *see Sakkab*, 803 F.3d at 437–39.

Indeed, many arbitrable claims require consideration of evidence concerning the defendant's conduct toward third parties and involve high stakes. An antitrust claim, for example, typically requires evidence of the anticompetitive effect of the defendant's conduct and any procompetitive justifications for it—matters

extending far beyond the parties' individual circumstances. And the stakes of a treble damages antitrust action may be very high. No one could suggest, however, that arbitration of an antitrust claim "is not arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. In *American Express*, for example, this Court held that the FAA *requires* enforcement of agreements to arbitrate antitrust claims despite the cost of developing market-wide evidence. 570 U.S. at 238–39. This Court has likewise held that many potentially high-stakes claims requiring consideration of evidence beyond the individual parties are arbitrable. *See, e.g., Mitsubishi*, 473 U.S. at 637 (antitrust); *McMahon*, 482 U.S. at 229–33 (Securities Exchange Act claims); *id.* at 238–42 (civil RICO claims); *Pyett*, 556 U.S. at 258 (employment discrimination claims); *Gilmer*, 500 U.S. at 33–35 (federal civil rights claims). The FAA would not permit, let alone require, enforcement of an arbitration provision that purported to waive altogether a party's right to bring such statutory claims in any forum. *See Mitsubishi*, 473 U.S. at 637 n.19.

## III. This case does not present the question whether *Iskanian* forecloses arbitration of PAGA claims.

In addition to its faulty argument that *Iskanian* is incompatible with fundamental attributes of arbitration, Viking argues that *Iskanian* "is displaced by the FAA" because it "prohibits outright the arbitration of a particular type of claim." Pet. 22 (quoting *Concepcion*, 564 U.S. at 341). Viking's invocation of this Court's holdings that "a categorical rule prohibiting arbitration of a particular type of claim … is contrary to the … FAA," Pet. 23 (quoting *Marmet*, 565 U.S. at

532–33), is misplaced for two reasons. First, *Iskanian* did not announce a categorical prohibition on arbitration of PAGA claims. Second, this case does not turn on whether a state could prohibit arbitration of PAGA claims because the arbitration agreement at issue did not provide for arbitration of PAGA claims. Instead, it *excluded* assertion of representative or private attorney general claims in arbitration proceedings—and in any other forum.

*Iskanian*'s holding was clear: An agreement must leave open "some forum" for the assertion of a PAGA claim on behalf of the State by an aggrieved individual employee. *See* 327 P.3d at 155; *see also id*. at 159 (Chin, J., concurring). *Iskanian* did not foreclose the possibility that an employee could agree to *arbitrate* rather than *waive* a PAGA representative claim. The California Supreme Court did not resolve that question because the agreement before it, which waived the right to bring *all* representative claims, gave the court "no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration." *Id*. at 155. Even so, the court did not foreclose the possibility that, on remand, the PAGA claims might be arbitrated. *See id*.

For these reasons, *Iskanian* "does not prohibit the arbitration of any type of claim." *Sakkab*, 803 F.3d at 434. Rather, it "expresses no preference" between litigation and arbitration of PAGA claims and "provides only that representative PAGA claims may not be waived outright." *Id*.

The California Supreme Court's subsequent restatements of *Iskanian*'s holding are to the same effect. As the court recently put it: "*Iskanian* established

an important principle: employers cannot compel employees to waive their right to enforce the state's interests when PAGA has empowered employees to do so." *ZB*, 448 P.3d at 252. The California Supreme Court has never held that *Iskanian* is a non-arbitrability rule.

Viking argues otherwise based on one sentence in *Iskanian*, which states that "a PAGA claim lies outside the FAA's coverage." 327 P.3d at 151. That statement was part of the Court's explanation of its reasons for concluding that an agreement, including an arbitration agreement, cannot waive the State's right to assert its claims for penalties through a PAGA plaintiff. Read in context, it is best understood as meaning that an *agreement waiving PAGA claims* is outside the FAA's coverage because, as the court went on to elaborate, the FAA's goal of enforcing private agreements to arbitrate does not extend to enforcing outright waivers of PAGA claims, which "curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties." *Id*. at 152.

Even on Viking's reading, moreover, the statement is no more than dicta concerning an issue not before the court: whether an agreement to arbitrate PAGA claims would be enforceable. Viking wrongly contends that *Iskanian* implicitly decided that PAGA claims are not arbitrable because it did not order arbitration of the PAGA claims on remand but did require individual arbitration of the non-PAGA damages claims the plaintiff had asserted on behalf of a class. But, as *Iskanian* explained, the reason the court did not order arbitration of the PAGA claims was that the arbitration agreement barred arbitration of any representa-

tive claims, and PAGA claims are inherently representative because they assert the State's claim for penalties. *See id*. at 151. By contrast, the agreement did call for arbitration of the individual damages claims that the plaintiff sought to litigate in a class action. Thus, the court's holding that the class-action waiver was enforceable necessarily required individual arbitration of the damages claims. *See id*. at 155. But the holding that the PAGA waiver was unenforceable to the extent that it did not allow *any* forum for PAGA claims, *id*. at 133; *see also id*. at 157 (Chin, J., concurring), did not have that consequence because fundamental FAA principles prohibit requiring parties to arbitrate claims they have agreed *not* to arbitrate. *See Granite Rock Co. v. Int'l B'hood of Teamsters*, 561 U.S. 287, 302 (2010); *see also Rivas*, 842 F. Appx. at 58 (Bumatay, J., concurring); *McGill v. Citibank, N.A.*, 393 P.3d 84, 97 (2017).

Some lower California courts have subsequently stated that agreements to arbitrate PAGA claims are unenforceable, absent consent by the State, in light of *Iskanian*'s reasoning. Those statements are themselves dicta to the extent that they were issued in cases concerning agreements that barred arbitration of PAGA representative claims rather than requiring arbitration of such claims. *See*, *e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177 (Cal. Ct. App. 2019); *Tanguilig v. Bloomingdale's, Inc.*, 210 Cal. Rptr. 3d 352, 359–60 (Cal. Ct. App. 2016), *cert. denied*, 138 S. Ct. 356 (2017). Moreover, given *Iskanian*'s clear statement of its holding, and the repetition of that holding in *ZB*, the conclusion that PAGA claims are nonarbitrable cannot be attributed to the California Supreme Court. Until that court so holds, any asser-

tion that California law bars enforcement of an agreement to arbitrate PAGA claims, and that such a bar violates the FAA, is premature.

In any event, this case would not present that issue because it does not involve an agreement to *arbitrate* PAGA claims. The arbitration agreement explicitly prohibits arbitration of any "private attorney general" claims, Pet. App. 14, a prohibition that necessarily encompasses *all* PAGA claims. The agreement's bar on arbitration of "representative" actions, *id.*, likewise forecloses arbitration of any PAGA claim, because "[alll PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf" and assert its claims for penalties for Labor Code violations. *ZB*, 448 P.3d at 243. This case, like *Iskanian* itself, presents only the question whether an agreement to *waive* PAGA claims is enforceable, not whether an agreement to *arbitrate* them must be enforced. And this Court's statements that the FAA preempts a state law "prohibit[ing] outright the arbitration of a particular type of claim," *Kindred*, 137 S. Ct. at 1427, say nothing at all about laws prohibiting outright the *waiver* of a particular type of claim.

Indeed, the FAA allows courts to "order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Granite Rock*, 561 U.S. at 297. Thus here, it is the parties' agreement and the FAA, not *Iskanian*, that preclude arbitration of Ms. Moriana's PAGA claim. Under the agreement, the lower courts could not order arbitration of that claim, and the only available remedy for the invalid PAGA waiver was to allow it to proceed in court. Whether California law permits arbitration of a PAGA claim, and, if not, whether the FAA nonetheless requires such arbitration, are issues that could

arise only under a completely different arbitration agreement: one that *provided for* rather than precluded arbitration of PAGA claims.

## IV. Viking's objections to PAGA provide no basis for review.

Viking's criticisms of PAGA echo those advanced in every previous petition for certiorari challenging *Iskanian* and provide no basis for review by this Court. Viking points to differences between PAGA and other qui tam statutes that give the State less control over a PAGA claim brought by an individual than the federal government has over a False Claims Act case. Those differences, however, cannot obscure the central reason that the State is the real party in interest in a PAGA action: An action in which the State is entitled to 75 percent of the recovery is the State's in a very real sense, regardless of the extent to which the State has chosen to exercise control over its prosecution. The State's dominant interest "reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Iskanian*, 327 P.3d at 152.[3] The design of the statute is a matter of policy choice concerning how the State wants its claims pursued, and disagreement with the wisdom of that choice has no bearing on whether the FAA issues this case presents merit review.

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[3] In *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021), a Ninth Circuit panel held that differences between PAGA and conventional qui tam statutes were sufficient to take PAGA claims outside the narrow Article III exception allowing uninjured persons to bring qui tam actions. But the panel acknowledged that PAGA plaintiffs represent the State's interests pursuant to an assignment of its claim. *See id*. at 675.

Viking's claim that *Iskanian* allows plaintiffs to "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," Pet. 26, is also fundamentally wrong. In a PAGA claim, a plaintiff is limited to seeking penalties on behalf of the State, a small percentage of which are distributed to employees affected by a violation. A class action that would aggregate individuals' own claims for monetary relief for Labor Code violations, such as back wages or damages, seeks compensatory remedies that are unavailable under PAGA. *See ZB*, 448 P.3d at 241. Thus, *Iskanian* does not provide an end run around *Concepcion* and *Epic*. Its anti-waiver rule only applies when a plaintiff moves to a different playing field and seeks penalties on behalf of the State rather than compensatory relief for herself and similarly situated employees.

That many employees may make that choice—in part because individual arbitration does not provide an opportunity for a recovery sufficient to make pursuing compensatory claims cost-effective—does not suggest that the FAA should be extended to require enforcement of PAGA waivers. The objective of the FAA is not to shield defendants from liabilities to states for violations of valid laws. Nonetheless, the statistics cited by Viking concerning the number of PAGA notices make clear that *Viking*'s objective is to suppress PAGA claims and shield employers from liabilities it considers excessive. California, however, has made the judgment that widespread Labor Code violations require enforcement mechanisms that exceed the State's own capacity to initiate actions. This Court has no basis for second-guessing that judgment or for

using the FAA as a tool to limit assertion of the State's claims.

Viking's contention that allowing such claims to proceed upsets employers' expectations, Pet. 20, is groundless. The FAA never created any legitimate expectation that employers could evade the State's penalty claims through arbitration agreements with employees, and California employers have been on notice for over seven years since *Iskanian* that they cannot expect enforcement of PAGA waivers. In this case, Viking cannot possibly have relied on enforcement of a PAGA waiver executed two years after *Iskanian* and a year after *Sakkab*.

The possibility that other states may adopt similar measures likewise provides no reason for review. If such laws are ultimately adopted, and if states then develop anti-waiver doctrines similar to *Iskanian*, their conformity with the FAA will inevitably be tested in court. If such litigation results in decisional conflict over the *Iskanian* rule, review by this Court may become necessary. No such conflict now exists.

Finally, even if Viking's policy objections to PAGA and *Iskanian* had any arguable merit, this case would be a particularly poor vehicle for addressing Viking's FAA preemption arguments because it arises from a state court. Justices of this Court continue to disagree over whether the FAA applies in state courts. *See Kindred*, 137 S. Ct. at 1429 (Thomas, J., dissenting). If this Court were to review this case on the merits, the vote of at least one Justice would be to affirm on the ground that the FAA does not apply to state courts, and there would be a significant likelihood that no

holding on the scope of FAA preemption would command a majority. Review would threaten to waste the time and efforts of the Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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