No. 17-1357

In the Supreme Court of the United States

FIVE STAR SENIOR LIVING INC. AND
FVE MANAGERS, INC.,

Petitioners,

v.

MELINDA MANDVIWALA,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, NATIONAL RETAIL FEDERATION, RETAIL LITIGATION CENTER, CALIFORNIA RETAILERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts to improve the state's economic and jobs climate by representing the business community on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the state and

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties have consented to the filing of this brief.

federal courts by filing *amicus* briefs in cases, like this one, involving issues of paramount concern to the business community.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government. As the industry umbrella group, NRF periodically submits *amicus* briefs in cases raising significant issues that are important to the retail industry.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant cases.

The California Retailers Association ("CRA") is the only statewide trade association representing all

segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of $330 billion annually and employs 3,211,805 people—one fourth of California's total employment.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits *amicus* briefs in cases presenting issues of importance to the manufacturing community.

Amici's members and affiliates regularly rely on bilateral arbitration agreements in their contractual relationships, including with their employees. Traditional, bilateral arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Such arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the policy embodied in the Federal Arbitration Act ("FAA"), many of *amici*'s members have structured millions of

contractual relationships around the use of bilateral arbitration to resolve disputes.

Amici have a strong interest in the questions presented by the petition. In *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015), a divided Ninth Circuit concluded that the FAA does not preempt a California judge-made rule (the "*Iskanian* rule"[2]) holding that any arbitration agreement requiring arbitration of claims under California's Private Attorneys General Act of 2004 ("PAGA") on an individualized basis may not be enforced as a matter of California public policy when an employee brings a representative PAGA action. Relying on *Sakkab*, the court below reached the same conclusion.

Sakkab and *Iskanian* threaten to disrupt existing arbitration agreements and to erode the benefits of bilateral arbitration as an alternative to litigation. *Amici* therefore have a strong interest in a grant of certiorari by this Court to ensure uniform and accurate application of the FAA.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition asks this Court to review one of the latest chapters in a long and well-documented history of attempts by California courts to invent new "devices and formulas" aimed at circumventing binding arbitration agreements and the preemptive force of the FAA. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011); see also, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Preston* v. *Ferrer*,

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[2] See *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014).

552 U.S. 346 (2008); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Southland* v. *Keating*, 465 U.S. 1 (1984); Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1433-40 (2014).

Review is essential to prevent an end-run around this Court's longstanding precedents upholding the strong federal policy in favor of arbitration, which represent the "authoritative interpretation of [the FAA]" that the "judges of every State must follow." *Imburgia*, 136 S. Ct. at 468. The Ninth Circuit, following the lead of the California Supreme Court, has allowed enterprising plaintiffs to circumvent *Concepcion* and subsequent decisions by invoking California's Private Attorneys General Act of 2004 ("PAGA"), which authorizes an "aggrieved employee" to recover civil penalties on a representative basis by raising alleged violations of California's Labor Code as to "himself or herself" and "other current or former employees." Cal. Labor Code § 2699(a).

The California Supreme Court's *Iskanian* decision first endorsed this strategy for circumventing *Concepcion*. Echoing the rule from *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005)—the rule that this Court invalidated in *Concepcion*—*Iskanian* held that any agreement requiring arbitration of PAGA claims on an individualized basis is contrary to "California's public policy," and therefore unenforceable, when an employee brings a representative PAGA claim. 327 P.3d at 153. A divided Ninth Circuit panel followed suit in *Sakkab*—over the vigorous dissent of Judge N.R. Smith—upholding the *Iskanian* rule by pointing to technical distinctions between representative PAGA actions and class ac-

tions under Rule 23 (or its state equivalents) that are irrelevant to this Court's reasoning in *Concepcion*.

As the petition details, the *Iskanian* rule runs afoul of the FAA in at least two independent ways. First, this PAGA-specific rule is not a generally applicable contract defense, but instead applies uniquely to disfavor the enforcement of agreements to arbitrate disputes on an individual, bilateral basis, "singling out those contracts for disfavored treatment." *Kindred Nursing Centers Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017). Second, the rule "interferes with" the same "fundamental attributes of arbitration" as the *Discover Bank* rule invalidated in *Concepcion*, "and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. Specifically, as the dissent in *Sakkab* recognized, the *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." 803 F.3d at 444 (N.R. Smith, J., dissenting).

The practical consequences of *Iskanian* and *Sakkab* are enormous. While PAGA claims were once an afterthought tacked onto putative employment class actions in California, the number of PAGA filings has skyrocketed in recent years as plaintiffs seek to evade the enforcement of their arbitration agreements under this Court's precedents. If the holdings in *Iskanian* and *Sakkab*—on which the decision below rests—are permitted to stand, representative PAGA claims will become even more common, resulting in the effective invalidation of millions of arbitration agreements that are governed by the FAA.

That result will have enormous repercussions for businesses with employees in California, the nation's most populous state, by discouraging arbitration programs covering labor and employment claims and depriving both employers and employees of the important benefits that traditional, bilateral arbitration provides.

This Court's review is essential to restore uniform application of the FAA and put an end to California's latest efforts to exalt its policy preferences over the determinations of Congress embodied in the FAA and this Court's FAA precedents.

ARGUMENT

I. The Ninth Circuit's Endorsement Of The *Iskanian* Rule Contravenes The FAA And Defies This Court's Precedents.

A. The *Iskanian* Rule Is Not A Generally Applicable Contract Defense.

"The FAA makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Kindred*, 137 S. Ct. at 1426 (quoting 9 U.S.C. § 2). "That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Ibid.* (quoting *Concepcion*, 563 U.S. at 339).

As the petition explains, the *Iskanian* rule runs afoul of these settled principles. Pet. 12-18. Despite the California Supreme Court's "attempt to cast the rule in broader terms," (*Kindred*, 137 S. Ct. at 1427),

the *Iskanian* rule has been uniquely applied to prevent the enforcement of bilateral arbitration agreements. The rule prevents the waiver of a single type of claim (representative claims under PAGA) in a single type of contract (dispute resolution agreements with employees). That type of specialized defense bears no resemblance to generally applicable common law doctrines like fraud, duress, or mutual mistake. For that reason, the dissenting judge in *Sakkab* expressed "serious doubts that the rule established by *Iskanian* falls into the same category as * * * common law contract defenses" such as "duress or fraud." 803 F.3d at 442 n.1 (N.R. Smith, J., dissenting).

Moreover, the *Iskanian* rule has been applied to prevent employees from waiving representative PAGA claims in arbitration agreements, but not from waiving such claims in other kinds of contracts, such as settlement agreements. See Pet. 15 & n.7 (collecting cases permitting employees to waive representative PAGA claims in settlement agreements). Just as there was no indication that the purportedly general rule of Kentucky law this Court struck down in *Kindred* applied to "a settlement agreement" or "other kinds of agreements" that waived the principal's right to bring a claim in court or to a jury (137 S. Ct. at 1427 n.1), there is no indication that the *Iskanian* rule bars waivers of representative PAGA claims in other kinds of contracts besides arbitration agreements. "Mark that as yet another indication that" the *Iskanian* rule "arises from the suspect status of arbitration" (*ibid.*), rather than any inherently unwaivable nature of representative PAGA claims.

Finally, neither the *Sakkab* majority nor the decision below pointed to a single example of a case applying the *Iskanian* rule outside of the arbitration

context—and *amici* are unaware of any such example. That absence is telling, and further indicates that the *Iskanian* rule is not in fact a rule of general applicability. *Cf. Imburgia*, 136 S. Ct. at 470 (noting that the Court had "found no * * * case" applying the California Court of Appeal's interpretation outside of the arbitration context).

B. The *Iskanian* Rule Conflicts With Fundamental Attributes Of Arbitration As Envisioned By The FAA.

The *Iskanian* rule conditions enforcement of arbitration agreements on the ability to assert representative PAGA claims. Just like the *Discover Bank* rule invalidated in *Concepcion*, which conditioned enforcement of arbitration agreements on the availability of class procedures, the *Iskanian* rule transforms the parties' bilateral arbitration agreement into something that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351. And because the *Iskanian* rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" it "is preempted by the FAA." *Id.* at 352 (citation omitted).

This Court recognized in *Concepcion* that "bilateral arbitration" is the type of informal, expedient proceeding "envisioned by the FAA." 563 U.S. at 351. In "bilateral arbitration," the "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 (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)).

This Court further explained why "class arbitration" is "*not* arbitration as envisioned by the FAA"

and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In addition, "class arbitration greatly increases risks to defendants," because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable" in light of the limited judicial review available. *Id.* at 350.

As the dissenting judge in *Sakkab* explained in detail, "[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." 803 F.3d at 444 (N.R. Smith, J., dissenting) (emphasis added).

First, arbitration of a representative PAGA action is inherently far slower and more costly than the bilateral arbitration contemplated by the FAA (and to which the parties agreed). *Sakkab*, 803 F.3d at 444-45 & n.4 (N.R. Smith, J., dissenting). Remedies in a representative PAGA action 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 that is proven by the representative plaintiff. Cal. Labor Code § 2699(f)(2).

Thus, in contrast to a bilateral wage-and-hour dispute in which the arbitrator focuses solely on the individual circumstances of the claimant, an arbitrator presiding over a representative PAGA action

"would have to make specific factual determinations regarding (1) the number of other employees affected by the labor code violations, and (2) the number of pay periods that *each* of the affected employees worked." *Sakkab*, 803 F.3d at 445 (N.R. Smith, J., dissenting). "Because of the high stakes involved in these determinations, both of these issues would likely be fiercely contested by parties." *Ibid*. And "[i]n arbitrations involving large companies," "the arbitrator would be required to make individual factual determinations regarding * * * hundreds or thousands of employees, none of whom are party to such arbitration." *Ibid.*

In fact, because representative PAGA claims are not subject to the commonality or predominance requirements of Rule 23 or similar state procedures (see *Sakkab*, 803 F.3d at 436 (citing *Baumann* v. *Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122-23 (9th Cir. 2014))), arbitration of representative PAGA claims could well produce a proceeding even slower, less efficient, and more costly than class arbitration—by requiring the burdensome and time-consuming adjudication of a huge number of individualized issues.

The Court need not speculate whether arbitration of representative PAGA claims will be unwieldy; experience already proves the point. In *Driscoll* v. *Granite Rock Co.*, 2011 WL 10366147 (Cal. Super. Ct. Sept. 20, 2011), for example, a bench trial on representative PAGA claims lasted *14 days* and involved *55 witnesses* and *285 exhibits*, including expert witnesses to prove violations as to each employee. *Id.* at *1. Cases like *Driscoll* illustrate the "inherent manageability problems" that representative PAGA actions inevitably raise. See Matthew J. Goodman, Comment, *The Private Attorney General Act: How to*

Manage the Unmanageable, 56 Santa Clara L. Rev. 413, 441 (2016).

Indeed, *Driscoll* understates the complexity of most PAGA actions, because that case involved a relatively small group of 200 current and former employees. See 2011 WL 10366147, at *1. The burdens of representative arbitration balloon exponentially for larger PAGA actions, which often include thousands if not tens of thousands of absent employees.[3]

Multiplying the detailed assessments required to resolve an alleged Labor Code violation across hundreds, thousands, or even tens of thousands of absent employees plainly would eviscerate the "lower costs" and "greater efficiency and speed" that arbitration is meant to achieve. *Concepcion*, 563 U.S. at 348 (citation omitted).

Second, for similar reasons, the procedures needed to resolve a representative PAGA arbitration will necessarily be far more complicated than those in bilateral arbitration. "In an individual arbitration, the employee already has access to all of his own employment records"; "[h]e knows how long he has been working for the employer"; and he "can easily determine how many pay periods he has been employed." *Sakkab*, 803 F.3d at 446 (N.R. Smith, J., dissenting).

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[3] See, *e.g.*, *Amey* v. *Cinemark USA Inc.*, 2015 WL 2251504, at *17 (N.D. Cal. May 13, 2015) (PAGA claim with "more than 10,000 class members"); see also Compl., *O'Bosky* v. *Starbucks Corp.*, 2015 WL 2254889, at *2 (Cal. Super. Ct. May 4, 2015) (approximately 65,000 employees); Defs.' Mot. to Strike, *Ortiz* v. *CVS Caremark Corp.*, 2014 WL 2445114, at *4 (N.D. Cal. Jan. 28, 2014) (more than 50,000 employees across 850 stores); Def.'s Opp'n to Class Certification, *Cline* v. *Kmart Corp.*, 2013 WL 2391711, at *1, 12 (N.D. Cal. May 13, 2013) (13,000 cashiers at 101 stores statewide).

By contrast, in a representative PAGA action, "the individual employee does not have access to any of this information" for "the other potentially aggrieved employees," and the "discovery necessary to obtain these documents from the employer would be significant and substantially more complex than discovery regarding only the employee's individual claims." *Id.* at 446-47.

The *Sakkab* majority brushed aside these concerns by speculating that parties *could* agree to arbitrate representative PAGA actions using procedures more informal than those required for class actions. 803 F.3d at 438-39. But as this Court pointed out in explaining that class arbitration "as a structural matter" includes "absent parties, necessitating additional and different procedures" (*Concepcion*, 563 U.S. at 347-48), the arbitration of representative PAGA claims likewise necessitates procedures to assess whether and to what extent absent employees were affected by the alleged Labor Code violations. In other words, the "procedural complexity present in representative PAGA claims is not attributable to the use of formal versus informal procedures. Instead, such complexity is a function of the sheer number of tasks and procedural hurdles present in bringing a representative PAGA claim." *Sakkab*, 803 F.3d at 447 (N.R. Smith, J., dissenting).

Those expansive procedures are incompatible with the streamlined proceedings that are the hallmark of individual arbitration—and therefore States may not impose such procedures on parties that have not agreed to them. *Concepcion*, 563 U.S. at 351. Just as "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA" (*id.* at 348), so too is repre-

sentative arbitration to the extent it is manufactured by *Iskanian* and *Sakkab*.

The *Sakkab* majority was also mistaken in its speculation that representative PAGA claims will not need extensive discovery akin to a class action. In support of that speculation, the majority cited a California Court of Appeal decision denying an employee extensive statewide discovery near the outset of his representative PAGA action. 803 F.3d at 439 (citing *Williams* v. *Super. Ct.*, 236 Cal.App.4th 1462, 1476 (2015)). But the California Supreme Court subsequently *reversed* that decision, holding that "a civil litigant's right to discovery is broad" and that California public policy "support[s] extending PAGA discovery *as broadly as class action discovery has been extended*." *Williams* v. *Super. Ct.*, 398 P.3d 69, 81 (Cal. 2017) (emphasis added). This Court has already held, of course, that class-wide discovery is incompatible with arbitration "as envisioned by the FAA." *Concepcion*, 563 U.S. at 351.

Third, the arbitration of representative PAGA actions "greatly increases the risk to employers." *Sakkab*, 803 F.3d at 447 (N.R. Smith, J., dissenting) (citing *Concepcion*, 563 U.S. at 350). The civil penalties available in a representative PAGA action may total many millions of dollars when sought by reference to hundreds or thousands of potentially affected employees for pay periods extending over multiple years. "Even a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars." *Kilby* v. *CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013). Indeed, in some PAGA cases, the fines to which an employer could be subject are substantially *higher* than the actual damages that would have been awarded had the suit

been brought as a class action. See Goodman, *supra*, at 415.

These outsized civil penalties pose the same "unacceptable" risk of "devastating loss" that arises "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Concepcion*, 563 U.S. at 350. Given the limited appellate review of arbitration awards, "[d]efendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would 'go uncorrected.'" *Quevedo* v. *Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (quoting *Concepcion*, 563 U.S. at 350); see also *Sakkab*, 803 F.3d at 448 (N.R. Smith, J., dissenting) ("the concerns expressed in *Concepcion* are just as real in the present case").

The significantly higher costs and exposure that inevitably accompany these representative actions place enormous pressure on defendants to settle rather than run even a small chance of catastrophic loss because of the unfair "risk of 'in terrorem' settlements." *Concepcion*, 563 U.S. at 350. The *Sakkab* majority ignored that imposing representative procedures on PAGA actions subject to arbitration leaves employers vulnerable to the same risks. As one observer has explained, "[t]he possibility of a 'blackmail settlement' looms even larger in PAGA actions [than in class actions]. * * * The threat of expensive litigation, combined with the unavailability of insurance, will compel settlement for many employers and can work as a type of 'legalized blackmail.'" Goodman, *supra*, at 447-48.

Finally, just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 563 U.S. at 349), it is equally inconceivable that Congress in 1925 contemplated the

arbitration of the types of representative actions that did not exist until the modern era. PAGA was created by the California legislature nearly eighty years after the passage of the FAA.

In sum, representative PAGA actions are every bit as incompatible with the "fundamental attributes of arbitration" as the class actions at issue in *Concepcion*, and "create[] a scheme inconsistent with the FAA." 563 U.S. at 344. State law cannot condition the enforcement of arbitration agreements on the availability of representative actions any more than it can condition enforceability on the availability of class procedures.

C. State Public Policy Objectives Cannot Justify A Rule Requiring Procedures Inconsistent With Arbitration As Envisioned By The FAA.

The *Sakkab* majority purported to "bolster[]" its preemption holding by pointing to "PAGA's central role in enforcing California's labor laws," asserting that representative PAGA actions reflect "the deterrence scheme [that] the [California] legislature judged to be optimal." 803 F.3d at 439. The *Iskanian* court similarly justified its rule as "vindicat[ing] the Labor and Workforce Development Agency's interest in enforcing the Labor Code." 327 P.3d at 153; accord *Sakkab*, 803 F.3d at 439 (quoting same).

But these statements are indistinguishable from the policy justifications advanced by the plaintiffs in *Concepcion* and rejected by this Court. The contention in *Concepcion* was that California's policy interest in the broad enforcement of its consumer protection laws justified its rule conditioning enforcement of arbitration agreements on the availability of classwide procedures. 563 U.S. at 338.

This Court could not have been more direct in holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 351; see also *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 238 & n.5 (2013). Thus, as the *Sakkab* dissent put it, "[a] [S]tate may not insulate causes of action [from arbitration] by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action." 803 F.3d at 450 (N.R. Smith, J., dissenting).

To hold otherwise, as the *Sakkab* majority and court below did, "make[s] it trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it." *Kindred*, 137 S. Ct. at 1428. If the Ninth Circuit's endorsement of the *Iskanian* rule is permitted to stand, all that a State need do to circumvent the FAA and invalidate millions of binding arbitration agreements is to declare that employees have an unwaivable right under that State's law to bring representative or collective claims.

Yet such an approach amounts to a transparent evasion of *Concepcion*, and "the 'Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" *Imburgia*, 136 S. Ct. at 468. Indeed, while the *Sakkab* majority purported to disclaim reliance on the "effective vindication" exception to the enforcement of arbitration agreements (803 F.3d at 433 n.9), it "stray[ed] awfully close" to invoking it "[b]y relying so heavily on state policy grounds to support its decision" (*id.* at 449 (N.R. Smith, J., dissenting)). And, of course, the FAA does not contain an effective-vindication exception for *state*-law claims. Instead, as all eight participating Justices in *American Express*

agreed, any effective-vindication exception can apply only when "the FAA's mandate has been 'overridden by a contrary *congressional* command.'" 570 U.S. at 233 (emphasis added); see also *id*. at 252 (Kagan, J., dissenting) ("a *state* law * * * could not possibly implicate the effective-vindication rule").

In short, this Court should grant review and put an end to this chapter in the California state and federal courts' long history of "attempt[s] to find creative ways to get around the FAA" and this Court's precedents. *Sakkab*, 803 F.3d at 450 (N.R. Smith., J., dissenting).

II. The Questions Presented Have Significant Practical Importance.

The Ninth Circuit's endorsement of the *Iskanian* rule is not only wrong, but also imposes substantial real-world harms that call out for this Court's review.

1. Representative PAGA actions have flooded California's state and federal courts in the wake of *Iskanian* and *Sakkab*, as enterprising plaintiffs and their counsel seek to evade this Court's decision in *Concepcion* and end-run their otherwise binding agreements to arbitrate employment-related claims on an individual basis.

Formerly, PAGA claims were brought, if at all, only on "the coattails of traditional class claims," largely because plaintiffs did not want to rely principally on a cause of action requiring them to remit 75% of their recovery to the State. Robyn Ridler Aoyagi & Christopher J. Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, 2013-7 Bender's California Labor & Employment Bulletin 1-2 (2013) (noting the "strong incen-

tive" for plaintiffs to prefer class claims over PAGA claims because of the allocation of PAGA proceeds). Even when plaintiffs tacked on PAGA claims to complaints asserting other claims under federal and state labor law, court-approved settlements in those cases reveal that the parties agreed to allocate only a tiny fraction of the recovery to the PAGA claims.[4]

Post-*Concepcion*, however, PAGA litigation has increased dramatically. The number of PAGA suits filed increased by 400% between 2005 and 2013—759 PAGA lawsuits were filed in 2005, but by 2013, that number had risen to 3,137. Emily Green, *An alternative to employee class actions*, L.A. Daily Journal (Apr. 16, 2014).

This deluge of cases has been encouraged further by *Iskanian* and *Sakkab*: the "practical effect" of *Iskanian* has been to generate "a significant increase in the filing of claims under PAGA." Erin Coe, Iskanian *Ruling to Unleash Flood of PAGA Claims*," Law360 (June 24, 2014), https://perma.cc/5UQ7-YRXP; see also Toni Vranjes, *Doubts Raised About New California PAGA Requirements*, Society for Human Resource Management (Dec. 6, 2016),

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[4] See, *e.g.*, *Franco* v. *Ruiz Food Prods., Inc.*, 2012 WL 5941801, at *2 (E.D. Cal. Nov. 27, 2012) ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia* v. *Gordon Trucking, Inc.*, 2012 WL 5364575, at *7 (E.D. Cal. Oct. 31, 2012) ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie* v. *Fed. Express Corp.*, 2012 WL 2930201, at *4 (C.D. Cal. July 2, 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu* v. *Wells Fargo Inv., LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 6, 2011) ($10,000 allocated to PAGA claim out of $6.9 million settlement); see also *Nordstrom Comm'n Cases*, 186 Cal.App.4th 576, 589 (Cal. Ct. App. 2010) (upholding multimillion dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

https://perma.cc/4VWK-CPLW ("Following the *Iskanian* decision, PAGA claims skyrocketed."); Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015), https://perma.cc/X3N7-LN4A ("The immediate impact of the *Iskanian* decision has been an increase in PAGA representative actions, especially stand-alone PAGA claims in which a single plaintiff seeks to bring an action on behalf of other 'aggrieved employees' in California courts."). As another commentator remarked, "[t]he fact that PAGA claims cannot be waived by agreements to arbitrate" under the *Iskanian* rule "contributes heavily to the prevalence of these suits." Goodman, *supra*, at 415.

A search of California state and federal district court dockets for PAGA-related filings confirms the dramatic increase in PAGA filings in the wake of *Iskanian* and *Sakkab*.[5] That search yielded 686 results for 2013—the year before *Iskanian* was decided. But for 2016—the year after the Ninth Circuit upheld the *Iskanian* rule in *Sakkab*—that same search yielded 1,645 results, a nearly *240%* increase. And this trend shows no sign of abating: for 2017, the number of results increased still further, to 1,706. While not every result represents a separate claim filed under PAGA, the results show that many of them do represent distinct PAGA actions; the results are thus indicative of the increasing frequency

[5] Specifically, counsel searched California state and federal district court dockets in Bloomberg Law using the following search terms: "private attorney general act" OR "PAGA" OR "private attorneys general act" OR "private attorney generals act" OR ("private attorney general" AND (labor n/20 2699) OR (labor n/20 2698)).

with which PAGA-related claims have been filed in recent years. See also Pet. 28 (noting the skyrocketing number of PAGA notices filed with the California Labor & Workforce Development Agency, which has reached at least as high as 635 new notices per *month*).

2. The impact on California alone, which is home to about 12% of the nation's workers (see Pet. 28-29), is already sufficiently substantial to warrant this Court's review. But to make matters worse, numerous observers hostile to arbitration and this Court's FAA precedents have urged other States to enact PAGA-like statutes for the specific purpose of circumventing "binding arbitration clauses." Aaron Blumenthal, *Circumventing* Concepcion: *Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699, 744 (2015). A law professor has described PAGA claims as a model for "private aggregate enforcement of * * * employment laws without triggering FAA preemption or vulnerability to contractual class waivers." Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203, 1208-09 (2013).

Advocacy organizations are taking these suggestions to the statehouse. A recent article quotes one activist whose organization "plans to campaign for PAGA-like bills in four states" in 2018, and it quotes the lead organizer for another organization that is currently campaigning for PAGA-like legislation in New York. Josh Eidelson, *California Helps Workers Sue Their Bosses. New York Has Noticed*, Bloomberg (Sept. 29, 2017), https://perma.cc/R69J-R57H.

3. The result of the *Iskanian* rule is to undermine the "real benefits to the enforcement of arbitration provisions" specifying traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-23 (2001); see also, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

Indeed, this Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 123 (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991)). On the contrary, the Court emphasized that the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.*

Empirical evidence confirms that employees tend to fare better in arbitration: Studies have shown that those who arbitrate their claims are more likely to prevail than those who go to court. See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute*

Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *id.* A 2004 report compiled a number of employment arbitration studies and concluded that employees were 19% more likely to win in arbitration than in court. See Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), available at goo.gl/nAqVXe.

As one scholar recently agreed, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

In short, employment arbitration programs confer real and substantial benefits. But if *Sakkab* is allowed to stand (and spread), these benefits will be lost—to the detriment of employees, businesses, and the economy as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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