No. 16-1110

IN THE
Supreme Court of the United States

BLOOMINGDALES, INC.,

Petitioner,

v.

NANCY VITOLO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EMPLOYERS GROUP, THE CALIFORNIA EMPLOYMENT LAW COUNCIL, AND INTERNET ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF EMPLOYERS GROUP, THE CALIFORNIA EMPLOYMENT LAW COUNCIL, AND INTERNET ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes in many different industries, which collectively employ nearly three million employees. Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships for the benefit of its employer members and the millions of individuals they employ.

The California Employment Law Council ("CELC") is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private sector employers in California who collectively employ hundreds of thousands of Californians. CELC strives to ensure that evenhanded employment laws

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[1] Pursuant to this Court's Rule 37.2(a), *amici* gave at least 10 days' notice to counsel for all parties of their intent to file this brief, and letters of consent to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their members made a monetary contribution intended to fund the preparation or submission of this brief.

are enacted and enforced in California, fair to employer and employee alike.

Internet Association is a not-for-profit trade organization representing more than 40 of America's leading internet companies and their global community of users. Internet Association's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

Because of their collective experience in employment matters, including their appearances as *amici curiae* in the United States Supreme Court, the Ninth Circuit Court of Appeals, and the California Supreme Court, Employers Group, CELC, and Internet Association (collectively, "*amici*") are uniquely suited to assess both the impact and implications of the issues presented in employment cases such as this one.

For decades, courts in California have issued decisions that flout the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, and this Court's jurisprudence regarding arbitration. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). This case—in which the Ninth Circuit applied a California Supreme Court rule that prohibits the bilateral arbitration of certain employment claims arising under California's Private Attorneys General Act ("PAGA")—is the latest manifestation of California courts' historic hostility to arbitration. That hostility not only flies in the face of this Court's precedents and the FAA; it fails to "give effect to the contractual rights and expectations" of millions of California employers and employees, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotation omitted), each of which expected—

and contracted for—the "speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

Amici submit this brief to urge the Court to grant certiorari and reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The California Supreme Court's *Iskanian* rule, which the Ninth Circuit upheld in *Sakkab* and applied in this case, prevents California employers and employees from contracting to resolve their employment disputes exclusively through bilateral arbitration. It resurrects the same obstacles to arbitration that this Court struck down in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), frustrating the expectations of the parties and eviscerating arbitration as an effective means of dispute resolution, in direct contravention of the Federal Arbitration Act ("FAA"). This Court should grant review.

The FAA was enacted in 1925 to combat "widespread judicial hostility to arbitration." *Concepcion*, 563 U.S. at 339. Its purposes are to "ensur[e] that private arbitration agreements are enforced according to their terms," and to "promote arbitration" as a means of "efficient and speedy dispute resolution." *Id*. at 344–45 (quotations omitted). These goals work in tandem with one another, allowing parties to "specify *with whom* [they] choose to arbitrate their disputes," and also to enjoy "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 686 (2010).

In *Concepcion*, 563 U.S. 333, this Court struck down a California rule that frustrated both of these important objectives—a rule that invalidated class waivers in most consumer contracts. As this Court explained, California's anti-waiver rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." 563 U.S. at 344. California's rule—which effectively compelled parties either to engage in class arbitration or forgo arbitration altogether—ran afoul of the FAA for three reasons: it (1) "sacrifice[d] the principal advantage[s] of [bilateral] arbitration," (2) "require[d] procedural formality" that the parties did not intend, and (3) "greatly increase[d] risks to defendants," who lack meaningful appellate review of "bet-the-company" class arbitration awards. *Id.* at 348–51 (emphasis altered). Accordingly, California's anti-waiver rule was "preempted by the FAA." *Id.* at 352.

Notwithstanding *Concepcion*, California courts—including both the California Supreme Court and the Ninth Circuit—have once again erected a deeply flawed anti-waiver rule that prohibits parties from agreeing to bilateral arbitration of certain types of California Labor Code claims. This new rule bars any waiver of representative claims brought under California's Private Attorneys General Act ("PAGA"). Under PAGA, any "aggrieved employee" who claims to have experienced a violation of the California Labor Code may file a claim against her employer, ostensibly on behalf of the State of California, seeking penalties for the employer's alleged violations against *all* of its California employees. *See* Cal. Lab. Code § 2699, *et seq*. Penalties are then calculated based on the num-

ber of aggrieved employees and the number of pay periods in which violations occurred for each employee. *Id.* § 2699(a).

According to the California Supreme Court—in an opinion that the Ninth Circuit upheld in *Sakkab v. Luxottica Retail North America, Inc*., 803 F.3d 425 (9th Cir. 2015), albeit on different grounds—employees are prohibited from waiving their right to pursue representative PAGA claims, even as part of arbitration agreements in which the employers and employees agree to arbitrate their disputes on a bilateral basis. *See Iskanian v. CLS Transp. L.A., LLC,* 59 Cal. 4th 348 (Cal. 2014). This new anti-waiver rule compels parties either to resolve PAGA claims in arbitration on a representative basis (which no rational employer would ever do), or litigate PAGA claims in court, even though *neither* option respects the "contractual rights and expectations of the parties," *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), and *neither* option enables the parties to experience "the simplicity, informality, and expedition" of bilateral arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Amici submit that the decisions of the California Supreme Court and the Ninth Circuit enforcing the anti-PAGA-waiver rule are a direct violation of *Concepcion.* In *amici's* experience, representative litigation under PAGA, just like class litigation, is a complex and costly endeavor. Indeed, representative PAGA claims require a determination as to whether there has been a Labor Code violation for each and every employee *in the entire State of California*, for each and every pay period falling within the relevant timeframe. Thus, representative PAGA claims, just

like class claims, demand a great deal of procedural formality, including voluminous discovery directed to non-parties and rigid settlement requirements. And representative PAGA claims, just like class claims, subject California employers to millions (or even *billions*) of dollars of liability, forcing them into exorbitant settlements that bear little or no relation to the merits of the claims. For these reasons, a rule prohibiting waiver of representative PAGA claims means, in practice, that employers and employees are prevented from agreeing to arbitrate their disputes on a bilateral basis, forced instead to litigate PAGA claims in court.

It is critically important that this Court review California's anti-waiver rule and strike it down as "preempted by the FAA." *Concepcion*, 563 U.S. at 352.

ARGUMENT

I. CALIFORNIA'S *ISKANIAN* RULE IS FUNDAMENTALLY INCONSISTENT WITH THE FAA.

In *Concepcion*, this Court confirmed—as it had many times before and has many times since—that the FAA preempts state rules that interfere with parties' contractual expectations and, in the process, unduly burden arbitration, even if those rules are based on doctrines "normally thought to be generally applicable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). *Concepcion* reversed a Ninth Circuit decision that had denied arbitration on the ground that the arbitration agreement at issue contained a class waiver that was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005). This Court explained that the FAA preempted California's

Discover Bank rule because "[r]equiring the availability of classwide arbitration," as California did, "disfavors arbitration" by "interfer[ing] with [its] fundamental attributes." *Concepcion*, 563 U.S. at 341, 344.

The Court cited several reasons why an anti-class-waiver rule "interferes with arbitration." *Concepcion*, 563 U.S. at 346. "First, the 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.

"Second, class arbitration *requires* procedural formality," as the very nature of representative litigation compels certain procedural protections that the parties are powerless to evade. *Concepcion*, 563 U.S. at 349. Such protections are indeed necessary to protect the due process rights of defendants when litigating against absent parties not present before the court. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (explaining that the pre-1966 version of Rule 23 was "[a] recurrent source of abuse" because it allowed absent class members to decide whether to join a lawsuit *after* the trial court had made merits determinations).

And "[t]hird, class arbitration greatly increases risks to defendants" and creates an unacceptable threat of "'in terrorem'" settlements. *Concepcion*, 563 U.S. at 350. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an [effectively unreviewable] error [by the arbitrator] will often become unacceptable," so much so that "defendants will be pressured into settling questionable claims." *Id.*

In the wake of *Concepcion*, the California plaintiffs' bar scrambled to find a new way to evade arbitration agreements requiring the individual arbitration of employment claims. It found its answer in an unusual provision of California's Labor Code called the Private Attorneys General Act (or "PAGA"). *See* Joshua R. Dale, Law360, *Power Continues To Flow Toward Calif. Plaintiffs Via PAGA* (May 22, 2015) (describing PAGA as an "awesome gift" to "employees and their would-be attorneys"). PAGA purports to deputize individual employees to bring actions for civil penalties on behalf of the State of California against their employers, for *all* "aggrieved employee[s]" throughout California that have experienced a California Labor Code violation. Cal. Lab. Code § 2699(a). The penalties available in PAGA actions can be massive: up to 200 dollars per employee, per pay period. Cal. Lab. Code § 2699(f)(2).

Before *Concepcion*, "employment attorneys saw PAGA as a throwaway claim," largely because "PAGA requires a large portion of damages recovered by the plaintiff and his or her attorney to be paid directly" to the California Labor and Workforce Development Agency ("LWDA"). Dale, *supra*. Since *Concepcion*, however, a veritable flood of PAGA litigation has overwhelmed California employers and the California court system. *See* Tim Freudenberger et al., *Trends in PAGA claims and what it means for California employers*, Inside Counsel (Mar. 19, 2015) (PAGA "is a particularly attractive vehicle for plaintiffs' attorneys to bring claims . . . in the wake of . . . *Concepcion*"); Dale, *supra* (with PAGA, "a whole new world of potential defendants and claims opened up").

As of 2014, "[a]nnual PAGA filings [had] increased over 200 percent [over] the [previous] five years, and

over 400 percent since 2004." Matthew J. Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016). The reason for this rapid growth is obvious: PAGA claims are a means of circumventing *Concepcion* and enabling employees to bring mass actions in court, despite their agreement to arbitrate claims on an individual basis. *Id.* Indeed, some commentators have identified PAGA as a model for other states seeking to subvert *Concepcion*'s holding. *See* Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203, 1221–39 (2013).

The California Supreme Court bolstered this strategy in a 2014 decision, *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal. 4th 348 (Cal. 2014). *Iskanian* held that agreements to arbitrate PAGA claims on an individual basis "frustrate[] the PAGA's objectives" and are "contrary to public policy." *Id.* at 383–84. Therefore, any waiver of an employee's right to bring PAGA claims on a *representative* basis is unenforceable under California law. *Id.* at 384.

In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), a divided panel of the Ninth Circuit upheld the *Iskanian* anti-waiver rule against a challenge under the FAA. The panel majority acknowledged that representative PAGA claims are likely to be "high stakes" and "complex," and recognized that prohibiting parties from waiving representative PAGA claims would make arbitration "less attractive." *Id.* at 437–38 But the panel majority nevertheless held that the *Iskanian* anti-waiver rule did

not violate the FAA because "[n]othing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims." *Id.* at 436.[2]

In dissent, Judge N. Randy Smith concluded that representative PAGA claims interfered with the fundamental attributes of arbitration and, as a result, that the FAA preempts the *Iskanian* rule. *Sakkab*, 803 F.3d at 444–48 (Smith, J., dissenting). As Judge Smith explained, the *Iskanian* rule "burdens arbitration" just as much as California's now-defunct *Discover Bank* rule once did, and in precisely the same ways: it "makes the [arbitration] process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk." *Id.* at 444. Thus, because arbitration of representative PAGA claims is impractical and unworkable, a rule prohibiting the waiver of such claims unduly burdens the right to contract for arbitration.

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[2] The California Supreme Court also concluded that the FAA does not preempt California's anti-waiver rule, but on different grounds: because PAGA claims ostensibly belong to the State, not private persons. *Iskanian*, 59 Cal. 4th at 384–389. Although state and federal courts in California are united in their disregard for the FAA, the differing rationales underpinning their opinions have sowed their own unique form of disarray for litigants. Indeed, PAGA claims brought in federal court are theoretically arbitrable under *Sakkab* (so long as the parties do not waive *representative* PAGA claims), whereas PAGA claims brought in California state court cannot be arbitrated *at all* because the State has not consented to arbitration. *Compare Valdez v. Terminix Int'l Co.*, __ F. App'x __, 2017 WL 836085, at *1–2 (9th Cir. Mar. 3, 2017) *with Betancourt v. Prudential Overall Supply*, __ Cal. Rptr. 3d __, 2017 WL 895834, at *3–4 (Cal. Ct. App. 2017).

The experiences of employers throughout California unquestionably support the dissent's conclusions. Because of the *Iskanian* rule, California employers are repeatedly forced to forgo the benefits of bilateral arbitration that the FAA is intended to guarantee. And the problem is only getting worse, as *hundreds* of new representative PAGA claims are being filed every year. This Court should grant certiorari to resolve this pressing matter now.

A. Representative PAGA claims are unsuitable for arbitration because they are protracted, costly, and complex, just like class claims.

In *Concepcion*, this Court concluded that the FAA preempts state laws requiring the availability of class-wide arbitration, in part, because "the 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." 563 U.S. at 348. This Court's logic is equally true in the context of representative PAGA claims, which are likewise fundamentally unsuitable for arbitration.

Time-consuming, expensive, and complex individualized inquiries into the employment records of non-parties are a necessary feature of representative PAGA actions. Specifically, PAGA authorizes a representative plaintiff to recover civil penalties in an amount equal to "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Lab. Code § 2699(f)(2). Thus, as Judge N.R. Smith explained in his *Sakkab* dissent, "rather than merely focusing on the individual employee . . .

an arbitrator overseeing a representative PAGA claim . . . [must] 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 (Smith, J., dissenting). This requires myriad "individual factual determinations" regarding employees scattered across California, "none of whom are party to [the] arbitration." *Id*.

The ongoing litigation in *O'Connor v. Uber Technologies, Inc.* provides an illustrative example. *O'Connor* is a class action in which drivers who use the Uber software application allege that Uber misclassified them as independent contractors and, as a result, violated the California Labor Code. *See O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC (N.D. Cal.). In 2015, the *O'Connor* court certified a Rule 23(b)(3) class consisting of hundreds of thousands of drivers, yet excluded thousands of *other* drivers from the class on predominance grounds. *Id.*, Dkt. 341, at 41. As the court explained, "tremendous (and likely material) variance" existed on the issue of alleged employment misclassification between drivers within the class, on the one hand, and drivers excluded from the class, on the other hand. *Id.*

Despite this ruling, however, the *O'Connor* plaintiffs sought leave to add representative PAGA claims based on the same alleged Labor Code violations underlying their class claims—PAGA claims that would require the *very same* individualized inquiries that caused the court to narrow plaintiffs' Rule 23 class in the first place. Indeed, in the words of the district judge, plaintiffs' proposed PAGA claims would require "more" individualized inquiries than even plaintiffs' class claims. *See* No. 13-cv-03826-EMC (N.D. Cal.),

Nov. 4, 2015 Tr. of Proceedings at 87:19–88:12; *see also id.* at 85:3–88:12, 93:10–21 ("[T]he representative [PAGA] claim would be brought on behalf of all [drivers] irrespective of whether they are in the class . . . . [W]ell, what does that actually mean? . . . . [H]ow do you determine [liability for] that?").

Other courts in California have likewise described representative PAGA claims as unwieldy, cumbersome, and unmanageable. In *Raphael v. Tesoro Refining & Marketing Co.*, for example, a plaintiff in a representative PAGA action contended that his former employer, Tesoro, committed wage-and-hour violations impacting "himself and thousands of other current or past employees." No. 15-cv-2862, 2015 WL 5680310, at *3 (C.D. Cal. Sept. 25, 2015). The *Raphael* court described the representative PAGA claim as "unmanageable" because of the highly "individualized assessments" necessary to resolve it—including a "non-exhaustive list of twenty-six relevant inquiries and requirements" for each and every employee. *Id.*

Time and again, district judges throughout California have voiced these concerns, finding that representative PAGA claims are costly, time-consuming, individualized, and as complex as—if not more complex than—class actions. *See Salazar v. McDonald's Corp.*, No. 14-cv-2096, 2017 WL 88999, at *1, 7–9 (N.D. Cal. Jan. 5, 2017) (finding "no easy way to identify" which of "more than 1,200" workers "may actually be aggrieved"); *Brown v. Am. Airlines, Inc.*, No. 10-8431-AG, 2015 WL 6735217, at *4 (C.D. Cal. Oct. 5, 2015) ("[T]oo many individualized assessments" would be needed "to determine PAGA violations"); *Amey v. Cinemark USA Inc.*, No. 13-cv-5669, 2015 WL 2251504, at *16–17 (N.D. Cal. May 13, 2015) ("[N]umerous individualized determinations would be

necessary to determine" which of "more than 10,000" employees "ha[d] been injured"); *Bowers v. First Student, Inc.*, No. 14-cv-8866, 2015 WL 1862914, at *4 (C.D. Cal. Apr. 23, 2015) (plaintiffs' PAGA claim entailed a "multitude of individual assessments.") (internal quotation marks omitted); *Ortiz v. CVS Caremark Corp.*, No. C-12-05859, 2014 WL 1117614, at *4 (N.D. Cal. Mar. 19, 2014) (same).[3]

Making matters worse, Rule 23's requirements are inapplicable to PAGA actions, meaning there is not necessarily *any* commonality among the employees whose alleged Labor Code claims underlie the representative PAGA action. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for example, the "members of the class[] 'held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, . . . with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Id*. at 359–60. In sum, "[t]hey ha[d] little in common but their sex and th[e] lawsuit." *Id*. at 360. Yet if that same case had included a representative PAGA claim, the fact-finder would have been forced to decide whether *each and every* California-based Wal-Mart employee experienced discrimination—even though, as this Court recognized, it was "impossible to say that examination of all the class members' claims for relief [would] produce a common answer . . . ." *Id.* at 352.

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[3] In light of these concerns, some California state courts *automatically* assign representative PAGA cases to their "complex civil litigation" departments. *See* Guidelines for the Complex Litigation Program, Superior Court for the State of Cal., San Bernardino; Guidelines for Complex Litigation, Superior Court for the State of Cal., Riverside.

Moreover, some California courts have held that they are powerless to strike PAGA claims on manageability grounds, meaning that many fact-finders believe they have no choice but to wade through these hundreds, or thousands, of individualized inquiries. *See, e.g.*, *Alcantar v. Hobart Serv.*, No. ED CV 11-1600-PSG, 2013 WL 146323, at *5 (C.D. Cal. Jan. 14, 2013); *Plaisted v. Dress Barn, Inc.*, No. 12-cv-1679, 2012 WL 4356158 (C.D. Cal. Sept. 20, 2012).

As a result of these well-documented problems, the *Iskanian* rule has turned California wage-and-hour cases into veritable "'two- or three-ring circus[es].'" Aaron Vehling, *9th Circ. Paves Way For PAGA Suits As Class Action Bypass*, Law360 (Sept. 30, 2015). As discussed below, most employers cannot risk defending a high-stakes, "bet-the-company" PAGA claim in arbitration. *See infra* at I(C). Therefore, cases with class and representative PAGA claims typically are "cut into [multiple] pieces," with the class claims compelled into arbitration on a bilateral basis and the representative "PAGA claims [] remain[ing] in court." *Id.* And, in many cases, federal courts refuse to stay the PAGA claims pending arbitration, leaving California employers to defend the same underlying claims against the same plaintiff in multiple forums simultaneously—eviscerating the purpose of their bilateral arbitration agreements.[4] *See Martinez v. Check 'N' Go of Cal., Inc.*, No. 15-cv-1864, 2015 WL 12672702, at *6 (S.D. Cal. Oct. 5, 2015); *see also Haugh v. Barrett Bus. Servs., Inc.*, No. 16-cv-2121, 2017 WL 945113, at *2

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[4] In contrast, California state courts must stay litigation during the pendency of arbitration proceedings related to the controversies at issue in the litigation. *See* Cal. Code Civ. Proc. § 1281.4.

(E.D. Cal. Mar. 1, 2017) ("[I]t's not correct . . . that a plaintiff's PAGA claims should always be stayed pending arbitration of the individual claims.").

For these reasons, California's anti-PAGA-waiver rule, just like its anti-class-waiver rule, "sacrifices the principal advantage[s] of [bilateral] arbitration," in violation of the FAA. *Concepcion*, 563 U.S. at 348.

B. Representative PAGA claims require procedural complexity.

In *Concepcion*, this Court found that the FAA preempted California's anti-waiver rule, in part, because "class arbitration *requires* procedural formality." 563 U.S. at 349. This rationale squarely applies to the *Iskanian* anti-waiver rule. Like class claims, procedural complexity is a "structural" feature of representative PAGA claims because such claims require proof of events involving non-parties and therefore lie well beyond the scope of traditional bilateral arbitration. *Id.* at 347–48.

As Judge N.R. Smith explained in his *Sakkab* dissent, an "employee who [brings] [a] representative PAGA claim [does] not initially have access to the information needed to prove the number of affected employees or the number of pay periods they worked." *Sakkab*, 803 F.3d at 445 (Smith, J., dissenting). "Therefore, . . . the employer [must] divulge the necessary documents (potentially a tremendous number of payroll and employment forms) to the PAGA claimant." *Id.* "This [is] not [] a minor undertaking." *Id.* Judge N.R. Smith's concerns have been borne out repeatedly across California.

In *Rix v. Lockheed Martin Corp.*, No. 09-cv-2063, 2012 WL 13724 (S.D. Cal. Jan. 4, 2012), for example,

the Southern District of California considered the burdens associated with representative PAGA discovery in a case involving alleged overtime violations. As the *Rix* court explained, the plaintiffs' requests—which sought discovery for "each of the 90 [aggrieved employees] . . . for each of the 148 relevant workweeks"—were "unduly burdensome." *Id.* at *4. Many other California courts have confronted these same intractable problems of proof in representative PAGA cases as well. *See Raphael*, 2015 WL 5680310, at *3 ("[I]nquiries for . . . all aggrieved employees would be nothing short of unmanageable."); *Ortiz*, 2014 WL 1117614, at *4 ("Proof of [plaintiff's representative PAGA] claim would be unmanageable, and could not be done with statistical or survey evidence but only with detailed inquiries about each employee.").

To be sure, the *Sakkab* majority speculated that contracting parties might be able to agree, *ex ante*, to limit the discovery available in arbitration in the hopes of reducing procedural formality. *Sakkab*, 803 F.3d at 438. But, "while parties can alter [discovery] procedures by contract, an alternative" discovery process for adjudicating expansive PAGA claims "is not obvious." *Concepcion*, 563 U.S. at 349. No discovery limitation, for instance, can relieve a fact-finder of her duty to evaluate (1) the total number of aggrieved employees across California, or (2) the total number of pay periods for which civil penalties must be levied—those requirements are part and parcel of *any* representative PAGA claim. Cal. Lab. Code § 2699(a). And a rule *requiring* companies to limit discovery in arbitration, simply to try to make arbitration manageable, itself burdens the parties' freedom to decide how their arbitration will be conducted, *see Concepcion*, 563 U.S.

at 351, and interferes with defendants' right "to present every available defense" under the Due Process Clause, *see Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted).

Representative PAGA claims require procedural formality in other ways as well. In June 2016, California amended PAGA to require parties attempting to settle representative PAGA claims to (1) notify the LWDA of the settlement; and (2) obtain court approval for the settlement. *See* 2016 Cal. Legis. Serv. Ch. 31 (S.B. 836).[5] PAGA's settlement requirements apply even if the parties would otherwise prefer to resolve their dispute confidentially in arbitration. *See Concepcion*, 563 U.S. at 347–48 (explaining that the shift from bilateral to class arbitration is "'fundamental'" because "[c]onfidentiality becomes more difficult") (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 686 (2010)).

In fact, representative PAGA and class-action settlement procedures are so similar that some California courts apply the *class action* settlement approval standards when deciding whether to approve representative PAGA settlements. *See Hollis v. Weatherford US LP*, No. 16-cv-252, 2017 WL 131994, at *2 (E.D. Cal. Jan. 12, 2017) (considering "the merits of the action" and "the maximum recovery the plaintiff could obtain"); *O'Connor v. Uber Techs., Inc.,* 201 F.

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[5] These rigid settlement procedures closely resemble the rules governing class settlements. The Class Action Fairness Act of 2005, for example, requires a defendant in a class settlement to serve "a notice of the proposed [class] settlement" to various state officials. 28 U.S.C. § 1715(b). And, of course, Federal Rule of Civil Procedure 23(e) requires court approval of any class action settlement.

Supp. 3d 1110, 1132–35 (N.D. Cal. 2016) (citing class settlement approval standards in PAGA settlement proceeding).

For all of these reasons, the *Iskanian* rule is fundamentally inconsistent with the FAA's goal of "affording parties discretion" to craft "efficient, streamlined," and often confidential "procedures tailored to the . . . [parties'] dispute." *Concepcion*, 563 U.S. at 344–45.

C. Representative PAGA claims increase the stakes for employers and produce inflated "in terrorem" settlements.

Finally, *Concepcion* concluded that state laws prohibiting class waivers "interfere[] with arbitration" because "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. In light of the limited judicial review available under the FAA, *see* 9 U.S.C. § 10, as well as the significant damage awards that can result from class arbitration, this Court found "it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 350–51. In *amici*'s experience, representative PAGA claims likewise subject employers to enormous liability that rivals—if not exceeds—class actions.

As discussed above, PAGA authorizes a statutory penalty of up to $200 per aggrieved employee, per pay period. Cal. Lab. Code § 2699(f)(2). When compounded over several years for tens or hundreds of thousands of employees, these civil penalties can easily outstrip the damages that are available in class actions. As the Ninth Circuit has observed, "[e]ven a

conservative estimate would put the potential penalties available in [representative PAGA] cases in the tens of millions of dollars." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013); *see also Sakkab*, 803 F.3d at 437 ("PAGA actions . . . involve high stakes."). In *O'Connor*, for example, the district court and California's LWDA estimated that Uber's PAGA exposure could exceed *1 billion dollars*, due to the large number of drivers who use the Uber application. *See O'Connor*, 201 F. Supp. 3d at 1127, 1133–35. The potential for such astronomical liability does not merely make arbitration "a less attractive method than litigation for resolving representative PAGA claims," as the *Sakkab* majority supposed; it renders arbitration an *impossible* method for resolving PAGA claims. 803 F.3d at 437.

And the high stakes of PAGA actions are not limited to the penalties available under PAGA. An "aggrieved employee" in California is permitted to invoke collateral estoppel and seek to use a PAGA judgment against her employer in any *subsequent* lawsuit (including a class action)—regardless of whether she was a party to the PAGA proceeding. Under California law, "if an employee plaintiff prevails in an action under [PAGA] for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment" and *any* "aggrieved employee" may then "use the judgment against the employer to obtain remedies" in a subsequent individual or class action based on "the same Labor Code violations." *Arias v. Sup. Ct.*, 46 Cal. 4th 969, 987 (Cal. 2009).

Consequently, representative PAGA claims "greatly increas[e] risks to defendants." *Concepcion*,

563 U.S. at 350. And because "[t]he absence of multilayered review makes it more likely that errors will go uncorrected" in arbitration, the "risk of an error . . . become[s] unacceptable" in "bet the company" PAGA cases. *Id.* at 350–51.[6] This presents precisely the same "risk of 'in terrorem' settlements" that this Court decried in *Concepcion*. *Id.* at 351. In fact, the California plaintiffs' bar has openly conceded that it adopts this strategy to obtain outsized settlements from California employers. *See, e.g.*, Bryan Schwartz, *Class-action settlement principles to take with you into mediation*, Plaintiff (Apr. 2014) (defendants often settle because they do "not want to have to address a separate suit alleging PAGA claims"); *O'Connor*, No. 13-cv-03826-EMC (N.D. Cal.), June 2, 2016 Tr. of Proceedings at 60:11–18 ("[PAGA] is a hammer. It drives a lot of settlements because it is an extraordinary amount of exposure the defendant could be facing").

There can be no reasonable dispute that arbitration is "poorly suited to the higher stakes of [representative PAGA] litigation." *Concepcion*, 563 U.S. at 350. Thus, the *Iskanian* rule "creates a scheme inconsistent with the FAA." *Id.* at 344.

II. THIS ISSUE IS CRITICALLY IMPORTANT TO CALIFORNIA EMPLOYERS.

This Court should grant certiorari not only because the FAA so clearly preempts the *Iskanian* rule,

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[6] This is not a risk that parties may simply contract around by providing for more expansive appellate review in their arbitration agreements. *See Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (the FAA provides the "exclusive" method of review for arbitration decisions that may not "be supplemented by contract.").

but also because California employers—including many of *amici's* members—are being deluged with costly and time-consuming representative PAGA actions that courts are requiring employers to litigate *in court*, in direct contravention of the parties' "contractual rights and expectations" that such disputes will be resolved in bilateral arbitration. *Stolt-Nielsen S.A.*, 559 U.S. at 682.

"Between 2005 and 2013, the number of lawsuits filed under [PAGA] more than quadrupled from 759 to 3,137," and "[t]hat number could rise much higher as PAGA emerges as the clear alternative for unhappy workers looking to circumvent contracts requiring them to arbitrate grievances on an individual basis." Emily Green, *State law may serve as substitute for employee class actions*, L.A. Daily J., Apr. 16, 2014; *see also* Goodman, *supra*, at 415. This explosion of representative PAGA litigation has had a crippling effect on California employers, by impeding their expansion and growth efforts and requiring employers to devote substantial time, money, and energy fending off claims that often have little or no merit. *See, e.g.*, Cal. Chamber of Commerce, Private Attorneys General Act, 2017 California Business Issues, at 5 ("PAGA is a primary concern of the employer community" because it produces "[f]rivolous litigation" and is being used for "financial leverage" during settlement discussions).

What is more, as many as 635 new PAGA notices are now filed *per month*. *See* Cal. Dep't of Indus. Relations ("CDIR") 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP-2016-GB, at 2. Not all of these notices ultimately lead to full-blown representative PAGA actions in court; rather, they are routinely filed to procure a quick settlement payout, which many employers have no choice but to accept—

even if the PAGA claims are "questionable"—in order to avoid the "small chance of a devastating loss." *Concepcion*, 563 U.S. at 350.

Nor is there any end in sight to the proliferation of representative PAGA litigation. According to the California Governor's 2016-2017 budget, just *one* State employee is staffed to review PAGA notices sent to the LWDA, meaning that "review and investigations of PAGA claims are quite rare." CDIR 2016/2017 Budget Change Proposal, Budget Request No. 7350-003-BCP-DP-2016-GB, at 1. Without this important layer of review, the State cannot determine whether any given representative PAGA claim has sufficient merit, such that the employee who filed a PAGA notice should be deputized. By default, then, virtually *every* employee who files a PAGA notice *automatically* gets deputized by the State to bring her PAGA claim. *Id*. at 2 (the State "lacks the resources to reach a solid conclusion and cite or settle within the allotted time before losing the ability to forestall private litigation").

As these trends demonstrate, California employers face (and in the absence of this Court's much-needed intervention, will continue to face) nearly the exact same difficulties they faced before *Concepcion*—a pervasive and unwarranted disregard for bilateral arbitration agreements, the expectations of the contracting parties, and the benefits that bilateral arbitration is designed to afford. This regime is fundamentally at odds with the FAA.

CONCLUSION

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

Respectfully submitted,

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