No. 13-56126

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL HOPKINS, an individual on behalf of himself and on behalf of all persons similarly situated,

Plaintiff-Appellant,

v.

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, a Delaware corporation,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the Central District of California
in Case No. 8:13-cv-00103-AG-RNB (Guilford, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America 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.[1]

The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. Accordingly, the Chamber files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the enforceability of arbitration agreements. These cases include *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052 (9th Cir. 2013) (en banc) (filed *amicus* brief and presented oral argument); and *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014) (same).

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *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 has made any monetary contributions intended to fund the preparation or submission of this brief.

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. These members 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.

Many of the *amici*'s members and affiliates regularly include arbitration agreements in their employment contracts because arbitration allows all parties to resolve disputes quickly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Relying on the legislative policy reflected in the Federal Arbitration Act (FAA) and the U.S. Supreme Court's consistent endorsement of arbitration for the past half-century, *amici*'s members have structured millions of employment relationships around arbitration agreements.

These agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As the Supreme Court explained in *Concepcion*, collective resolution of claims on an aggregate or class-wide basis is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristic of arbitration. 131 S. Ct. at 1753. The district court below correctly held that the plaintiff's arbitration agreement is enforceable as a matter of federal law, and that his claims under California's Private Attorney General Act of 2004 (PAGA) for alleged wage-and-hour violations must therefore be resolved through individual arbitration. If that decision were overturned, it would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits of arbitration as an alternative to litigation. *Amici* therefore have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action was brought by a private plaintiff (appellant Michael Hopkins) who agreed to resolve any disputes with his employer through arbitration on an individual basis. Despite that agreement, Hopkins seeks to sue in court to obtain a monetary recovery from his employer for alleged wage-and-hour violations involving a putative class of private individuals (made up of other purportedly aggrieved employees) who have likewise agreed to resolve any disputes with the employer through individual arbitration.

Those arbitration agreements are valid and enforceable under the Federal Arbitration Act (FAA). In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court held that agreements to resolve disputes through individual arbitration are fully enforceable under the FAA, and in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam), the Supreme Court reiterated that States may not declare particular causes of action off-limits to arbitration. These principles mandate the enforcement of Hopkins's arbitration agreement.

Hopkins's attempt to avoid arbitration invokes a California statute, the Private Attorney General Act of 2004 (PAGA). That statute—as construed by the California Supreme Court's recent decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014)—authorizes private plaintiffs to bring actions on behalf of the State seeking civil penalties for violations of the California Labor Code. *Iskanian* holds that this supposed cloak of state authority immunizes private plaintiffs' PAGA claims from arbitration and entitles them to proceed in court notwithstanding their arbitration agreements.

But *Iskanian* was wrongly decided in this regard, and the state-law rule it announced is preempted by the FAA. *Iskanian* relied on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), which held that, despite an employee's arbitration agreement, a federal agency could prosecute a lawsuit seeking relief on behalf of the employee. But private PAGA claims bear no relation to the public enforcement action brought by the federal government in *Waffle House*. Despite the facade of state authority, claims brought by a private plaintiff (Hopkins) to enforce the interests of private individuals (the employees) in the end still amount to claims brought by a private

individual bound by an arbitration agreement. Simply put, this is not a case brought or controlled by state officials. Hopkins's PAGA claim bears no resemblance to a civil enforcement action under *Waffle House*, in which *publicly accountable state officials* bring an action in the name of the State to enforce its laws.

Nor can the State override the FAA by deputizing a private party to represent the State in court notwithstanding that employee's valid agreement to bring claims only through individual arbitration. It is the FAA that displaces state interests and policy preferences, not the other way around.

Iskanian accordingly amounts to an impermissible attempt to declare private PAGA claims off-limits to arbitration. That is precisely what *Concepcion* and *Marmet* do not allow. The FAA was enacted specifically to overcome the "great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted). Like California's many earlier attempts to exempt private claims from arbitration, each overturned by the U.S. Supreme Court, the California Supreme Court's latest effort to place private PAGA actions off-limits to arbitration is preempted by federal law. The decision below should therefore be affirmed.

ARGUMENT

THE FAA REQUIRES HOPKINS TO PURSUE HIS PAGA CLAIMS IN ARBITRATION ON AN INDIVIDUAL BASIS.

In conflict with the overwhelming majority of federal district courts, the California Supreme Court held in *Iskanian* that a private plaintiff's PAGA claims cannot be arbitrated on an individual basis, notwithstanding that plaintiff's contractual agreement to do so. The state public policy declared in *Iskanian*—that individual arbitration of PAGA claims is forbidden—is squarely preempted by the FAA.

Nearly every federal court to consider the issue since *Iskanian* was decided has rejected that decision. *See Lucero v. Sears Holdings Mgmt. Corp.*, 2014 WL 6984220, at *4-6 (S.D. Cal. 2014); *Mill v. Kmart Corp.*, 2014 WL 6706017, at *6-7 (N.D. Cal. 2014); *Langston v. 20/20 Cos.*, 2014 WL 533734, at *6-8 (C.D. Cal. 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240, at *12-13 (C.D. Cal. 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, 2014 WL 4961126, at *8-10 (E.D. Cal. 2014); *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 4782618, at *3-4 (C.D. Cal. 2014).[2]

[2] Hopkins contends (Reply 6 n.4, 26) that his position is supported by *Gutierrez v. Carter Brothers Security Services, LLC*, 2014 WL 5501327 (E.D. Cal. 2014), but that case did not involve PAGA claims and did not address the issues presented here.

Those decisions are correct. As we discuss below, an unbroken line of Supreme Court authority holds that the FAA precludes States from declaring a cause of action off-limits to arbitration. The FAA and *Concepcion* also preclude States from requiring that claims be arbitrated on a class-wide or representative basis rather than individually. The fact that PAGA's private cause of action labels any damages recovered as "civil penalties" and requires a portion to be shared with the State does not exempt the claim from these rules. The FAA therefore requires Hopkins to pursue his PAGA claim through individual arbitration.[3]

A. The FAA Mandates Enforcement Of Arbitration Agreements Requiring Arbitration On An Individual Basis Even If The Claimant Seeks Class-Wide Relief.

A long line of decisions interpreting the FAA holds that States may not place any private cause of action off-limits to arbitration. Similarly well-settled case law holds that States may not refuse to

[3] As the parties acknowledge, the terms of Hopkins's arbitration agreement encompass his PAGA claim and require it to be arbitrated on an individual, rather than class-wide or representative, basis. The agreement covers "any claims arising out of or related to [Hopkins's] employment," including "wage/hour and other compensation matters," and waives participation in any "class action litigation or other representative or collective actions." E.R. 200.

enforce an arbitration agreement requiring that claims be arbitrated on an individual, and not class-wide or representative, basis. Those principles require arbitration of Hopkins's PAGA claim on an individual basis, and (as we discuss in Part B) nothing about a PAGA claim exempts it from those principles.

1. The FAA Forbids California From Placing Any Private Cause Of Action Off-Limits To Arbitration.

Hopkins's contention that his PAGA claim is exempt from arbitration is flatly at odds with Supreme Court precedent, which holds that States cannot declare a private cause of action off-limits to arbitration. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Marmet*, 132 S. Ct. at 1203; *Concepcion*, 131 S. Ct. at 1747. This "straightforward" rule precludes California from barring the arbitration of PAGA claims brought by private plaintiffs.

Indeed, the U.S. Supreme Court has repeatedly overturned previous attempts by California courts to require that particular statutory claims be resolved through litigation in court or agency

proceedings. Three decades ago, the Court held that the FAA preempted California's attempt to prohibit arbitration of disputes under the Franchise Investment Law. *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). The Court explained that the FAA "declared a national policy favoring arbitration and withdrew the power of the States to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

Three years later, the Court overturned a law requiring a judicial forum for wage-and-hour disputes under the California Labor Code—the same body of law at issue here. *Perry v. Thomas*, 482 U.S. 483, 489-92 (1987). And two decades after that, the Court again overturned a California decision holding that the Labor Commissioner had primary jurisdiction of claims under the Talent Agency Act and that such claims therefore could not be arbitrated. *Preston v. Ferrer*, 552 U.S. 346, 352-63 (2008).

Just two years ago, the Court again emphasized in *Marmet* that the FAA preempts any state-law rule that declares particular claims off-limits to arbitration. 132 S. Ct. 1201. *Marmet* unanimously (and summarily) reversed a West Virginia decision that forbade arbitration

of certain claims against nursing homes. *Id.* at 1203. That state-law impediment to arbitration was preempted, the Court explained, because it amounted to "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1204.

These cases make clear, as district courts in this Circuit have recognized, that any state-law rule prohibiting the arbitration of PAGA claims is preempted by the FAA every bit as much as the rules invalidated in *Southland*, *Perry*, *Preston*, and *Marmet*. *See, e.g.*, *Andrade v. P.F. Chang's China Bistro, Inc.*, 2013 WL 5472589, at *10 (S.D. Cal. 2013) ("[T]o preclude enforcement of the [arbitration] agreement on the basis of the PAGA representative waiver would allow state law to 'prohibit[] outright the arbitration of a particular type of claim,' a result explicitly preempted by the FAA."); *Luchini v. Carmax, Inc.*, 2012 WL 3862150, at *8 (E.D. Cal. 2012) ("A PAGA claim is a state-law claim, and states may not exempt claims from the FAA."); *Valle v. Lowe's HIW, Inc.*, 2011 WL 3667441, at *6 (N.D. Cal. 2011); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *4 (N.D. Cal. 2011).

2. The FAA Precludes California From Requiring Claims To Be Arbitrated On A Representative Or Class-Wide Basis.

Hopkins argues that his arbitration agreement is not enforceable because the agreement requires him to pursue any PAGA claim on an individual basis, rather than as a representative or class action. Opening Br. 11, 18-27. That argument runs headlong into the Supreme Court's decision in *Concepcion*.

a. Concepcion *held that a State may not condition enforcement of an arbitration agreement upon the availability of class proceedings.*

Concepcion holds that the FAA prohibits States from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. That is because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

Concepcion explained why "class arbitration" is "not arbitration as envisioned by the FAA" and "lacks its benefits." *Id.* at 1753. 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 1751.

Concepcion thus "observed that individualized proceedings are an inherent and necessary element of arbitration." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012) (citing *Concepcion*, 131 S. Ct. at 1750-52).[4]

Furthermore, because class arbitration involves the same high stakes as a judicial class action without any meaningful opportunity for judicial review, it is "hard to believe" that any company would willingly agree to it. *Concepcion*, 131 S. Ct. at 1751. As a result, requiring parties to permit collective resolution of claims in arbitration is tantamount to prohibiting arbitration altogether—a result that is manifestly at odds with the FAA's purpose and objective "to promote arbitration." *Id.* at 1749; *see also Coneff*, 673 F.3d at 1160.[5]

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[4] *Concepcion* also recognized that conditioning enforcement of arbitration agreements on the availability of class proceedings is inconsistent with the FAA as a historical matter. "[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925," as it "is a 'relatively recent development.'" 131 S. Ct. at 1751. And because individual arbitration is the form of "arbitration * * * envisioned by the FAA" (*id.* at 1753), hostility to individual arbitration is the same "judicial hostility to arbitration agreements" (*id.* at 1745) that the FAA sought to eradicate.

[5] *Concepcion* therefore forecloses Hopkins's argument (*e.g.*, Reply 12-13) that PAGA claims must be arbitrated either on a representative basis or not at all.

For these reasons, *Concepcion* held that courts may not refuse to enforce arbitration agreements because they require arbitration to be conducted on an individual basis. State law cannot condition access to the arbitral forum on the availability of collective or class-action proceedings, even if doing so would be "desirable for unrelated reasons." 131 S. Ct. at 1753.

b. Arbitration of PAGA claims on a representative basis is just as incompatible with arbitration as a class proceeding.

Representative actions under PAGA are incompatible with "arbitration as envisioned by the FAA" and "lack[] its benefits" for the very reasons explained in *Concepcion*. 131 S. Ct. at 1753. Numerous courts have reached this conclusion, holding "that *Concepcion* applies equally to waivers of PAGA representative actions," and that arbitration clauses barring representative PAGA actions are "valid and enforceable." *Asfaw v. Lowe's HIW, Inc.*, 2014 WL 1928612, at *9-10 (C.D. Cal. 2014) (collecting cases).[6]

[6] *See, e.g.*, *Mill*, 2014 WL 6706017, at *6-7; *Andrade*, 2013 WL 5472589, at *10-11; *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1305 (N.D. Cal. 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418, at *10 (C.D. Cal. 2013); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011).

That is because a representative action shares the very characteristics of class actions that led the Supreme Court in *Concepcion* to hold that the FAA prevents States from requiring that class arbitration be available:

- The outsized civil penalties available in a representative PAGA action—often involving claims for civil penalties on behalf of hundreds or thousands of potentially aggrieved employees ranging into many millions of dollars—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*, 131 S. Ct. at 1752.
- "[R]epresentative PAGA claims 'increase[] risks to defendants' by aggregating the claims of many employees," and "[j]ust as '[a]rbitration is poorly suited to the higher stakes of class litigation,' it is also poorly suited to the higher stakes of a collective PAGA action." *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (quoting *Concepcion*, 131 S. Ct. at 1752); *accord Asfaw*, 2014 WL

1928612, at *10 (following *Quevedo*); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1180 (S.D. Cal. 2011).

- Given the limited appellate review of arbitration awards, moreover, it is "hard to believe that defendants would bet the company" by consenting to representative arbitration "with no effective means of review." *Concepcion*, 131 S. Ct. at 1752. "Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would 'go uncorrected' given the 'absence of multilayered review.'" *Quevedo*, 798 F. Supp. 2d at 1142 (quoting *Concepcion*, 131 S. Ct. at 1752); *accord Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025, at *6 (quoting *Quevedo*), *recon. denied*, 2014 WL 4782618 (C.D. Cal. 2014); *Grabowski*, 817 F. Supp. 2d at 1180.

As in *Concepcion*, it defies belief to think "that Congress would have intended to allow state courts to force such a decision." 131 S. Ct. at 1752.

Moreover, just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1751), 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 in 2004.

Representative actions under PAGA are therefore every bit as incompatible with the "fundamental attributes of arbitration" as the class action at issue in *Concepcion*, and thus "create[] a scheme inconsistent with the FAA." *Id.* at 1748. State law cannot condition enforcement of arbitration agreements on the availability of representative actions any more than it can require class arbitrations. *See Grabowski*, 817 F. Supp. 2d at 1181 (citing *Concepcion*, 131 S. Ct. at 1747, 1753).

c. The FAA preempts Iskanian*'s reliance on state public policy objectives as a ground for refusing to compel arbitration.*

These principles make clear that *Iskanian* cannot be reconciled with the FAA. *Iskanian* held that the right to bring PAGA actions on a representative basis cannot be waived because "whether or not an individual claim is permissible under the PAGA, a prohibition of *representative* claims frustrates the PAGA's objectives." 327 P.3d at 149. To support that conclusion, the California Supreme Court adopted a state appellate court's statements that

> a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA * * * .

Id. at 384 (quoting *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 862 (Ct. App. 2011)).

That is the precise argument rejected by the Supreme Court in *Concepcion*. The plaintiffs there argued that California was entitled to condition enforcement of arbitration agreements on the availability of class-action procedures because of California's policy interest in the broad enforcement of consumer protection laws. *Concepcion*, 131 S. Ct. at 1745 ("relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, * * * 113 P.3d 1100 (2005), the [district] court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions").[7]

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[7] Tellingly, in holding that California law precludes the waiver of PAGA representative actions, *Iskanian* cited Section 1668 of the California Civil Code—the very same provision that *Discover Bank* relied upon in holding that waivers of class procedures were unenforceable under California law. *Compare Concepcion*, 131 S. Ct. at

Rejecting these policy arguments, the U.S. Supreme Court explained that "States cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*." *Concepcion*, 131 S. Ct. at 1753 (emphasis added). As this Court has put it, "policy concerns, however worthwhile, cannot undermine the FAA." *Coneff*, 673 F.3d at 1159.

The California Supreme Court therefore erred in allowing a state-law policy preference for collective adjudication of claims—here, through a representative action—to trump the FAA.

d. The "effective vindication of federal statutory rights" doctrine cannot be invoked to avoid the arbitration of state-law PAGA claims on an individual basis.

Finally, Hopkins insists that the FAA does not require enforcement of his agreement to arbitrate PAGA claims on an individual basis because, in his view, this might produce a waiver of his rights under PAGA and thereby preclude the "effective vindication" of those state statutory rights. Opening Br. 1, 10, 29-38; Reply 19-23. That argument is meritless for two reasons.

1746, 1756 (quoting *Discover Bank*, quoting in turn Cal. Civ. Code § 1668), *with Iskanian*, 327 P.3d at 148 (quoting same).

First, requiring individual resolution of PAGA claims does not amount to a waiver of PAGA rights, because nothing stops Hopkins from bringing an individual claim for civil penalties under PAGA. Contrary to Hopkins's insistence (Reply 17-19), *Iskanian* did not resolve "whether or not an individual claim is permissible under PAGA." *See* 327 P.3d at 149. But *this Court* has already said that PAGA rights "are held individually" (*Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013)).

Indeed, the substantial majority of district courts in this Circuit have held that individual PAGA claims are permitted and thus PAGA claims can be arbitrated on an individual basis. *See, e.g.*, *Lucero*, 2014 WL 6984220, at *4-6; *Fardig*, 2014 WL 2810025, at *6-7; *Asfaw*, 2014 WL 1928612, at *10 & n.3; *Appelbaum v. AutoNation, Inc.*, 2014 WL 1396585, at *11 (C.D. Cal. 2014); *Parvataneni*, 967 F. Supp. 2d at 1305; *Miguel*, 2013 WL 452418, at *9-10; *Quevedo*, 798 F. Supp. 2d at 1141.

Second, even if California law required plaintiffs to bring PAGA claims solely on a representative rather than an individual basis, that oddity of state law would not justify a refusal to enforce Hopkins's arbitration agreement. As the Supreme Court held in *American*

Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) ("*Amex*"), the FAA does not contain an effective-vindication exception for claims arising *under state law*. Instead, the effective-vindication doctrine applies only when "the FAA's mandate has been 'overridden by a contrary *congressional* command.'" 133 S. Ct. at 2309 (emphasis added; citation omitted).

"Congress [may] evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)), but the Supremacy Clause of the Constitution prevents States from doing the same. Thus, "a *state* law * * * could not possibly implicate the effective-vindication rule," because "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives." *Amex*, 133 S. Ct. at 2320 (Kagan, J., dissenting). As Justice Kagan put it, "We have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal law; any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." *Id.*

This Court recognized as much in *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013). Stating that "[t]he effective vindication and inherent conflict exceptions" to the enforcement of arbitration agreements "are two sides of the same coin," the Court explained that "[b]oth exceptions are reserved for claims brought under federal statutes." *Id.* at 936. Because PAGA claims arise under *state* law, the effective-vindication doctrine simply "does not apply." *Id.*[8]

B. California Cannot Authorize Private Plaintiffs To Avoid Their Arbitration Agreements By Labeling Them "Private Attorneys General"

The California Supreme Court concluded in *Iskanian* that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." 327 P.3d at 151. Instead, according to that court, a PAGA claim "is a dispute between an employer and the *state*"—with "aggrieved employees" merely serving as "agents" of the state. *Id.* (emphasis in original). Thus, in the *Iskanian* court's view, it does not matter whether the employee has agreed to arbitrate a PAGA claim because the claim belongs to the State.

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[8] Hopkins's contention that the effective-vindication doctrine applies to state-law claims (Opening Br. 31-35) relies solely on pre-*Amex* and pre-*Ferguson* cases that are no longer good law. *See, e.g.*, *McGill v. Citibank, N.A.*, 2014 WL 7202035, at *8 (Cal. Ct. App. 2014).

That holding is misguided for multiple reasons. First, although *Iskanian* relied on the Supreme Court's decision in *Waffle House*, that decision makes clear that PAGA claims are not exempt from arbitration. Critical to *Waffle House*'s determination that the private party's arbitration agreement did not apply was the fact that *the government* controlled the litigation. But under PAGA—which, of course, stands for the *Private* Attorney General Act—the *private plaintiff* exercises unfettered control over the prosecution of the claim, subject to virtually no government oversight or control.

Second, *Iskanian* is wrong in asserting that the FAA permits a State to deputize a private plaintiff to pursue a claim on its behalf when the plaintiff is a party to an arbitration agreement that encompasses the claim. Even assuming that delegation of law-enforcement authority to private citizens is permissible, the State cannot override an employee's contractual commitment to resolve all disputes by individual arbitration when that agreement is otherwise enforceable under the FAA.

It is clear—as *Iskanian* acknowledged—that a party who has agreed to resolve through arbitration all disputes with another

contracting party is bound to arbitrate *all* disputes, including claims assigned by a third party. As we discuss below, the fact that the third party who has "assigned" its claim here is a State rather than a private entity makes no difference under the FAA.

1. PAGA Actions Do Not Qualify As Government Enforcement Actions Excluded From Arbitration Under *Waffle House*.

In holding that private PAGA claims "lie[] outside the FAA's coverage," the California Supreme Court pointed to the U.S. Supreme Court's decision in *Waffle House*, which held that a federal agency—the Equal Employment Opportunity Commission—could pursue claims in court to seek employee-specific relief even though the employee had agreed to arbitrate such claims. *See Iskanian*, 327 P.3d at 151. But *Waffle House* makes clear that a PAGA claim brought by a private plaintiff is *not* the type of lawsuit that may avoid arbitration.

Waffle House held that the EEOC, a federal government agency that was not a party to the arbitration agreement at issue, could *itself* proceed in court on the government's own enforcement action, even though that action sought relief for an employee who had agreed to arbitrate any claims of his own. 534 U.S. at 291-94. Critical to the

Court's analysis was the fact that the agency *itself* was pursuing the enforcement action under separate authority conferred by Congress *upon the agency*.

The Court stressed that "the [agency] is *in command* of its own process" and that "[t]he statute clearly makes the EEOC the *master of its own case*." *Id.* at 292 (emphasis added). By contrast, the Court explained, if the agency lacked direct and exclusive control over the case—for example, "[i]f it were true that the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]"—then the arbitration agreement could have barred the agency from pursuing employee-specific relief. *Id.*; *see also, e.g.*, *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 733-36 (Iowa 2014) (holding that Iowa commission was able to pursue an enforcement action against an employer where "the agency, not the [employee], is the 'master of its own case' and determines the course of the case," in case where the employee "did not attempt to intervene in the administrative proceeding against" the employer) (quoting *Waffle House*, 534 U.S. at 291).

The situation presented by PAGA bears no resemblance to *Waffle House*. PAGA places a private plaintiff in the driver's seat; the State has virtually no control over the litigation. *See Lucero*, 2014 WL 6984220, at *5 ("Notably, in EEOC actions, the EEOC controls the litigation, but in PAGA claims, the employee is the named plaintiff and directs the litigation."). Specifically, once the State fails to preclude a private PAGA action by issuing a citation itself upon receiving notice of the alleged violation from a prospective plaintiff (*see* Cal. Labor Code § 2699.3), that private plaintiff is in charge of pursuing and litigating the PAGA representative action and has full control over the case. Among other things, the private PAGA plaintiff:

- controls the allegations in the complaint;
- defines the set of employees that he or she seeks to represent; and
- may settle the claims without the government's approval.

Thus, under PAGA's private cause of action, private plaintiffs are free to prosecute a case without supervision or control by any publicly accountable state officials. As one district court recently explained, "[i]n EEOC suits, the EEOC brings and controls the litigation, whereas, in PAGA claims, the employee is the named plaintiff and controls the

litigation." *Langston*, 2014 WL 5335734, at *7. Stated another way, "it is Plaintiffs"—not the State—"who would control the litigation" under PAGA. *Fardig*, 2014 WL 4782618, at *4.

That stands in stark contrast to *Waffle House*, in which the Supreme Court found it determinative that the EEOC exercised discretion over whether to pursue the alleged violation of federal employment discrimination law and controlled the subsequent litigation. As the Court explained, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." 534 U.S. at 296; *see also Rent-A-Center*, 843 N.W.2d at 736.

In an effort to imbue PAGA claims with the State's authority, the *Iskanian* court pointed out that PAGA provides for 75 percent of the civil penalties recovered by a private plaintiff to go to the State (with the remaining 25 percent to go to the "employees affected by the Labor Code violation")—meaning, in the *Iskanian* court's view, that PAGA claims are made "on behalf of the state" and therefore satisfy the *Waffle*

House standard. 327 P.3d at 147. Yet the fact that California receives a large portion of the penalties awarded does not make the State the party that is controlling the litigation—and *control* is what matters under *Waffle House*. No matter how civil penalties awarded under PAGA are divided, it remains clear that, for the reasons explained above, private plaintiffs exercise virtually all control over PAGA claims.[9]

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[9] The absence of State control over PAGA litigation is underscored by practical experience with how PAGA cases have historically been litigated and resolved. PAGA claims routinely have been filed together with other claims under federal and state labor law, and, as with most class or representative actions, the cases that were not dismissed tend to settle. In many of those court-approved settlements, the parties agreed to attribute the vast majority of the settlement amount to the other claims, allocating only a tiny fraction of the recovery to the PAGA claims. The reason, although unspoken, is apparent: Private plaintiffs and their counsel frequently sought to maximize the recovery to themselves, and therefore are loath to recover much on the PAGA claim when 75 percent of that amount will go to the State. This reality confirms both the State's lack of involvement in the litigation and the absence of concern for any supposed State interest. *See, e.g.*, *Franco v. Ruiz Food Prods., Inc.*, 2012 WL 5941801 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $2.5 million settlement); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575 (E.D. Cal. 2012) ($10,000 allocated to PAGA claim out of $3.7 million settlement); *McKenzie v. Fed. Express Corp.*, 2012 WL 2930201 (C.D. Cal. 2012) ($82,500 allocated to PAGA claim out of $8.25 million settlement); *Chu v. Wells Fargo Inv., LLC*, 2011 WL 672645 (N.D. Cal. 2011) ($7,500 allocated to PAGA claim out of $6.9 million settlement); *see also Nordstrom Comm'n Cases*, 112 Cal. Rptr. 3d 27, 37-38 (Ct. App. 2010) (upholding multi-million dollar settlement agreement that allocated *zero* dollars to the PAGA claim).

Indeed, if it mattered that some portion—even a substantial one—of a recovery is allocated to the State, that would prove far too much. For example, a number of States have enacted laws requiring that as much as 75 percent of any punitive-damages award won by a private plaintiff be distributed to the State or one of its agencies.[10] But it is well established that agreements to arbitrate punitive-damages claims are still enforceable under the FAA. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). As with punitive-damages claims, the fact that California retains for itself a portion of any penalties recovered does not exempt private PAGA claims from arbitration.

2. California May Not Displace An Employee's Agreement To Arbitrate Employment Disputes By "Assigning" PAGA Claims To Him.

The California Supreme Court acknowledged in *Iskanian* that a State may not "circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D"—conceding that such an arrangement is "tantamount to a private class action" that is incompatible with

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[10] *E.g.*, Alaska Stat. § 09.17.020(j); Ga. Code Ann. § 51-12-5.1(e)(2); 735 Ill. Comp. Stat. Ann. 5/2-1207; Ind. Code Ann. § 34-51-3-6(c); Iowa Code Ann. § 668A.1(2)(b); Or. Rev. Stat. Ann. § 31.735(1); Utah Code Ann. § 78B-8-201(3)(a).

arbitration under the FAA. 327 P.3d at 152. Yet it purported to distinguish PAGA because it viewed PAGA claims as "belonging" to the State rather than to the aggrieved employees. *Id.*

But even assuming that PAGA claims belong entirely to the State and that the State may freely assign those claims, it does not follow (as *Iskanian* mistakenly held) that the State's assignment of PAGA claims would render unenforceable an employee's agreement to arbitrate all claims relating to his or her employment, including PAGA claims. On the contrary, under the FAA, the employee's agreement to arbitrate on an individual basis is enforceable and precludes that employee from serving as the State's proxy to pursue representative claims.

Basic principles of contract law forbid such an approach. Assume that private party A has a claim against private party B and assigns that claim to private party C. Assume further that C and B have agreed to arbitrate all disputes between them, and accordingly that the assigned claim falls within the scope of that agreement. In such circumstances, it is readily apparent that C must arbitrate the claim, even if there is no arbitration agreement between A and B.

The *Iskanian* court did not dispute this point. Instead, it held that "a PAGA litigant's status as 'the proxy or agent' of the state" altered the calculus because of a private "PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." 327 P.3d at 152. But California's policy interest in deputizing private attorneys general does not permit the State to declare inapplicable to arbitration agreements generally applicable rules governing contract enforceability, which is what the *Iskanian* court did by holding that when the State is the assignor of the claim, it may render unenforceable the assignee's pre-existing otherwise-applicable arbitration agreement.

Concepcion makes clear that the FAA bars States from distorting generally applicable principles of contract law regardless of the State's asserted policy rationale. According to the *Iskanian* court, the point of "[r]epresentative actions under the PAGA" is to "directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws." 327 P.3d at 152. But the FAA necessarily displaces such policy concerns about the appropriate balance of public versus private enforcement and their perceived efficacy at deterrence.

As this Court has underscored, any such "concern is, of course, a primary policy rationale for class actions, as discussed by the district court [in that case] in terms of deterrence. * * * But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Coneff*, 673 F.3d at 1159.

In short, Hopkins's PAGA claim must be arbitrated on an individual basis because Hopkins has contractually agreed to resolve any dispute against his employer (in terms that include this dispute) through individual arbitration. That agreement is "valid, irrevocable, and enforceable" (9 U.S.C. § 2) under the FAA, and there is no "generally applicable contract defense[]" (*Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) that would excuse Hopkins from complying with that agreement. By creating a new arbitration-agreement-specific basis for refusing to enforce an arbitration contract, the California Supreme Court's ruling violates the fundamental principle embodied in the FAA—that while "generally applicable contract defenses * * *, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA, "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.*

3. The California Supreme Court's Attempt To Analogize PAGA Claims To State *Qui Tam* Actions Does Not Justify Exempting Such Claims From Arbitration.

Iskanian also attempts to characterize PAGA claims as akin to *qui tam* actions that purportedly (in that court's view) need not be arbitrated. *Iskanian*, 327 P.3d at 148; *see also* Reply 11, 16. But the *qui tam* analogy does not save *Iskanian*'s rationale from preemption for multiple reasons.

a. To begin with, the federal *qui tam* law is designed to give the government avenues of control over litigation brought by private plaintiffs. Under the federal False Claims Act, "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action." 31 U.S.C. § 3730(c)(2)(A). If the government chooses to proceed with the action, it has "the primary responsibility for prosecuting the action, and" cannot "be bound by" the actions of the private plaintiff. *Id.* § 3730(c)(1). Even if the government chooses not to intervene at the outset and to allow the private plaintiff to proceed, it may later intervene on a showing of good cause. *Id.* § 3730(c)(3). And a private plaintiff may not settle or dismiss a *qui tam* action without the consent of the government. *Id.* § 3730(b)(1).

In contrast to the role the government is authorized to play in federal *qui tam* litigation, California has essentially no control over the conduct of a PAGA action brought by a private plaintiff. *See* pages 26-27, 33, *supra*. The State's nonexistent role in the prosecution of PAGA claims by private plaintiffs comes nowhere close to what would be required to satisfy *Waffle House*.

b. *Iskanian* further states that a PAGA claim is a "kind of *qui tam* action" that "lies outside the FAA's coverage." 327 P.3d at 151. In the federal context, courts have repeatedly rejected the argument that there is an "inherent conflict" between the False Claims Act and arbitration of a private plaintiff's lawsuit. *See Deck v. Miami Jacobs Bus. Coll. Co.*, 2013 WL 394875, at *6-7 (S.D. Ohio 2013) (noting that "other courts have uniformly rejected" a federal district court decision identifying an inherent conflict between the False Claims Act and arbitration) (citations omitted).

But even if there were such an inherent conflict between the False Claims Act and the FAA, that would be because "the FAA's mandate" to enforce arbitration agreements "has been 'overridden by a contrary *congressional* command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct.

665, 669 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)) (emphasis added).

As this Court has recognized, that "inherent conflict exception[]" to the enforcement of arbitration agreements is "reserved for claims brought under *federal* statutes." *Ferguson*, 733 F.3d at 936 (emphasis added); *see also* pages 20-22, *supra*. The FAA forbids States from declaring state-law causes of action off-limits to arbitration. Whether Congress has overridden the FAA's generally-applicable rule with respect to federal *qui tam* actions therefore is wholly irrelevant to the arbitrability of state PAGA claims.[11]

[11] The *Iskanian* court's observation that the False Claims Act "'can reasonably be regarded as effecting a partial assignment of the Government's damages claim'" adds nothing to this argument. 327 P.3d at 148 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)). That *Congress* might "assign" a claim and exempt the claim from arbitration says nothing about PAGA, because Congress's action would rest on its authority to declare federal claims nonarbitrable—something that the Supreme Court has repeatedly held a *State* may not do.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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