No. 22-56209

In the United States Court of Appeals for the Ninth Circuit

YURIRIA DIAZ, AS AN INDIVIDUAL AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,

v.

MACY'S WEST STORES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR AMICI CURIAE THE NATIONAL RETAIL FEDERATION AND THE RETAIL LITIGATION CENTER, INC., SUPPORTING APPELLANT

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CORPORATE DISCLOSURE STATEMENT

No. 22-56209
Yuriria Diaz, as an individual and on behalf of all others similarly situated,
Plaintiff-Appellee,
v.
Macy's West Stores, Inc.,
Defendant-Appellant.

Under Federal Rule of Appellate Procedure 26.1, the National Retail Federation certifies that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The National Retail Federation has no parent corporation, and no publicly held company has 10% or greater ownership in the National Retail Federation.

The Retail Litigation Center, Inc., likewise certifies that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Retail Litigation Center, Inc., has no parent corporation, and no publicly held company has 10% or greater ownership in the Retail Litigation Center, Inc.

/s/ Steven P. Lehotsky
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INTEREST OF AMICI CURIAE

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association.[1] Retail is the largest private-sector employer in the United States. It supports one in four U.S. jobs—approximately 52 million American workers—and contributes $3.9 trillion to annual GDP. The NRF's membership includes retailers of all sizes, formats, and channels of distribution.

The Retail Litigation Center, Inc., ("RLC") was founded in 2010 for the purpose of representing the retail industry in matters pending before the courts. In this capacity, the RLC has filed more than 200 amicus briefs on a range of issues important to the country's leading retailers.

Like most employers, *amici*'s members rely on arbitration agreements to avoid the costs and unpredictability that come with litigation. But *amici*'s members avoid large-scale arbitration for similar reasons—arbitration of massive-scale disputes eliminates the advantages of arbitration. *Amici*'s members therefore have a strong interest in ensuring that courts interpret

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellant and Appellee consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

their arbitration agreements as covering only the kinds of claims they specifically agree to arbitrate.

SUMMARY OF THE ARGUMENT

I. The Supreme Court has repeatedly held that parties must arbitrate only where they have specifically agreed to do so. A well-established corollary to that rule is that courts may not force parties to arbitrate using procedures fundamentally different than the parties expected. Parties choose to arbitrate because it is an informal, inexpensive, and faster way to resolve individualized disputes than litigation. But arbitrating claims involving numerous different individuals—for example, through class or collective arbitration—makes the process long, costly, and prone to errors. A court may therefore only order parties to arbitrate these types of claims if the parties unambiguously agreed to do so.

II. These bedrock principles prohibit courts from ordering parties to arbitrate representative claims under California's Private Attorneys General Act ("PAGA") unless they specifically agree to do so. The district court's holding otherwise is deeply mistaken.

A. Arbitration of representative PAGA claims presents all the downsides of class or collective arbitration. Like class arbitration, representative PAGA claims allow a single plaintiff to bundle many unrelated claims in a single action. And, also like class claims, PAGA claims involve massive financial liability. Because the stakes are so high, businesses often settle meritless

representative PAGA claims rather than submit them to arbitration. In other words, PAGA claims share the same fundamental characteristics that make class actions so "poorly suited" to arbitration. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924 (2022) (citation omitted). Courts may therefore order arbitration of representative PAGA claims only if the parties specifically agreed to it.

B. The district court disagreed because it misunderstood both the arbitration agreement here and *Viking River*'s discussion of PAGA.

The plain text of Macy's arbitration agreement with Diaz limits arbitration to disputes "asserted by the Associate against the Company." Doc. 84-3, Ex. A at 24. It specifically excludes claims involving other associates from arbitration and prohibits the arbitrator from hearing class or collective arbitration. That language thus excludes PAGA claims, which are collective claims for all practical purposes. And even if the contract were ambiguous, the parties certainly did not affirmatively *agree* to arbitrate representative PAGA claims. Yet, despite all this, the district court ordered Macy's to arbitrate representative PAGA claims anyway.

The district court reached that conclusion because it misunderstood *Viking River*. In that case, the Court considered whether two aspects of California law implementing PAGA violated the Federal Arbitration Act ("FAA"). First, California law prohibited courts from enforcing contracts that waived the right to bring representative PAGA claims. *Viking River* upheld this rule because representative PAGA claims are not necessarily incompatible with

arbitration, even though the resulting arbitration may not be bilateral. Second, the Court held that a California rule prohibiting parties from agreeing to arbitrate individual PAGA claims but not representative PAGA claims *did* violate the FAA. Mandatory joinder of representative claims greatly expands the scope and risk of arbitration. The Court therefore held that when the parties agreed to arbitrate only individual claims, courts cannot order arbitration of representative claims too. The district court's judgment requiring Macy's to arbitrate representative PAGA claims despite admitting the arbitration agreement did not specifically consent to that arbitration was thus in error.

III. The district court's reasoning threatens to upset the established expectations of many businesses, including numerous retailers, that routinely enter into arbitration agreements like Macy's. These agreements typically use broad language excluding all manner of large-scale arbitration. This has been sufficient to avoid court-ordered arbitration of representative PAGA claims in the past. But, under the district court's rule, retailers would have to anticipate every state-specific cause of action a plaintiff might sue under. That would make arbitration agreements unworkably complex. And it would fundamentally subvert the expectations of the parties to these contracts, who reasonably assume they will not be subject to the massive stakes of representative PAGA arbitration when they specifically exclude collective claims.

ARGUMENT

I. Under the Federal Arbitration Act, parties cannot be required to arbitrate without their consent.

The "first principle" of the Federal Arbitration Act is that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (citation omitted). And "[t]he most basic corollary of the principle that arbitration is a matter of consent is that 'a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.'" *Viking River*, 142 S. Ct. at 1923 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)). The FAA requires "courts and arbitrators to give effect to the[] contractual limitations" in the arbitration agreement so as to honor "the intent of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

These principles mean that a party "cannot be coerced into arbitrating a claim, issue, or dispute 'absent an affirmative contractual basis for concluding that the party *agreed* to do so.'" *Viking River*, 142 S. Ct. at 1923 (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019)). Where a party is presented with "an unacceptable choice between being compelled to arbitrate using procedures" the party did not expect or "forgoing arbitration altogether," *id.* at 1918, parties lose the fundamental right to have their "private agreements to arbitrate … enforced according to their terms," *Stolt-Nielsen*, 559 U.S. at 682 (citation omitted).

That is especially true where a court attempts to impose arbitration "procedures at odds with arbitration's informal nature." *Viking River*, 142 S. Ct. at 1918. "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Parties often opt for arbitration *because* of its "simplicity, informality, and expedition." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Litigation is expensive and time consuming—especially discovery and trial—and so "the informality of arbitral proceedings is itself desirable" to "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 563 U.S. at 345.

Arbitration of "massive-scale disputes" frustrates those benefits. *Viking River*, 142 S. Ct. at 1924. There are "fundamental" differences between "the individualized form of arbitration envisioned by the FAA" and class, collective, or representative arbitration. *Lamps Plus*, 139 S. Ct. at 1416 (citation omitted). "Arbitration is poorly suited to the higher stakes" that come with arbitration of claims from "tens of thousands of potential claimants." *Concepcion*, 563 U.S. at 350. That kind of arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. The benefits of individualized arbitration—"lower costs [and] greater efficiency and speed"—are thus lost when parties must arbitrate many claims from different parties simultaneously. *Stolt-Nielsen*, 559 U.S. at 685.

Accordingly, the Supreme Court has repeatedly held that parties can be forced to arbitrate class or collective claims only if they *unambiguously* agree to do so. "[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* If the agreement is silent about whether it includes "consent to participate in class arbitration," a court may not order class arbitration. *Lamps Plus*, 139 S. Ct. at 1416. And "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" *Id.* (second alteration in original) (quoting *Concepcion*, 563 U.S. at 348). In other words, the normal rule—that "ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration"—is reversed in the class action context. *Id.* at 1418. Unless there is "affirmative 'contractual'" consent to class arbitration, *id.* at 1416 (citation omitted), ordering a party to submit to class arbitration is "inconsistent with the FAA," *Concepcion*, 563 U.S. at 348.

II. Entities that exclude representative actions from arbitration agreements have not consented to adjudicate representative PAGA actions.

In *Viking River*, the Supreme Court relied on these same principles in holding that court-mandated arbitration of representative PAGA claims would "compel[] parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than

consent, or else forgo arbitration altogether." 142 S. Ct. at 1924 (citing *Lamps Plus*, *Concepcion*, and *Stolt-Nielsen*). Thus, if an arbitration agreement does not specifically consent to arbitrate representative PAGA claims, courts cannot infer that consent. And for Macy's—like many retailers, *see infra* Part III—there was no affirmative consent to arbitrate representative PAGA claims. The arbitration agreement signed by Macy's and its employee expressly *excludes* class or collective claims. The district court's determination that Macy's agreed to arbitrate representative PAGA claims anyway was thus deeply mistaken. Indeed, the district court's reasoning reflects a fundamental misunderstanding of *Viking River* and the costs associated with representative PAGA claims.

A. Parties must consent to arbitrate representative PAGA claims with just as much specificity as class or collective claims.

The Supreme Court's instructions about how to interpret the scope of arbitration agreements apply to representative PAGA claims.

Like class actions, "PAGA suits 'greatly increas[e] risks to defendants.'" *Viking River*, 142 S. Ct. at 1921 (alteration in original) (citation omitted). PAGA authorizes individual plaintiffs to bring an action "on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed." Cal. Labor Code § 2699(g)(1). California courts have interpreted that language to mean an employee can seek "penalties for violations involving employees other than the PAGA litigant herself." *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243-44 (Cal. 2019). This

ability to bring "representative claims"—those "predicated on code violations sustained by other employees"—"allows plaintiffs to unite a massive number of claims in a single-package suit." *Viking River*, 142 S. Ct. at 1916, 1924.

PAGA claims can be even broader and more varied than class action claims. "In bringing such an action, the aggrieved employee" wields the authority of "state labor law enforcement agencies, representing the same legal right and interest as those agencies." *Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). That means a plaintiff can assert representative PAGA claims even for violations involving other employees that do not "arise from a common 'transaction' or 'nucleus of operative facts.'" *Viking River*, 142 S. Ct. at 1920 (citation omitted). A plaintiff can leverage "a single violation … as a gateway to assert a potentially limitless number of other violations as predicates for liability." *Id.* at 1915. So unlike class action plaintiffs, who can only bring claims that share common questions of law or fact, PAGA plaintiffs can bring many, entirely unrelated claims. *Id.* at 1920-21. This means that PAGA suits can involve claims related to enormous numbers of employees. *See, e.g.*, *Turrieta v. Lyft, Inc.*, 284 Cal. Rptr. 3d 767 (Ct. App. 2021) (PAGA claims purportedly brought on behalf of 565,000 rideshare employees); Order and Final Judgment Approving Settlement Between Settlement Class Plaintiffs and Wal-Mart Stores, Inc., *Brown*

v. Wal-Mart Stores, Inc., No. 5:09-cv-03339 (N.D. Cal. Mar. 28, 2019), Dkt. 302 (claims brought on behalf of over 100,000 current and former cashiers).[2]

The "risk" associated with combining damages from many "potential claimants" exposes defendants to potentially "devastating loss." *Concepcion*, 563 U.S. at 350. PAGA authorizes civil penalties of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Labor Code § 2699(f)(2). Seventy-five percent of the penalties imposed go to the State of California; the remaining 25 to the "aggrieved employees." *Id.* § 2699(i). And a prevailing plaintiff is "entitled to an award of reasonable attorney's fees and costs." *Id.* § 2699(g)(1). PAGA's rule of unlimited claim joinder therefore "radically expands the scope of PAGA actions," and permits plaintiffs to easily combine "low-value claims … into high-value suits." *Viking River*, 142 S. Ct. at 1915. PAGA plaintiffs (or at least their counsel) have a financial incentive to bring

[2] California courts are currently divided over whether courts may require that PAGA claims be "manageable." *Compare Wesson v. Staples the Off. Superstore, LLC*, 283 Cal. Rptr. 3d 846, 859 (Cal. Ct. App. 2021) ("[C]ourts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable.") *with Estrada v. Royalty Carpet Mills, Inc.*, 292 Cal. Rptr. 3d 1, 21 (Cal. Ct. App. 2022) (disagreeing with *Wesson*). But that potential limit would not stop PAGA plaintiffs from bringing broad allegations and many unrelated claims in most cases.

as many claims as they can. The hundreds of dollars in penalties per employee per pay period can swiftly amount to alarming sums. *See Paprock v. First Transit, Inc.*, No. D064697, 2015 WL 2398189, at *3 & n.11 (Cal. Ct. App. May 18, 2015) (settlement of $11.5 million); Order Granting Approval of PAGA Settlement and Judgment Thereon, *Price v. Uber Techs., Inc.*, No. BC554512 (Cal. Super. Ct. Jan. 31, 2018) (approving $7.75 million settlement); Order and Final Judgment Approving Settlement Between Settlement Class Plaintiffs and Wal-Mart Stores, Inc., *Brown*, No. 5:09-cv-03339, Dkt. 302 (approving $65 million settlement).

And these dynamics, together, mean that court-ordered arbitration of PAGA "suits featuring a vast number of claims entail the same 'risk of "in terrorem' settlements that class actions entail.'" *Viking River*, 142 S. Ct. at 1924 (citation omitted). The scale and complexity of representative PAGA claims make arbitration more expensive and time-consuming, especially because California courts have extended "PAGA discovery as broadly as class action discovery has been extended." *Williams v. Superior Ct.*, 398 P.3d 69, 81 (Cal. 2017). And if that complexity leads a rogue arbitrator to incorrectly award millions of dollars, "[t]he absence of multilayered review makes it more likely that error[] will go uncorrected." *Concepcion*, 563 U.S. at 350. Rather than arbitrate representative PAGA claims, businesses must thus often settle even "questionable claims." *Id.*

These features mean that, at least for purposes of interpreting the scope of an arbitration agreement, PAGA claims *are* collective claims. They share

the same fundamental characteristics that make class actions so "poorly suited" to arbitration. *Id.* To be sure, PAGA claims are not identical to class claims in every way. For example, they "do not present the problems of notice, due process, and adequacy of representation" that class arbitration does. *Viking River*, 142 S. Ct. at 1921.[3] But they present many of the same litigation risks as other collective claims, and "[l]itigation risks are relevant" in interpreting the scope of arbitration agreements because state law may not "coerce parties into forgoing their right to arbitrate … by conditioning that right on the use of a procedural format that makes arbitration artificially unattractive." *Id.*

In other words, arbitration of representative PAGA claims "changes the nature of arbitration to such a degree" that courts should order arbitration only where the parties affirmatively agreed to it. *Stolt-Nielsen*, 559 U.S. at 685. If a court "expand[s] the scope of the arbitration by introducing [representative PAGA] claims that the parties did not jointly agree to arbitrate," the parties have been denied "the individualized and informal *procedures* characteristic of traditional arbitration." *Viking River*, 142 S. Ct. at 1921, 1923. And

[3] The *Viking River* Court held this difference mattered in analyzing whether a state law could preclude waivers of PAGA claims entirely. *Viking River*, 142 S. Ct. at 1922 ("These principles do not mandate the enforcement of waivers of representative capacity as a categorical rule."). But this difference did not matter when assessing whether a party could be required to arbitrate claims pertaining to other individuals where they did not agree to do so. *Id.* at 1924.

neither "silence" nor "ambiguity" is a "sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" *Lamps Plus*, 139 S. Ct. at 1416 (alteration in original) (citation omitted).

B. The district court misunderstood both the parties' agreement and *Viking River*.

The district court violated these principles at every turn. It ordered Macy's to arbitrate the representative PAGA claims here despite freely admitting the agreement did not specifically consent to arbitrate those claims. And it reached that conclusion by thoroughly misunderstanding *Viking River's* discussion of PAGA.

1. The arbitration agreement's plain text *excludes* mass-scale arbitration. The agreement covers "all employment-related legal disputes, controversies, or claims arising out of" the employment relationship. Doc. 84-3, Ex. A. at 24. But that scope is carefully limited. Under the agreement, arbitration is limited to claims "asserted by the Associate against the Company," or "by the Company against the Associate." *Id.* The agreement expressly excludes claims involving *other* associates from arbitration. The arbitrator may not "consolidate claims of different Associates into one" proceeding. *Id.* at 12. Nor may the arbitrator hear the arbitration "as a class or collective action." *Id.* There is thus no textual support for the idea that Macy's intended to implicitly consent to arbitrate representative PAGA claims that have nothing to do with "the Associate" who signed the arbitration agreement. *Id.*

Yet, the district court disregarded all of this. It made no effort to determine whether Macy's had "specifically … agreed to submit to arbitration" of the PAGA claims. *Viking River*, 142 S. Ct. at 1923. In fact, the district court ordered Macy's to arbitrate representative PAGA claims *because* the agreement "lack[ed] language excluding" those claims. 2022 WL 18107103 at *4. That reasoning gets the analysis entirely backwards. The absence of language is not affirmative consent. And even if an agreement's scope is ambiguous, the Supreme Court has repeatedly emphasized that ambiguity is not a sufficient basis to order arbitration that would "sacrifice the principal advantage of arbitration." *Lamps Plus*, 139 S. Ct. at 1416.

2. The district court went astray because it fundamentally misunderstood *Viking River*. The court argued it could disregard the arbitration agreement's exclusion of class or collective arbitration because "the Court in *Viking River* clearly distinguished class and PAGA actions." 2022 WL 18107103 at *4. No one disputes there are difference between class actions and representative PAGA actions. But *Viking River* did not authorize courts to infer consent to arbitrate representative PAGA claims. Just the opposite.

In *Viking River*, the Court was considering "whether PAGA contains any procedural mechanism at odds with arbitration's basic form." 142 S. Ct. at 1921. That question was important because state law may not "coerce parties into forgoing their right to arbitrate … by conditioning that right on the use of a procedural format that makes arbitration artificially unattractive." *Id.* "Putting parties to that choice is inconsistent with the FAA." *Id.* at 1918.

Viking River's petitioners argued that two "procedural mechanisms" in PAGA put parties to that choice. First, petitioners argued that California's refusal to enforce agreements that waived the right to bring representative PAGA claims violated the FAA. *See id.* at 1918-23. They emphasized that representative PAGA arbitration departs from traditional "bilateral arbitration," and thus argued that parties could not be subjected to it against their will. But the Court held that arbitration of representative PAGA claims is not so "alien" from "traditional arbitral practice" as to require a "categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals." *Id.* at 1922. Arbitration of representative PAGA claims may not involve purely "bilateral" arbitration, but nothing in the FAA "ensure[s] that parties will never have to arbitrate in a proceeding that deviates from "'bilateral arbitration.'" *Id.* at 1923. In other words, representative PAGA claims are not *necessarily* incompatible with arbitration, even if the resulting arbitration is not strictly bilateral. *Id.* at 1918-23.

But the Court then held that another part of "PAGA's procedural structure" *did* "conflict" with the FAA—and the district court entirely ignored this holding as well as its reasoning. *Id.* at 1923-24. Specifically, a California rule that prohibited parties from agreeing to arbitrate individual PAGA claims but not representative PAGA claims "violate[d] the fundamental principle that 'arbitration is a matter of consent.'" *Id.* at 1923 (quoting *Stolt-Nielsen*, 559 U.S. at 684). That mandatory "claim joinder" rule required parties to arbitrate "claims that the parties did not jointly agree to arbitrate." *Id.*

And the mandatory joinder was especially problematic because arbitration featuring "a vast number of claims" is massively risky for businesses, and so the threat of being forced to arbitrate representative PAGA claims would "coerce[]" parties into "forgo[ing] arbitration altogether." *Id.* at 1924.

Viking River thus does not hold that PAGA claims and class action claims are different for purposes of interpreting the contractual language. Rather, *Viking River* establishes that courts must apply the same rule to both class arbitration and representative PAGA arbitration: parties can be ordered to arbitrate those claims only when they affirmatively consent to do so. *Id.* at 1923 (citing *Lamps Plus*, *Stolt-Nielsen*, and *Concepcion*). In other words, when it came to whether Viking River could be ordered to arbitrate PAGA claims when they did not consent to do so, the Court treated PAGA and class arbitration claims identically.

This Court should not let the district court's misinterpretation of *Viking River* stand. Arbitration requires consent, and the district court erred in ordering Macy's to arbitrate representative PAGA claims despite admitting the agreement did not specifically consent to that arbitration.

III. Arbitration of representative PAGA claims would upset the bargained-for agreements established across the retail industry.

The district court's opinion threatens to upset the established expectations of the many retailers and other businesses that have entered into similar arbitration agreements on the understanding they exclude representative PAGA claims.

"[M]any of the Nation's employers" have negotiated arbitration agreements with their employees. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Retailers rely on the predictable, consistent enforcement of these agreements to limit expensive and protracted litigation. The faithful enforcement of these arbitration agreements is of "particular importance in employment litigation." *Cir. City Stores*, 532 U.S. at 123. Such disputes are very common, especially for businesses with many employees. But litigating these claims is almost never cost-effective, because they "often involve[] smaller sums of money than disputes concerning commercial contracts." *Id.*; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Given "the higher stakes" and "unacceptable" risks of group arbitration, these agreements usually exclude large-scale claims from arbitration. *Concepcion*, 563 U.S. at 348, 350; *see also, e. g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 908 (9th Cir. 2020) (describing arbitration agreement in which parties agreed to resolve disputes "on an individual basis and not on a class or collective basis"). The district court's order threatens to undermine these agreements, disturbing the settled expectations of countless retailers and employees.

Because these agreements are intended to be generally applicable across the country, they typically do not single out PAGA claims. Nor has doing so been necessary in the past. Rather, broad language prohibiting class and collective arbitration has generally been sufficient to avoid court-ordered

arbitration of representative PAGA claims. For example, in *Fardig v. Hobby Lobby Stores Inc.*, the court held that language prohibiting arbitration of claims "as part of a class action, collective action, or otherwise jointly with any third party" covered PAGA claims. No. SACV 14-561, 2014 WL 2810025, at *6 n.8 (C.D. Cal. June 13, 2014). *Ortiz v. Hobby Lobby Stores Inc.* likewise found the same language "sufficiently broad to encompass representative PAGA claims." 52 F. Supp. 3d 1070, 1083 (E.D. Cal. 2014). And *Parvataneni v. E*Trade Fin. Corp.* found that an agreement that was "silent as to class arbitration" did not authorize arbitration of "representative PAGA claims." 967 F. Supp. 2d 1298, 1303 (N.D. Cal. 2013), *order vacated on other grounds*, 2014 WL 12611301 (N.D. Cal. Nov. 7, 2014). Retailers therefore have an established expectation that when they agree with their employees to exclude class or collective claims from arbitration, that language covers all kinds of mass arbitration—however labeled.

The district court's reasoning, however, would require retailers to specifically spell out every eventuality in their arbitration agreements to ensure they are enforced according to the parties' intentions. But the whole point of the FAA is to ensure that businesses need not navigate fifty different state law regimes to ensure the claims they agree to arbitrate are, in fact, arbitrated. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (explaining that, by passing the FAA, "Congress declared a national policy favoring arbitration"); *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n as Tr. for Tr. No. 1*, 218 F.3d 1085, 1091 (9th Cir. 2000) (Tashima, J., concurring) (noting that

arbitration is "a subject as to which Congress has declared the need for national uniformity"). The FAA was passed to make it easy for private parties to enforce their arbitration agreements "according to their terms." *Stolt-Nielsen*, 559 U.S. at 682 (citation omitted). The Supreme Court has therefore directed courts not to adopt rules that "unnecessarily complicat[e] the law," because that "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 275 (1995).

The district court's "gotcha" approach to interpretation would make arbitration agreements more complex and likely to lead to satellite litigation. Arbitration agreements are valuable to retailers, especially retailers with multistate operations, *because* they are generally applicable across jurisdictions and no matter the claims at issue. When parties sign an arbitration agreement, they do not know if, when, and where the agreement will be enforced. Retailers therefore need confidence their arbitration agreement will be enforced even if they do not specifically name all state causes of action under which an employee might sue. It is impossible to anticipate every unique, state-specific claim an employee *might* bring in the future. A rule requiring businesses to do so would "undermin[e] the FAA's proarbitration purposes" by making arbitration agreements unworkably complex. *Cir. City Stores, Inc.*, 532 U.S. at 123.

Ordering a business to arbitrate a unique, state-specific claim simply because the agreement did not mention it with specificity thus fundamentally ignores the agreement of the parties. In every way that the parties might care

about—the massive liability at stake, the number of claims, the cost and complexity of defending a "massive-scale dispute," and the increased likelihood of erroneous decisions—representative PAGA claims *are* class or collective claims. *Viking River*, 142 S. Ct. at 1924. Technical details of California law aside, representative PAGA claims plainly fall within the same general category. No retailer that specifically excludes collective and class claims from their arbitration agreement thinks they are thereby implicitly consenting to have a single employee haul them into arbitration to litigate the claims of potentially hundreds of thousands of other employees.

If adopted broadly, the district court's rule would therefore force many retailers (and other employers) into a fundamentally different kind of arbitration than they thought they were contracting for. That kind of judicial intrusion "in th[e] bargained for exchange" between employer and employee is always inappropriate. *14 Penn Plaza LLC*, 556 U.S. at 257. Like any other contract, arbitration agreements reflect an agreement between parties over how best to protect their "individual needs and interests" in the future. Williston on Contracts § 1:1 (4th ed. 2020). An employee might have signed an arbitration agreement excluding class or collective arbitration "in return for other concessions from the employer." *14 Penn Plaza LLC*, 556 U.S. at 257. That bargained for exchange—indeed, all the benefits of arbitration agreements generally—is defeated if courts remake the agreements to their own liking.

CONCLUSION

The Court should reverse the judgment of the district court.

Dated: April 5, 2023

Respectfully submitted.

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CERTIFICATE OF SERVICE

On April 5, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Steven P. Lehotsky
Steven P. Lehotsky

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 22-56209

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[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Steven P. Lehotsky* **Date** 4/5/2023