No. 17-1357

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MELINDA MANDVIWALA,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

"Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Epic Sys. Corp. v. Lewis*, No. 16-285, slip op. at 1 (U.S. May 21, 2018).

This Court's repeated and longstanding answer, including most recently in the *Epic* decision, is an emphatic "yes." The Ninth Circuit's and California Supreme Court's explicit answer is an emphatic "no" – so long as the employee raises a claim under a particular California statute (the Private Attorneys General Act ("PAGA")).

The issue in this petition is clear and straightforward. Petitioners have asked this Court to review California's "*Iskanian* rule."[1] That rule prevents the enforcement of contractual agreements to arbitrate on an individual basis when an employee raises "representative" PAGA claims. Those claims are brought not only on behalf of the plaintiff, but on behalf of other employees. As Petitioners have explained, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, preempts the *Iskanian* rule because that rule discriminates against arbitration agreements and frustrates the FAA's purpose. Pet. 12-26. The rule also has far-reaching consequences. It directly affects 19 million California employees, while the skyrocketing number of PAGA claims (pursued by plaintiffs and their counsel as they seek to evade this Court's arbitration decisions) now total approximately 8,000 annually. *Id.* at 28-29. And there is no serious prospect of further "percolation" because the California Supreme Court

[1] *Iskanian v. CLS Transp., L.A., LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 129 (2015).

and the Ninth Circuit have definitively resolved the matter. *Id.* at 26-27.

In an attempt to avoid review of the serious, consequential, and pressing issues now before the Court, Respondent pursues a series of attempted deflections and distractions. First, Respondent misconstrues and mischaracterizes the Questions Presented. Opp'n 14-17. Second, Respondent attempts to sow confusion regarding the procedural posture of the case where none exists. *Id*. at 17-19. Third, Respondent erroneously contends that the California rule is consistent with this Court's FAA decisions, *id*. at 20-33 – a deeply flawed argument that Respondent can fully present at the merits stage after review is granted.

None of Respondent's attempts to deflect and distract undermine the compelling need for this Court to review the Questions Presented. To the contrary, they strongly confirm it. For the Respondent's contentions highlight the core issue – the impermissibility of a judicially-created rule that sweepingly invalidates arbitration provisions agreed to by the contracting parties.

I. The Questions Presented Are Accurate and Clear.

The petition presents two questions about the *Iskanian* rule:

- (1) whether the *Iskanian* rule "is preempted by the FAA because the rule discriminates against arbitration agreements," Pet. i; and
- (2) whether the *Iskanian* rule is preempted because it "eviscerates bilateral arbitration agreements and thereby thwarts the objectives of the FAA." *Id.*

Both questions describe the *Iskanian* rule as "a California rule that prohibits enforcement of arbitration agreements with respect to representative employment claims under PAGA." *Id.*

The answers to the Questions Presented plainly do not favor Respondent. Her rejoinder is simply to mischaracterize the questions in an effort to create confusion. The Questions Presented, however, refer precisely to the circumstances and legal issues presented in this case (and many others governed by the *Iskanian* rule). The California rule prohibits the enforcement of arbitration agreements *as written* with respect to representative employment claims under PAGA. Those contractual agreements require resolution of disputes through the arbitration of the employee's *individual* claims, rather than *representative* claims on behalf of other employees. The *Iskanian* rule, however, explicitly prohibits the enforcement of such individual-only agreements in the PAGA representative-claims context.

Respondent incorrectly suggests that the Questions Presented mean that representative PAGA claims – that is, claims on behalf of other employees – may *never* be arbitrated, even if an arbitration agreement provides for their arbitration. Opp'n 14. But that is not what the Questions Presented say. Nor is that what the petition says. Instead, the Questions Presented clearly raise the important issue of the lawfulness of a California rule that, by design and operation, squarely prohibits the enforcement of agreements that provide for the resolution of disputes through individual arbitration.

Despite Respondent's effort to cloud the Questions Presented, the questions are clear, accurate, and

straightforward. They warrant this Court's prompt review.

II. The Ninth Circuit's Decision Is Ripe for Review.

Respondent's second attempt to divert and distract relates to the case's procedural posture. Like Respondent's effort to obscure the Questions Presented, this attempt fails. Respondent's argument relies on an unsupported and unsupportable reading of a few words of a district court minute order taken wholly out of context.

Notably, Respondent does not suggest that there is anything in *the Ninth Circuit's decision* that raises any procedural obstacle to this Court's review. Like the dog that didn't bark in the Sherlock Holmes story,[2] this silence is telling. The Ninth Circuit decision squarely presents the issues now before the Court.

Respondent nevertheless seeks to rely on a few words in a minute order the district court issued on remand after the Ninth Circuit rendered its decision (and after the certiorari petition had been filed). But the district court's brief housekeeping order is far from an adequate basis to prevent or obscure this Court's review of the important questions the petition presents.

The Ninth Circuit clearly affirmed the district court's holding that Respondent's *representative* PAGA claims (those on behalf of other employees) could proceed despite the individual-only arbitration provision in the parties' contract. *See* Pet. App. 3a (under the *Iskanian* rule, "the waiver of representative PAGA claims in an employment contract is unenforceable"). But with

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[2] The Adventure of Silver Blaze, *The Complete Sherlock Holmes* 347 (A.C. Doyle Memorial ed. 1960).

regard to Respondent's *individual* claims for unpaid wages, the Ninth Circuit "reverse[d] . . . and remand[ed] to the district court to order arbitration of the victim-specific relief sought." *Id.* at 5a.

The district court subsequently issued a one-page minute order. The order briefly and accurately summarized the Ninth Circuit's ruling, including a recognition that, under the Ninth Circuit's decision, the district court was to "'order arbitration of the *victim-specific relief* sought by [Respondent].'" Minute Order ORDERING Arbitration of Victim-Specific Relief, *Mandviwala v. Five Star Quality Care, Inc.*, No. 8:15-cv-1454 (C.D. Cal. Apr. 26, 2018) (emphasis added). The district court then ordered Respondent to "submit to arbitration of her PAGA claims." *Id.*

According to Respondent, those last few words in the minute order render it "unsuitable" for this Court to review the Ninth Circuit's holding that the *Iskanian* rule overrides the parties' individual-only arbitration agreement. Opp'n 2. Even Respondent concedes that her far-fetched reading of the district court's minute order would be "inconsistent with the court of appeals' mandate." *Id*. The words at the end of an order titled "Arbitration of Victim-Specific Relief," which come immediately after an explicit recognition that the Ninth Circuit ordered arbitration only of "victim-specific" relief, plainly are not sufficient to create a genuine procedural issue.

Respondent's baseless attempt to suggest procedural confusion does not detract from the need for this Court to review the Ninth Circuit's unambiguous holding, which is based on the FAA-flouting rule that both the California Supreme Court and the Ninth Circuit have embraced and applied as settled law.

III. The *Iskanian* Rule Conflicts with the FAA.

Respondent repeatedly insists that the *Iskanian* rule is "fully consistent with this Court's precedents." Opp'n 20. But Respondent's arguments are demonstrably erroneous and cannot save California's anti-arbitration rule from preemption by the FAA. And, in any event, Respondent's arguments are best made at the merits stage, when this Court can fully consider the important issues the petition raises.

A. The *Iskanian* Rule Prohibits the Enforcement of the Terms of Arbitration Agreements in Violation of the FAA.

Respondent's primary argument is that the *Iskanian* rule is consistent with the FAA because the California rule addresses only the *waiver* of representative PAGA claims and has no effect on the *enforcement* of agreements to arbitrate. Opp'n 3. That claim is belied by this Court's decisions, the plain language of the FAA and of arbitration agreements, and common sense.

Respondent ignores the long-recognized fact that what it separately refers to as the "waiver" of "representative" claims, and the "enforcement" of individual-only arbitration agreements, are two sides of the same coin. Indeed, this Court has invalidated numerous judicially-imposed "anti-waiver" rules precisely because they impermissibly overrode arbitration agreements. In *Epic*, for example, this Court held that the FAA requires the enforcement of the parties' "class and collective action *waivers*." Slip op. at 7 (emphasis added). Failure to enforce such "waivers," this Court found, would violate the FAA because it would "reshape [the] traditional individualized arbitration [the parties

agreed to] by mandating classwide arbitration procedures without the parties' consent." *Id.* at 8. Similarly, in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), this Court invalidated a "rule classifying most collective-arbitration *waivers* in consumer contracts as unconscionable," 563 U.S. at 340 (emphasis added), because failing to enforce such "waivers" meant "[r]equiring the availability of classwide arbitration," and thus "interfer[ing] with fundamental attributes of arbitration," *id.* at 344. And, in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), this Court reversed a lower court's ruling that a class "*waiver* was unenforceable" because, without the waiver, "arbitration could not proceed." *Id.* at 232 (emphasis added).

In sum, this Court's decisions establish that, where a rule prohibiting "waiver" conflicts with an agreement to arbitrate, such rule is preempted. Respondent attempts to justify the California rule on the ground that judicial invalidation of "waiver" provisions in arbitration agreements does not even implicate the FAA. That argument vividly highlights a key error made by the courts below, and underscores the urgent need for this Court's review.

B. The FAA Preempts the *Iskanian* Rule Because the California Rule Discriminates Against Arbitration and Frustrates the Act's Purpose.

As Petitioners have explained, the California rule first announced in Justice Liu's opinion in *Iskanian* suffers from two fatal flaws: (1) it targets arbitration agreements for disfavored treatment, and (2) it thwarts the purposes and objectives of arbitration. Pet. 12-26. Respondent's arguments fall far short of saving the rule from its fatal flaws.

First, Petitioners explained that the rule bears the markers this Court has identified as signs of anti-arbitration animus. *See* Pet. 13-16 (discussing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015)). There is no non-arbitration context in which the rule has been applied, and there are other non-arbitration contexts in which the *Iskanian* rule is explicitly *not* applied. Pet. 15-16.

Respondent fails to identify a single example of the *Iskanian* rule's application outside the arbitration context. Instead, Respondent offers only conclusory assertions and speculation about how the rule *could* be applied in other contexts. Opp'n 23. But California's PAGA experience belies Respondent's assertions and speculation. The hard empirical reality is that the *Iskanian* rule has been applied, and is applied, only to disfavor arbitration.

Nor does Respondent dispute that the *Iskanian* rule does *not* apply in other contexts, such as settlement agreements. Pet. 15-16. Instead, Respondent asserts that the inapplicability of the rule in the settlement context is justified because settlements occur *after* a dispute has arisen. Opp. 23. But this Court has explicitly relied on a rule's applicability in an arbitration agreement and inapplicability in a settlement agreement as a powerful indicator that the rule impermissibly "arises from the suspect status of arbitration." *Kindred*, 137 S. Ct. at 1427 n.1. And, tellingly, the principle of applying a rule to a pre-dispute agreement but not to a post-dispute agreement specifically and impermissibly targets ("oh so coincidentally," *id*. at 1426) arbitration agreements, which by their nature routinely are pre-dispute.

Second, Respondent's contention that the *Iskanian* rule does not frustrate the FAA's purpose is baseless. The thrust of Respondent's argument is the same position squarely rejected in *Concepion*: that judicially-mandated group, or "representative," arbitration does not undermine agreed-upon individual arbitration provisions. *See* 563 U.S. at 348-5; *see also* Pet. 18-21; *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 444-47 (9th Cir. 2015) (N.R. Smith, J., dissenting). This Court's *Epic* decision confirms the longstanding understanding that individual-only arbitration provisions are protected by the FAA. The Court explained that "attacking (only) the individualized nature of the arbitration proceedings . . . interferes with one of arbitration's fundamental attributes." *Epic*, slip op. at 7. That settled principle is fully applicable to the California rule here. As in *Concepcion*, *Epic*, and other decisions of this Court, invalidating an individual-only arbitration provision by judicial fiat fundamentally frustrates the purpose and objectives of arbitration in violation of the FAA.

C. Respondent's Other Claims Are Unavailing.

Respondent also raises a grab-bag of other miscellaneous objections to this Court's review. None of those objections have merit.

First, Respondent claims that representative PAGA actions, in which the individual employee proceeds on behalf of other employees, actually are "bilateral" and "a one-on-one proceeding between the state, represented by the plaintiff, and the defendant." Opp'n 24-25. But PAGA actions like Respondent's – which Respondent filed not just in her own name or on behalf of California, but "as an individual *and on behalf of all*

employees similarly situated"[3] – clearly are not individual-only actions as provided in the arbitration agreement. *See* Pet. App. 23a ("You and the Company agree to waive all rights to bring, or be a party to, *any class or collective claims* against one another and agree to pursue claims *on an individual basis only*." (emphasis added)). Moreover, "representative" actions on behalf of other employees certainly are not the type of actions this Court envisioned when it used the term "bilateral." *See, e.g.*, *Concepcion*, 563 U.S. at 336 (referring to an agreement as "bilateral" that required arbitration in an "individual capacity, and not as a plaintiff or class member in any purported class *or representative* proceeding" (emphasis added) (citation and internal quotation marks omitted)); *Epic*, slip op. at 2, 9 (referring to an agreement as "bilateral" that "specified individualized arbitration, with claims pertaining to different [e]mployees [to] be heard in separate proceedings") (citation and internal quotation marks omitted). "Representative" PAGA actions, which involve potential recovery for thousands of employees, simply are not "bilateral" in the traditionally understood sense. And representative proceedings, based on allegations and proof regarding multiple employees, plainly conflict with the arbitration agreement's explicit prohibition on "class *or collective*" claims. Pet. App. 23a (emphasis added).

Second, Respondent seeks to rely on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and on an analogy to *qui tam* claims. Opp'n 29-31. But as discussed in the petition, representative PAGA claims are nothing like the claims in *Waffle House* or *qui tam* claims. Pet. 22-

[3] Appellants' Excerpts of Record, Volume II, ER0175, *Mandviwala v. Five Star Quality Care, Inc.*, No. 16-55084 (9th Cir. May 31, 2017) (emphasis added), Dkt. 19-2.

24. Unlike those claims, a PAGA action is controlled by the employee from filing to completion, and the state has no right to intervene. *Id.* The fact that California, along with the plaintiff and other employees on whose behalf the plaintiff has litigated, may cash a check upon the resolution of the action does not render the FAA irrelevant and permit the invalidation of the parties' arbitration agreement. And the plain language of the FAA includes no exception for state statutes that nullify the parties' contractual arbitration clauses, whatever their label.

Third, Respondent argues that the lack of a split in authority supports denial of review. Opp'n 19-20. But the California rule at issue creates a flagrant conflict with this Court's decisions and the commands of the FAA, with far-reaching consequences for millions of employees. Moreover, the California Supreme Court and the Ninth Circuit – the courts where this issue arises repeatedly – have definitively ruled on the federal question regarding this California rule. Respondent's invocation of a few isolated cases in other jurisdictions, Opp'n 20 n.4, does not provide a substantial reason to deny review of a case that squarely presents the issue from the federal appellate court that is the heartland for this fundamental arbitration issue. Indeed, this Court has repeatedly granted certiorari to review state-specific arbitration rules that conflict with the FAA, even in the absence of a circuit split. *See* Pet. 33.[4]

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[4] Respondent also suggests that her individual-only arbitration provision should be overridden with respect to representative PAGA claims because such claims involve "statutory" rights. Opp'n 27-29. That argument is flawed for multiple reasons. First, with respect to her representative claims, Respondent seeks not the enforcement of her own statutory rights, but the ability to assert statutory rights of *other* employees. Second, the

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The FAA's command is clear and unequivocal: Rules that target arbitration for disfavored treatment or that frustrate the purpose and objectives of arbitration are prohibited. This legal requirement does not yield to "new devices and formulas" that interfere with arbitration agreements. *Epic*, slip op. at 9. A "rule seeking to declare individualized arbitration proceedings off limits" – precisely the mission of the California rule here – "is . . . just such a device." *Id*.

The *Iskanian* rule violates the FAA and conflicts with decisions of this Court; has enormous practical consequences; and is settled law in the highest federal and state courts that are charged with adjudicating the disputes in which the issue regularly arises. It is time for this anti-arbitration rule to be reviewed by this Court.

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doctrine regarding the interplay between statutory rights and arbitration agreements, sometimes known as "effective vindication," applies, if at all, only to *federal* statutory rights. *See, e.g.*, *American Express*, 570 U.S. at 235; *id*. at 252 (Kagan, J., dissenting) ("We have no earthly interest (quite the contrary) in vindicating [state] law."). Even as applied to federal statutes, moreover, the doctrine has careful limits and boundaries. *See, e.g.*, *id.* at 234-35.

CONCLUSION

Five Star's petition for a writ of certiorari should be granted.

Respectfully submitted,

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