No. 17-____

IN THE

Supreme Court of the United States

FIVE STAR SENIOR LIVING INC.,

Petitioner,

v.

LOURDES LEFEVRE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are identical to the questions presented in Petitioner Five Star Senior Living Inc.'s petition for a writ of certiorari filed in *Five Star Senior Living Inc. and FVE Managers, Inc. v. Melinda Mandviwala*, No. 17-1357.

1. Whether a California rule that prohibits the enforcement of arbitration agreements with respect to representative employment claims under California's Private Attorneys General Act ("PAGA"), and that is applied to no other type of agreement, is preempted by the Federal Arbitration Act ("FAA") because the rule discriminates against arbitration agreements.

2. Whether a California rule that prohibits the enforcement of arbitration agreements with respect to representative employment claims under PAGA is preempted by the FAA because the rule eviscerates bilateral arbitration agreements and thereby thwarts the objectives of the FAA.

RULE 29.6 STATEMENT

No parent corporation or publicly held company owns 10 percent or more of Five Star Senior Living Inc.'s stock. ABP Acquisition LLC, a wholly-owned subsidiary of ABP Trust, owns approximately 36 percent of Five Star Senior Living Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Five Star Senior Living Inc. ("Five Star") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

INTRODUCTION

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219-20 (1985). As this Court has emphasized, the "judicial hostility towards arbitration that prompted the FAA" has continued to "manifest[] itself in a great variety of devices and formulas." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation and internal quotation marks omitted).

The California Supreme Court's "Iskanian rule" is such an anti-arbitration device. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). This petition—like Five Star's recently-filed and still-pending petition in *Five Star Senior Living Inc. and FVE Managers, Inc. v. Mandviwala*, No. 17-1357 (docketed Mar. 27, 2018) (the "*Mandviwala* Petition")—seeks its review and invalidation.

Five Star respectfully submits that this petition should be held pending the resolution of the petition in *Mandviwala*, or, alternatively, granted.

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[1] Five Star Senior Living Inc. was formerly known as Five Star Quality Care, Inc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. 1a-3a, is reported at 705 F. App'x 622. The order of the United States District Court for the Central District of California denying Five Star's motion to compel arbitration, App. 4a-14a, is unreported and is not available on a publicly accessible database.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its judgment on December 6, 2017. On February 27, 2018, Justice Kennedy extended the time to file this petition to and including April 20, 2018. *See* No. 17A906. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy

> arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

A. California's Private Attorneys General Act

As Five Star explained in the *Mandviwala* Petition, PAGA enables private persons to bring representative actions against their employers seeking civil penalties for violations of California labor laws on behalf of not only the individual employee, but also other employees. *See* Petition for Certiorari at 5-6, *Five Star Senior Living Inc. and FVE Managers, Inc. v. Mandviwala*, No. 17-1357 (docketed Mar. 27, 2018) ("*Mandviwala* Pet.").

B. *Iskanian* and *Sakkab*

As also explained in the *Mandviwala* Petition (at 6-9), the California Supreme Court's *Iskanian* decision held that, when an employee asserts a representative PAGA claim, an arbitration provision limiting disputes to individual claims will not be enforced. *Iskanian*, 327 P.3d at 153. In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), a sharply divided panel of the Ninth Circuit upheld the *Iskanian* rule, concluding first, that "the *Iskanian* rule is a 'generally applicable' contract defense" within the ambit of the FAA's "saving clause," and, second, that the rule "does not conflict with [the FAA's] purposes." 803 F.3d at 433.

In *Sakkab*, Judge N.R. Smith wrote a searing dissent. He observed that, "[d]espite ninety years of Supreme Court precedent invalidating state laws

deemed hostile to arbitration, the majority today displays this same 'judicial hostility' to arbitration agreements." *Id.* at 440 (N.R. Smith, J., dissenting) (citation omitted). The dissent detailed the similarities between the PAGA claims in *Sakkab* and the class claims at issue in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Judge Smith found that the California rules in both cases "burden[] arbitration in the same . . . ways." *Id.* at 444. "Because the *Iskanian* rule stands as an obstacle to the purposes and objectives of the FAA," the dissent concluded, "there is no question—the rule must be preempted." *Id.* at 450.

The dissent closed with a forecast for the majority opinion: "Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same [regarding the class-action rule in *Discover Bank*], and were subsequently reversed in *Concepcion*. The majority now walks that same path." *Id.*

C. The *Mandviwala* Litigation

Five Star filed a petition for a writ of certiorari in *Mandviwala*, which was docketed in this Court on March 27, 2018. The questions presented in the *Mandviwala* Petition are identical to those in this petition. Further, the facts underlying the *Mandviwala* Petition, as well as its procedural history, mirror those here in material respects. *Mandviwala*'s factual and procedural background is set forth in that petition. *See Mandviwala* Pet. at 9-10.

D. Proceedings In This Case

Respondent Lourdes Lefevre, like the respondent in *Mandviwala*, was employed at a Five Star senior living community in California. App. 5a. Before Lefevre's employment began in January 2013, she

signed the same arbitration agreement signed by Mandviwala. *Id.* at 15a-27a. After Lefevre filed suit against Five Star in California state court alleging representative PAGA claims, Five Star removed the case to the Central District of California and moved to compel arbitration. *See* App. 5a; *see also* Appellant's Excerpt of Record Volume 2, ER0118-47, ER0185-201, ER0203-24, *Lefevre v. Five Star Quality Care, Inc.*, No. 16-55059 (9th Cir. Oct. 20, 2016).

The district court, which was the same court as in the *Mandviwala* case, denied Five Star's motion to compel arbitration. App. 5a. As in *Mandviwala*, the court held that California law, as upheld in *Iskanian* and *Sakkab*, prohibits waiver of representative PAGA claims in arbitration agreements and is not preempted by the FAA. *Id.* at 13a-14a. Moreover, as in *Mandviwala*, the district court also held that the California rule is so fundamental that the court would apply California law, rather than the law as specified in the parties' arbitration agreement (Maryland law). *Id*. at 8a-13a.

In this case, unlike in *Mandviwala*, the plaintiff alleged class claims in addition to representative PAGA claims. *See* Appellant's Excerpt of Record Volume 2, ER0208-19, *Lefevre*. Lefevre asserted that she could maintain these claims despite the arbitration agreement because, she alleged, she never signed the arbitration agreement with Five Star. App. 7a. On that issue, the district court "decline[d] to rule . . . pending an evidentiary hearing regarding Plaintiff's assent" to the arbitration agreement. *Id.* at 14a. That evidentiary hearing has yet to occur.

Five Star appealed the district court's decision that Lefevre's representative PAGA claims are not governed by the arbitration agreement. The Ninth

Circuit affirmed. App. 2a-3a. The Court of Appeals held that *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), which struck down a rule that disfavored arbitration agreements, "is not clearly irreconcilable with *Sakkab* or *Iskanian*" because, in the Ninth Circuit's view, this Court in *DIRECTV* "simply held that a California court failed to place arbitration contracts on equal footing with all other contracts when it interpreted a choice-of-law provision in an arbitration agreement." *Id.* at 3a (citations and internal quotation marks omitted). Accordingly, in the court's view, neither *Iskanian* nor *Sakkab* "is undermined by [*DIRECTV*]." *Id.* As in *Mandviwala*, the Ninth Circuit also affirmed the district court's rejection of the parties' choice of law provision in order to apply the *Iskanian* rule. *Id*. at 2a-3a.

REASONS FOR GRANTING THE WRIT

This petition presents the same important and recurring questions presented in the *Mandviwala* Petition: whether the FAA preempts the *Iskanian* rule (1) because the *Iskanian* rule discriminates against arbitration agreements and thus is not a generally applicable contract defense, or (2) because the arbitration-destroying rule eviscerates bilateral arbitration agreements and thus thwarts the FAA's objectives. The *Mandviwala* Petition squarely presents these pressing issues, which have far-reaching real world consequences. The issues no longer are percolating in federal or state courts, and thus the questions presented are ripe for review.

Moreover, the *Mandviwala* Petition is the best vehicle that has come before this Court raising the questions at issue here. The *Mandviwala* Petition seeks review of a definitively case-dispositive decision to apply the *Iskanian* rule; the Ninth Circuit consid-

ered both *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), and *DIRECTV* in explicitly concluding that the *Iskanian* rule is generally applicable; unlike several of the previously-filed petitions regarding the *Iskanian* rule, *Mandviwala* comes from a federal court; also unlike several of the previously-filed petitions, *Mandviwala* was filed after the Ninth Circuit denied the request in *Sakkab* for *en banc* review; and *Mandviwala* lacks potential procedural issues. *See Mandviwala* Pet. at 26-33.

This Court thus should hold this petition pending the outcome of *Mandviwala*. Alternatively, the Court should grant certiorari in this case.

I. The *Iskanian* Rule Is Not a Rule of General Applicability and Thus is Preempted By the FAA.

As explained in the *Mandviwala* Petition (at 12-18), the *Iskanian* rule discriminates against arbitration agreements and thus is not a "generally applicable contract defense[]" that "may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis added). Indeed, the *Iskanian* rule renders representative PAGA claims "unwaivable" only where enforcement of a PAGA waiver would result in arbitration. In contrast, California courts permit the waiver of representative PAGA claims in other contexts. That pick-and-choose approach plainly violates the "equal-treatment principle" set forth in the FAA. *Kindred*, 137 S. Ct. at 1426. The *Iskanian* rule thus is preempted and must be invalidated.

While decades of precedent from this Court demonstrate that selective targeting of arbitration

agreements cannot be sustained, *Kindred* and *DIRECTV* are especially illustrative. They highlight a particular brand of unlawful state rules: those that, nominally, are generally applicable, but that, in practice, target arbitration for disfavored treatment. As this Court explained in *Kindred*, the FAA "preempts any state rule discriminating on its face against arbitration" *and also* "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." 137 S. Ct. at 1426.

In *Kindred* and *DIRECTV*, this Court identified guideposts that reveal a discriminatory rule's true nature. Those guideposts—the inability for a court to point to a single example outside the arbitration context in which the rule has been applied, *see Kindred*, 137 S. Ct. at 1427; *DIRECTV*, 136 S. Ct. at 470, and the failure to apply the rule at issue in non-arbitration contexts, *see Kindred*, 137 S. Ct. at 1427 n.1—are conspicuously present in the *Iskanian* rule. Thus, while neither *DIRECTV* nor *Kindred* created new law, they make the claim that the *Iskanian* rule is "grounds . . . for the revocation of any contract" especially untenable. 9 U.S.C. § 2. This Court should review the *Iskanian* rule and reject that untenable claim, which contravenes the FAA and this Court's precedents.

II. The *Iskanian* Rule Frustrates the Purposes and Objectives of the FAA.

As also explained in the *Mandviwala* Petition (at 18-26), the *Iskanian* rule is preempted by the FAA for a second, independent reason: it obstructs the FAA's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms."

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). That purpose plainly is defeated when parties' agreements to arbitrate bilaterally are judicially invalidated. The *Iskanian* rule, as interpreted in *Sakkab*, produces that very result, replacing the streamlined dispute resolution mechanism agreed to by contracting parties with a different and substantially more onerous process. On that score, the *Iskanian* rule is no different from the California rule struck down by this Court in *Concepcion*. Only by relying on deeply flawed arguments—that PAGA claims are not "private" so the FAA does not apply to them; that this Court's opinion in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), supports the *Iskanian* rule's validity; that representative PAGA actions are akin to *qui tam* actions; and that California public policy supersedes the mandates of the FAA—did the California Supreme Court and the Ninth Circuit conclude otherwise.

In *Concepcion*, this Court emphasized that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. at 348. Further, this Court found, class arbitration "greatly increases risks to defendants" by offering only limited judicial review of awards of "damages allegedly owed to tens of thousands of potential claimants" that "will often become unacceptable." *Id.* at 350. As the *Sakkab* dissent explained, the *Iskanian* rule, as interpreted and upheld by the Ninth Circuit, has the same effects. *See* 803 F.3d at 444 (N.R. Smith, J., dissenting). It thus should meet the same fate: invalidation under the FAA because it thwarts the objectives of arbitration

and the statute Congress enacted to protect those objectives.

CONCLUSION

Five Star respectfully requests that this Court hold this petition pending the disposition of the *Mandviwala* Petition. Alternatively, Five Star asks this Court to grant certiorari in this case to address the critical question whether the *Iskanian* rule is preempted by the FAA.

Respectfully submitted,

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