No. 17-1470

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Federal Arbitration Act requires enforcement of a "choice of law" provision in a private arbitration agreement to force a waiver of a State's substantive rights and labor laws that apply to wrongs which arise in that State.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

Statutes and Rules:

INTRODUCTION

The State of California has enacted substantive laws authorizing the it to collect penalties for violations of California's labor laws through the California Private Attorneys' General Act (PAGA), Cal. Labor Code ''2698 *et seq.* PAGA authorizes an "aggrieved employee" to pursue a "representative action" on behalf of the State for Labor Code violations. The State stands to recover seventy-five percent (75%) of any civil penalties recovered for labor code violations established in a PAGA action, and aggrieved employees who suffered the violations stand to recover twenty-five percent (25%) of the civil penalties.

In this case, the Ninth Circuit held in an unpublished decision that Petitioner Five Star Senior Living's "choice of law" provision requiring Maryland law to apply to the "enforcement" of its arbitration agreement and to whether a party's claim is subject to the arbitration agreement, did not ban a PAGA action from proceeding or require the PAGA claim to be dismissed. Rather, citing California 'conflict of laws' principles and *Iskanian v. CLS Transportation Los Angeles,* LLC, 327 P.3d 129 (2014), *cert.* denied, 135 S.Ct. 1155 (2015), the Ninth Circuit found that California has a compelling state interest in applying its substantive laws embodied in PAGA to any harms and wrongs that arise within California, and the PAGA action was not waived based on the "choice of law" analysis argued by Five Star.

The questions presented in Five Star's petition to the Court do not match up with the underlying facts or proceedings in this case. The proceedings below presented straightforward "conflict of laws" analysis in which the district court and the Ninth Circuit applied the correct analysis to this case, which was removed from state court, to conclude that California substantive laws, including PAGA, apply in this action. Moreover, Five Star does not fully describe the proceedings from which it appealed below, which were never concluded on the issue of arbitration contract formation. The record is incomplete. An evidentiary hearing on contract formation was still in progress when Five Star filed an appeal from the district court's interlocutory order denying Five Star's motion to dismiss the PAGA cause of action. Mindful of the importance of a completed record and the procedural posture of cases for which review is sought from this Court, the record on this case is not completed, and the case is not ripe for review. A mere advisory opinion on "choice of law" principles *if* an enforceable arbitration agreement was formed between Lefevre and Five Star, would not further the jurisprudence of this Court nor the interests of justice at this stage of the case.

On the merits, Five Star fails to demonstrate that PAGA representative actions are *waived* under the peculiar wording of its Arbitration Agreement. Even if the arbitration agreement was worded clearly and unmistakably to waive PAGA claims, a substantive PAGA waiver is against the fundamental public policy of the State of California regardless of the form or nature of the employer's contract in which the waiver is placed. Respondent refers to, and incorporates, the arguments of Respondents in *Five Star Senior Living Inc. and FVE Managers, Inc. v.*

Mandiviwala, No. 17-1357 (docketed Mar. 27, 2018) setting forth grounds for denying this petition and Petitioner's petition in Mandviwala. California's PAGA waiver prohibition is generally applicable to any employment contract or form an employer in California may seek to impose on its employees. Notwithstanding the artful placement of a purported PAGA waiver in an arbitration form, rather than in some other employer-related business form, a PAGA waiver is still against California's public policy and is unenforceable.

This Court has expressed that the Federal Arbitration Act (FAA) is not intended to supplant or preempt the substantive, generally applicable laws of states, notwithstanding the FAA's stated preference for arbitration. Five Star's own arbitration agreement form admits "[t]he law of the jurisdiction in which you are primarily employed will govern the substance of your grievance." See Pet. App. 24a. The State of California is not a party to Five Star's arbitration agreement and did not "waive" its laws for Five Star when Five Star began doing business in California. Five Star is subject to PAGA, and it has no enforceable "agreement" waiving PAGA representative actions brought under this law.

STATEMENT

1. PAGA

PAGA's principal purpose is that of deterrence and enforcement. "An employee plaintiff suing [under PAGA] does so as the proxy or agent of the state's labor law enforcement agencies." *Arias v. Superior Court*, 209 P.3d 923, 933 (2009) PAGA's

"declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Id.* In a lawsuit brought under PAGA, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. *Id.*

A PAGA action "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Id.* Aggrieved employees retain only 25% of any civil penalty recovery. The remaining 75% goes to the California Labor and Workforce Development Agency for education and enforcement purposes. *Cal. Labor Code '2699(i).* Because PAGA's primary purpose is to deter and penalize those employers who violate the California Labor Code, rather than to compensate individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 151 (2014).

A PAGA action is a "representative" claim on the state's behalf, regardless of the number of employees, one or ten thousand, who are aggrieved. *Id.* at 151. PAGA actions are not class actions or collective actions and they do not require class certification or notice provided to other employees. *Arias*, 209 P.3d at 929-34. Persons are bound by the outcome of a PAGA action only with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Id.* at 933. A PAGA action "is a dispute between the employer and the *state*, which alleges directly or through its agents—

either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the labor code." *Iskanian*, 327 P.3d at 151. PAGA represents the California legislature's determination of public policy and strong governmental interest to balance labor law enforcement agencies "primacy over enforcement efforts" with limitations on the state's enforcement resources. *Arias*, 209 P.3d at 929-930.

2. *Iskanian* and *Sakkab*

The California Supreme Court in *Iskanian* held that employment agreements requiring employees to prospectively waive the right to bring PAGA representative actions are unenforceable under state law. *Iskanian*, 327 P.3d at 149. The court held that the FAA does not require enforcement of employers' forced waiver of PAGA rights exercised by aggrieved employees on behalf of the state. *See id.* at 150-53.

The majority of the court explained that the real party in interest in a PAGA action is the state and that, by definition, a PAGA action is a representative action brought on the state's behalf. *See id.* at 151. A ban on representative PAGA actions would thwart state law and prevent the state from pursuing its claims through the agent authorized by law to represent it. *See id.* at 149. The state was not a party to the arbitration agreement containing the PAGA waiver and permitting the PAGA action to proceed would also not be in conflict with the FAA because the arbitration agreement and waiver were not enforceable against the state as a non-party to the employer's private agreement. *See id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).) The concurring opinion in *Iskanian* added

an alternative basis for the result based on this Court's conclusions in *American Express Co. v. Italian Colors Restaurant* that the FAA does not require enforcement of "'a provision of an arbitration agreement forbidding the assertion of certain statutory rights,'" *Iskanian*, 327 P.3d at 157, quoting *American Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 236 (2013). A ban on an employer's attempt to cause a prospective waiver of PAGA rights "does not run afoul of the FAA." Id.

The Court denied the petition for certiorari in *Iskanian*, 153 S.Ct. 115 (2015), as well as in another California Supreme Court case that applied *Iskanian*, *Bridgestone Retail Operations, LLC v. Brown*, 135 S.Ct. 2377 (2015).

The Ninth Circuit agreed in *Sakkab v. Luxottica Retail North America, Inc.* with the California Supreme Court's conclusion in *Iskanian* that the FAA does not preempt the ban on waivers of PAGA actions. PAGA bans and prospective waivers are illegal contract provisions under California law and this rule is generally applicable to any contract or business form that an employer may force or require an employee to sign. *Sakkab v. Luxottica Retail North America, Inc.,* 803 F.3d 425, 432 (9th Cir. 2015). Whether or not PAGA claims are litigated or arbitrated, "representative PAGA claims may not be waived outright" (*see id.*), and such a waiver would violate state law and would "effectively . . . limit the penalties an employee-plaintiff may recover on behalf of the state." *Sakkab*, 803 F.3d at 434-35. A PAGA action is a "statutory action" in which the state, represented by an aggrieved employee, brings the state's claim to recover penalties "measured by the number of Labor Code violations committed by the employer." *Id.* at 435. It is fundamentally

different from a class action, which is a "procedural device" aggregating the individual damages claims of multiple class members, to adjudicate all class members' individual rights. *Id*. The state's interest and police powers, rather than an aggregation of individuals' private interests, are the substantive rights involved in a PAGA action. *Id*. at 435-436.

The Ninth Circuit cited long-standing precedents of this Court on the importance of state-federal relations that in all cases in which preemption of state law is argued, the assumption is that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress." *Id.* at 439 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). California exercised its "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State," *id*. (quoting *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)), by "creating a form of qui tam action" to supplement the state's limited enforcement resources. *Id*. The *Sakkab* decision concluded that the FAA "was not intended to preclude states from authorizing qui tam actions to enforce state law" or to "require courts to enforce agreements that severely limit the right to recover penalties" in such actions." *Id* at 439-40.

The Ninth Circuit denied rehearing on banc in *Sakkab*, and no judge required a vote on the petition by the full court. This Court had denied certiorari in five more cases seeking review of whether the FAA preempts *Iskanian*: *Prudential Overall Supply v. Betancourt*, 138 S.Ct. 566 (2017); *Bloomingdale's Inc. v. Tanguilig*, 138 S.Ct. 356 (2017); *Bloomindales, Inc. v. Vitolo*, 137 S.Ct. 2267 (2017); *CarMax Auto Superstores Cal., LLC v. Areso*, 136 S.Ct. 689 (2015);

Apple Am. Group, LLC v. Salazar, 136 S.Ct. 688 (2015).

3. Proceedings In This Case

Although Petitioner seeks to align this case and *Mandviwala* as similar, there are important differences. The record in this case does not establish that Lefevre signed and formed an arbitration agreement with Five Star, despite what Five Star claims at pages 4-5 of its Petition. Rather, the record establishes that at the time of the hearing and ruling by the district court to deny Five Star's motion to dismiss the PAGA action, the district court had found "[o]n this record, the Court declines to decide whether Plaintiff and Defendant entered into a valid contract to arbitrate Plaintiff's class action claims." Pet. App. 8a. The district court had set an evidentiary hearing on the matter of contract formation. Pet. App. 8a. Before the evidentiary proceedings were completed, Five Star filed a notice of appeal. Resp. App. 2a. The district court confirmed that its prior order from which Five Star appealed "did not 'finally determine the entire action,' as the Court ordered the parties to appear at the hearing to determine whether Plaintiff had assented to the Agreement, and it had yet to decide the arbitrability of Plaintiff's class action claims." Resp. App.. 2a-3a.

It is also important to note that Five Star's description given to the district court of the questions to be decided on its appeal, are much different than the questions presented by Five Star in its petition. Five Star previously claimed that its appeal was to address only two "narrow issues" to the Ninth Circuit, "(1) whether California law should apply to

the Agreement, and (2) whether a PAGA waiver was enforceable." Resp. App. 3a. These "narrow issues" which Five Star claims were the purpose of its appeal, reflect an intention to challenge the district court's decision to deny Five Star's motion to dismiss the PAGA action on choice of law grounds. These issues are far different from the questions sought to be raised by Five Star in its petition over "enforcement of arbitration agreements" with respect to PAGA actions. Because the district court had not yet reached a determination whether the purported arbitration agreement between Lefevre and Five Star was validly formed and enforceable, Five Star's petition questions are hypothetical and not correctly framed, based on the record.

The proceedings before the district court and the Ninth Circuit resulted in an order and appellate court opinion about "choice of law" principles and the rules that apply to determine the applicable substantive state laws to an action. In the district court proceedings, the court found that California law applied to Lefevre's action and that California law precluded the application of the Agreement to bar Lefevre's representative PAGA action. (Pet. App. 8a.) The district court noted that the case was removed from California state court on diversity grounds and that the choice of law rules of the forum state, California, would apply to determine the enforceability of the Agreement's choice of law provisions. Pet. App. 8a-9a. The district court applied California's three part test for determining the enforceability of a contractual choice of law provision. Pet. App. 9a citing *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1152 (1992). The district court found that it is contrary to the fundamental public policy of California for an

employer to require a prospective waiver of the right to bring a PAGA action, citing to *Iskanian* and provisions of the California Labor Code. Pet App. 10a-11a. Furthermore, the application of Maryland law, rather than California law, to deprive California of its right and interest to enforce PAGA to employers in California would cause California to "suffer greater impairment" of its labor statutes and policies if Maryland law is applied to Five Star's California business operations. See Pet. App. 10a-13a citing authorities including *Brack v. Omni Loan Co., Ltd.*, 80 Cal. Rptr. 3d 275, 282-287 (2008). The district court found "California has a greater interest in applying its laws to the instant action" and noted that Five Star identified "no other interest of Maryland relevant here" other than that Five Star incorporated its business in Maryland. Pet. App. 13a, 9a. Five Star's own language it drafted in its arbitration business form conceded that '[t]he law of the jurisdiction in which you are primarily employed will govern the substance of your grievance." Pet. App. 24a. The PAGA grievances of the state of California, and Lefevre as an aggrieved employee, were determined to be governed by California law and could not be waived; accordingly, Five Star's motion to dismiss the PAGA action through the vehicle of its motion to compel arbitration, was denied. Pet. App. 14a.

On appeal, the Ninth Circuit affirmed the district court's order as correct that California law, rather than Maryland law. Pet. App. 2a-3a. "Applying the choice-of-law principles of the forum state, California, the district court reasoned that application of Maryland law would be contrary to a fundamental policy of California, which encourages private enforcement of labor code violations.

California, which does not recognize contractual waivers of PAGA claims, has a materially greater interest in applying its law to an employment contract involving work performed in California than does Maryland." *Id.* The Ninth Circuit likewise disagreed with Five Star that *DirectTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015) abrogated *Iskanian*'s holding that PAGA waivers were unenforceable. *Iskanian* "directly addressed the validity of PAGA waivers" whereas *Imburgia* required that "choice of law" provisions in arbitration contracts be placed on equal footing with other contracts. Pet. App. 3a. The substantive law of California applied to the PAGA action brought against Five Star and the district court order was affirmed.

REASONS FOR DENYING THE PETITION

1. The Decisions Of This Court Do Not Hold That The FAA Bars Or Waives The Assertion Of State Statutory Rights

Even where a party agrees to arbitrate a statutory claim, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). An arbitration clause containing a "prospective waiver of a party's right to pursue statutory remedies" is "against public policy." *Id.* at 637, n. 19; *accord Iskanian*, 327 P.3d at 149. Moreover, the existence and enforcement of the substantive laws of California governing and regulating the conduct persons operating within the borders of California, are firmly committed to the

state's police powers and law enforcement authority central to its sovereignty. *Metro Life*, 471 U.S. at 756; *Printz v. United States*, 521 U.S. 898, 928 (1997).

The fundamental public policy of California to enforce its substantive labor laws and to do so through a PAGA action, is generally applicable to all employers, and regardless of the form through which an employer may seek to evade California laws. As a matter of federalism and state sovereignty, the application of California laws to a company doing business in California, for its operations conducted in California, violating the labor laws of the state and its residents, is simple, basic and understood. Each state's laws are to be respected within its borders, and California's laws still apply to Five Star even if it wished and wrote down that another state's laws should apply to it.

2. California Is Not A Party To A Private Contract Agreeing To Abrogate Its Labor Laws For Five Star's Benefit

The "real party in interest" in Lefevre's PAGA action is the state of California. *Iskanian*, 327 P.3d at 151. The state of California is not a party to any "agreement" waiving or abrogating its rights, or obligating it to have the PAGA action determined according to the terms of a private contractual arbitration arrangement.

Indeed, the Five Star "agreement" would impinge the State's police powers and abilities to fully investigate and assess civil penalties, by restricting discovery to only "five (5) interrogatories, including

sub-parts, five (5) requests for production, including sub-parts, and two (2) depositions." Pet. App. 21a. Electronic discovery under Five Star's private arrangement would limit the State's exercise of police power "to searches of e-mail accounts of no more than two (2) addresses for a twelve month period (or any shorter period for which e-mails are retained in the ordinary course) and a maximum of five (5) search terms or phrases will be permissible." Pet. App. 21a. Surely, Five Star cannot point to any agreement between the state of California and itself allowing for such restrictions.

The Five Star contractual arbitration form, itself, only references a waiver of "class" and "collective" actions, and the waiver clause is silent on "representative" actions. Pet. App. 23a. A PAGA action is a "representative" action, not a class or collective action. *Iskanian*, 327 P.3d at 148; *See Sakkab*, 803 F.3d at 435-36.

Accordingly, the argument for a waiver of PAGA actions asserted by Five Star is lacking from the face of the contractual arbitration form.

Turning to the "choice of law" analysis determined below, Five Star fails to address the general applicability of California's material interest in having its labor laws applied to wage and hour activities in California, and that PAGA is the substantive law of California, generally applicable to all employers, including Five Star. It is Five Star that has attempted to create a special exception for itself, compared to nearly all other employers in the state of California. Five Star's private contractual exemption for itself, and its decision to choose

Maryland law for itself, do not bind California or nullify California law. This proposition, even under the guise of the FAA, would be astounding to say the least. The FAA is not a vehicle of nullification of state substantive law, and no case suggests such a radical outcome.

3. There Was No Final Determination On Contract Formation Leaving The Record Incomplete To Support Any Determination Under The FAA

The question of the formation of a valid arbitration agreement between Lefevre and Five Star, remained to be determined when Five Star filed its notice of appeal. Resp. App. 1a- . It would have to be up to this Court to determine if a valid arbitration agreement was even formed, to reach the arguments that Five Star is attempting to make regarding the FAA and *Iskanian*. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below." (citation and internal quotation marks omitted)). Based on the lack of a completed record, Five Star's petition in this matter does not present a proper vehicle to support Five Star's questions and requested relief before this Court.

4. Respondent Refers To The Opposition In *Mandviwala* And Incorporates The Arguments Against Granting Five Star's Petition Or Holding This Petition, Based On The *Mandviwala* Petition

Respondent Lefevre incorporates the grounds asserted for denying the *Mandviwala* petition in the opposition in that matter, as grounds for denying Five Star's instant petition. Lefevre further contends that, in any event, there are not adequate grounds for holding this Petition, because there was no error in applying California substantive law in this case to permit the PAGA action to proceed below.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 13, 2018

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

EDCV 15-1305-VAP (SPx)

Lourdes Lefevre, et. al.,

Plaintiffs,

v.

Five Star Quality Care, Inc. et al.,

Defendants,

ORDER DENYING MOTION FOR AN EVIDENTIARY HEARING

On January 26, 2016, Defendant Five Star Quality Care, Inc. ("Defendant") filed its Motion for an Evidentiary Hearing ("Motion"). (Doc. 33.) Plaintiff Lourdes Lefevre ("Plaintiff") opposed the Motion on February 2, 2016 (Doc. 39), and Defendant failed to file a timely reply.

After consideration of the papers filed in support of, and in opposition to, the Motion, the Court DENIES the Motion in its entirety and STAYS litigation of this case, pending resolution of Defendant's appeal to the Ninth Circuit Court of Appeals (Doc. 28).

On December 11, 2015, the Court denied Defendant's Motion to Compel Arbitration of Plaintiff's claims under the Private Attorneys General Act ("PAGA"). (Order (Doc. 25) at 8.) California law applied to the parties' arbitration agreement (Agreement (Doc. 16-4)), and regardless of whether the parties entered into a valid agreement, Plaintiff's PAGA claims were not arbitrable. (See Order at 4.) With respect to Plaintiff's class action claims, the Court set a hearing to determine whether Plaintiff assented to the Agreement such that Defendant could compel her to arbitrate her remaining, non-PAGA claims. (Id. at 3-4.) Before the hearing, Defendant appealed this Court's denial of the Motion to Compel Plaintiff's PAGA claims. (Docs. 28, 32.) Hence, the Court asked for further briefing as to whether it still had jurisdiction over Plaintiff's remaining claims to hold its hearing.

The Court does not have jurisdiction to resolve Plaintiff's non-PAGA claims. In Britton v. Co-op Banking Group, the Ninth Circuit concluded that an appeal normally "divests the district court of jurisdiction and transfers jurisdiction to the appellate court." 916 F.2d 1405, 1411 (9th Cir. 1990). "However, ... where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal." Id. (citations omitted) (internal quotation marks omitted).

The Order did not "finally determine the entire action," as the Court ordered the parties to appear at

a hearing to determine whether Plaintiff had assented to the Agreement, and it had yet to decide the arbitrability of Plaintiff's class action claims. (See id.; Order at 3-4.) In holding a hearing, however, the Court would be deciding a "matter[] involved in the appeal," which could possibly duplicate the litigation now pending at the Ninth Circuit. See Britton, 916 F.2d at 1411.

Defendant disagrees, stating "the existence of an enforceable ... Agreement in this case had no bearing on the Court's denial of the Motion as to Plaintiff's PAGA claims." (Motion at 7.) Defendant further claims it has only appealed two narrow issues to the Ninth Circuit -- (1) whether California law should apply to the Agreement, and (2) whether a PAGA waiver was enforceable. (Motion at 7.) That is not so. Defendant's First Amended Notice of Appeal makes clear it has appealed a broader issue -- whether Plaintiff should be compelled to arbitrate her PAGA claims.
(See Doc. 32 at 1.) In deciding this issue, the Ninth Circuit could find the Agreement unenforceable, and hence, the PAGA claims non-arbitrable. It might also reverse the Court's decision and "return the issue to the district court ... to decide in the first instance where [Plaintiff's] representative PAGA claims should be resolved." See Sakkab v. Luxottica Retail N. Am., 803 F.3d 425, 440 (9th Cir. 2015). In both these scenarios, the Ninth Circuit's decision is inextricably intertwined with
the validity of the Agreement.

Accordingly, the Court finds it inappropriate for it to go forward with the hearing and DENIES

Defendant's Motion. See Masalosalo by Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 956 (9th Cir. 1983) ("The effective filing of a notice of appeal transfers jurisdiction from the district court to the court of appeals with respect to all matters involved in the appeal.") (citations omitted).

The parties shall file a status report regarding their case within 10 days of the resolution of Defendant's appeal.

IT IS SO ORDERED.

Dated: 7/21/16 /s/ Virginia A. Phillips
Virginias A. Phillips
United States District Judge