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**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF

This petition seeks review of an unlawful anti-arbitration rule with far-reaching consequences.

California's "*Iskanian* rule"[1] prevents the enforcement of contractual agreements to arbitrate on an individual basis when an employee raises "representative" claims under California's Private Attorneys General Act ("PAGA"). In so doing, the rule violates the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., and its command "that private arbitration agreements [be] enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989).

Respondent raises a series of flawed arguments in an attempt to avoid review of the pressing issues before the Court. None has merit. *First*, the validity of the *Iskanian* rule is a question of tremendous importance that affects a large number of American workers and businesses, and that question is ripe for this Court's review. *Second*, although this Court recently denied certiorari in *Five Star Senior Living Inc. and FVE Managers, Inc. v. Mandviwala*, No. 17-1357 (docketed Mar. 27, 2018) (the "*Mandviwala* Petition"), the procedural issues raised by the *Mandviwala* respondent are not present here. *Third*, none of Respondent's other objections undermine the compelling need for this Court to review the *Iskanian* rule in this case. This Court should therefore grant the petition.

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[1] *Iskanian v. CLS Transp., L.A., LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

## I. The *Iskanian* Rule Violates the FAA and Urgently Calls for Review.

As explained in the petition in this case (at 6-10), and in the *Mandviwala* Petition (at 12-26) and Reply (at 6-9), the FAA preempts California's *Iskanian* rule. That no-waiver rule discriminates against arbitration and thus is not a rule of general applicability. It also thwarts the fundamental objectives and operation of arbitration: When a "representative" PAGA claim is raised, the *Iskanian* rule forecloses the individual bilateral arbitration process that the parties adopted as the exclusive avenue for dispute resolution. This Court has repeatedly emphasized the important role the FAA plays in protecting bilateral-only arbitration agreements—and in invalidating rules requiring collective arbitration involving other individuals. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-52 (2011).

The *Iskanian* rule has profound consequences. It directly affects nineteen million California employees, and the skyrocketing number of PAGA claims already has risen to approximately 8,000 claims *annually*. *Mandviwala* Pet. 28-29. That total has soared since California and Ninth Circuit courts[2] held that "representative" PAGA claims—claims on behalf of other individuals—may not be waived as part of bilateral arbitration agreements, thereby creating a gaping loophole that allows evasion of this Court's arbitration decisions by resourceful plaintiffs and plaintiffs' counsel. Employers and employees in California thus are

[2] *Iskanian,* 327 P.3d 129; *Sakkab v. Luxottica Retail N.A., Inc*., 803 F.3d 425 (9th Cir. 2015); *see also id.* at 440 (N.R. Smith, J., dissenting).

routinely deprived of the contractual benefits of arbitration that the FAA was enacted to safeguard.

There is no serious prospect of further "percolation" on this urgent issue because the California Supreme Court and the Ninth Circuit have definitively resolved the matter. Pet. 3-4; *see also Mandviwala* Pet. 26-27. For the reasons discussed in the petition, and in the *Mandviwala* Petition and Reply, Respondent's arguments on the merits of this dispute are untenable. And, in any event, Respondent's defense of the *Iskanian* rule's sweeping invalidation of arbitration provisions can be fully considered at the merits stage. But Respondent's arguments defending California's arbitration-destroying rule are not a basis for denying review of this vitally important issue.[3]

## II. The Procedural Issues in *Mandviwala* Are Not Present in this Petition.

Although the petition in *Mandviwala* was recently denied, the procedural issues emphasized by the

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[3] Respondent apparently misunderstands the "general applicability" requirement of §2 of the FAA. She objects that the petition "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." Opp'n 13 (emphasis added). Of course, what must be generally applicable is the *Iskanian* rule, not California's interest in enforcing PAGA. Particularly in light of this Court's decisions in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the *Iskanian* rule conspicuously fails in that regard. *See* Pet. 7-8; *see also Mandviwala* Pet. 12-18. This Court has repeatedly emphasized that policy reasons for displacing or limiting arbitration are inadequate. *See, e.g., Concepcion*, 563 U.S. at 351 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

*Mandviwala* respondent are not present in this case. Unlike *Mandviwala*, the district court in this case has not issued a minute order that could be read to result in the arbitration of all claims—which was a point stressed by the *Mandviwala* respondent. *See Mandviwala* Opp'n 17-19 (May 21, 2018). The issue here—in which the decisions below unquestionably prevent the enforcement of the arbitration agreement providing for individual bilateral arbitration as the exclusive avenue for dispute resolution—is squarely presented.

**III. Respondent's Other Claims Are Unavailing.**

Respondent raises a few additional, miscellaneous objections to this Court's review. None has merit.

*First*, Respondent mischaracterizes the proceedings below. Respondent claims that "[t]he proceedings below presented [a] straightforward 'conflict of laws' analysis," Opp'n 2, and thus purportedly did not even address the question of whether the *Iskanian* rule is preempted by the FAA.

But Respondent's characterization of the proceedings below is simply wrong, as she herself appears to acknowledge elsewhere in her opposition. *See, e.g., id.* at 9 ("[T]he district court . . . found . . . that California law precluded the application of the [arbitration] Agreement to bar [Respondent]'s representative PAGA action."); *id.* at 11 ("The Ninth Circuit . . . h[eld] that PAGA waivers were unenforceable."). In ruling on Petitioner's motion to compel arbitration, the district court plainly applied the *Iskanian* rule and held that, under controlling Ninth Circuit precedent, "the FAA does not preempt the California Supreme Court's decision." Pet. App. 14a. The Ninth Circuit upheld that determination, expressly rejecting the argument

that this Court's decision in *DIRECTV* abrogated either *Iskanian* or the Ninth Circuit's endorsement of *Iskanian* in *Sakkab*. *Id.* at 3a.

This petition seeks review of the *Iskanian* rule applied by the Ninth Circuit and the district court in this case to prevent bilateral arbitration as the exclusive, contractually agreed avenue of dispute resolution—not of the Ninth Circuit's separate choice-of-law analysis, which found California law to be applicable as a predicate to enforcing the *Iskanian* rule.

*Second*, Respondent seems to suggest that Petitioner omitted pertinent details about the case's posture when Petitioner did no such thing. Respondent asserts that Petitioner "does not fully describe the proceedings from which it appealed below, which were never concluded on the issue of arbitration contract formation." Opp'n 2. But the petition clearly states: Respondent "alleged[] she never signed the arbitration agreement with [Petitioner]. . . . *On that issue, the district court 'decline[d] to rule . . . pending an evidentiary hearing,'" which "has yet to occur*." Pet. 5 (emphasis added) (citing Pet. App. 7a, 14a). Petitioner thus fully and accurately described the posture of this case.

Moreover, Respondent erroneously claims that the issue of contract formation makes this case an improper vehicle for review. But this Court frequently has granted certiorari to review questions of FAA preemption in cases where other issues remained open for decision on remand—and even where certain claims were in the process of being arbitrated. *See, e.g., Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 224-25 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620-24 & n.12 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 5 (1984).

*Third*, Respondent mischaracterizes the language of the arbitration clause to which she and Petitioner agreed. She asserts that Petitioner "fails to demonstrate that PAGA representative actions are *waived* under the peculiar wording of its Arbitration Agreement," Opp'n 2 (emphasis in original), which "only references a waiver of 'class' and 'collective' actions, and the waiver clause is silent on 'representative' actions," *id.* at 13 (citing Pet. App. 23a). But Respondent selectively ignores the second half of that very sentence, in which she and Petitioner "agree[d] to pursue claims *on an individual basis only*." Pet. App. 23a. (emphasis added). A "representative" PAGA claim brought on behalf of a plaintiff and other employees—which can sometimes total thousands or tens of thousands of fellow employees[4]—clearly is not brought "on an individual basis only," as the arbitration agreement explicitly requires.

[4] *See, e.g., Mandviwala* Amicus Br. of Chamber of Commerce of the United States of America et al. 12 n.3 (Apr. 26, 2018).

## CONCLUSION

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 California's anti-arbitration rule to be reviewed by this Court.

Petitioner respectfully asks this Court to grant certiorari in this case.

Respectfully submitted,

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