No. _____

IN THE

Supreme Court of the United States

SHIPT, INC.,

Petitioner,

v.

JADE GREEN,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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February 2, 2022

QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), this Court held that the FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of [an] arbitration agreement[]" "providing for individualized proceedings." *Id.* at 1619, 1621, 1623.

This Court granted review in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 734 (2021), which raises the same issue Petitioner Shipt, Inc. raises here: whether the FAA preempts the rule in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014) that California Labor Code Private Attorneys General Act waivers are unenforceable and instead requires enforcement of bilateral arbitration agreements including representative action waivers, such as the one the parties entered into here. Shipt requests that this Court hold this Petition pending disposition of *Viking River*, and then grant this Petition, vacate the California Court of Appeal decision below, and remand to the Court of Appeal with instructions to follow *Viking River*.

The question presented is:

Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private Attorneys General Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Shipt, Inc. is a wholly owned subsidiary of Target Corporation; and Target Corporation is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Target Corporation, Shipt, Inc. is unaware of any shareholder who beneficially owns more than 10% of Target Corporation's outstanding stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the California Superior Court for the County of Los Angeles, the California Court of Appeal, and the California Supreme Court:

- *Jade Green v. Shipt, Inc.*, No. 20STCV01001 (Cal. Super. Ct.), order issued September 22, 2020;
- *Jade Green v. Shipt, Inc.*, No. B309061 (Cal. Ct. App.), opinion issued October 21, 2021;
- *Jade Green v. Shipt, Inc.*, No. S272030 (Cal.), petition for review denied January 19, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

The question presented in this Petition is whether the Federal Arbitration Act ("FAA") preempts California's rule in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014) that California Labor Code Private Attorneys General Act ("PAGA") waivers are unenforceable, and whether the FAA requires enforcement of bilateral arbitration agreements including representative action waivers. This Court recently granted review in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 734 (2021) to resolve this question. Shipt requests that this Court hold this Petition while *Viking River* is pending, and then grant this Petition, vacate the decision below, and remand once *Viking River* is decided.

The FAA requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). California's courts refuse to follow that mandate with respect to an entire category of claims: those brought under PAGA, an expansive statute that permits individual employees to seek penalties on behalf of themselves and any other purportedly "aggrieved" employees. Cal. Lab. Code § 2699.

This is not the first time that California has tried to circumvent the FAA. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court confronted the California Supreme Court's rule from *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148 (2005), that rendered class action waivers in arbitration agreements unenforceable on the ground that they were against public policy. *Concepcion*, 563 U.S. at 338, 348. This Court held that the FAA preempted the *Discover Bank* rule because "[r]equiring the

availability of classwide arbitration interferes with fundamental attributes" of the traditional, bilateral arbitration favored by the FAA. *Id.* at 344.

More recently, the Court in *Epic Systems* reaffirmed that the FAA requires "rigorous[]" enforcement of class and collective action waivers in arbitration agreements calling for "one-on-one arbitration," regardless of countervailing federal policy interests in federal labor laws. 138 S. Ct. at 1619, 1621. Yet despite this Court's "emphatic direction[]" that individual arbitration agreements must be enforced, *id.* at 1621, state and federal courts in California have carved out an exception to that rule for PAGA claims.

As it currently stands, employees in California can escape otherwise valid and binding agreements to arbitrate disputes with their employers on an individual basis by asserting their claims under PAGA. PAGA authorizes an "aggrieved employee" to seek civil penalties "on behalf of himself or herself and other current or former employees" for a wide range of violations of the California Labor Code. Cal. Lab. Code § 2699(a). The California Supreme Court has interpreted PAGA to permit the entry of judgments binding on employees who are not parties to the action *without* notice or any showing that the named plaintiff has typical claims or that his counsel is adequate. *Arias v. Superior Court*, 46 Cal. 4th 969, 985–86 (2009).

In *Iskanian*, the California Supreme Court held that arbitration agreements requiring employees to arbitrate disputes with their employers individually rather than bring a PAGA action in court are void as a matter of public policy. 59 Cal.4th at 360. As a result, the so-called "*Iskanian* rule" allows employees

in California to bring PAGA claims on behalf of themselves and hundreds or thousands of other "aggrieved employees" in court, often for millions of dollars in penalties—even if they expressly agreed with their employers to resolve all disputes in individual arbitration.

Both the California Supreme Court and the Ninth Circuit have concluded that the *Iskanian* rule is not preempted by the FAA. The California Supreme Court held that a PAGA claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." *Iskanian*, 59 Cal.4th at 386–87. *Iskanian* reasoned that a PAGA claim "is a dispute between an employer and the *state*," meaning that the state is "the real party in interest," *id.* (emphasis in original)—even though in PAGA actions it is the employee who actually files the action and has complete control over the litigation. And in *Sakkab v. Luxxotica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), a divided panel of the Ninth Circuit held that the *Iskanian* rule was not preempted by the FAA, but declined to adopt the California Supreme Court's reasoning. Instead, the Ninth Circuit held that the *Iskanian* rule falls within the FAA's savings clause because it is "generally applicable" to contracts as it supposedly "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* at 432–40.

Both the California Supreme Court and the Ninth Circuit have repeatedly refused to reconsider these holdings. They have done so even though, as Judge Bumatay recently explained, "the writing is on the wall" that *Iskanian* and *Sakkab* have "been seriously

undermined" by *Epic Systems*. *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 57–58 (9th Cir. 2021) (Bumatay, J., concurring) ("Recent Supreme Court decisions . . . make clear that our precedent is in serious need of a course correction."). The Court should hold this Petition until it issues a ruling in *Viking River* that parties may not "sidestep an arbitration agreement simply by filing a PAGA claim." *Id.*

Like class and collective actions, PAGA actions "'fundamental[ly]' change . . . the traditional arbitration process" Congress sought to promote when it enacted the FAA. *Epic Sys.*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 347–48). In seeking to adjudicate alleged violations of the California Labor Code for hundreds or thousands of employees in a single action, PAGA actions "sacrific[e] the principal advantage of arbitration—its informality"—"and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* (quotation marks omitted; alterations in original). Like California's since-overruled prohibition on class-action waivers, *Iskanian*'s prohibition on the arbitration of PAGA claims on an individual basis "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. *Concepcion*, 563 U.S. at 352 (quotation marks omitted). *Iskanian* also invalidates arbitration "agreements precisely because they require individualized arbitration proceedings instead of [representative] ones." *Epic Sys.*, 138 S. Ct. at 1622.

Holding this Petition pending a decision in *Viking River* will allow the court below the benefit of this Court's instructions regarding whether the PAGA

waiver in the arbitration agreement can be enforced. If this Petition is not held, the decision below will be enforced before a decision in *Viking River*. When an earlier-filed petition raises the same issues, this Court "regularly hold[s]" the subsequent, overlapping petition. *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' [grant, vacate, remand order] when the case is decided."). The Court should hold this Petition until it issues a decision in *Viking River*, and then grant this Petition, vacate the California Court of Appeal decision, and remand to the Court of Appeal with instructions to follow the *Viking River* decision.

OPINIONS BELOW

The California Supreme Court's January 19, 2022 order denying Shipt's petition for review is unpublished and is reproduced at App.1a. The California Court of Appeal's opinion, dated October 21, 2021, is unpublished but available at 2021 WL 4901523 and reproduced at App.2a–16a. The order of the California Superior Court of Los Angeles County is unpublished and is reproduced at App.17a–25a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Supreme Court denied Shipt's petition for review on January 19, 2022.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, states: "A written provision in any maritime transaction or a contract evidencing a transaction

involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, 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. Legal Background

1. Congress enacted the FAA in 1925 in response to "longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Congress recognized that arbitration has much to offer, "not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. Congress thus enacted the FAA to "ensur[e] that private arbitration agreements are enforced according to their terms," *Concepcion*, 563 U.S. at 344 (quotation marks omitted), and "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). To advance those goals, Section 2 of the FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This Court has expansively interpreted the FAA's preemptive scope, holding that the FAA preempts state laws that interfere with the parties' ability to

choose the efficiency and informality of individual arbitration. *Concepcion*, 563 U.S. at 344. In *Concepcion*, this Court considered the enforceability of a consumer contract providing for "arbitration of all disputes between the parties, but requir[ing] that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 336 (quotation marks omitted). *Concepcion* held that the FAA preempts any rule prohibiting class action waivers in arbitration agreements, including California's *Discover Bank* rule. *Id.* at 341–44.

The Court explained that Section 2's saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" but offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. The Court held that the *Discover Bank* rule "interfere[d] with fundamental attributes of arbitration"—namely, its informality, lower cost, greater efficiency, and speed—by "[r]equiring the availability of classwide arbitration." *Id.* at 344. As the Court explained, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*

2. PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties for Labor Code violations on behalf of themselves, other employees, and the State of California. Cal. Lab. Code § 2698 *et seq*. For California Labor Code provisions that do not themselves specify a monetary penalty, PAGA

provides statutory penalties of $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *Id.* § 2699(f)(2). These penalties may be recovered by "an aggrieved employee . . . in a civil action . . . filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed." *Id.* § 2699(g)(1).

PAGA provides that civil penalties collected from an employer "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency" and "25 percent to the aggrieved employees." Cal. Lab. Code § 2699(i). PAGA further provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." *Id*. § 2699(g)(1). PAGA penalties can run into the hundreds of millions of dollars. *See Sakkab*, 803 F.3d at 448 (Smith, J., dissenting) (explaining that a "representative PAGA claim could . . . increase the damages awarded . . . by a multiplier of a hundred or thousand times"); *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) (noting that "[e]ven a conservative estimate would put the potential penalties [under PAGA] in these cases in the tens of millions of dollars").

While PAGA claims "may be brought as class actions," *Arias*, 46 Cal. 4th at 981, n.5, the California Supreme Court has held that they need not comply with California's class action statute. *See id.* at 933. As a result, in California state court, a plaintiff suing on behalf of other allegedly aggrieved employees under PAGA is not required to seek or obtain class certification or provide notice of the action to absent

persons. *Id.* at 929–34. Nor is an employee barred from bringing a PAGA claim after already resolving their own wage-and-hour claims against an employer through an individual settlement. *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 82–88 (2020).

These purportedly "non-class" PAGA actions can bind absent employees without notice or an opportunity to opt out. *See Arias*, 46 Cal. 4th at 987. They are also preclusive as to the defendant employers: "[I]f an employee plaintiff prevails in an action under [PAGA] for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment" and "[n]onparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations." *Id.*

Under PAGA, "[a]n aggrieved employee can only sue if California declines to investigate or penalize an alleged violation; and California's issuance of a citation precludes any employees from bringing a PAGA action for the same violation." *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021) (citing Cal. Lab. Code §§ 2699(h), 2699.3(b)(2)(A)(i)). "But once California elects not to issue a citation, the State has *no authority* under PAGA to intervene in a case brought by an aggrieved employee." *Id.* (emphasis added).

PAGA is distinct from "a traditional *qui tam* action" because such actions serve "only as a *partial* assignment of the Government's claim," while "PAGA represents a permanent, *full* assignment of

California's interest to the aggrieved employee" and the statute "lacks the procedural controls necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains substantial authority over the case." *Id.* at 677 (emphases in original, quotation marks omitted). As the Ninth Circuit recently noted, "[a] complete assignment to this degree . . . undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.*

3. In *Iskanian*, the California Supreme Court held that employees have a right to bring a PAGA action in court despite agreeing to arbitrate disputes individually. 59 Cal.4th at 360. The court reasoned that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy" and would "frustrate[] the PAGA's objectives." *Id.* at 360, 384. The court further held that the rule it announced was not subject to the FAA, which "aims to ensure an efficient forum for the resolution of *private* disputes," because a PAGA claim is "a type of *qui tam* action" between an employer and the state. *Id.* at 382, 384 (emphasis in original). The court thus held that "the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." *Id.* at 360, 388–89.

In *Sakkab*, a divided panel of the Ninth Circuit held that the *Iskanian* rule was not preempted by the FAA but on different grounds. 803 F.3d at 432. The majority held that the *Iskanian* rule fits within Section 2's savings clause because it supposedly "bars

any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* The Ninth Circuit further held that the *Iskanian* rule does not conflict with the FAA's purpose to overcome judicial hostility to arbitration because it "does not prohibit the arbitration of [PAGA] claim[s]," but rather "provides only that representative PAGA claims may not be waived outright." *Id.* at 434. And the court ruled that "the *Iskanian* rule does not conflict with the FAA, because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration." *Id.* at 439.

In dissent, Judge N.R. Smith opined that "the majority ignore[d] the basic precepts enunciated in *Concepcion*" by holding that the *Iskanian* rule did not frustrate the purposes of the FAA. *Sakkab*, 803 F.3d at 440 (Smith, J., dissenting). Judge Smith explained that *Iskanian*'s prohibition of representative action waivers was sufficiently analogous to *Discover Bank*'s prohibition of class action waivers such that *both* are inconsistent with the FAA. *Id.* at 443–44. Specifically, Judge Smith reasoned that "the *Iskanian* rule burdens arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass; . . . requir[ing] more formal and complex procedure[s]; and [] expos[ing] the defendants to substantial unanticipated risk." *Id.* at 444.

4. Four years after *Iskanian*, this Court held in *Epic Systems* that agreements to arbitrate individually must be enforced according to their terms. The Court rejected the argument that the National Labor Relations Act ("NLRA") guarantees

workers the right to bring class and collective actions against their employer, despite their agreements to arbitrate individually. *Epic Sys.*, 138 S. Ct. at 1619.

In reciting the question presented, the Court framed the issue broadly: "Should employees and employers be allowed to agree that *any disputes* between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" *Epic Sys.*, 138 S. Ct. at 1619 (emphasis added). And the Court reached a broad conclusion: "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*"—regardless of whether the plaintiff attempts to bring a class, collective, or other type of representative action, and regardless of whether the plaintiff seeks to represent private or public entities (or both). *Id.* (emphasis added).

The Court explained that the plaintiffs in *Epic Systems* "object[ed] to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones." 138 S. Ct. at 1622. But any "argument that a contract is unenforceable *just because it requires bilateral arbitration*" is "emphatic[ally]" at odds with the FAA. *Id.* at 1621, 1623 (emphasis in original). Arbitration has "traditionally [been] individualized," and even a federal statute embodying important "public policy" interests cannot override an agreement to arbitrate individually—no matter how well intentioned the law is or whether it applies to all contracts generally. *Id.* at 1622–23.

Thus, "the law is clear"—"arbitration agreements . . . must be enforced as written," absent a "clear" congressional command to the contrary. *Epic Sys.*, 138 S. Ct. at 1632. And given the widespread "judicial antagonism toward arbitration" that led to the FAA's enactment, courts "must be alert to new devices and formulas" that would expressly or implicitly "declar[e] arbitration against public policy." *Id*. at 1623. "[A] rule seeking to declare individual arbitration proceedings off limits is . . . just such a device." *Id.*

After *Epic Systems*, this Court held twice more that the FAA requires courts to enforce arbitration agreements according to their terms. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Court held that the FAA preempted "California's rule that ambiguity in a contract should be construed against the drafter" when used to "infer from an ambiguous agreement that [the] parties have consented to arbitrate on a classwide basis." *Id.* at 1417, 1419. Even though the rule was "neutral" and gave "equal treatment to arbitration agreements and other contracts alike," this Court determined that "courts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.'" *Id.* at 1418 (quoting *Epic Sys.*, 138 S. Ct. at 1623). "The FAA requires courts to 'enforce arbitration agreements according to their terms,'" and state-law rules "based on public policy" that sidestep that command "'interfer[e] with [the] fundamental attributes of arbitration.'" *Id.* at 1415, 1417–18 (quoting *Epic Sys.*, 138 S. Ct. at 1622).

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), this Court reiterated that the FAA "requires that we interpret the contract as written," even if, "as a practical and policy matter," such exceptions to arbitration may be desirable. *Id.* at 528–31; *see also id.* at 531 ("[W]e may not rewrite the statute simply to accommodate . . . policy concern[s].").

On December 15, 2021, this Court granted review in *Viking River*. This Court is poised to determine whether the FAA preempts the rule announced in *Iskanian* and requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise PAGA claims in court.

B. Factual And Procedural History

Shipt is a network company that provides and maintains an online marketplace and mobile platform on which individual Members, local retailers, and Shoppers connect to facilitate the purchase, fulfillment, and, when applicable, delivery of goods from retailers to Members by Shoppers. *See* App.4a.

Anyone can sign up to be a Shopper, but all new Shoppers must accept Shipt's Independent Contractor Agreement (the "IC Agreement") before accessing Shipt's platform to begin receiving shopping and delivery opportunities. *See id.* The IC Agreement governs the relationship between Shipt and Shoppers, and provides that Shoppers are independent contractors engaged in the business of "strategic shopping and delivery services" who "retain the sole right to determine when, where, and for how long [they] will utilize the Shopper App or the Shipt Services." *See* App.4a–5a.

The Arbitration Agreement incorporated in the IC Agreement broadly provides that Shipt and Shoppers "agree that any and all disputes, claims, or controversies," including "any claims that a worker/independent contractor should be classified as an employee," "will be resolved through mandatory, binding arbitration." *See id.* The Arbitration Agreement also contains an express Class Action Waiver, through which Shoppers agree to arbitrate their disputes on an individual basis and to waive their right to bring collective or class actions. *See* App.5a. The Class Action Waiver states:

> No Class Actions or Joinder of Additional Parties. YOU AND SHIPT WAIVE ANY RIGHT FOR ANY DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A CLASS AND/OR COLLECTIVE ACTION AND THE ARBITRATOR WILL HAVE NO AUTHORITY TO HEAR OR PRESIDE OVER ANY SUCH CLAIM ("Class Action Waiver"). *See id.*

Respondent Jade Green signed and accepted this Arbitration Agreement on October 15, 2018. *See* App.4a. It is undisputed that Green did not opt out of the Arbitration Agreement. *See* App.5a.

After agreeing to resolve all disputes with Shipt in individual arbitration, Green filed this action against Shipt in January 2020, alleging she was misclassified as an independent contractor. *See* App.6a. Green's operative complaint seeks civil penalties under PAGA. *See id*.

Shipt moved to compel arbitration pursuant to the parties' Arbitration Agreement and requested a stay pending the completion of arbitration in April 2020. *See* App.7a. Shipt recognized that the California

Supreme Court held in *Iskanian* that PAGA waivers in arbitration agreements are unenforceable as against public policy, but Shipt argued that the United States Supreme Court's decision in *Epic Systems* abrogated *Iskanian*. *See id.*

Green argued that her PAGA claims were not arbitrable under the terms of the Arbitration Agreement. She also argued that the Arbitration Agreement's Class Action Waiver was unenforceable under California law, and that *Epic Systems* did not abrogate *Iskanian* and thus Plaintiff's PAGA claims could not be compelled to arbitration.

The trial court issued an order denying Shipt's motion to compel arbitration on September 22, 2020. App.17a–25a. The court acknowledged that a valid arbitration agreement exists, but held that "[w]ithout the state's consent, a pre-dispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement." App.20a–21a. Thus, the trial court held that "[t]he arbitration agreement, signed by [Respondent] Green in her individual capacity, does not require that this PAGA action be sent to arbitration." App.21a.

Further, the trial court concluded that *Epic Systems* did not compel Plaintiff to arbitrate her PAGA claim. App.21a–22a. According to the trial court, *Epic Systems* "did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action." *Id.*

The Court of Appeal affirmed the trial court's order denying Shipt's motion to compel arbitration in an unpublished opinion on October 21, 2021. App.2a–16a. The court joined the other Courts of Appeal that have held that *Epic Systems* did not abrogate *Iskanian*. App.11a–13a. The court concluded that, "[u]nder the doctrine of stare decisis, we are bound to follow our Supreme Court's decision in *Iskanian*." App.13a.

On November 30, 2021, Shipt filed a Petition for Review with the California Supreme Court, presenting the issue of whether *Epic Systems* abrogated the California Supreme Court's holding in *Iskanian* that the FAA does not preempt California's rule that an arbitration agreement requiring individual arbitration is not enforceable as to claims under PAGA. *See* App.1a. The California Supreme Court denied Shipt's petition on January 19, 2022. *Id.*

REASONS FOR HOLDING THE PETITION

The California Supreme Court and Ninth Circuit have endorsed a unique, unwritten exception to the FAA that directly conflicts with this Court's command that arbitration agreements providing for individualized proceedings "must be enforced according to their terms." *Epic Sys.*, 138 S. Ct. at 1620; *see Sakkab*, 803 F.3d at 432. It is clear that neither court will course correct on its own, as the California Supreme Court has declined to reassess the *Iskanian* rule many times, and the Ninth Circuit has refused to revisit its decision upholding the rule—including as recently as April 2021, when it denied a petition for rehearing en banc in *Rivas v. Coverall North America, Inc.*, No. 20-55140, Dkt. 44 (9th Cir. Apr. 6, 2021). This Court granted review in *Viking*

River and is set to decide whether the FAA preempts California's *Iskanian* rule that arbitration agreements requiring individual arbitration are not enforceable as to claims under PAGA. This Petition raises that same question, and should be held until a decision is reached in *Viking River*, at which time the California Court of Appeal decision below should be vacated and the case remanded back to Court of Appeal.

A. This Petition Should Be Held Pending A Decision In *Viking River*

This Petition should be held pending this Court's decision in *Viking River*, which raises the same question as this Petition: whether the FAA preempts California law holding that PAGA waivers are unenforceable and instead requires enforcement of bilateral arbitration agreements that include representative action waivers. This Court routinely holds petitions pending a decision in an overlapping petition which has been granted review. *See Stutson*, 516 U.S. at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' [grant, vacate, remand order] when the case is decided."); *Foster v. Alabama,* 577 U.S. 1188 (2016) (explaining that "[t]he Court has held the petition in this and many other cases pending the decision" in an overlapping case before the Court). Because the *Viking River* decision will resolve the issue raised in this Petition, this Petition should be held until *Viking River* is decided, and then the Petition should be granted, the California Court of Appeal decision vacated, and the case remanded to the

California Court of Appeal with instructions to follow the *Viking River* decision.

B. The Decision Below Is Incorrect And Conflicts With This Court's Decisions Interpreting The FAA, So A Hold Is Necessary

This Petition should be held pending the *Viking River* decision because California's *Iskanian* rule cannot be reconciled with either the FAA or this Court's decision in *Epic Systems.*

1. The FAA Applies To PAGA

Section 2 of the FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Unless a contract defense falls within Section 2's savings clause, the FAA protects agreements to arbitrate individually "pretty absolutely." *Epic Sys.*, 138 S. Ct. at 1621. "[C]ourts may not allow a contract defense to reshape traditional individualized arbitration," and "must be alert to new devices and formulas . . . seeking to declare individualized arbitration proceedings off limits." *Id.* at 1623.

The *Iskanian* rule is "such a device." *Epic Sys.*, 138 S. Ct. at 1623. In *Iskanian*, the California Supreme Court held that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship" but is instead "a dispute between an employer and the *state*," and the FAA "aims to promote arbitration of claims belonging to the *private* parties to an arbitration agreement." 59

Cal.4th at 386, 388 (second emphasis added). The California Supreme Court compared PAGA actions to *qui tam* actions, since both types of suits allow for penalties that the plaintiff shares with the government. *Id.* at 382. The court thus found support in this Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), where this Court held that the EEOC could pursue an enforcement action on behalf of an employee regardless whether that employee was bound by an individual arbitration agreement. *Iskanian*, 59 Cal.4th at 386.

But as the Ninth Circuit recently recognized, PAGA and *qui tam* actions differ in significant respects. *Magadia*, 999 F.3d at 676–77. "[A] traditional qui tam action acts only as a *partial* assignment' of the Government's claim," as the "government remains the real party in interest throughout the litigation and may take complete control of the case if it wishes." *Id.* at 677 (emphasis in original, quotations omitted). The same was true of the EEOC's action in *Waffle House*, where the EEOC deprived the employee of an independent cause of action once it filed suit, had "exclusive jurisdiction" over the enforcement action, and remained "the master of its own case" throughout the litigation. 534 U.S. at 291.

By contrast, "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Magadia*, 999 F.3d at 677 (emphasis in original). If California declines to investigate or issue a citation after receiving notice of an alleged violation from an aggrieved employee, the employee may sue the employer and "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Id.* Once the aggrieved employee files a

PAGA claim in court, the dispute is solely between the employer and the aggrieved employee. The FAA should thus apply to PAGA claims just as it would to any other dispute between an employer and employee. *Iskanian*, however, held just the opposite, and created a massive loophole to the FAA that California employees have exploited in recent years to bypass agreements calling for the individual arbitration of disputes.

2. The *Iskanian* Rule Cannot Be Reconciled With *Epic Systems*

Iskanian's holding that PAGA claims cannot be arbitrated on an individual basis even when an employee and an employer have agreed to resolve all disputes through individual arbitration cannot survive *Epic Systems*. This Court held that parties may "agree that any disputes between them will be resolved through one-on-one arbitration," and that courts must enforce arbitration agreements—"including terms providing for individualized proceedings"—according to their terms. *Epic Sys.*, 138 S. Ct. at 1619.

This Court further explained in *Epic Systems* that the FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of the arbitration agreement[]." 138 S. Ct. at 1621, 1623. Therefore, "the only solution that gives proper effect to the parties' expressed intent" is to "enforce the parties' agreement" to arbitrate all disputes between them "on an individual basis"—including disputes asserted under PAGA. *Rivas*, 842 F. App'x at 57 (Bumatay, J., concurring).

Epic Systems also held that even a federal statute embodying important federal policy interests cannot be construed as overriding private arbitration. This Court assumed that the NLRA created a federal right to collective action, and was based on important policy goals of vindicating federal labor laws. *Epic Sys.*, 138 S. Ct. at 1622. But the Court still held that employees' individual arbitration agreements had to be enforced according to their terms. *Id.* at 1632. Although "[t]he policy may be debatable . . . the law is clear: Congress has instructed that arbitration agreements . . . must be enforced as written." *Id.* If the FAA requires courts to enforce individual arbitration agreements even where a federal statutory scheme or policy is seemingly to the contrary, then *a fortiori*, it also requires enforcement of individual arbitration agreements where a law based on a state statutory scheme and state public policy contradicts the FAA.

In *Sakkab*, the Ninth Circuit nonetheless held that the *Iskanian* rule was consistent with the FAA because it supposedly was a generally applicable contract defense in that it "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." 803 F.3d at 432. But as Judge Bumatay has explained, a generally applicable contract defense "must apply to *any* contract," not just contracts involving PAGA claims, and "the defense must concern the *revocability*—not enforceability—of the arbitration agreement." *Rivas*, 842 F. App'x at 59 n.2 (Bumatay, J., concurring) (emphasis in original) (citing *Concepcion*, 563 U.S. at 352–55 (Thomas, J., concurring)).

C. The *Iskanian* Rule Will Continue To Be The Law In California Until This Court's Decision In *Viking River*

Epic Systems and *Concepcion* have "seriously undermined" the California Supreme Court's and Ninth Circuit's holdings that the FAA does not preempt the *Iskanian* rule. *Rivas*, 842 F. App'x at 57. Yet both courts have refused to course correct on their own.

The California Court of Appeal has been unwilling to disturb the *Iskanian* rule because they remain bound by controlling state Supreme Court authority. *See*, *e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 179 (Cal. Ct. App. 2019) ("We additionally determine we remain bound by *Iskanian*."). And the California Supreme Court has refused to reconsider whether the *Iskanian* rule remains good law in light of *Epic Systems*, despite its duty to do so. *See*, *e.g.*, *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) (state courts are "bound by th[e] Court's interpretation of federal law"). The California Supreme Court has denied review on this exact issue at least ten times. *See Green v. Shipt, Inc.*, No. S272030 (Cal. Jan. 19, 2022) (petition for review denied); *Winns v. Postmates*, No. S270638 (Cal. Oct. 13, 2021) (same); *Rosales v. Uber Techs., Inc.*, No. S269214 (Cal. Aug. 11, 2021) (same); *Santana v. Postmates*, No. S267574 (Cal. Apr. 14, 2021) (same); *Gregg v. Uber Techs., Inc.*, No. S269000 (Cal. June 30, 2021) (same); *Schofield v. Skip Transport*, No. S267967 (Cal. May 12, 2021) (same); *Campbell v. DoorDash*, No. S266497 (Cal. Mar. 10, 2021) (same); *Rimler v. Postmates*, No. S266718 (Cal. Feb. 24, 2021) (same); *Provost v. YourMechanic*, No. S265736 (Cal.

Jan. 20, 2021) (same); *Moriana v. Viking River Cruises, Inc.*, No. S265257 (Cal. Dec. 9, 2020) (same).

For its part, the Ninth Circuit recently reaffirmed *Sakkab* and declined to grant rehearing en banc. *Rivas*, 842 F. App'x at 57; *Rivas v. Coverall N.A., Inc.*, No. 20-55140, Dkt. 44 (9th Cir. Apr. 6, 2021). Though the panel in *Rivas* was bound by *Sakkab*, Judge Callahan stated throughout oral argument that *Sakkab*—and, by extension, the *Iskanian* rule at the center of *Sakkab*—is "problematic" and in "tension" with recent U.S. Supreme Court precedent. Oral Argument at 4:38 (9th Cir. Nov. 19, 2020) *Rivas v. Coverall North America*, No. 20-55140, https://bit.ly/3x6ee67.

Judge Bumatay similarly recognized that "[t]he tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious." *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring). While *Sakkab* required the panel to affirm the district court's holding that the arbitration agreement was unenforceable because it included an implied PAGA waiver, that conclusion "undermines the parties' promises to each other and potentially upends all arbitration agreements" if, as California courts have held, "a party may always sidestep an arbitration agreement simply by filing a PAGA claim." *Id.* at 58 & n.1 (Bumatay, J., concurring). Judge Bumatay also noted that "the writing is on the wall that the [U.S. Supreme] Court disfavors our approach" to the *Iskanian* rule, and encouraged his colleagues to "listen to what the Court is telling us and revisit our precedent before again being forced to do so." *Rivas*, 842 F. App'x at 58–59.

It is clear that California courts will enforce *Iskanian* until a decision is reached in *Viking River*.

CONCLUSION

The Court should hold this Petition for a Writ of Certiorari pending a decision in *Viking River*, then grant this Petition, vacate the California Court of Appeal decision, and remand to the California Court of Appeal with instructions to follow the *Viking River* decision.

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February 2, 2022