No. 21-1079

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 13, 2022

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REPLY BRIEF FOR PETITIONER

This Petition presents an important legal question about the continued viability of the California Supreme Court's rule that mandates the availability of representative PAGA actions even where parties agreed to resolve disputes on an individual basis in bilateral arbitration. In fact, this Court granted review of this very same issue just last year in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 734 (2021). Given that the Court is already poised to determine whether the FAA preempts the rule announced in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014), and requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise PAGA claims in court, Shipt requested that this Court hold this Petition while *Viking River* is pending, and then grant this Petition, vacate the decision below, and remand to the California Court of Appeal once *Viking River* is decided.

This Court regularly holds petitions pending decisions for overlapping petitions which have been granted review. Pet. 18–19. The Court has several similar petitions pending before it, all of which turn on the resolution of *Viking River*. *See Uber Techs., Inc. v. Rosales*, No. 21-526; *Uber Techs., Inc. v. Gregg*, No. 21-453; *Postmates, LLC v. Winns*, No. 21-1246; *Postmates, LLC v. Rimler*, No. 21-119.

Respondent does not address Shipt's request for this Court to hold this Petition pending the resolution of *Viking River*. To the contrary, Respondent concedes that *Viking River* will very likely "impact . . . the lower court decision" in this case. Opp. 4–5. Yet despite that concession, Respondent argues at length that the question presented here—despite the granting of

certiorari on that same question in *Viking River*—does not warrant this Court's review. Respondent also disputes Shipt's review of the merits. The Court need not dwell on these issues given *Viking River* and the relief that Shipt has requested in the Petition. In any event, Respondent's view of the law is wrong.

Respondent argues that review is not warranted because the *Iskanian* rule does not conflict with this Court's precedents. But representative PAGA actions, in all material respects, are just like the class and collective actions at issue in *AT&T Mobility LLC v. Concepcion*, 568 U.S. 333, 344 (2011), and *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Respondent also asserts that enforcing agreements to arbitrate PAGA claims on an individual basis would infringe upon California's police powers and ability to enforce its laws. But enforcement of Respondent's agreement to arbitrate will have no impact on California's right to seek penalties for violations of its Labor Code, as it remains free to bring its own enforcement action or deputize other individuals who have not agreed to bilateral arbitration of their claims against Shipt.

Respondent contends that the *Iskanian* rule is not "hostile" to arbitration, but this ignores this Court's holding in *Concepcion* that state laws cannot interfere with a fundamental attribute of arbitration by allowing a party to demand proceedings—like PAGA actions—different from the individualized and informal nature of arbitration. The *Iskanian* rule imposes procedures incompatible with individual arbitration, just as class and collective actions imposed incompatible procedures in *Epic Systems* and *Concepcion*.

A. *Iskanian* Conflicts with the Logic of *Epic Systems* and *Concepcion*

Respondent asserts that *Iskanian* is consistent with *Epic Systems* and *Concepcion* and that Shipt does not cite a decision from this Court holding that "the FAA requires enforcement of an arbitration agreement that waives a claim rather than requiring its arbitration." Opp. 15. In Respondent's view, the agreements in *Epic Systems* and *Concepcion* waived only "procedural device[s]" that did not affect the ability to assert substantive claims. Opp. 10. This argument rests on the flawed premise that PAGA creates a "substantive right," Opp. 19, and is a type of substantive claim in and of itself. But PAGA "does not create . . . any . . . substantive rights." *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009).

Instead, PAGA is a procedural vehicle—a mechanism for pursuit of claims on a representative basis that is akin to a class or collective action—through which an individual may vindicate certain underlying substantive claims for violations of California's Labor Code with respect to not only himself but also his co-workers. *See, e.g.*, *Wesson v. Staples the Off. Superstore, LLC*, 283 Cal. Rptr. 3d 846, 859 (Ct. App. 2021).

Respondent nevertheless maintains that PAGA is a substantive claim, and that Shipt is seeking a decision that "bar[s] an individual from asserting *any* claim that she could otherwise assert in a bilateral proceeding." Opp. 16, 18. That is incorrect. Shipt is not attempting to excuse itself from liability for specific claims—it seeks only to enforce a bargained-for agreement as to the forum and procedure for dispute resolution. The Class Action Waiver here did

not waive the substantive, "statutory claim[s]" for violations of the California Labor Code; instead, Respondent chose to resolve all disputes—including disputes about purported violations of the Labor Code, like the one here—in an arbitral forum and on an individual basis. Pet. 15. By doing so, Respondent agreed to bring these claims only on an individual basis and not via representative vehicles, whether it be under PAGA, the FLSA, or Federal Rule of Civil Procedure 23. There has been no "prospective waiver of the substantive right." *14 Penn Plaza LLC v. Pyett*, 566 U.S. 247, 265 (2009).

Respondent's assertion that the parties' agreement "forecloses any assertion of a PAGA claim, in any manner, in any forum," Opp. 17—even assuming that is true—is no different from the arguments rejected in *Concepcion* and *Epic Systems*, where the plaintiffs complained that they entered into agreements waiving their abilities to proceed with a "class-action claim" or a "collective-action claim" in any forum. The logic of *Concepcion* and *Epic Systems* thus applies equally here. And under those decisions, the FAA requires enforcement of arbitration agreements "according to their terms—including terms providing for individualized proceedings." *Epic Sys.*, 138 S. Ct. at 1619.

Respondent resists that conclusion by asserting that enforcement of an agreement to arbitrate on an individual basis here would effectively waive the rights of California and impinge upon the state's police powers. Opp. 20, 22. But enforcing the arbitration agreement as to a PAGA claim will not waive California's right to seek penalties for violations of its Labor Code. Instead, it would only mean that Respondent will not be allowed to pursue

such a claim on a representative basis. California remains able to bring enforcement actions on its own accord, and is able to deputize those who did not sign agreements to arbitrate on an individual basis. And Respondent can pursue claims for any purported Labor Code violations that she alleges she suffered in arbitration on an individual basis.

B. *Iskanian* Is Hostile to Arbitration and to Contractual Rights of Parties

Respondent argues that "*Iskanian* and *Sakkab* do not reflect hostility to arbitration" because their holdings that the FAA does not preempt the *Iskanian* rule apply evenly to all types of agreements, not just to arbitration agreements. Opp. 22–23. But this focus on "hostility" is misplaced: the relevant inquiry under this Court's precedent is whether the state law "interfere[s] with a fundamental attribute of arbitration" by allowing a party to an arbitration agreement to demand proceedings different from "the traditionally individualized and informal nature of arbitration." *Epic Sys.*, 138 S. Ct. at 1622–23. And the *Iskanian* rule *does* in fact "'impermissibly disfavor[] arbitration' by targeting its bilateral nature and rendering a contract 'unenforceable *just because it requires bilateral arbitration*'" of individual claims, rather than proceeding with a representative PAGA action in court. *Id.* at 1623.

The *Iskanian* rule "effectively impose[s] procedures incompatible with arbitration," just as class and collective actions imposed incompatible procedures in *Epic Systems* and *Concepcion*. Pet. 21–22. PAGA actions, like class actions, undermine traditional arbitration: these actions are "slower, more costly, and more likely to generate procedural morass"; they require more "procedural formality"

than individual arbitration; and they "greatly increase[] risks to defendants" by "aggregat[ing] and decid[ing] at once" the liability "owed to tens of thousands of potential claimants." *Concepcion*, 563 U.S. at 348–50. The parties did not agree to resolve the "higher stakes of" representative litigation in proceedings designed to adjudicate individual disputes with "great[] efficiency and speed." *Id.* at 348, 350.

Far from consistent with the fundamental attributes of arbitration, PAGA has become a vehicle to bypass the FAA and agreements to arbitrate. This is underscored by the fact that from the moment *Concepcion* was decided in 2011, the number of PAGA cases docketed annually in California skyrocketed, and has nearly quadrupled since.[1] Whether it was so intended or not, PAGA is being used as an end-run around this Court's decisions enforcing the FAA. In fact, it is now common practice for plaintiffs to repackage class actions as employer-wide PAGA actions when defendants invoke arbitration agreements. Plaintiff's own counsel admits as much: they refer to PAGA as "an effective go around of the federal Supreme Court." Blumenthal Nordrehaug Bhowmik De Blouw LLP, *What Is The Private Attorney General's Act And Why Should California Workers Care?*, tinyurl.com/s65dnmbr (last visited May 5, 2022).

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[1] In 2007, approximately 600 PAGA actions were filed in California; by 2014, more than 4,500 were filed; and in 2021, more than 6,500 were filed. *See* California Department of Industrial Relations, *Private Attorneys General Act (PAGA) Case Search*, https://cadir.secure.force.com/PagaSearch/PAGASearch (last visited May 5, 2022).

"Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Concepcion*, 563 U.S. at 351. Under the parties' agreement here, Respondent may proceed with arbitration against Petitioner only for individual relief for violations of the Labor Code. But what cannot happen is for Respondent to proceed in court on a representative basis, which is what will occur absent this Court's intervention.

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.

Respectfully submitted,

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