No. _____

IN THE
Supreme Court of the United States

HANDY TECHNOLOGIES, INC.,
Petitioner,

v.

PATRICK POTE,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal Second Appellate District, Division Seven

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Arbitration Act require enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act. In other words, does the FAA and this Court's precedent (e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018)) overrule the California Supreme Court's precedent in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014)?

This precise question is already pending before this Court in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (certiorari granted Dec. 15, 2021) and has been raised in numerous past and pending petitions for certiorari.

CORPORATE DISCLOSURE STATEMENT

Petitioner Handy Technologies, Inc. is a Delaware corporation wholly owned by its publicly traded parent company Angi, Inc., and the publicly traded company IAC/InterActiveCorp owns over 10% of Angi, Inc.

PARTIES TO THE PROCEEDING

All parties are listed in the caption:

- Handy Technologies, Inc. was the defendant in the Los Angeles County Superior Court and the appellant in the California Court of Appeal.
- Patrick Pote was the plaintiff in the Los Angeles County Superior Court and the respondent in the California Court of Appeal.

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:

- *Pote v. Handy Technologies, Inc.*, No. BC723965 (Cal. Super. Ct.), order issued Oct. 18, 2019;
- *Pote v. Handy Technologies, Inc.*, No. B302770 (Cal. Ct. App. 2d Dist. Div. 7), judgment issued Aug. 16, 2021;
- *Pote v. Handy Technologies, Inc.*, No. S271083 (Cal.), petition for review denied Nov. 10, 2021.

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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OPINIONS BELOW

The California Court of Appeal's opinion is available at 2021 WL 3615916 and reproduced in Appendix A. The order of the Superior Court of Los Angeles County is unpublished and reproduced in Appendix B. The California Supreme Court denied review in an order reproduced in Appendix C.

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on November 10, 2021. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

The Federal Arbitration Act, 9 U.S.C. §2, provides: "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."

INTRODUCTION

Handy Technologies urges this Court to review a judgment of the California Court of Appeal that—like numerous other California courts—continues to follow the California Supreme Court's opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, despite this Court's more recent precedent that is inconsistent with that opinion. Without this Court's intervention, plaintiffs in California will continue to evade federally favored arbitration by asserting claims under California's Private Attorneys General Act of 2004 ("PAGA"), a form of representative action. *See Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 58 & n.1 (9th Cir. 2021) (Bumatay, J., concurring, noting that a California plaintiff "may always sidestep an arbitration agreement by filing a PAGA claim"), *cert. petition pending* No. 21-268.

Petitioner Handy had sought to compel arbitration of various state law employment claims brought in state court by Respondent Patrick Pote. Handy and Pote had agreed to arbitrate any and all disputes. Pote, nonetheless, refused to arbitrate, forcing Handy to move to compel arbitration. Pote and Handy's agreements to arbitrate required arbitration on an individualized basis only rather than on a class or representative basis. Yet Pote insisted on pursuing a PAGA claim, which plaintiffs in California commonly invoke (instead of class actions) to avoid arbitration agreements.

The trial court denied Handy's motion to compel arbitration, and the court of appeal affirmed. Both courts relied on the California Supreme Court precedent of *Iskanian* for the proposition that

Pote's repeated contractual commitments not to pursue representative actions are invalid.

The court of appeal expressly noted that it was bound by the "controlling authority" of *Iskanian*, and that the question of whether *Iskanian* is incompatible with this Court's precedent (particularly *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)) "is properly addressed to the California Supreme Court or the United States Supreme Court." (App-14-15.) The California Supreme Court denied review, leaving this Court as the only—and most appropriate—venue for relief.

This Court should reverse and remand for arbitration. This Court's precedent has undermined *Iskanian*'s holding that representative action waivers are invalid.

This Court's review is warranted, both to reaffirm the FAA and the national policy in favor of arbitration, and to ensure that this Court's precedent (e.g., *Epic Systems*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)) is enforced to result in bilateral arbitration. As it stands, rather than being enforced, plaintiffs who have agreed to individual arbitration can circumvent it in California by bringing representational PAGA actions. PAGA should not be a procedural device that delivers the benefits of class action yet avoids the FAA's limitations.

This is not a new issue. Numerous petitions (both before and after *Epic Systems*) have presented precisely this same question. Most recently, this Court granted certiorari in *Viking*

River Cruises, Inc. v. Moriana, No. 20-1573 (cert. granted Dec. 15, 2021), presenting this issue. There is no doubt that this is issue is recurring and important. Therefore this Court should grant certiorari. At a minimum, this Court should hold and remand with instructions to follow this Court's eventual opinion in *Viking River Cruises*.

STATEMENT OF THE CASE

A. Handy's contracts with professional service providers include mutual arbitration provisions.

Handy operates a national online platform that enables customers in need of household services to connect with independent contractors to provide such services. To gain access to Handy's platform (and thus find jobs on the platform), a service professional must agree to Handy's Independent Contractor Acknowledgement and Service Professional Agreement. Both the Acknowledgement and the Agreement provide for mutual individual arbitration of any dispute between the service professional and Handy.

The Independent Contractor Acknowledgment includes the following statement: "I understand that the Handy Service Professional Agreement contains a Mandatory and Exclusive Arbitration provision which requires Handy and me to submit disputes to final and binding arbitration." Handy's Service Professional Agreement similarly contains a Mutual Arbitration Provision.

B. Pote enters into arbitration agreements with Handy and never opts out of arbitration.

In April 2018, Patrick Pote downloaded Handy's Pro Portal mobile application onto his phone and then used the app to confirm and accept Handy's Independent Contractor Acknowledgement and Service Professional Agreement. Specifically, in the Independent Contractor Acknowledgement, Pote checked the box that reads, "I agree to the Service Professional Agreement," and selected the "Confirm" button. In so doing, he agreed to the Service Professional Agreement's Mutual Arbitration Provision and its binding nature, absent his opting out.

After reviewing and confirming the Independent Contractor Acknowledgement, Pote also specifically accepted the terms and conditions of the Service Professional Agreement by checking the box that read: "I agree to the Service Pro Agreement" and selecting the "Accept" button. These terms included a Mutual Arbitration Provision, which also included a specific representative action waiver.

Pote had the opportunity to opt-out of the Mutual Arbitration Provision because it contained a specific clause—titled "Service Professional's Right to Opt Out of Arbitration"—expressly providing that "Arbitration is not a mandatory condition of Service Professional's Contractual Relationship with Handy …." This clause provided a 30-day opt-out period in which Pote could have opted out simply by sending an email or otherwise providing notice of his opting out to Handy. Pote

never elected to opt out of the Mutual Arbitration Provision.

C. Pote provides PAGA notice in September 2018, and then sues Handy in early October 2018.

In September 2018, Pote served a notice of intent to sue Handy under PAGA for various alleged Labor Code violations (i.e., overtime pay, travel time pay, missed meal and rest break pay, expense non-reimbursement, non-itemized wage statements). Pote's notice also alleged that his arbitration agreement with Handy was unenforceable under *Iskanian* because it included a representative action waiver.

On October 3, 2018, Pote filed a complaint against Handy alleging the violations listed in his notice of intent to sue.

D. In late October 2018, Pote then again enters into another arbitration agreement with Handy.

Whenever Handy changes its Independent Contractor Acknowledgement or Service Professional Agreement, service professionals must confirm and accept the new terms in app to maintain continued access to the Handy platform.

On October 26, 2018—over three weeks *after* he had sued Handy—Pote accepted updated versions of the Independent Contractor Acknowledgement and Service Professional Agreement, which were substantially similar to the agreements he had entered into in April of that year.

In particular, Section 12.2 of both the April and October 2018 Service Provider Agreements contain a Mutual Arbitration Provision, which provides:

> HANDY AND SERVICE PROFESSIONAL MUTUALLY AGREE TO WAIVE THEIR RESPECTIVE RIGHTS TO THE RESOLUTION OF DISPUTES IN A COURT OF LAW BY A JUDGE OR JURY AND AGREE TO RESOLVE ANY DISPUTE IN ARBITRATION, as set forth below. This Mutual Arbitration Provision is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) and shall survive the termination of this Agreement.
>
> [¶¶]
>
> EXCEPT AS EXPRESSLY PROVIDED BELOW, ALL DISPUTES AND/OR CLAIMS BETWEEN YOU AND HANDY SHALL BE EXCLUSIVELY RESOLVED IN BINDING ARBITRATION ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED.

The Mutual Arbitration Provision also contained a subsection (c) waiving any right to bring a representative action, which was amended in the October version to state:

> **(c) <u>REPRESENTATIVE ACTION WAIVER-PLEASE READ</u>** Handy and Service Professional mutually agree that

> by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a representative action, and an arbitrator shall not have any authority to arbitrate a representative action ("Representative Action Waiver"). Notwithstanding the foregoing, private attorney general representative actions brought prior to the effective date of this Agreement on behalf of the state under the California Labor Code are not arbitrable, not within the scope of this Agreement and may be maintained in a court of law, but any claim brought by Service Professional for recovery of underpaid wages (as opposed to representative claims for civil penalties) under the California Labor Code shall be arbitrable, and must be brought, if at all, on an individual basis in arbitration as set forth in this Mutual Arbitration Provision.

Pote again agreed to Handy's representative action waiver on October 26, 2018, while he was represented by counsel, and did so 42 days after his pre-lawsuit notice, and 23 days after filing his original complaint against Handy.

E. Pote files his operative complaint, and Handy moves to compel arbitration.

On November 19, 2018, Pote filed a First Amended Complaint, alleging two causes of action. Pote's first cause of action sought a declaration that the representative action waiver was "void against public policy and illegal" and thus unenforceable as to underpaid wages. Pote's second cause of action sought civil penalties and victim-specific unpaid wages for himself and other allegedly "aggrieved employees" under PAGA.

Handy answered with a general denial and affirmative defenses, including defenses that Pote's claims were subject to mandatory arbitration and that he was contractually obliged to arbitrate.

Handy demanded arbitration, based on Pote's agreement to the Independent Contractor Acknowledgements and Service Professional Agreements, but Pote refused. Handy then moved to compel arbitration.

F. California's courts refuse to compel arbitration, relying on *Iskanian*.

Handy moved to compel arbitration premised on Pote's having agreed to valid and enforceable contractual provisions requiring him to submit all of his claims to binding arbitration on an individual basis. Handy explained that Pote's claims for PAGA civil penalties were subject to individual arbitration under *Epic Systems*, because *Epic Systems* implicitly overruled *Iskanian*, to the extent that *Iskanian* prohibited individual arbitration of PAGA representative actions.

Pote argued that *Iskanian* remained valid law (despite *Epic Systems*), and therefore defeated Handy's position that its representative action waiver was enforceable.

The trial court concluded that under the binding authority of *Iskanian*, Handy's representative action waiver was unenforceable. The court of appeal affirmed, expressly noting that *Iskanian* was "controlling authority" and that whether *Iskanian* was incompatible with U.S. Supreme Court precedent was "properly addressed to the California Supreme Court or the United States Supreme Court." (App-14-15.) The California Supreme Court denied review—as it has done repeatedly when this issue has been presented to it.

ARGUMENT: REVIEW IS NEEDED TO CLARIFY THAT UNDER THIS COURT'S PRECEDENT, THE FAA PREEMPTS *ISKANIAN*

This Court should grant certiorari because the ruling against Handy conflicts with the FAA and this Court's FAA precedent. In particular, *Iskanian*'s rule invalidating representative-action waivers is inconsistent with this Court's most recent cases. California's *Iskanian* opinion reflects "judicial antagonism toward arbitration" and asserts a rule created to avoid "individualized arbitration" exactly as this Court cautioned against in *Epic Systems*, 138 S. Ct. at 1623.

In *Iskanian*, an employee sought to pursue a PAGA representative action against his employer despite having previously agreed to waive his right to do so in favor of individual arbitration of any

disputes with his employer. The California Supreme Court held that such pre-dispute waivers violate public policy and so are unenforceable. *Iskanian*, 59 Cal.4th at 360, 378-391. In reaching this conclusion, the court reasoned that although the strong national policy in favor of arbitration reflected in the Federal Arbitration Act as interpreted by this Court ordinarily would preempt any state law or policy to the contrary, the FAA was intended to govern only *private* disputes, whereas PAGA actions are actually disputes between an employer and the *State*. *Id.* at 384, 386-387, 381.

But four years after *Iskanian*, in *Epic Systems*, this Court reiterated that the FAA requires courts to "rigorously" enforce arbitration agreements according to their terms. *Epic Systems*, 138 S. Ct. at 1632 ("Congress has instructed that arbitration agreements [between private employers and employees] must be enforced as written."). This includes terms requiring "individualized rather than class *or collective action* procedures." *Id.* at 1621 (emphasis added).[1]

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[1] Indeed, whenever a legislature or court has tried to create a rule that lets parties avoid their arbitration agreements by bringing class, collective, or representative actions, this Court has struck it down. *See*, *e.g.*, *Kindred Nursing Centers Ltd. P'Ship v. Clark* (2017) 137 S.Ct. 1421, 1426-27 (2017); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012) (*per curiam*); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (*per curiam*); *Moses H. Cone Mem'l Hosp. v. Mercury*

Epic Systems thus reaffirmed the FAA's broad preemptive scope barring state law interference on whatever grounds, with arbitration provisions that clearly specify individual arbitration as the only agreed-upon dispute-resolution mechanism. *Iskanian*'s rationale—that enforcing an arbitration provision that requires an employee to give up his right to assert a representative PAGA claim in any forum would contravene public policy (59 Cal.4th at 359)—has no force in the wake of *Epic Systems*. *See* 138 S.Ct. at 1632.

There is no meaningful difference between the class action at issue in *Concepcion*, the collective actions at issue in *Epic*, and the representative PAGA action at issue here.

This Court's precedent squarely holds that states may not categorically place specific claims beyond the FAA's reach by conceptualizing them as particularly intertwined with state interests. What matters is whether the party who signed the arbitration agreement is seeking to litigate claims in contravention of the agreement. When that occurs—as here—the precise nature of the claims that the signatory seeks to pursue in contravention of the agreement does not matter.

California's courts, however, have not "read" *Epic Systems* to "invalidate" or "implicitly overrule" *Iskanian*. Instead, California courts read *Epic Constr. Corp.*, 460 U.S. 1, 24 (1983) (FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

Systems very narrowly, emphasizing that the case concerned the enforceability of an individualized arbitration requirement against an employee's collective claims under Fair Labor Standards Act and the National Labor Relations Act.[2]

Relying on this distinction—that *Epic Systems* confirmed the primacy of individualized arbitration provisions regardless of *federal* laws allowing representative actions but did not address similar *state* laws like California's PAGA—California courts reason that *Iskanian* and *Epic Systems* have not "decided the *same* question differently." The trial court here, for instance, focused on how "PAGA is fundamentally different" from the FLSA or federal class actions, because a PAGA action is one brought by an employee deputized by the State. (App-45.)

The question, however, is whether any of this makes any difference in light of the clear teaching of *Epic Systems*. The linchpin of the view that *Iskanian* survives *Epic Systems* is that in a PAGA representative action the plaintiff-employee is acting as the State.

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[2] The employees in *Epic Systems* agreed to individually arbitrate any disputes with their employer. 138 S. Ct. at 1619. But they nonetheless sued in court for violations of the FLSA and California law. *Id.* at p. 1620. When the employer moved to compel arbitration, the plaintiffs objected on the basis that the NLRA guarantees workers the right to assert wage and hour violations on behalf of one another. *Id.* at 1624.

But the notion that PAGA claims being pursued by private individuals belong to the State is a "legal fiction." *Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal., July 23, 2009, No. 2:09-cv-00459-JAM-JFM) 2009 WL 2230788, *3 (PAGA "represents a legal fiction—the aggrieved employee is enforcing California labor laws as if he or she was the Labor and Workforce Development Agency"). This legal fiction overlooks that in actuality PAGA both (1) allows the State itself to pursue claims it truly wishes to pursue, and (2), concomitantly, allows the State to relinquish control over claims it chooses not to pursue. So here, Pote provided notice to the State of his claims, and the State declined to prosecute them. The State thereby gave up control of the PAGA claim to Pote—who entered agreements to litigate all of his claims against his employer on an individual basis only, and only in arbitration, several times—including after being "deputized" by the State.

Thus, an individual employee can pursue a PAGA claim in arbitration. The employee is, of course, acting with the State's consent, evidenced by the State's declining to pursue the PAGA claim itself. But this also empowers the employee to agree to arbitrate PAGA claims. *See, e.g.*, *Valdez v. Terminix International Co. Ltd. P'ship* (9th Cir. 2017) 681 Fed.Appx. 592 (compelling arbitration of PAGA claims); *Wulfe v. Valero Ref. Co.-Cal.* (9th Cir. 2016) 641 Fed.Appx. 758, 760 (same); *Cabrera v. CVS Rx Servs., Inc.* (N.D.Cal. 2018) 2018 WL 1367323, *5 (compelling arbitration of PAGA claims, noting while PAGA claims cannot be

waived, "nothing prevents them from being arbitrated").

More fundamentally, and regardless of the precise nature of the relationship between the plaintiff-employee and the State, when the former is asserting a PAGA claim, the directive of *Epic Systems* could not be clearer: arbitration agreements are to be enforced according to their terms—full stop. That means that Pote's agreement to arbitrate his PAGA claims must be enforced, as his agreement indisputably encompasses such claims and state public-policy considerations of the sort relied on in *Iskanian* cannot be used to rewrite Pote's arbitration agreement.

Iskanian conflicts with federal law. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 440-50 (9th Cir. 2015) (Smith, N.R., dissenting, reasoning that the FAA should preempt *Iskanian* because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"). Only this Court is positioned to overrule *Iskanian* and the time has come to do so, either in this case or in any of the many pending cases now before this Court.

CONCLUSION

California courts will continue to apply *Iskanian* and to deny California employers the benefit of their bargains unless and until this Court intervenes. This Court's involvement is necessary to repudiate California law's blatant effort to evade the FAA and to ensure the continued vitality of this Court's precedent in *Concepcion*, *Lamps Plus*, and *Epic*.

Respectfully submitted,

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