No. _____

IN THE

Supreme Court of the United States

POSTMATES, LLC (F/K/A POSTMATES, INC.),
Petitioner,

v.

MELANIE WINNS, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

THEANE EVANGELIS
Counsel of Record
BLAINE H. EVANSON
BRADLEY J. HAMBURGER
DHANANJAY S. MANTHRIPRAGADA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tevangelis@gibsondunn.com

Counsel for Petitioner Postmates, LLC

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 Postmates, LLC raises here: whether the FAA preempts the rule in *Iskanian* v. *CLS Transportation Los Angeles, 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. Postmates 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 parties to these proceedings include Plaintiffs Melanie Ann Winns, Ralph John Hickey Jr., and Kristie Logan; and Defendant Postmates, LLC (f/k/a Postmates Inc.). *See* App.2a.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Postmates, LLC (f/k/a Postmates Inc.) is a wholly owned subsidiary of Uber Technologies, Inc.; and Uber is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Uber, Uber is unaware of any shareholder who beneficially owns more than 10% of Uber'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 San Francisco, the California Court of Appeal, and the California Supreme Court:

- *Winns* v. *Postmates Inc.*, No. CGC-17-562282 (Cal. Super. Ct.), order issued Sept. 24, 2018;
- *Winns* v. *Postmates Inc.*, No. A155717 (Cal. Ct. App.), opinion issued July 20, 2021;
- *Winns* v. *Postmates Inc.*, No. S270638 (Cal.), petition for review denied Oct. 13, 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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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 granted review in *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 734 (2021), to resolve this question. Postmates 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. 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.

The California Supreme Court and the Ninth Circuit have both 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. *Luxottica 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.

The California Supreme Court and the Ninth Circuit have repeatedly refused to reconsider these holdings 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* making clear 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).

Holding this Petition pending a decision in *Viking River* will give the court below the benefit of this Court's instructions regarding whether the PAGA waiver in the parties' arbitration agreement must 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." (emphasis omitted)). 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's decision, and remand to the Court of Appeal with instructions to follow *Viking River*.

OPINIONS BELOW

The California Supreme Court's order denying Postmates' petition for review is unpublished and is reproduced at App.1a. The California Court of Appeal's opinion is available at *Winns* v. *Postmates Inc.*, 66 Cal. App. 5th 803 (2021), and reproduced at App.2a. The judgment of the California Superior Court of San Francisco County is unpublished and is reproduced at App.19a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Supreme Court denied Postmates' petition for review on October 13, 2021.

This Court granted Postmates a 60-day extension to file its petition for a writ of certiorari. *See Postmates, LLC* v. *Winns, et al.*, No. 21A294 (Jan. 5, 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; alteration in original)), 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 held unequivocally that the FAA preempts state laws that interfere with 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 savings 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 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). These penalties can run into the hundreds of millions of dollars. *See Sakkab*, 803 F.3d at 448 (Smith, J., dissenting) (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) ("Even 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 985–86). 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 979–87. 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." *Magadia*, 999 F.3d at 677 (emphases in original). 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 "[t]he *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 as whether "employees and employers [should] 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 concluded that "[i]n the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*"—regardless whether the plaintiff attempts to bring a class, collective, or other type of representative action, and regardless 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 individualized 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 1621–22).

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

Postmates is a technology company that operates an online and mobile platform that connects consumers with local merchants and, if consumers request delivery, independent couriers to facilitate the purchase, fulfillment, and when applicable, local delivery of purchased products from merchants to consumers. *See* App.3a.

Couriers wishing to use Postmates' platform must first enter into the "Fleet Agreement." App.3a. The Fleet Agreement contains a conspicuous "Mutual Arbitration Provision" that "is governed exclusively by the [FAA]." App.4a (quotation marks omitted); *see also*, *e.g.*, *Lee* v. *Postmates Inc.*, 2018 WL 6605659, at *8 (N.D. Cal. Dec. 17, 2018) (applying the FAA to the

Mutual Arbitration Provision). "'Arbitration is not a mandatory condition of [couriers'] contractual relationship with Postmates,'" as couriers may opt out of arbitration by submitting an opt-out notice within 30 days of accepting the Fleet Agreement. App.4a. But couriers who do not opt out "'agree to resolve any disputes'" with Postmates "'exclusively through final and binding arbitration instead of filing a lawsuit in court.'" *Id.* It is undisputed that Plaintiffs accepted the Fleet Agreement but did not opt out of the Mutual Arbitration Provision within it, despite having had the opportunity to do so. App.5a.

The Mutual Arbitration Provision contains provisions entitled "Class Action Waiver" and "Representative Action Waiver." App.24a. Through these provisions, parties who choose not to opt out of arbitration agree not to bring a class, collective, or representative action, and that "any and all disputes or claims between the parties will be resolved in individual arbitration." *Id.* For instance, the Representative Action Waiver states that both parties "waive their right to have any dispute or claim brought, heard or arbitrated as a representative action, or to participate in any representative action, and an arbitrator shall not have any authority to arbitrate a representative action." *Id.*

Although Plaintiffs agreed to resolve all disputes with Postmates in individual arbitration, they filed their First Amended Complaint against Postmates in San Francisco Superior Court in December 2017, asserting individual and class claims under the California Labor Code and Unfair Competition Law, and representative claims under PAGA for which they sought civil penalties and statutory damages on

behalf of all couriers who used the Postmates app to complete deliveries in California. App.5a; Cal. Lab. Code § 2699(a).

Postmates filed a petition to compel arbitration and stay proceedings pending arbitration in January 2018. App.5a. After this Court decided *Epic Systems*, Postmates filed supplemental briefing, arguing that *Epic Systems* abrogated *Iskanian* to the extent the California Supreme Court held that PAGA waivers in arbitration agreements are unenforceable. App.6a. On September 24, 2018, the trial court granted in part and denied in part Postmates' petition to compel arbitration. App.34a. The court held that the parties' arbitration agreements were valid, but that Plaintiffs could not be compelled to arbitrate their PAGA claims under *Iskanian* and that *Epic Systems* did not abrogate *Iskanian* because it did not expressly address PAGA actions. App.32a–34a.

The California Court of Appeal affirmed on July 20, 2021. App.2a–18a. Relying primarily on four other California Court of Appeal decisions addressing the same issue, the court held that "*Epic Systems* did not overrule *Iskanian*" because this Court "did not decide or consider whether a worker may waive a right to bring a [PAGA] action on behalf of a state government." App.10a–13a.

Postmates sought review of the Court of Appeal's decision from the California Supreme Court, arguing that *Iskanian* should be revisited in light of *Epic Systems*. The California Supreme Court denied Postmates' petition for review on October 13, 2021. App.1a. On January 5, 2022, this Court granted Postmates a 60-day extension to file its petition for a

writ of certiorari. *See Postmates, LLC* v. *Winns, et al.*, No. 21A294 (Jan. 5, 2022).

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. 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 the 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." (emphasis omitted)); *Foster* v. *Alabama,* 577 U.S. 1188, 1188 (2016) (Thomas, J., concurring) (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

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 found support in this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), which 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). 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. *Iskanian* 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 since 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) (emphases 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 (Bumatay, J., concurring). 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.*, 32 Cal. App. 5th 602, 609 (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*, 577 U.S. 306, 307 (2016) (per curiam) (state courts are "bound by th[e] Court's interpretation of federal law"); *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 21 (2012) (per curiam) ("once the [Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law"). The California Supreme Court has denied review on this exact issue at least fifteen times. *See Galarsa* v. *Dolgen Cal.*, No. S272483 (Cal. Feb. 9, 2022) (petition for review denied); *Green* v. *Shipt, Inc.*, No. S272030 (Cal. Jan. 19, 2022) (same); *Mondragon* v. *Santa Ana Healthcare & Wellness Ctr.*, No. S271651 (Cal. Dec. 15, 2021) (same); *Pote* v. *Handy Techs.*, No. S271083 (Cal. Nov. 10, 2021) (same); *Malaspina* v. *Maplebear*, No. S270976 (Cal. Oct. 27, 2021) (same); *Winns* v. *Postmates,* No. S270638 (Cal. Oct. 13, 2021) (same); *Seifu* v. *Lyft, Inc.*, No. S269800 (Cal. Aug. 18, 2021) (same); *Rosales* v. *Uber Techs., Inc.*, No. S269214 (Cal. Aug. 11, 2021) (same); *Gregg* v. *Uber Techs., Inc.*, No. S269000 (Cal. June 30, 2021) (same); *Schofield* v. *Skip Transp.*, No. S267967 (Cal. May 12, 2021) (same); *Santana* v. *Postmates*, No. S267574 (Cal. Apr. 14, 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. Am.,*

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, *Rivas* v. *Coverall N. Am., Inc.*, No. 20-55140 (9th Cir. Nov. 19, 2020), 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. 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." *Id.* 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's decision, and remand to the California Court of Appeal with instructions to follow the *Viking River* decision.

Respectfully submitted,

THEANE EVANGELIS
Counsel of Record
BLAINE H. EVANSON
BRADLEY J. HAMBURGER
DHANANJAY S. MANTHRIPRAGADA
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tevangelis@gibsondunn.com

Counsel for Petitioner Postmates, LLC

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