No. 21-13

In The
Supreme Court of the United States

KINDERCARE EDUCATION, LLC,

Petitioner,

vs.

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF FOR RESPONDENT ROCHELLE WESTMORELAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the California Court of Appeal's decision to find Petitioner's arbitration agreement as unenforceable in light of an illegal waiver of Private Attorneys General Act ("PAGA") claims and an ***express*** nonseverability clause of said illegal PAGA waiver (consistent with other California precedent—*Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015) and *Kec v. Superior Court of Orange County*, 51 Cal. App. 5th 972 (2020) interpreting arbitration agreements with the very same provisions) violate *Lamps Plus v. Varela*, ___ U.S. ___, 139 S. Ct. 1407 (2019), the holding of which is not applicable to this case as it speaks to whether parties can impose classwide arbitration absent an express agreement in the arbitration agreement?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rochelle Westmoreland ("Respondent") answers Petitioner KinderCare Education, LLC's ("Petitioner" or "KinderCare") Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two's decision, filed January 29, 2021, in case number A159824, reversing the superior court's decision granting Petitioner's motion to compel arbitration and stay action, and thus denying Petitioner's motion in its entirety.

INTRODUCTION

Petitioner has tried to grasp at every straw possible to overturn the California Court of Appeal's ruling finding that its Mutual Arbitration Agreement Regarding Wages and Hours (the "Arbitration Agreement") is unenforceable. Notwithstanding the Court of Appeal's decision to follow state precedent in determining the enforceability of arbitration agreements with identical provisions as Petitioner's Arbitration Agreement, Petitioner is now raising a federal preemption issue in a desperate attempt for this Court to grant review. In this regard, Petitioner argues that there is a preemption issue under the Federal Arbitration Act ("FAA") as the Court of Appeal did not reference *Lamps Plus v. Varela*, ___ U.S. ___, 139 S. Ct. 1407 (2019) ("*Lamps Plus*"), arguing that *Lamps Plus* prohibits applying the doctrine of *contra proferentem* to interpret any and all

arbitration agreements. Petitioner's attempt to raise this very argument has been rejected by the California Court of Appeal (denying Petitioner's petition for rehearing on the writ of mandate) and by the California Supreme Court (denying Petitioner's petition for review).

Indeed, both the California Court of Appeal and the California Supreme Court recognized that this is not a case that involves FAA preemption—rather, it is a case of interpreting the **express** terms of an arbitration agreement to ascertain the intent of the parties. In this regard, the express terms of Petitioner's Arbitration Agreement provide for (1) a waiver of representative Private Attorneys' General Act ("PAGA") claims—which was found by the superior court to be illegal and Petitioner does not dispute such, and (2) a nonseverability provision that provides that if the PAGA waiver is found to be unenforceable, then the entirety of Petitioner's Arbitration Agreement is "invalid." Based on such provisions, the Court of Appeal found that the unenforceable PAGA waiver is not severable from the remainder of the Arbitration Agreement, and therefore, renders the entire Arbitration Agreement unenforceable. This decision is consistent with other California precedent interpreting identical provisions in arbitration agreements—*Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015) ("*Securitas*") and *Kec v. Superior Court of Orange County*, 51 Cal. App. 5th 972 (2020) ("*Kec*").

Petitioner now wishes to re-raise the same arguments again with this Court by *mischaracterizing* this

case as an issue involving federal interpretation. However, the Court of Appeal's interpretation of the Arbitration Agreement does not present a conflict with this Court's opinion in *Lamps Plus* in any manner. While this Court examined an ambiguity present in the arbitration agreement in *Lamps Plus*, it was an ambiguity that concerned **whether parties are to proceed with arbitration on an individual or class-wide basis**. The Court's analysis of that ambiguity resulted in the ruling that "[t]he general *contra proferentem* rule cannot be applied to **impose class arbitration** in the absence of the parties' consent." 139 S. Ct. at 1418 (emphasis added). The case at hand does not deal with an ambiguity regarding individual versus class-wide arbitration. On the contrary, it deals with whether the Arbitration Agreement is enforceable in light of the express provisions prohibiting enforcement—a matter of contract interpretation subject to state contract principles. *See Lamps Plus*, *supra*, at 1415 (state courts are permitted to "rely[ ] on state contract principles" in enforcing arbitration agreements); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts."). In light of this distinction, *Lamps Plus* is not applicable to this case. There is no federal preemption issue under the FAA warranting this Court's review as Petitioner suggests.

Moreover, this Court in *Lamps Plus* did not articulate a blanket prohibition of application of *contra proferentem* on **all** issues surrounding interpretation of arbitration agreements. Such a rule would have the unintended effect of granting employers the unrestricted freedom to draft vague arbitration agreements, knowing that even the vaguest and most confusing terms would be resolved in their favor and upheld in court. Thus, while the Court of Appeal here indicated that it "acknowledged" an ambiguity in the Arbitration Agreement and applied *contra proferentem* to construe any ambiguities against Petitioner as the drafter, it was correct in doing so. That decision did not conflict with *Lamps Plus*, as this Court never articulated and could not have intended a rule that prohibits the doctrine of *contra proferentem* on **all** issues regarding interpretation of arbitration agreements.

For the reasons above and further explained below, there is no reason for this Court to grant review. This Petition should be denied.

STATEMENT

A. The Relevant Terms of the Arbitration Agreement.

Respondent is a former employee of Petitioner. On April 25, 2016, Respondent signed the Mutual Arbitration Agreement Regarding Wages and Hours (the "Arbitration Agreement").

First, the Arbitration Agreement provides for a "Waiver of Class and Collective Claims," which states, in part, that "[a]ny arbitrator hearing my claim may **not**: . . . (iii) arbitrate any form of a class, collective, or representative proceeding." *See* CA Pet. Appx. 60 (emphasis added).

In addition, the Arbitration Agreement also does not have a provision specifically excluding representative PAGA claims. In this regard, the Arbitration Agreement provides for "Covered Claims" that are subject to and within the scope of the Arbitration Agreement. This includes "any statutory or common law legal claims . . . to fines or penalties, or any other claimed violation of wage-and-hour practices or procedures under local, state, or federal statutory or common law." CA Pet. Appx. 60. The Arbitration Agreement continues to identify claims that are excluded from the Arbitration Agreement. However, claims under the PAGA are **not** listed as one of the excluded claims from the Arbitration Agreement. *Id*. Thus, the Arbitration Agreement contemplates that claims under the PAGA will be included in the Arbitration Agreement, as PAGA claims are essentially claims for violation of wage-and-hour practices brought under state law on a representative basis.

Next, the Arbitration Agreement provides for a "Savings Clause & Conformity Clause," which states:

> If any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it

> shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected. ***Provided, however*, that if the Waiver of Class and Collective Claims is found to be unenforceable, then this agreement is invalid and any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction**, and such court shall be the exclusive forum for such claims.

CA Pet. Appx. 62.

As Petitioner explains, this clause explains what occurs when certain provisions under the Arbitration Agreement are found unenforceable. Following Petitioner's logic and by the Arbitration Agreement's own **express** terms, the Arbitration Agreement specifically provides that the Waiver of Class and Collective Claims is **not severable** in the event that it is found to be unenforceable.

B. Procedural History.

On January 24, 2019, Respondent filed a class action complaint against Petitioner in the San Francisco County Superior Court, alleging that Petitioner violated Labor Code §§ 201-203, 212, and 213, by issuing payment of final wages to separated employees in the form of a pay card without the employee's authorization and thus failing to timely and properly pay all

final wages to said separated employees. On February 26, 2019, Respondent filed her first amended complaint to add a representative claim for violation of the PAGA, Labor Code § 2698, *et seq.*, predicated on the same violations as her class claims.

After Respondent filed her lawsuit in court, Petitioner moved to compel arbitration based on the Arbitration Agreement. On January 13, 2020, the San Francisco County Superior Court issued its order granting Petitioner's motion to compel arbitration. While the Superior Court found that the PAGA action waiver from the "Waiver of Class and Collective Claims" was unenforceable—specifically finding said waiver to be "illegal" in light of California law, it nevertheless concluded that the PAGA waiver was severable from the Arbitration Agreement. CA Pet. Appx. 95. The Superior Court also acknowledged an ambiguity—that the Arbitration Agreement did not specify whether the *entire* Waiver of Class and Collective Claims or *any portion* of the Waiver of Class and Collective Claims must be deemed unenforceable to render the Arbitration Agreement invalid. *Id*. Nonetheless, rather than following *Securitas* to interpret the agreement as unenforceable, the Superior Court found in favor of Petitioner and granted Petitioner's motion. CA Pet. Appx. 97.

On March 13, 2020, Respondent filed a petition for writ of mandate in the California Court of Appeal, First Appellate District, seeking to reverse the Superior Court's decision upholding the Arbitration Agreement. CA Pet. Respondent's basis for reversal was

based on the Court of Appeal's decision in *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015), wherein the Court of Appeal held that an arbitration agreement containing a similar PAGA action waiver and nonseverability provision as here was unenforceable in its entirety. After analyzing both provisions and applying principles of contract interpretation, the Court of Appeal in *Securitas* found that the unenforceable PAGA waiver could not be severed from the arbitration agreement and rendered the arbitration agreement unenforceable in its entirety.

On June 25, 2020, Respondent submitted her reply in support of her petition for writ of mandate, notifying the Court of Appeal of a then-recent ruling from the Court of Appeal, Fourth District—*Kec v. Superior Court*, 51 Cal. App. 5th 972 (2020). CA Pet. Reply. The *Kec* opinion supports Respondent's petition, as *Kec* also addressed identical provisions that are contained in the Arbitration Agreement at issue and affirms the *Securitas* decision. Specifically, the arbitration agreement in *Kec* also contained an unenforceable PAGA waiver and an *express exception* to its nonseverability clause that specifically prohibits severance of the PAGA waiver in the event that it was found unenforceable.

On January 29, 2021, the Court of Appeal issued its order in favor of Respondent and granting Respondent's petition for writ of mandate. Pet. Appx. 2a. The Court of Appeal found that while the Superior Court correctly concluded that the PAGA waiver was unenforceable, it erred by severing the unenforceable PAGA

waiver from the remainder of the "Waiver of Class and Collective Claims" and the remainder of the Arbitration Agreement. Pet. Appx. 3a. Following *Securitas*, the Court of Appeal resolved the ambiguity against Petitioner as the drafter of the Arbitration Agreement. In light of that construction, the Court of Appeal found that the PAGA waiver was not severable from the rest of the Arbitration Agreement, and thus the entirety of the Agreement was unenforceable. Petitioner suggests that the Court of Appeal recognized "another possible construction" of the Arbitration Agreement, which is that the Arbitration Agreement would have been invalidated only if it called for arbitration of claims not subject to arbitration as a matter of law and thus assertion of PAGA claims is not sufficient to invalidate the Agreement as a whole. However, that was never articulated by the Court of Appeal in its Order. Rather, the Court of Appeal is acknowledging the ambiguity addressed by the Superior Court—whether the *entire* Waiver of Class and Collective Claims or *any portion* of the Waiver of Class and Collective Claims must be deemed unenforceable to render the Arbitration Agreement invalid. The Court of Appeal resolved this ambiguity against Petitioner as the drafter of the Arbitration Agreement.

On February 8, 2021, Petitioner submitted its petition for rehearing on the Court of Appeal's decision granting a writ of mandate. On February 17, 2021, the Court of Appeal denied Petitioner's request. CA Pet. ReHrg.

On February 26, 2021, Petitioner petitioned for review in the California Supreme Court arguing for review on the purported basis of FAA preemption under *Lamps Plus*. On March 18, 2021, Respondent submitted her answer to Petitioner's petition for review, addressing the reasons why review should not be granted. Specifically, Respondent explained that the Court would not need to interpret *Lamps Plus* in any manner, and thus the California Supreme Court does not have jurisdiction under California Rules of Court, Rule 8.500(b). *Lamps Plus* decided the issue of whether class arbitration must be permitted under an *enforceable* arbitration agreement that contained ambiguous phrases about individual or class arbitration. On the contrary, the issue with respect to the Arbitration Agreement here does not concern class-wide arbitration nor does it concern interpretation of *Lamps Plus*—there has never been a dispute between the Parties as to whether Respondent could compel her claims to arbitration on a class-wide basis. Thus, the issue cannot be characterized as pertaining to FAA preemption. Rather, as explained to the California Supreme Court, the issue here was whether the "Savings Clause & Conformity Clause" that ***expressly*** calls for nullification of the entirety of the Arbitration Agreement when the PAGA waiver is found to be unenforceable operate as a "poison pill" that rendered the Arbitration Agreement unenforceable in its entirety. In light of that reasoning, the California Supreme Court denied Petitioner's petition for review on April 28, 2021. Pet. Appx. 1a.

KINDERCARE'S PETITION SHOULD BE DENIED

A. The Court of Appeal's Construction of the Arbitration Agreement Is Not In Conflict With *Lamps Plus* and Thus It Does Not Present an Issue Meriting Review.

Contrary to Petitioner's contention, this is a not a case where there is a conflict between the state court's decision and a decision from this Court, nor is there an important federal preemption question for this Court to answer. The decision from the Court of Appeal was correct, and the Court of Appeal did not need to in an analysis of *Lamps Plus* in interpreting the Arbitration Agreement. In fact, *Lamps Plus* is not even applicable to this case as it **only prohibits application of *contra proferentem* to impose class arbitration absent an agreement to arbitrate on a class-wide basis**. *Lamps Plus* does not hold, as a general rule, that the applicability of the *contra proferentem* doctrine violates the FAA as a matter of law. Rather, *Lamps Plus* articulates a **narrow limitation** to application *contra proferentem*—that *contra proferentem* cannot be applied to interpret an arbitration agreement when doing so would **impose class-wide arbitration**, absent the parties' express agreement to do so in an arbitration agreement. As this is not a case that presents an issue of whether class-wide arbitration should be allowed in spite of *Lamps Plus*, an analysis of FAA preemption under *Lamps Plus* was and is not necessary and there is no reason for this Court to grant review.

In *Lamps Plus*, the Court was faced with an enforceable arbitration agreement that was ambiguous on whether arbitration should proceed on an individual basis or class-wide basis. 139 S. Ct. 1407, 1413. The dispute in *Lamps Plus* concerned whether the District Court correctly authorized class-wide arbitration despite these ambiguous terms. For procedural background, the employer in *Lamps Plus* moved to compel arbitration on an individual basis and to dismiss the lawsuit, which was granted by the District Court. *Id*. The employer then requested for individual arbitration, but the District Court authorized arbitration to proceed on a class-wide basis. *Id*. The employer then appealed to the Ninth Circuit, disputing that the District Court should not have compelled arbitration on a class-wide basis but rather on an individual basis. *Id*.

On appeal, the Ninth Circuit affirmed the District Court's order granting class-wide arbitration. 139 S. Ct., *supra*, at 1413. The Ninth Circuit found that the arbitration agreement was ambiguous on the issue of class arbitration. The agreement did not expressly authorize class arbitration, but there were phrases in the agreement that seemed to contemplate individual arbitration—i.e. contemplating "purely binary claims," as well as phrases that could be broadly construed to cover class arbitration—i.e. "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." *Id*. To resolve the ambiguity, the Ninth Circuit applied the *contra proferentem* doctrine and construed the ambiguity against the employer-drafter to allow for class arbitration. *Id*.

On review, this Court disagreed with the Ninth Circuit. The Court's sole focus was on the issue of whether there was mutual consent by the parties to class arbitration, which the Court found crucial when determining whether arbitration can proceed on a class-wide basis. 139 S. Ct. at 1415-16 (citing *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (holding that a party cannot be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so). This Court emphasized that the FAA's foundational principle is that arbitration is strictly a matter of consent, and discussed the fundamental difference between an individual and class arbitration:

> In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to general procedural morass than final judgment."

Id. at 1416. In light of this crucial difference, the Court reiterated that it cannot "infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so.'" *Id*. Because there was no express term allowing for class arbitration in the agreement, this Court thus

rejected the Ninth Circuit's application of the *contra proferentem* doctrine in that particular scenario—when the terms of an arbitration agreement are ambiguous as to class arbitration. As articulated by this Court, "**[t]he general *contra proferentem* rule cannot be applied to impose *class arbitration* in the absence of the parties' consent**." *Id*. at 1418.

In short, this Court only held that the general *contra proferentem* rule cannot be applied to impose class arbitration when the parties did not expressly consent to class arbitration in the arbitration agreement. This Court did not bar application of the *contra proferentem* rule when interpreting arbitration agreements altogether. As a result, the Court of Appeal's decision to apply the *contra proferentem* rule here to interpret the ambiguity against Petitioner with respect to the non-severability clause present in the "Savings Clause & Conformity Clause" was correct; it does not concern an ambiguity regarding individual vs. class-wide arbitration and there was no need to reference *Lamps Plus*. The Court should not adopt Petitioner's misinterpretation of the *Lamps Plus* holding as a blanket prohibition of the *contra proferentem* rule when interpreting any arbitration agreement. Such a rule would essentially provide employers with unrestricted freedom to draft vague and confusing arbitration agreements, and have those agreements interpreted in their favor absent *contra proferentem*. This cannot be what this Court envisioned as a result of *Lamps Plus*, as such a blanket prohibition of *contra proferentem* in all arbitration

agreements would unfairly benefit employers to the detriment of employees.

Petitioner suggests otherwise that the Court in *Lamps Plus* recognized yet another FAA doctrine that "ambiguities about the scope of the arbitration agreement must be resolved in favor of arbitration." However, even if that were the case, the Court of Appeal was correct not to apply *Lamps Plus* here as the issue here does not deal with the "scope" of arbitration. To elaborate, when this Court discussed that FAA doctrine in *Lamps Plus*, the Court cited to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), which discusses whether the arbitration agreement could be read as covering claims founded on statutory rights, and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), which dealt with whether the claim of fraud in the inducement was a claim that within the scope of the arbitration agreement. These cases concerned what types of claims would be subject to arbitration. Unlike those cases, the ambiguity presented in this Arbitration Agreement did not concern the "scope" of arbitration—i.e. whether arbitration should be individual vs. class arbitration, what claims were arbitrable, or whether state or federal law should apply to decide whether a claim was subject to the arbitration agreement. Rather, the ambiguity here concerned a threshold question about whether the Arbitration Agreement was even an enforceable agreement in light of the express terms calling to invalidate the Arbitration Agreement. Thus, the Court of Appeal did not divert from *Lamps Plus* in

interpreting the enforceability of the Arbitration Agreement, and there is no FAA preemption issue warranting review by this Court.

B. The Court of Appeal's Decision Is Consistent With Other State Court Opinions and Thus Review By This Court Is Not Warranted.

The Court of Appeal was correct to rely on the *Securitas* decision to interpret whether the nonseverability provision rendered the entirety of the Arbitration Agreement as unenforceable. The Court of Appeal's decision to do so is consistent with other California Court of Appeal cases that also relied on *Securitas* and state principles of contract interpretation in determining enforceability of an arbitration agreement. *See Kec v. Sup. Ct. of Orange County*, 51 Cal. App. 5th 972 (2020); *Juarez v. Wash Depot Holdings, Inc.*, 24 Cal. App. 5th 1197 (2018). Those cases are not "at odds on the issue of the use of *contra proferentem*" as Petitioner suggests. Rather, California courts presented with the same nonseverability clause have applied the same contract interpretation rules and have reached the same conclusion. A review of the analysis underlying these cases indicate that the Court of Appeal's decision to interpret Petitioner's Arbitration Agreement does not violate the FAA in any manner.

In *Securitas*, the Court of Appeal analyzed an arbitration agreement containing similar provisions as here: (1) a waiver of PAGA claims, and (2) a

nonseverability provision. The Court of Appeal found that the PAGA waiver was unenforceable in violation of public policy pursuant to *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Then the Court analyzed the nonseverability clause, which provides that the PAGA waiver cannot be severed from the entire arbitration agreement. Specifically, the clause said:

> [T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ('Class Action Waiver'). **Notwithstanding any other clause in this Agreement, the preceding sentence shall not be severable** from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action. . . .

Id. at 1114 (emphasis added). Looking to the **literal** terms of the nonseverability clause, the *Securitas* court deemed the entire agreement as unenforceable, finding that the terms of the arbitration agreement presented an "all-or-nothing proposition." *Id*. at 1126. In other words, if an employee asserts a class, collective, or representative claim, either the employee forgoes his or her right to arbitrate the claims, or the agreement is deemed unenforceable in the entirety and the parties have to resolve their claims in court. The *Securitas* court found the parties' "contractual intent" to be paramount in its determination—reasoning that "[w]hether a contract is entire or separable *depends upon its language and subject matter*, and this

question is one of construction to be determined by the court *according to the intention of the parties*." *Id*. at 1126 (emphasis in original). Thus, based on these principles, the Court looked to the express intent and indicated that it "**view[ed] this construction as clear**." *Id*. However, it indicated that its decision would stand even in the alternative as it would apply the *contra proferentem* rule to construe any ambiguities regarding severability against the drafter. *Id*. Also citing to *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) in its decision, the *Securitas* court noted the rule that the "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." Thus, the express intent of the parties as written in the arbitration agreement correctly guided the Court of Appeal in its analysis here. The FAA clearly does not prohibit applying general rules of contract interpretation to arbitration agreements, and Petitioner's suggestion that *Securitas* must give way to *Lamps Plus* on the issue of FAA preemption is illogical and must be rejected. In short, *Securitas* does not contradict the FAA.

Securitas has been relied upon by other California courts. In *Juarez v. Wash Depot Holdings, Inc*., 24 Cal. App. 5th 1197 (2018), the Court of Appeal examined an arbitration agreement in an employee handbook that also contained an illegal PAGA waiver, and an English-version of the employee handbook which allowed for severance of the PAGA waiver, and a Spanish-version of the employee handbook which provided that the PAGA waiver as not severable from the arbitration

agreement. The Court of Appeal affirmed the trial court's ruling denying the employer's motion to compel arbitration finding that the trial court was correct to decline severance of the PAGA waiver. *Id*. at 1203. Citing to *Securitas* and also applying the *contra proferentem* rule, the Court of Appeal construed the ambiguity regarding severance vs nonseverance against the employer-drafter. *Id*. The Court noted that *contra proferentem* should apply "with particular force" to such agreements as concerns regarding adhesive contracts would come into play. *Id*. As the Court stated, the employer "may have left the meaning of severability 'deliberately obscure, intending to decide at a later date what meaning to assert.'" *Id*. This same concern is precisely why a blanket rule prohibiting *contra proferentem* to the interpretation of all arbitration agreements would make no sense.

Recently, the Court of Appeal also reaffirmed *Securitas* in *Kec v. Sup. Ct. of Orange County*, 51 Cal. App. 5th 972 (2020), wherein the Court of Appeal again analyzed the same invalid PAGA waiver and nonseverability provision present in an arbitration agreement. Significantly, *Kec* followed *Securitas* and also ruled against enforcement of the arbitration agreement in the entirety. Section 5 of the *Kec* arbitration agreement contained a PAGA waiver that states: "The Parties waive the right to bring, join, participate in, or opt into, a class action, collective action, or other representative action whether in court or in arbitration." 51 Cal. App. 5th at 976. The arbitration agreement continues, "The Section (Section 5) may not be modified or severed

from this Agreement for any reason." *Id*. The arbitration agreement also contains a "blow-up provision" that provides:

> **Except for Section 5**, if any provision of this Agreement is held by a court of competent jurisdiction or an arbitrator to be invalid, void, or unenforceable, the remaining provisions shall, nevertheless, continue in full force without being impaired or invalided in any way. **If Section 5 is found by a court of competent jurisdiction to be, in any way, unlawful, invalid, void or otherwise unenforceable, the Agreement becomes null and void as to employee(s) who are parties to that particular dispute**, for purposes of that dispute in the jurisdiction of the court delivering the ruling. I**f Section 5 is found by a court of competent jurisdiction to be, in any way, unlawful, invalid, void or otherwise unenforceable, any class claims, collective claims, or any other representative claims may only be brought in a court of competent jurisdiction.**

Id. (emphasis added). Citing to *Securitas* and applying principles of contract interpretation, the Court found that this blow-up provision specifically made the PAGA waiver nonseverable and thus the entire arbitration agreement was not enforceable. *Id*. at 978 ("We interpret the arbitration agreement as we would any other contract. 'The fundamental rule is that interpretation of . . . any contract . . . is governed by the mutual

intent of the parties at the time they form the contract."). As stated by the *Kec* Court:

> Had the parties intended to permit defendants to proceed with arbitration notwithstanding an invalid waiver of representative claims, they would have simply made that provision severable, like every other term in the agreement. But that is not what they did. Instead, by specifically making section 5 *not* severable, the agreement evinces an intent *not* to allow defendants to selectively enforce the arbitration agreement.

Id. at 979 (emphasis in original). Thus, *Kec* reaffirms *Securitas* that when presented with an invalid PAGA waiver and a nonseverability clause that ***expressly*** prevents severance of said PAGA waiver, that speaks to the intent of the parties to make entire agreement unenforceable. These are the same principles that the Court of Appeal applied in finding Petitioner's Arbitration Agreement unenforceable in the entirety.

As shown above, the analysis of the Court of Appeal in these cases do not invoke/involve any FAA preemption issue. Nor were they raised in the Court's discussions in any of these cases. Contrary to Petitioner's argument, there is no attempt by California appellate courts "to invalidate properly enforceable arbitration agreements in violation of the strong federal policy in favor of arbitration," as Petitioner's Arbitration Agreement was not a "properly enforceable" agreement by its very own terms. Petition, at p. 14. The Court of Appeal was correct to rely on the *Securitas*

and *Kec* opinions in interpreting the enforceability of the Arbitration Agreement at issue as they contained identical provisions. California courts presented with the same nonseverability clauses have applied the same rules of interpretation and have reached the same conclusion. In sum, there is no conflict presented such that it warrants review by this Court.

Petitioner also attempts to justify review by this Court on the basis that review of arbitration disputes are recurrent in the California appellate courts, and thus this Court must have the final say regarding interpretation of arbitration agreements. While there is some merit to Petitioner's position in that arbitration agreements are reviewed all the time, there is no legitimate reason for this Court to review ***every single issue*** regarding interpretation of an arbitration agreement. Contractual interpretation, including that of arbitration agreements, is long acknowledged as a state issue. As recognized by this Court, "the interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen*, *supra*, 559 U.S. at 681. The FAA allows state courts to enforce arbitrations relying on state contract principles. *Lamps Plus*, *supra*, 139 S. Ct. at 1415. This is simply another case where the state appellate court correctly applied state rules of contract interpretation to the specific language to interpret an arbitration agreement. As such, there is no reason for this Court to grant review.

CONCLUSION

For all the reasons articulated above, Respondent respectfully urges the Court to deny KinderCare's petition for writ of certiorari.

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