No. _____

In the Supreme Court of the United States

SANTA ANA HEALTHCARE & WELLNESS CENTRE, LP; ROCKPORT HEALTHCARE SUPPORT SERVICES, LLC; ROCKPORT ADMINISTRATIVE SERVICES, LLC; COUNTRY VILLA PLAZA,
Petitioners,

v.

RUBYANN MONDRAGON,
Respondent.

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

PETITION FOR A 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.*, *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407; *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018); *Kindred Nursing Ctr. L.P. v. Clark*, 137 S.Ct. 1421 (2017)) overrule the California Supreme Court's precedent in *Iskanian v. CLS Transp. 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.

PARTIES TO THE PROCEEDING

Petitioners Santa Ana Healthcare & Wellness Centre, LP, Rockport Healthcare Support Services, LLC, Rockport Administrative Services, LLC, and Country Villa Plaza were the defendants in the Los Angeles County Superior Court and the appellants in the California Court of Appeal. Respondent Patrick Pote was the plaintiff in the Los Angeles County Superior Court and the respondent in the California Court of Appeal.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The California Court of Appeal's opinion is unpublished but can be found at 2021 WL 4436388 and is reproduced as Appendix A. The California Supreme Court denied review in an order reproduced as Appendix B.

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on December 15, 2021. This petition is being filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §2, provides: "A written provision in any . . . 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

Petitioners 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 Santa Ana Healthcare & Wellness Centre, LP ("Santa Ana") had sought to compel arbitration of various state law employment claims brought in state court by Respondent Rubyann Mondragon. Respondent and Santa Ana had agreed to arbitrate any and all disputes. Respondent nonetheless refused to arbitrate, forcing petitioners to move to compel arbitration. Respondent and Santa

Ana's agreements to arbitrate required arbitration on an individualized basis only rather than on a class or representative basis. Yet respondent insisted on pursuing a PAGA claim, which plaintiffs in California commonly invoke (instead of class actions) to avoid arbitration agreements.

The trial court denied petitioners' 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 respondent's repeated contractual commitments not to pursue representative actions are invalid.

The court of appeal expressly noted that it was "bound by *Iskanian*" as long as "the specific issues before the *Iskanian* court have not been decided by the United States Supreme Court." (App. A at 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 as its 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 its precedent 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. The Arbitration Agreement

In December 2017, respondent began employment with petitioner Santa Ana as a medication technician at co-petitioner Country Villa Plaza ("Country Villa"), a nursing facility. (App. A at 2-3.)

As part of her employment agreement, respondent signed an arbitration agreement ("Agreement") in which she agreed to arbitrate "any dispute arising out or related to my employment [and/or] the terms and conditions of my employment. (App. A at

2-4.) Respondent also agreed, "IN ADDITION, I UNDERSTAND I AM PROHIBITED FROM JOINING OR PART[I]CIPATING IN A CLASS ACTION OR REPRESENTATIVE ACTION, ACTING AS A PRIVATE ATTORNEY GENERAL OR REPRESENTATIVE OF OTHERS, OR OTHERWISE CONSOLIDATING A COVERED CLAIM WITH THE CLAIM OF OTHERS." (AA 188-189; Opn. at 2-4.)

B. California's Courts Refuse to Compel Arbitration, Relying on *Iskanian*

In July 2019, respondent sued Santa Ana, Country Villa, and related entities, seeking civil penalties under PAGA for alleged wage, meal break, and rest period violations. (App. A at 2, 4.) Petitioners moved to compel arbitration under the Agreement. (App. A at 2, 5.) The trial court denied the motion on the ground that it was bound by *Iskanian*, "which held that agreements to waive the right to bring PAGA representative actions were unenforceable." (App. A at 2, 6.)

On appeal, petitioners argued that *Iskanian* now "conflicts with controlling United States Supreme Court authority." (App. A at 2, 9-10.) In an opinion issued on September 28, 2021, the Court of Appeal agreed with the trial court and held that "the specific issues before the *Iskanian* court have not been decided by the United States Supreme Court

and we too remain bound by *Iskanian*. As such, respondent's PAGA waiver remains unenforceable. (*See* App. A at 14-15.) The California Supreme Court denied review, as it has done repeatedly when this issue has been presented to it. (*See* App. B.)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the ruling against petitioners 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 FAA 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, 378-91. In reaching this conclusion, the court reasoned that although the strong national policy in favor of arbitration reflected in the FAA 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, 386-87, 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]

Epic Systems thus reaffirmed the FAA's broad preemptive scope barring state law interference on whatever grounds, with arbitration provisions that

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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*, 137 S.Ct. at 1426-27; *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. 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").

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 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 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." (*See* App A. at 10-13.)

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.

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) 2009 WL

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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.

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, respondent provided notice to the State of her claims, and the State declined to prosecute them. The State thereby gave up control of the PAGA claim to respondent--who entered agreements to litigate all of her claims against her 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 Int'l 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 respondent's agreement to arbitrate her PAGA claims must be enforced, as her agreement indisputably encompasses such claims and state public-policy considerations of the sort relied on in *Iskanian* cannot be used to rewrite respondent'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.

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 *Lamps Plus*, *Epic Systems*, and *Kindred Nursing*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 15, 2022

APPENDIX

Appendix A:

Opinion of the California Court of Appeal

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RUBYANN MONDRAGON, Plaintiff and Respondent, v. SANTA ANA HEALTHCARE & WELLNESS CENTRE, LP, et al., Defendants and Appellants.	B307872 (Los Angeles County Super. Ct. No. 19STCV26878)

APPEAL from an order of the Superior Court of Los Angeles County, Rupert A. Byrdsong, Judge. Affirmed.

Fisher & Phillips, Grace Y. Horoupian, Christopher M. Ahearn and Raymond W. Duer for Defendants and Appellants.

Cohelan Khoury & Singer, Michael D. Singer, Kristina De La Rosa; Hekmat Law Group and Joseph M. Hekmat for Plaintiff and Respondent.

Plaintiff Rubyann Mondragon (Mondragon) sued her former employer, Santa Ana Healthcare & Wellness Centre (Santa Ana), seeking civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab Code, § 2698 et seq.) for various wage, meal break and rest period violations. Santa Ana moved to compel "individual" arbitration under the parties' arbitration agreement, which provides that arbitration shall be the exclusive forum for any dispute, and which prohibits employees from joining or bringing a "representative action" or "acting as a private attorney general or representative of others."

The trial court denied Santa Ana's motion, concluding that it was bound by the California Supreme Court decision in *Iskanian v. CLS Transportation Los Angeles*, LLC (2014) 59 Cal.4th 348 (*Iskanian*), which held that agreements to waive the right to bring PAGA representative actions were unenforceable. It rejected Santa Ana's contention that several intervening United States Supreme Court cases rendered the *Iskanian* rule invalid.

On appeal, Santa Ana renews its assertion that *Iskanian* was wrongly decided and conflicts with controlling United States Supreme Court authority. However, the specific issues before the *Iskanian* court have not been decided by the United States Supreme Court and we too remain bound by *Iskanian*. As such, Mondragon's PAGA waiver remains unenforceable.

We also reject Santa Ana's suggestion that Mondragon's PAGA action can be split off into an individual arbitrable claim. As explained in *Iskanian*, forcing a plaintiff to arbitrate a PAGA claim for penalties as a single-claimant procedure would frustrate the core objectives of the PAGA.

As there is nothing in Mondragon's PAGA-only complaint to compel arbitration, we affirm the trial court's order.

BACKGROUND

From December 18, 2017 to April 3, 2019, Mondragon was employed by Santa Ana as a nurse and medication technician. Throughout her employment Mondragon worked at Country Villa Plaza, a skilled nursing facility operated by Santa Ana.[1] On December 18, 2017, as a condition of her employment, Mondragon signed an agreement to be bound by an alternative dispute resolution (ADR) policy (the Arbitration Agreement).[2]

A. The Arbitration Agreement

The ADR policy states, in relevant part: "The ADR [p]olicy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES, ON THE ONE HAND, AND YOUR EMPLOYER, AND/OR ITS EMPLOYEES AND OFFICERS . . . ON THE OTHER HAND. . . . [¶] For parties covered by this [ADR] [p]olicy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes . . . . [¶] . . . [¶] Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of your employment . . . ."

The ADR policy also contained a class action waiver: "I understand and agree this ADR [p]rogram prohibits me from joining or participating in a class action or representative action,

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[1] Additional defendants in this action include Country Villa Plaza, Rockport Healthcare Support Services, LLC, and Rockport Administrative Services, LLC. We use the term "Santa Ana" throughout this opinion to collectively refer to all defendants.

[2] The ADR policy, which spans three pages is followed by the "agreement to be bound by [ADR] policy" which spans two pages and repeats many of the same provisions.

acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others. Under this Policy, no arbitrator shall have the authority to order such class action or representative action."

The separate document signed by Mondragon entitled "agreement to be bound by [ADR] policy," reiterated that the "ADR [p]olicy is understood to apply to all disputes relating to my employment, the terms and conditions of my employment," and also reiterated the class/representative action waiver, stating: "I agree this ADR policy prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claims of others."

B. The Complaint for Civil Penalties under the PAGA

1. *The Complaint*

On July 31, 2019, after the requisite 65-day notice period,[3] Mondragon filed a "representative PAGA action" against Santa

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[3] Labor Code section 2699.3 of the PAGA requires a plaintiff to "notify the employer and the Labor and Workforce Development Agency (LWDA) of the specific labor violations alleged, along with the facts and theories supporting the claim." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81; see Lab. Code, § 2699.3, subd. (a)(1)(A).) The employee may commence a PAGA action only "[i]f the [LWDA] does not investigate, does not issue a citation, or fails to respond to the notice within 65 days." (*Kim*, *supra*, at p. 81; see Lab. Code, § 2699.3, subd. (a)(2).)

On May 16, 2019, Mondragon sent the requisite PAGA notice to California's LWDA and Santa Ana, detailing the facts and theories in support of her allegations of Labor Code violations.

Ana, seeking civil penalties on behalf of herself and other aggrieved employees for a variety of wage, meal break, and rest period violations. The complaint pled nine causes of action, each stating that Mondragon was proceeding "as a representative of the general public," and was seeking "to recover any and all penalties for each and every violation, in an amount according to proof, as to those penalties that are otherwise only available in public agency enforcement actions."

In her prayer for relief, Mondragon again stated that she sought "[m]aintenance of this claim as a [r]epresentative [a]ction under the PAGA" and prayed for judgment "only as to those remedies which are permissible . . . pursuant to the PAGA."

2. *Background on the PAGA*

The California Legislature enacted the PAGA in 2003 after deciding that lagging labor law enforcement resources made additional private enforcement necessary " 'to achieve maximum compliance with state labor laws.' " (*Iskanian*, *supra*, 59 Cal.4th at p. 379, quoting *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.)

"The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.) Seventy-five percent of any penalties collected by a PAGA representative are distributed to the LWDA, while the remaining 25 percent are distributed to the aggrieved employees. (Lab. Code, § 2699, subd. (i).)

C. The motion to Compel Individual Arbitration

On July 24, 2020, Santa Ana moved to compel "individual (and not collective or representative) arbitration" arguing that the California Supreme Court's holding in *Iskanian*—that

California public policy bars the waiver of PAGA representative claims—was wrongly decided and has since been further undermined by United States Supreme Court precedent defining the broad preemptive scope of the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.).[4]

On August 17, 2020, the court denied the motion at a hearing with the parties, stating "the *Iskanian* case is still the good-to-go authority on this issue." Later that day, the trial court issued a minute order and statement of decision summarizing its ruling.

The trial court pointed out that several intermediate appellate courts have held that the United States Supreme Court's broad view of the FAA's preemptive scope in *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S.Ct. 1612, 200 L.Ed.2d 887] (*Epic Systems*) (one of the cases cited by Santa Ana) did not undermine *Iskanian*'s reasoning or holding. The trial court further noted that the recent PAGA decisions issued by the California Supreme Court have continued to cite to *Iskanian* without any indication that the United States Supreme Court authority has effected any change. The court concluded that it would therefore not enforce the provision of the Arbitration Agreement that prohibits Mondragon "from joining or participating in a . . . representative action" or "acting as a private attorney general or representative of others."

On September 11, 2020, Santa Ana timely appealed the trial court's order.

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[4] Within its moving papers, Santa Ana stated the court should "dismiss this litigation or, in the alternative, stay the proceedings pending the outcome of [Mondragon's individual] arbitration."

DISCUSSION

A. Standard of Review

Where, as here, the trial court's order denying a motion to compel arbitration "rests solely on a decision of law," we review that decision de novo. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

B. The FAA

In 1925, the FAA was enacted in response to widespread judicial hostility to arbitration agreements. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*).) Section 2 of the FAA—its primary substantive provision—states in relevant part: "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 . . . 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.)

The final clause of section 2, the FAA's savings clause, "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, *supra*, 563 U.S. at p. 339.) Moreover, even if a state-law rule is "generally applicable," it is preempted if it conflicts with the FAA's objectives. (*Concepcion*, *supra*, at p. 341.)

For example, in *Concepcion*, the United States Supreme Court held that the FAA preempted California's rule classifying class action or collective action waivers in consumer contracts of adhesion as unconscionable. (*Concepcion*, *supra*, 563 U.S. at

pp. 340-352.) The *Concepcion* court noted that although California's rule did not explicitly discriminate against arbitration (see *id.* at pp. 341-343), it "interfer[ed] with fundamental attributes of arbitration" (*id.* at p. 344), by effectively imposing formal classwide arbitration procedures on the parties against their will. (*Id.* at pp. 345-347.) As such, the rule was preempted by the FAA. (*Concepcion*, *supra*, at p. 352.)

C. The *Iskanian* Rule

In *Iskanian*, the plaintiff-employee signed an agreement which provided that " 'any and all claims' " arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator and that neither the employee nor the employer could " 'assert class action or representative action claims against the other.' " (*Iskanian, supra*, 59 Cal.4th at p. 360.) The employee subsequently brought both a class action and a PAGA representative action against his employer. (*Id.* at p. 361.)

The *Iskanian* court first addressed the employee's class action waiver and determined that, under *Concepcion*, the refusal to enforce a class action waiver in an employment arbitration agreement would conflict with the FAA by interfering with the fundamental attributes of arbitration. (*Iskanian*, *supra*, 59 Cal.4th at p. 364.) The court, however, reached a different conclusion on the waiver of the employee's PAGA action.

The court held that a complete ban on PAGA actions was contrary to public policy, and unenforceable as a matter of state law, because it would "disable one of the primary mechanisms for enforcing the Labor Code"—the use of deputized citizen-employees to augment the limited enforcement capability of the LWDA and pursue the civil penalties used to deter such violations. (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) The court

held that such a rule did not conflict with the FAA because the FAA was intended to govern "the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state . . . [a]gency." (*Iskanian*, *supra*, at p. 384.) The court analogized a PAGA claim to a qui tam action and stated that such actions generally fall outside the FAA's purview. (*Iskanian*, *supra*, at pp. 382, 387.)

Notwithstanding *Iskanian*'s observations that "a PAGA claim lies outside the FAA's coverage" (*Iskanian*, *supra*, 59 Cal.4th at p. 386), the court left open the possibility that representative PAGA claims might be subject to arbitration if that were the parties' preference: "Although the arbitration agreement can be read as requiring arbitration of individual claims but not of representative PAGA claims, neither party contemplated such a bifurcation. [The plaintiff] has sought to litigate all claims in court, while [the employer] has sought to arbitrate the individual claims while barring the PAGA representative claim altogether. In light of the principles above, neither party can get all that it wants. [The plaintiff] must proceed with bilateral arbitration on his individual damages claims, and *[the employer] must answer the representative PAGA claims in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration*." (*Iskanian*, *supra*, at p. 391, italics added.)

D. The *Iskanian* Rule Remains Binding Authority Regarding Enforceability of PAGA Waivers

Santa Ana claims the United States Supreme Court's interpretation of the FAA preemption clause in three recent cases undermines *Iskanian*'s holding and requires California courts to enforce PAGA representative action waivers. Santa Ana relies on

Lamps Plus, Inc. v. Varela (2019) 587 U.S. ___ [139 S.Ct. 1407, 203 L.Ed.2d 626] (*Lamps Plus*), *Epic Systems*, *supra*, 584 U.S. ___ [138 S.Ct. 1612], and *Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. ___ [137 S.Ct. 1421, 197 L.Ed.2d 806] (*Kindred Nursing*).) We are not persuaded.

"On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently." (*Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th at p. 619; see also *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 221 [51 S.Ct. 453, 75 L.Ed. 983]; *Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 955-957.)

In *Epic Systems,* an accountant sued his employer for violations of the federal Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.) and California overtime law. (*Epic Systems*, *supra*, 584 U.S. at p. ___ [138 S.Ct. at p. 1620].) The employee had signed an arbitration agreement that "specified individualized arbitration, with claims 'pertaining to different [e]mployees [to] be heard in separate proceedings.' " (*Id.* at p. 1621.) The accountant sought to litigate the state law claim as a class action and the FLSA claim on behalf of a nationwide class under FLSA's collective action procedures. (*Epic Systems*, *supra*, at p. ___ [138 S.Ct. at p. 1620].)

In compelling arbitration, the United States Supreme Court reconfirmed *Concepcion*'s holding that the FAA requires enforcement of class action waivers. It also rejected the employee's argument, as did the *Iskanian* court, that the National Labor Relations Act's guarantee of the right to engage in "concerted activit[y]" (29 U.S.C. § 157) preempted the FAA on

this issue. (*Epic Systems*, *supra*, 584 U.S. at p. ___ [138 S.Ct. at pp. 1623-1630]; *Iskanian*, *supra*, 59 Cal.4th at p. 372.)

Notwithstanding *Epic Systems,* courts considering the continuing vitality of *Iskanian* have unanimously concluded that, in light of the unique nature of a PAGA action—i.e., a suit to punish and deter state labor violations for the benefit of the public—*Epic System*'s interpretation of the FAA's preemptive scope does not defeat *Iskanian*'s holding for purposes of an intermediate appellate court applying the law.[5] (See *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 620 [*Epic Systems* did not consider "the unique nature of a PAGA claim" nor "the implications of a complete ban on a state law enforcement action" and thus *Iskanian* remains good law]; cf. *Sakkab v. Luxottica Retail North American, Inc.* (9th Cir. 2015) 803 F.3d 425, 435-436 [upholding *Iskanian* rule against FAA

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[5] In distinguishing the FLSA claim brought in *Epic Systems*, the *Correia* court pointed to the following passage from *Iskanian*: " 'Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief . . . would be tantamount to a private class action . . . .' " (*Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 619, quoting *Iskanian*, *supra*, 59 Cal.4th at p. 387.)

Unlike the PAGA, the FLSA *is* focused on such victim-specific relief. (See 29 U.S.C. § 216 [discussing various compensatory damages available to victim employees under FLSA]; cf. *United States v. Edwards* (4th Cir. 2021) 995 F.3d 342, 346 [observing that additional liquidated damages in amount equal to unpaid wages and overtime compensation available under FLSA "makes perfect sense when considering that the goal is to provide full compensation to employees"].)

preemption by noting that: (1) unlike class action plaintiff, PAGA plaintiff does not vindicate the right to damages for absent employees, but acts as a proxy for the state; and (2) a representative PAGA action does not require any of the formal procedures associated with class actions]; *Rivas v. Coverall N. Am., Inc*. (2021) 842 Fed.Appx. 55, 56 [stating that while *Epic Systems* and *Lamps Plus* reiterated and reapplied rule announced in *Concepcion*—"a case *Sakkab* considered at length" "neither case expanded upon *Concepcion* in such a way as to abrogate *Sakkab*"].)

We agree with these and other appellate courts that have recognized the limited reach of *Epic Systems* in the context of PAGA suits. (See, e.g., *Winns v. Postmates Inc.* (2021) 66 Cal.App.5th 803, 812; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 872; *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 998; *Collie v. The Icee Co*. (2020) 52 Cal.App.5th 477; *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 620.)

The two other United States Supreme Court decisions cited by Santa Ana plainly do not abrogate *Iskanian*. In *Lamps Plus*, an employee who had signed an arbitration agreement sued Lamps Plus in federal court to pursue claims on behalf of a putative class of employees whose tax information had been compromised as a result of a hacker-related breach. (*Lamps Plus*, *supra*, 587 U.S. at p. ___ [139 S.Ct. at pp. 1412-1413].) Although the arbitration agreement was ambiguous as to whether the parties had agreed to class arbitration, the Ninth Circuit construed the agreement against Lamps Plus (the drafter of the agreement) and approved a classwide arbitration order. (*Id.* at p. ___ [139 S.Ct. at pp. 1413-1414.) The high court reversed, holding the FAA preempted California's contra

proferentem rule (requiring agreements be held against the drafter) when the rule is used "to impose class arbitration in the absence of the parties' consent." (*Lamps Plus*, *supra*, at p. ___ [139 S.Ct. at pp. 1415, 1418, fn. omitted].)

In *Kindred Nursing,* the United States Supreme Court rejected the argument that an arbitration agreement between a nursing facility and its resident, which had been entered by the resident's attorney-in-fact, was unenforceable. (*Kindred Nursing*, *supra*, 581 U.S. at p. ___ [137 S.Ct. at pp. 1425-1426].) The high court concluded that a judicially-created state rule (that a power of attorney could not entitle a representative to waive the right to a jury trial absent a "clear statement" specifically granting such authority) violated the FAA. (*Kindred Nursing*, *supra*, at pp. 1425-1427.)

We fail to discern how these cases compel us to abandon our high court's holding in *Iskanian*. The central concern in *Iskanian* was whether an outright waiver of representative PAGA actions would defeat the state's augmented enforcement of its labor laws. In contrast, *Kindred Nursing* focused on a state rule that effectively singled out arbitration agreements for disfavored treatment. Similarly, *Lamps Plus* rejected imposing a state rule of contract interpretation that would have forced class-wide arbitration of private party claims absent the parties' consent to such procedures.

Neither case decided or considered whether a worker may waive the right to bring a representative action on behalf of a state government *in any forum*. Neither case mentions PAGA or similar laws in other states. Accordingly, under the doctrine of stare decisis, we are bound to follow our Supreme Court's decision in *Iskanian*. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at pp. 455-456.)

E. Mondragon May Not Be Compelled to Arbitrate Her PAGA Action on an Individual Basis

Santa Ana requests an order compelling Mondragon to submit her PAGA claims "to binding individual (not collective or representative) arbitration." Under *Iskanian,* however, such an order cannot issue.

In *Iskanian*, the court noted there existed a split in authority regarding whether an employee could file an individual claim under the PAGA. (*Iskanian*, *supra*, 59 Cal.4th at p. 383.) The court went on to explain that, even assuming the PAGA permitted an individual claim for penalties, "a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." (*Iskanian, supra*, 59 Cal.4th at p. 384.) Because compelling a single-claimant procedure would frustrate the core objectives of the PAGA, the court held that the right to bring a representative PAGA case could neither be waived nor bifurcated and compelled to arbitration on an "individual" basis. (*Id.* at p. 384.)

Mondragon's complaint is expressly designated as a "PAGA representative action" and it alleges that, as "a representative of the general public," she is seeking penalties on behalf of all aggrieved employees. Thus, like the plaintiff in *Iskanian,* Mondragon cannot be compelled to arbitrate her PAGA action on an individual basis. (*Iskanian*, *supra*, 59 Cal.4th at pp. 384, 391.)

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Mondragon shall recover her costs on appeal.

NOT TO BE PUBLISHED

CRANDALL, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appendix B:

Denial of Petition for Review from the California Supreme Court

Court of Appeal, Second Appellate District, Division One - No. B307872

S271651

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RUBYANN MONDRAGON, Plaintiff and Respondent,

v.

SANTA ANA HEALTHCARE & WELLNESS CENTRE, LP, et al., Defendants and Appellants.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice