No. _________

IN THE
Supreme Court of the United States

DOLGEN CALIFORNIA, LLC,
Petitioner,

v.

TRICIA GALARSA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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. The FAA "pretty absolutely" protects agreements that "specify the rules that would govern . . . arbitrations," including agreements that require "individualized" proceedings. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Yet California courts disregard the FAA when, as here, an employee sues under California's Private Attorneys General Act ("PAGA"). Under *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014), courts invalidate arbitration agreements that would waive representative PAGA claims and require the parties to arbitrate their dispute on an individualized, bilateral basis. *Iskanian* also holds that the FAA does not preempt this state rule.

This Court granted review in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 142 S. Ct. 734 (2021), to decide the issues raised here. Dolgen California, LLC ("Dollar General") asks the Court to hold this Petition pending *Viking River*. After the Court decides *Viking River*, it should grant this Petition, vacate the California Court of Appeal decision below, and remand.

The question presented is: Does the FAA require enforcement of a bilateral arbitration agreement providing that an employee cannot assert representative claims, including under PAGA?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all the parties to the proceedings below.

Under this Court's Rule 29.6, Dolgen California, LLC is a Tennessee limited liability company and a wholly-owned subsidiary of Dolgencorp of Texas, Inc. ("DTI"), a Kentucky corporation. DTI is not a publicly held company. Dollar General Corporation is the parent corporation of DTI. Dollar General Corporation is a publicly held corporation traded on the New York Stock Exchange under the symbol "DG." No publicly held corporation holds 10% or more of its shares.

RELATED PROCEEDINGS

This case arises from and relates to the below proceedings in the California Superior Court for the County of Kern, the California Court of Appeal, and the California Supreme Court:

- *Galarsa v. Dolgen California, LLC, et al.*, No. BCV-19-102504-TSC (Cal. Sup. Ct.), order issued Sept. 30, 2020;

- *Galarsa v. Dolgen California, LLC*, No. F082404 (Cal. Ct. App.), judgment issued Nov. 19, 2021;

- *Galarsa v. Dolgen California, LLC*, No. S272483 (Cal.), petition for review denied Feb. 9, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case under this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Under the *Iskanian* rule, California law prohibits a predispute contractual waiver of representative PAGA claims. *See Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382-84 (Cal. 2014). California courts also hold that the FAA does not preempt the *Iskanian* rule. *Id.* at 384-87; *Galarsa v. Dolgen California, LLC*, 2021 WL 5411013, at *2-4 (Cal. Ct. App. 2021). California courts thus invalidate arbitration agreements that otherwise would compel employment disputes to individualized, bilateral arbitration simply because the employee asserts a PAGA claim.

The California courts are wrong. The FAA preempts the *Iskanian* rule. When parties have agreed to individualized, bilateral arbitration of their disputes, the FAA enforces that agreement regardless of state laws designed to circumvent it.

Recognizing the error, this Court granted review in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 142 S. Ct. 734 (2021). *Viking River* poses the same question presented as here: whether the FAA preempts the *Iskanian* rule. That issue in *Viking River* arose from an arbitration agreement nearly identical to the one in this case, and on the same procedural posture.

Dollar General asks the Court to hold this Petition while *Viking River* is pending. If *Viking River* is decided in favor of the Petitioner in that case, the Court should grant this Petition, vacate the decision below, and remand. Alternatively, if *Viking River* does not yield a merits decision, the Court should grant this Petition or one of the others now being held.

OPINIONS BELOW

The California Court of Appeal's decision is available at 2021 WL 5411013 and reproduced at App. 2. The judgment of the Superior Court for the County of Kern is unpublished and reproduced at App. 27.

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on February 9, 2022. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . 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.

STATEMENT OF THE CASE

A. Factual background.

Dollar General offers its employees an agreement to arbitrate all employment disputes on a bilateral basis. Employees who choose to agree to arbitrate thus expressly waive all class, collective, and representative actions.

Dollar General's arbitration agreement states in relevant part:

> **Dolgen California LLC ("Dollar General") has a process for resolving employment related legal disputes with employees that involves binding arbitration. This Dollar General Employee Arbitration Agreement ("Agreement") describes that process and constitutes a mutually binding agreement between you and Dollar General, subject to opt out rights described at the end of this Agreement.**
>
> You agree that, with the exception of certain excluded claims described below, any legal claims or disputes that you may have against Dollar General . . . arising out of your employment with Dollar General or termination of employment with Dollar General ("Covered Claim" or "Covered Claims") will be addressed in the manner described in this Agreement.

App. 38 (all emphasis in original).

The agreement also contains a representative action waiver clause:

> **Class and Collective Action Waiver: You and Dollar General may not assert any class action, collective action, or representative action claims in any arbitration pursuant to the Agreement or in any other forum. You and Dollar General may bring individual claims or multi-plaintiff claims joining together not**

> **more than three plaintiffs, provided that the claims are not asserted as a class, collective or representative action.**

App. 5 (all emphasis in original).

Last, the agreement states that it is "governed by the Federal Arbitration Act," and has an opt-out provision. App. 41, 46-47.

In March 2016, Tricia Galarsa applied for employment with Dollar General. App. 4. Before she began working, Galarsa signed Dollar General's arbitration agreement. App. 4. She never opted out. App. 4. Galarsa worked for Dollar General for about eight months until January 2017. App. 6.

B. Procedural background.

Galarsa sued Dollar General in a complaint she styled as a PAGA enforcement action. App. 6. Although Galarsa notified California's Labor and Workforce Development Agency of this matter, the Agency declined to investigate. App. 6. Galarsa later filed a First Amended Complaint which also asserted a single PAGA cause of action. App. 6. The single count alleges multiple Labor Code violations for which Galarsa seeks "to recover [various] civil penalties." App. 3.

Dollar General moved to compel Galarsa's PAGA claim to individual arbitration. App. 6. The trial court denied the motion. App. 7. Citing *Iskanian*, the trial court held that Galarsa's right to bring a representative PAGA action was "unwaivable," and that the FAA did not preempt this rule. App. 29.

Dollar General appealed to the California Court of Appeal, Fifth Appellate District. The Court of Appeal affirmed the trial court's denial of arbitration and held that the waiver of representative actions in Galarsa's arbitration agreement was unenforceable under *Iskanian*. App. 7-12. It further held that recent U.S. Supreme Court authority did not abrogate *Iskanian* and rejected the argument that contract-based grounds compelled individualized, bilateral arbitration of Galarsa's employment dispute. App. 10-11.

The California Supreme Court denied Dollar General's petition for review. App. 1.

REASONS FOR HOLDING THE PETITION

A. The FAA preempts the *Iskanian* rule and requires reversal here.

1. The FAA preempts the *Iskanian* rule.

In many recent cases, employees alleging Labor Code violations against their employers have used PAGA to avoid their arbitration agreements. *See* Cal. Lab. Code § 2699(a). Citing the *Iskanian* rule, California courts have refused to enforce the parties' agreement to individualized, bilateral arbitration of employment disputes. *See, e.g.*, *Galarsa*, 2021 WL 5411013, at *2.

These courts are wrong. The FAA preempts the *Iskanian* rule and requires enforcement of the parties' agreement to arbitrate PAGA claims on an individualized basis.

The FAA requires courts to "rigorously enforce arbitration agreements according to their terms,

including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). That function is the FAA's "principal purpose." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

"The FAA thus preempts any state rule discriminating on its face against arbitration." *Kindred Nursing Centers Ltd. v. Clark*, 137 S. Ct. 1421, 1426 (2017). And so, despite contrary state law, the FAA requires "giv[ing] effect to the [parties'] intent" in how arbitration should occur, such as "specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019); *see also* 9 U.S.C. § 3 (requiring arbitration to be "had in accordance with the terms of the agreement"). In other words, the FAA "protect[s] pretty absolutely" the rules that govern contracting parties' arbitrations, including "use [of] individualized . . . procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). "The individualized nature of . . . arbitration proceedings" is "one of arbitration's fundamental attributes." *Id.* at 1622.

This Court has made clear that the FAA requires enforcing the agreement to individualized, bilateral arbitration—regardless of state law. For instance, in *Lamps Plus*, the Court held that the FAA preempted a state rule that ambiguous contracts should be read to authorize *class* arbitration. 139 S. Ct. at 1415-17. Similarly, in *Concepcion*, the FAA preempted a California ruling that barred class action waivers in certain arbitration agreements. 563 U.S. at 352. And

the Court has clarified that the FAA does not tolerate defenses to arbitration that specifically target arbitration agreements. *See, e.g.*, *Epic Systems*, 138 S. Ct. at 1621-23 (holding that employees could not avoid their agreement to individualized, bilateral arbitration by asserting that federal labor statutes made their class and collective action waivers illegal).

The *Iskanian* rule therefore violates the FAA. It is a state rule designed to defeat individualized, bilateral arbitration agreements. *See Iskanian*, 59 Cal. 4th at 384 ("We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."). The FAA thus preempts the *Iskanian* rule and requires enforcing arbitration agreements that waive class, collective and representative action claims—even when the dispute is brought as a PAGA claim. *See Epic Systems*, 138 S. Ct. at 1619 ("Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.").

2. The FAA applies to PAGA claims.

California courts routinely hold that the FAA does not apply to PAGA claims, reasoning 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. Instead, they characterize a PAGA claim as "a dispute between an employer and the *state*, which alleges directly or through its agents . . . that the employer has violated the Labor Code." *Id.* at 386-87.

This rationale misconstrues both the FAA and PAGA claims. Preliminarily, no type of claim has ever been categorically exempted from the FAA's scope. *See, e.g.*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012) ("The [FAA's] text includes no exception for personal-injury or wrongful-death claims."); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (the FAA preempted a California state law that granted "the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate"). As one California Supreme Court Justice remarked, exempting a particular type of claim from the FAA is "a novel theory, devoid of case law support." *Iskanian*, 59 Cal. 4th at 396 (Chin, J., concurring). California courts thus misconstrue the FAA in holding that PAGA claims are categorically exempted from the FAA's provisions.

Nor can California courts exempt PAGA claims from the FAA by characterizing PAGA claims as "a type of *qui tam* action" that is really "a dispute between an employer and the *state*," rather than "a dispute between an employer and an employee arising out of their contractual relationship." *Id.* at 382, 386 (majority op.). Because a PAGA claim can be brought only by an "aggrieved employee," Cal. Lab. Code § 2699(a), a PAGA plaintiff is a "willing employe[e] who ha[s] been aggrieved by the employer." *Iskanian*, 59 Cal. 4th at 387. "Thus, although the scope of a PAGA action may extend beyond the contractual relationship between the plaintiff-employee and the employer[-defendant] . . . the dispute arises, first and fundamentally, out of that relationship." *Id.* at 395 (Chin, J., concurring).

PAGA claims are brought by the employee who signed the arbitration agreement. And that employee, not the government, has near complete control over the PAGA action. *See Langston v. 20/20 Companies, Inc.*, 2014 WL 5335734, at *7 (C.D. Cal. Oct. 17, 2014) ("[I]n PAGA claims, the employee is the named plaintiff and controls the litigation.").

If California's Labor and Workforce Development Agency declines to investigate a PAGA claim—which it routinely does—PAGA "empowers or deputizes an aggrieved employee to sue for civil penalties . . . as an alternative to [California's] enforcement." *Dunlap v. Superior Court*, 142 Cal. App. 4th 330, 337 (Cal. App. 2006). This delegation of authority to the employee deprives California of "supervisorial authority over the employee in the litigation." *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 615 (Cal. App. 2019). PAGA "lacks the procedural controls necessary to ensure that California . . . retains substantial authority over the case." *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 677 (9th Cir. 2021). PAGA even "prevents California from intervening in a suit brought by the aggrieved employee, yet still binds the State to whatever judgment results." *Id.*

Thus, no matter what the State of California might desire, an employee typically controls the PAGA claim. The employee could, for instance, simply refuse to bring a PAGA claim, or could agree to arbitrate the PAGA claim once the dispute has arisen. *See Iskanian*, 59 Cal. 4th at 383 ("Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations."); *id.* at 391 (employee could agree "to resolve a representative PAGA claim through

arbitration"). When employees bring PAGA claims, California generally has no authority over or oversight of that claim. *See Magadia*, 999 F.3d at 677 ("PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee.").

Even in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court found it "persuasive" that if an agency could not file a claim or craft a prayer for relief without the employee's consent, the employee's arbitration agreement would apply and govern the agency's claim seeking relief for the employee. 534 U.S. at 290-91. PAGA claims are far more employee-oriented even than those described in *Waffle House*. The arbitration clauses apply, thus so does the FAA.

In this case, the California Court of Appeal disregarded all this authority and followed *Iskanian*. *See Galarsa*, 2021 WL 5411013, at *2 ("*Iskanian*'s anti-waiver rule remains good law because it is not preempted by federal law."); *id.* at *3 ("our Supreme Court's analysis of preemption under the FAA remains good law"). That decision wrongly invalidates the FAA's preemptive effect that applies even when an employee brings a PAGA claim.

Dollar General therefore asks the Court to hold that the FAA applies to PAGA actions, preempts the *Iskanian* rule, and requires enforcing the parties' agreement to arbitrate *including* their waiver of class, collective and representative actions.

B. This case presents the same issues, facts, and procedural posture as *Viking River*.

Viking River asks this Court to address "[w]hether the Federal Arbitration Act requires enforcement of a

bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." *Viking River* Pet'r Br. i. The arguments made in *Viking River* cover the waterfront on whether the *Iskanian* rule survives FAA preemption.

There is no meaningful difference between *Viking River* and this case. Both here and in *Viking River*, the employee and employer entered a broad predispute agreement to arbitrate employment disputes. App. 4-6; *Viking River* Pet'r Br. 12. In both cases, the employee agreed to not bring class, collective or representative actions. Instead, the agreement called for the simpler and less formal path of individualized, bilateral arbitration. Galarsa agreed that she could "not assert any class action, collection action, or representative action claims in any arbitration pursuant to the Agreement or in any other forum." App. 5. The *Viking River* plaintiff similarly agreed she had "no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions." *Viking River* Pet'r Br. 12-13.

The proceedings below also are similar to those in *Viking River*. Both Galarsa and Moriana filed PAGA-only suits in California state court. App. 6; *Viking River* Pet'r Br. 13-14. Both Dollar General and Viking River Cruises moved to compel individualized, bilateral arbitration. The California trial courts denied both motions under *Iskanian*. App. 7-12; *Viking River* Pet'r Br. 14-15.

The employers in both proceedings made the same argument on appeal: that the FAA preempts the *Iskanian* rule and requires enforcing the arbitration agreement. The California Courts of Appeal rejected these arguments in both cases. App. 12; *Viking River* Pet'r Br. 14-15. The California Supreme Court denied review in both cases. App. 1; *Viking River* Pet'r Br. 15.

Because *Viking River* came first by 12 months, this Court granted review in that case. But there is no meaningful difference between the key facts or procedural posture in the two cases.

C. The Court should hold this Petition until the Court decides *Viking River*.

This Court "regularly hold[s] 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 [granted, vacated, and remanded] when the case is decided." *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting); *see also, e.g.*, *Williams v. Alabama*, 577 U.S. 1188 (2016) (Thomas, J., concurring) (observing that "[t]he Court has held the petition in this and many other cases pending the decision in" an overlapping case).

This case raises the same legal issues, in the same procedural posture, based on similar relevant facts as those in *Viking River*. The Court therefore should hold this Petition until it resolves *Viking River*, as it appears to have done with other petitions presenting similar issues on similar facts. *See, e.g.*, *Coverall N. Am., Inc. v. Rivas*, No. 21-268 (U.S.) (held since January 21 conference); *Uber Techs., Inc. v. Gregg*,

No. 21-453 (U.S.) (held since February 18 conference); *Uber Techs., Inc. v. Rosales*, No. 21-526 (U.S.) (held since February 18 conference); *Lyft, Inc. v. Seifu*, No. 21-742 (U.S.) (held since March 18 conference).

CONCLUSION

The Court should hold the Petition and then, after resolving *Viking River*, reverse, vacate, and remand. Alternatively, this case would also provide a proper vehicle for deciding this issue in the unlikely event that *Viking River Cruises v. Moriana* does not proceed to a merits ruling from this Court, or otherwise is resolved in a way that leaves this case undetermined.

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