No. _____

IN THE

Supreme Court of the United States

DOORDASH, INC.,

Petitioner,

v.

BRANDON CAMPBELL,

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. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), this Court held that the FAA requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619. And since *Epic Systems*, this Court has repeatedly confirmed that courts must enforce arbitration agreements as written. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

California courts have nonetheless created a broad exception to the FAA's "emphatic directions." *Epic Sys.*, 138 S. Ct. at 1621. According to the California Supreme Court, claims arising under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.*—which threaten employers with massive penalties for even trivial legal violations—are exempt from the FAA, and otherwise valid agreements calling for individual arbitration are therefore unenforceable as to PAGA claims. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 360 (2014). The Ninth Circuit has upheld this conclusion. *See Sakkab v. Luxxotica Retail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015). And both courts have declined to reassess their holdings in the wake of this Court's decision in *Epic Systems*.

The question presented is:

Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under California's Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.*

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner DoorDash, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from, and is related to, the following proceedings in the California Superior Court for the County of San Francisco, the California Court of Appeal, and the California Supreme Court:

- *Campbell v. DoorDash, Inc.*, No. CGC-19-575383 (Cal. Super. Ct.), order issued Nov. 7, 2019;
- *Campbell v. DoorDash, Inc.*, No. A159296 (Cal. Ct. App.), opinion issued Nov. 30, 2020;
- *Campbell v. DoorDash, Inc.*, No. S266497 (Cal.), petition for review denied Mar. 10, 2021.

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

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PETITION FOR A WRIT OF CERTIORARI

The Federal Arbitration Act ("FAA") requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). California courts refuse to follow that mandate with respect to an entire category of claims: those brought against employers (or putative employers) under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.*—an expansive statute that permits individuals to seek penalties on behalf of themselves and any other purportedly "aggrieved" employees.

This is not the first time that California has tried to end-run the FAA. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court evaluated the California Supreme Court's *Discover Bank* rule, which rendered class action waivers in arbitration agreements unenforceable on public policy grounds. *Id.* at 338, 348. This Court held that the FAA preempted the *Discover Bank* rule because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes" of the traditional, bilateral arbitration favored by the FAA. *Id.* at 344.

More recently, this Court reaffirmed in *Epic Systems* that the FAA requires "rigorous[]" enforcement of class and collective action waivers in arbitration agreements calling for "one-on-one arbitration," regardless of countervailing policy interests expressed in federal labor laws. 138 S. Ct. at 1621, 1619. And yet, despite this Court's "emphatic direction[]" that individual arbitration agreements must be enforced "according to their terms," *id.* at

1621, state courts in California have devised a blanket exception to that rule for PAGA claims.

Presently, employees (and purported employees) in California can evade otherwise valid and binding agreements to arbitrate disputes with their employers on an individual basis merely by asserting their claims under PAGA. That state statute authorizes an "aggrieved employee" to seek civil penalties "on behalf of himself or herself and other current or former employees" for a wide range of violations of the California Labor Code. Cal. Lab. Code § 2699(a).

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), the California Supreme Court held that workers may bring PAGA actions—which are inherently representative, and seek relief on behalf of others—notwithstanding their agreement to arbitrate disputes individually. *Id.* at 360. The so-called "*Iskanian* rule" thus allows employees in California to bring PAGA claims on behalf of themselves and hundreds or thousands of other "aggrieved employees" in court, often for millions of dollars in penalties—even if they expressly agreed to resolve all disputes in individual arbitration.

Both the California Supreme Court and the Ninth Circuit have held that this "rule" is not preempted by the FAA. In *Iskanian* itself, the California Supreme Court held that a PAGA claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." 59 Cal. 4th at 386. The court reasoned that a PAGA claim "is a dispute between an employer and the *state*," meaning that the state is "the real party in interest," *id.* at 386–87 (emphasis in original)—even though in PAGA actions

it is the individual employee who files the action, is represented by counsel, and controls the litigation. A divided panel of the Ninth Circuit similarly held in *Sakkab v. Luxxotica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), that the *Iskanian* rule was not preempted by the FAA—though it did not endorse the California Supreme Court's reasoning. Instead, the Ninth Circuit held that the *Iskanian* rule falls within the FAA's savings clause because the *Iskanian* rule "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* at 432.

Both the California Supreme Court and the Ninth Circuit have repeatedly declined to reconsider these holdings, even as one Ninth Circuit judge has observed that this Court's decision in *Epic Systems* "seriously undermine[s]" the *Iskanian* rule, putting California law in "obvious" "tension[]" with this Court's command that agreements to arbitrate individually must be enforced. *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 57, 59 (9th Cir. 2021) (Bumatay, J., concurring); *see also id.* at 58 ("Recent Supreme Court decisions . . . make clear that our precedent is in serious need of a course correction."). This Court's review is necessary to prevent parties from "sidestep[ping] an arbitration agreement simply by filing a PAGA claim." *Id.*

Granting review would resolve an important and recurring issue affecting thousands of employers in the country's most populous state. Since *Iskanian*, PAGA has become the preferred avenue for plaintiffs seeking to evade the individual arbitration agreements to which they agreed and to which they

are otherwise bound. The sheer volume of PAGA filings has exploded in the years since *Iskanian*—thousands of PAGA actions are now filed every year. *See* Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 446 (2016). The California Supreme Court and the Ninth Circuit have made clear they will not change course. Absent this Court's intervention, California's unwritten and unprincipled "PAGA exception" to the FAA may spread to other states, some of which are considering adopting similar laws.

This Court should grant review to make clear that the FAA applies to claims asserted under PAGA, and to reaffirm its prior holdings that individual arbitration agreements must be enforced according to their terms.

OPINIONS BELOW

The California Supreme Court's order denying DoorDash's petition for review is unpublished and is reproduced at App.1a. The California Court of Appeal's opinion is unpublished but available at 2020 WL 7021459 and reproduced at App.2a–11a. The judgment of the California Superior Court of the City and County of San Francisco is unpublished and is reproduced at App.12a–14a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Supreme Court denied DoorDash's petition for review on March 10, 2021. On March 19, 2020, this Court extended the deadline to

file a petition for writ of certiorari due on or after that date to 150 days.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, states: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration," *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (quotation marks omitted). Congress recognized that arbitration has much to offer—"not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. The FAA thus sought to "ensur[e] that private arbitration agreements are enforced according to their terms," *Concepcion*, 563 U.S. at 344 (quotation marks omitted), and "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). In furtherance of those ends, the FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Section 2's final phrase, referred to as its "savings clause," permits courts to apply "generally applicable contract defenses, such as fraud, duress, or unconscionability," to invalidate arbitration agreements in limited circumstances. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The savings clause reflects the basic principle that arbitration agreements, like other contracts, are unenforceable if they were procured by fraud or other means that vitiate consent. *See id.* But this Court has stated clearly that the FAA's savings clause does not condone "any state rule discriminating on its face against arbitration," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017), or any state law that "frustrates [the FAA's] purpose to ensure that private arbitration agreements are enforced according to their terms," *Concepcion*, 563 U.S. at 347 n.6.

The Court has especially emphasized the latter point—that the FAA preempts state laws that interfere with parties' ability to choose the efficiency and informality of bilateral arbitration. In *Concepcion*, the Court considered the enforceability of a consumer contract providing for "arbitration of all disputes between the parties, but requir[ing] that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 336 (quotation marks omitted). This Court held that the FAA preempts any state law or rule prohibiting class action waivers in arbitration agreements, including California's *Discover Bank* rule. *Id.* at 341–

44. And the Court concluded that the *Discover Bank* rule "interfere[d] with fundamental attributes of arbitration"—namely, its informality, lower cost, greater efficiency, and speed—by "[r]equiring the availability of classwide arbitration." *Id.* at 344. As the Court explained, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*

2. PAGA allows employees to file lawsuits to recover civil penalties for Labor Code violations on behalf of themselves, other "aggrieved" employees, and the State of California. Cal. Lab. Code § 2699. But the statute is even more expansive than that: An employee who alleges that she was "affected by at least one Labor Code violation" may "pursue penalties for all the Labor Code violations committed by that employer," regardless whether she was affected by them. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 751 (Cal. Ct. App. 2018). For California Labor Code provisions that do not themselves specify a monetary penalty, PAGA provides statutory penalties of $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. Cal. Lab. Code § 2699(f)(2). Employees keep 25 percent of any civil penalties recovered and remit the rest to the State. *Id.* § 2699(i). PAGA also provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." *Id.* § 2699(g)(1). PAGA penalties can—and often do—run into the hundreds of millions of dollars. *See Sakkab*, 803 F.3d at 448 (Smith, J., dissenting) ("[A] representative PAGA claim could . . . increase the damages awarded . . . by

a multiplier of a hundred or thousand times."); *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) ("Even a conservative estimate would put the potential penalties [under PAGA] in these cases in the tens of millions of dollars.").

While PAGA claims "may be brought as class actions," the California Supreme Court has held that they need not comply with California's class action statute. *Arias v. Superior Court*, 209 P.3d 923, 930 n.5, 933 (Cal. 2009). As a result, in California courts, plaintiffs suing under PAGA on behalf of other allegedly aggrieved employees are not required to seek or obtain class certification or provide notice of the action to absent persons. *See id.* at 929–34. Nor is an employee barred from bringing a PAGA claim even after resolving her own wage-and-hour claims against an employer in an individual settlement. *See Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1128–32 (Cal. 2020).

These purportedly "non-class" PAGA actions can bind absent employees without notice or an opportunity to opt out. *See Arias*, 209 P.3d at 934. They are also preclusive as to the defendant employers: "[I]f an employee plaintiff prevails in an action under [PAGA] for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment." *Id.*

Under PAGA, "[a]n aggrieved employee can only sue if California declines to investigate or penalize an alleged violation." *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021) (citing Cal. Lab. Code §§ 2699(h), 2699.3(b)(2)(A)(i)). "But once California elects not to issue a citation, the State has

no authority under PAGA to intervene in a case brought by an aggrieved employee." *Magadia*, 999 F.3d at 677 (emphasis added).

PAGA is distinct from "a traditional *qui tam* action" because *qui tam* actions serve "only as 'a *partial* assignment' of the Government's claim," while "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Id.* PAGA "lacks the 'procedural controls' necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains 'substantial authority' over the case." *Id.* PAGA's "complete assignment" of California's interest to an aggrieved employee, as the Ninth Circuit recently observed, "undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.*

3. In *Iskanian*, the California Supreme Court held that employees may bring PAGA actions in court despite agreeing to arbitrate disputes individually. 59 Cal. 4th at 360. "[A]n arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions," the court reasoned, "is contrary to public policy." *Id.* In so doing, the court expressly held that its rule was not subject to the FAA: whereas "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, [] a PAGA action is a dispute between an employer and the state." *Id.* at 384 (emphasis in original).

In *Sakkab*, a divided panel of the Ninth Circuit declined to adopt the California Supreme Court's reasoning but nevertheless agreed with its conclusion

that the *Iskanian* rule was not preempted by the FAA. 803 F.3d at 432. The majority held that the *Iskanian* rule fit within Section 2's savings clause because *Iskanian*'s holding supposedly "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* The majority further concluded that the *Iskanian* rule does not conflict with the FAA's purpose to overcome judicial hostility to arbitration because it "does not prohibit the arbitration of [PAGA] claim[s]," but rather "provides only that representative PAGA claims may not be waived outright." *Id.* at 434. And the majority said "the *Iskanian* rule does not conflict with the FAA[] because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration." *Id.* at 439.

In dissent, Judge N.R. Smith accused the majority of "ignor[ing] the basic precepts enunciated in *Concepcion*" by holding that the *Iskanian* rule does not frustrate the FAA's purposes. *Sakkab*, 803 F.3d at 440 (Smith, J., dissenting). Judge Smith opined that *Iskanian*'s prohibition of representative action waivers was sufficiently analogous to *Discover Bank*'s prohibition of class action waivers such that *both* California rules are inconsistent with the FAA. *Id.* at 443–44. He further reasoned that "the *Iskanian* rule burdens arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass; . . . requir[ing] more formal and complex procedure[s]; and [] expos[ing] the defendants to substantial unanticipated risk." *Id.* at 444.

4. Four years after *Iskanian*, this Court held in *Epic Systems* that agreements to arbitrate

individually must be enforced according to their terms. The Court rejected the argument that, for workers who have agreed to arbitrate their disputes individually, the National Labor Relations Act ("NLRA") nevertheless guarantees the right to bring class and collective actions against employers. *Epic Sys.*, 138 S. Ct. at 1619.

In reciting the question presented, the Court framed the issue broadly: "Should employees and employers be allowed to agree that *any disputes* between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" *Epic Sys.*, 138 S. Ct. at 1619 (emphasis added). And the Court reached a similarly broad conclusion: "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*"—regardless whether a plaintiff attempts to bring a class, collective, or other type of representative action, and regardless whether the plaintiff seeks to represent private or public entities (or both). *Id.* (emphasis added). Although it analyzed the NLRA in *Epic Systems*, the Court made clear that it does not "mak[e] any difference" whether a contrary rule arises under a federal law (like the NLRA) or a state law (like PAGA); in either circumstance, the FAA requires courts "to enforce, not override, the terms of the arbitration agreement[]." *Id.* at 1623.

The plaintiffs in *Epic Systems* had "object[ed] to their agreements precisely because they require individualized arbitration proceedings instead of class

or collective ones." 138 S. Ct. at 1622. This Court cast that objection aside, explaining that the "argument that a contract is unenforceable *just because it requires bilateral arbitration*" is "emphatic[ally]" at odds with the FAA. *Id.* at 1623, 1621 (emphasis in original). Arbitration has "traditionally [been] individualized," and even a federal statute embodying important "public policy" interests cannot override an agreement to arbitrate individually—no matter how well intentioned the law is or whether it applies to all contracts generally. *Id.* at 1622–23.

Thus, "the law is clear": "[A]rbitration agreements . . . must be enforced as written," absent a "clear" congressional command to the contrary. *Epic Sys.*, 138 S. Ct. at 1632. And given the widespread "judicial antagonism toward arbitration" that led to the FAA's enactment, courts "must be alert to new devices and formulas" that would expressly or implicitly "declar[e] arbitration against public policy." *Id.* at 1623. "[A] rule seeking to declare individual arbitration proceedings off limits is . . . just such a device." *Id.*

Since *Epic Systems*, this Court has held twice more that the FAA requires courts to enforce arbitration agreements according to their terms. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), the Court unanimously held that "courts must respect the parties' decision" to delegate questions of arbitrability to the arbitrator "as embodied in the contract," even if they believe the argument for arbitration is "wholly groundless." *Id.* at 528. The Court explained that the FAA "requires that we interpret the contract as written," even if, "as a practical and policy matter," exceptions to

arbitration may be desirable. *Id.* at 529–31; *see also id.* at 531 ("[W]e may not rewrite the statute simply to accommodate . . . policy concern[s].").

And in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), this Court made clear that neither federal nor state rules may circumvent the FAA's goal of enforcing parties' individual arbitration agreements. *See id.* at 1417–18. The Court concluded that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." *Id.* at 1419. Even where a rule is "neutral" and gives "equal treatment to arbitration agreements and other contracts alike," "courts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.'" *Id.* at 1418 (quoting *Epic Sys.*, 138 S. Ct. at 1623). "The FAA requires courts to 'enforce arbitration agreements according to their terms,'" and state-law rules that sidestep that command on "public policy" grounds "'interfer[e] with [the] fundamental attributes of arbitration.'" *Lamps Plus*, 139 S. Ct. at 1415, 1417–18 (quoting *Epic Sys.*, 138 S. Ct. at 1622).

These decisions follow a long line of precedent from this Court striking down statutes and judge-made rules that interfere with individual arbitration. *See, e.g.*, *Kindred*, 137 S. Ct. at 1426–27; *Nitro-Lift Techs., L.L.C. 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); *Concepcion*, 563 U.S. at 352.

B. Factual And Procedural History

DoorDash is a San Francisco-based technology company that facilitates food delivery through an

online platform. App.43a. The platform connects consumers, restaurants, and independent-contractor delivery providers called "Dashers." *Id.* When a consumer places an order for delivery on DoorDash's platform, a Dasher is notified and can choose whether to accept the offer to pick up the order and complete the delivery. *Id.* at 162a.

To create an account with DoorDash, a prospective Dasher must enter certain personal information and check a box verifying that he or she "agree[s] to the Independent Contractor Agreement and ha[s] read the Dasher Privacy Policy." App.44a. The words **"Independent Contractor Agreement"** and **"Dasher Privacy Policy"** are displayed in bright red text and are hyperlinked to the Independent Contractor Agreement ("ICA") and Dasher Privacy Policy, respectively, allowing each prospective Dasher an opportunity to review those documents before indicating his or her assent to them. *Id.* Prospective Dashers cannot sign up for a DoorDash account without consenting to the ICA and Dasher Privacy Policy. *Id.*

Section XI of the ICA is entitled "MUTUAL ARBITRATION PROVISION" (the "Arbitration Agreement"). App.51a (capitals in original). It states:

> CONTRACTOR and DOORDASH mutually agree to resolve any justiciable disputes between them exclusively through final and binding arbitration . . . . This arbitration agreement . . . shall apply to any and all claims arising out of or relating to this Agreement . . . the payments received by CONTRACTOR for providing services to consumers . . . and all other aspects of CONTRACTOR's relationship with DoorDash.

Id. (capitals in original). The Arbitration Agreement also provides that the FAA governs the Agreement and that an arbitrator will resolve "[a]ny disputes in this regard." *Id.* at 52a.

The Arbitration Agreement states that both Dashers and DoorDash "waive their right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action" ("Class Action Waiver"). App.52a. And the Arbitration Agreement contains a delegation clause providing that an arbitrator (not a court) must decide all issues relating to arbitrability, other than the validity of the Class Action Waiver. *Id.*

Although prospective Dashers must agree to the terms of the ICA before they may receive delivery opportunities on the DoorDash platform, they need not agree to arbitration. Rather, the ICA gives every Dasher the right to opt out of arbitration with DoorDash within 30 days of the ICA's effective date. App.53a. The ICA notifies Dashers of their right to opt out of arbitration in bold, capitalized text in the second paragraph and in Section XI.8:

> **CONTRACTOR's Right to Opt Out of Arbitration Provision. Arbitration is not a mandatory condition of CONTRACTOR's contractual relationship with DOORDASH, and therefore CONTRACTOR may submit a statement notifying DOORDASH that CONTRACTOR wishes to opt out and not be subject to this MUTUAL ARBITRATION PROVISION.**

App.53a.

Respondent Brandon Campbell signed up to be a Dasher and accepted the ICA in November 2018.

App.43a. He checked a box next to the words: "I have read, understand, and agree to the Independent Contractor Agreement." And he chose not to exercise his right to opt out of arbitration with DoorDash. *Id.* at 44a. Under the ICA, then, Respondent and DoorDash have agreed to arbitrate their disputes on an individual basis and not to bring or participate in representative actions, including PAGA actions.

Despite having agreed to resolve all disputes with DoorDash in individual arbitration, Respondent filed this lawsuit in April 2019, seeking civil penalties under PAGA. App.4a. DoorDash moved to compel arbitration and to stay court proceedings pending arbitration, arguing that Respondent should be compelled to arbitrate his claims under *Epic Systems*. *See* App.12a. The trial court denied DoorDash's motion, holding that Respondent could not be compelled to arbitrate his claims under *Iskanian*, and that *Epic Systems* did not abrogate *Iskanian* because it did not expressly address actions asserted under PAGA. *Id.* at 12a–14a.

The California Court of Appeal affirmed. App.2a–11a. The court recognized that, by consenting to the ICA, Plaintiff agreed to submit "'any and all claims arising out of or relating to [the ICA],' including 'the payments received by [Respondent] for providing services to consumers,'" to binding arbitration. *Id.* at 4a. The court also recognized that Respondent had waived his "'right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action—including but not limited to actions brought pursuant to . . . PAGA.'" *Id.* But relying primarily on other California Court of Appeal decisions addressing

the same issue, the court held that this Court's decision in *Epic Systems* did not overrule the California Supreme Court's decision in *Iskanian* because "*Epic Systems* did not 'decide the same question [as that presented in *Iskanian*] differently.'" *Id.* at 7a–9a.

DoorDash sought review of the California Court of Appeal's decision in the California Supreme Court, arguing in its petition for review that *Iskanian* cannot survive *Epic Systems*. The California Supreme Court denied DoorDash's petition for review on March 10, 2021. App.1a.[1]

REASONS FOR GRANTING THE PETITION

The California Supreme Court (and the Ninth Circuit) have created (and endorsed) an unwritten exception to the FAA that is irreconcilable with this Court's directive that arbitration agreements providing for individualized proceedings "must be enforced according to their terms." *Epic Sys.*, 138 S. Ct. at 1620. The decision below—and the repeated refusals of the California Supreme Court and the Ninth Circuit to reassess the *Iskanian* rule's validity—confirm that neither court will change course on its own. Absent this Court's intervention, PAGA claims—whose prevalence has increased dramatically in recent years—will remain off-limits to individual arbitration. This Court should grant

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[1] Since the California Supreme Court denied review, DoorDash reached a settlement with several class-action and PAGA plaintiffs, including Respondent. *See Marko v. DoorDash, Inc.*, No. BC659841 (L.A. Super. Ct.). However, that preliminary settlement has not received final approval by any court.

review and hold that *Epic Systems* abrogated the *Iskanian* rule.

A. The Decision Below Conflicts with This Court's Decisions Interpreting the FAA

1. The FAA Applies to PAGA

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Unless a contract defense falls within Section 2's savings clause, the FAA protects agreements to arbitrate individually "pretty absolutely." *Epic Sys.*, 138 S. Ct. at 1621. "[C]ourts may not allow a contract defense to reshape traditional individualized arbitration," and "must be alert to new devices and formulas . . . seeking to declare individualized arbitration proceedings off limits." *Id.* at 1623.

The judge-made *Iskanian* rule is "such a device." *Epic Sys.*, 138 S. Ct. at 1623. In an apparent effort to evade this Court's precedent, the California Supreme Court has endeavored to shield the *Iskanian* rule from preemption by asserting that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship," but is instead "a dispute between an employer and the *state*." *Iskanian*, 59 Cal. 4th at 386 (emphasis in original). Because the FAA "aims to promote arbitration of claims belonging to the *private* parties to an arbitration agreement," according to the California Supreme Court, it does not apply to PAGA claims. *Id.* at 388 (emphasis added).

This transparent effort to avoid the FAA's preemptive effect conflicts with this Court's precedent, which squarely holds that states may not categorically place specific claims beyond the reach of the FAA by conceptualizing them as particularly intertwined with state interests. *Concepcion*, 563 U.S. at 341 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

In *Iskanian*, the California Supreme Court cited approvingly this Court's decision in *EEOC v. Waffle House*, 534 U.S. 279 (2002), but that decision only underscores the California Supreme Court's error. In *Waffle House*, this Court held that the EEOC could pursue an enforcement action on behalf of an employee regardless whether that employee was bound by an individual arbitration agreement. 534 U.S. at 297–98. The Court's conclusion was based on the fact that the EEOC was not bound by the employee's agreement to arbitrate because the EEOC had not entered into the agreement and thus did not agree to arbitrate the dispute. *Id.* at 291. That holding is inapplicable here. No state official or entity initiated this litigation; Respondent did—after he agreed to arbitrate all disputes with DoorDash. App.44a. When an aggrieved worker files a PAGA claim in court, the dispute is solely between the worker and her purported employer. *See Magadia*, 999 F.3d at 677 ("PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee."). Indeed, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Id.* The FAA should therefore apply to PAGA claims just as it would to any other

dispute between an individual and an employer. The California Supreme Court held just the opposite in *Iskanian*, creating a massive loophole to the FAA that California workers have exploited in recent years to bypass their otherwise valid agreements requiring individualized arbitration.

2. The *Iskanian* Rule Cannot Be Reconciled with *Epic Systems* and Its Progeny

The FAA preempts the *Iskanian* rule for the same reasons it preempted the laws at issue in *Concepcion* and *Epic Systems*. There is no meaningful difference between the class action at issue in *Concepcion*, the collective actions at issue in *Epic Systems*, and the representative action at issue here. Just as class and collective actions permit plaintiffs to prosecute claims and collect damages on behalf of other class or collective members, PAGA authorizes a plaintiff to sue "on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a). By "attacking (only) the individualized nature of arbitration proceedings," the *Iskanian* rule "interfere[s] with one of arbitration's fundamental attributes." *Epic Sys.*, 138 S. Ct. at 1622. The judge-made doctrine therefore "fail[s] to qualify for protection under the saving[s] clause" and is invalid. *Id.* at 1623.

The FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of the arbitration agreement[]." *Epic Sys.*, 138 S. Ct. at 1621, 1623. As this Court held in *Epic Systems*, even a federal statute embodying important public policy interests cannot be construed to override private arbitration. *See id.* at 1632. Although "[t]he policy may be debatable . . . the

law is clear: Congress has instructed that arbitration agreements . . . must be enforced as written." *Id.* A state law or rule that purports to negate private agreements to arbitrate on the ground that particular forms of representational litigation are important is incompatible with the FAA. That is the clear teaching of this Court's decisions in *Concepcion* and *Epic Systems*, and the *Iskanian* rule runs headlong into those precedents. This Court should grant review.

B. This Case Presents a Good Vehicle to Assess the *Iskanian* Rule

This Court's decisions in *Epic Systems* and *Concepcion* have "seriously undermined" the holdings of the California Supreme Court and Ninth Circuit that the FAA does not preempt the *Iskanian* rule. *Rivas*, 842 F. App'x at 57 (Bumatay, J., concurring). Yet neither court shows any interest in reevaluating the *Iskanian* rule in light of those decisions.

The California Court of Appeal is unwilling to disturb the *Iskanian* rule because it remains bound by controlling state Supreme Court authority. *See, e.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 179 (Cal. Ct. App. 2019) ("We additionally determine we remain bound by *Iskanian*."). And the California Supreme Court has refused to reconsider *Iskanian*, despite its duty to do so. *See James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) (state courts are "bound by this Court's interpretation of federal law"); *Nitro-Lift*, 568 U.S. at 21 ("[O]nce the [U.S. Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."). The California Supreme Court has denied review on this exact issue at least six times in the last year alone. *See Schofield v. Skip Transport*, No.

S267967 (Cal. May 12, 2021) (petition for review denied); *Santana v. Postmates*, No. S267574 (Cal. Apr. 14, 2021) (same); *Campbell v. DoorDash*, No. S266497 (Mar. 10, 2021) (same); *Rimler v. Postmates*, No. S266718 (Cal. Feb. 24, 2021) (same); *Provost v. YourMechanic*, No. S265736 (Cal. Jan. 20, 2021) (same); *Moriana v. Viking River Cruises, Inc.*, No. S265257 (Cal. Dec. 9, 2020) (same).[2]

The Ninth Circuit recently reaffirmed its prior decision in *Sakkab* and declined to grant rehearing en banc. *Rivas*, 842 F. App'x at 57 (reaffirming *Sakkab*); *Rivas v. Coverall N. Am., Inc.*, No. 20-55140, Dkt. 44 (9th Cir. Apr. 6, 2021) (declining to grant rehearing en banc). Although the panel in *Rivas* was bound by *Sakkab*, Judge Callahan stated during oral argument that *Sakkab*—and, by extension, the *Iskanian* rule—is "problematic" and in "tension" with recent precedent of this Court.[3]

Judge Bumatay similarly recognized that "[t]he tensions between *Epic Systems*/*Lamps Plus* and *Sakkab* are obvious." *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring). *Sakkab* (and, thus, *Iskanian*) required the *Rivas* panel to affirm the district court's holding that the arbitration agreement at issue in that case was unenforceable. But that

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[2] Petitions for writ of certiorari on this issue are currently pending in this Court in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (U.S. May 10, 2021), *YourMechanic, Inc. v. Provost*, No. 20-1787 (U.S. June 21, 2021), and *Postmates v. Rimler*, No. 21-0119 (U.S. July 26, 2021). If this Court grants certiorari in any of those cases, it should hold this petition until that action is resolved.

[3] *See* Oral Argument at 4:38, *Rivas v. Coverall N. Am., Inc.*, No. 20-55140 (9th Cir. Nov. 19, 2020) https://bit.ly/3x6ee67.

conclusion "undermines the parties' promises to each other and potentially upends all arbitration agreements" if, as California courts have held, "a party may always sidestep an arbitration agreement simply by filing a PAGA claim." *Id.* at 58 (Bumatay, J., concurring). Judge Bumatay also explained that "the writing is on the wall that the [U.S. Supreme] Court disfavors our approach" to the *Iskanian* rule, and encouraged his colleagues to "listen to what the Court is telling us and revisit our precedent before again being forced to do so." *Id.* at 58–59 (Bumatay, J., concurring).

This Court has not hesitated before—and should not hesitate here—to intervene when states so openly defy the FAA and when the stakes are as high as they are here. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], . . . [i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 568 U.S. at 17–18.

The absence of conflict among the lower courts is no reason to deny this petition. PAGA is (for now) unique to California, so appellate courts in other states have not had an opportunity to assess the interplay between a statute like PAGA and the FAA. And while the Ninth Circuit has upheld the *Iskanian* rule, it did so in a divided opinion that employed different reasoning than that adopted by the California Supreme Court. *Compare Sakkab*, 803 F.3d at 434, *with Iskanian*, 59 Cal. 4th at 383.

If this Court declines to review this issue now, it will discourage California employers from continuing to challenge the *Iskanian* rule through costly motions

to compel arbitration that will almost certainly be denied and then affirmed on appeal by either the Ninth Circuit or the California Court of Appeal. Challenges to the *Iskanian* rule will slow and eventually cease. This Court should not forgo the opportunity to step in now.

C. Whether the FAA Encompasses PAGA Claims Is an Important and Recurring Issue

Since the California Supreme Court decided *Iskanian* in 2014, plaintiffs have turned in droves to PAGA as "a means . . . to avoid arbitration." Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103, 127–28 (2015). In 2005, the year after PAGA was enacted, California plaintiffs filed 759 PAGA actions. *See* Emily Green, *State Law May Serve As Substitute for Employee Class Actions*, Daily Journal (Apr. 17, 2014), https://bit.ly/3AVQ5lY. That number had increased nearly eight fold by 2017, when California plaintiffs filed more than 6,000 PAGA actions. *See* Tim Freudenberger et al., *Trends in PAGA Claims And What It Means For California Employers*, Inside Counsel (Mar. 19, 2015), https://bit.ly/2NFIXWi; Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016). Indeed, in the five-year period before and after *Iskanian* was decided, PAGA filings more than doubled—a strong indication that litigants have used *Iskanian* to bypass their otherwise valid individual arbitration agreements. *See* Goodman, *supra*, at 415; *see also* Toni Vranjes, *Doubts Raised About New California PAGA Requirements*, Society for Human Resource

Management (Dec. 6, 2016), https://bit.ly/36tlRZl ("Following the *Iskanian* decision, PAGA claims skyrocketed . . . ."). Today, on average, more than 15 new PAGA notice letters are filed every day. *See* Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Soc'y for Human Res. Mgmt. (Mar. 26, 2019), https://bit.ly/3wzkHX1.

The increasing number of PAGA actions filed every year presents a significant risk to businesses across California. These suits—because they are representative actions—often exert "unacceptable" pressure on defendants to settle, due to the "small chance of a devastating loss." *Concepcion*, 563 U.S. at 350. And because PAGA exposes employers to civil penalties for every violation of certain wage-and-hour laws, plaintiffs bringing PAGA claims frequently seek millions of dollars in penalties. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 451 (2018) ("Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries.").

The viability of the *Iskanian* rule also has profound implications for employment litigation and enforcement of arbitration agreements, particularly given that California has the largest workforce of any state. *See* U.S. Bureau of Labor Statistics, *Economy at a Glance: California*, https://bit.ly/3xybqzK. Although PAGA claims are currently limited to California, legislatures in at least seven different states have recently considered, or are currently considering, bills that would enact versions of, or

analogues to, PAGA.[4] This Court's review is therefore needed not only to address an issue affecting thousands of employers and arbitration agreements in California, but also to ensure that the judge-made PAGA exception to the FAA does not spread to other states.

CONCLUSION

The Court should grant the petition.

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[4] *See* H.B. 1959, 192nd Gen. Court (Mass. 2021); S.B. 1179, 192nd Gen. Court (Mass. 2021); Assemb. B. 5876, 2021 Reg. Sess. (N.Y. 2021); S.B. 12, 2021 Reg. Sess. (N.Y. 2021); 2d Substitute H.B. 1076, 67th Leg., Reg. Sess. (Wash. 2021); H.B. 5381, 2020 Gen. Assemb., Reg. Sess. (Conn. 2020); Legis. Doc. 1693, 129th Leg., 1st Reg. Sess. (Me. 2019); S.B. 750, 80th Legis. Assemb., Reg. Sess. (Or. 2019); H.B. 483, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019); S.B. 139, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019); *see also* Charles Thompson et al., *Employers Must Brace for PAGA-Like Bills Across US*, Law360 (June 18, 2021), https://bit.ly/3BAFGfH; Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020), https://bit.ly/3hxPHCp.

Respectfully submitted.

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