NO. _____

IN THE
Supreme Court of the United States

COVERALL NORTH AMERICA, INC.,

Petitioner,

v.

CARLOS RIVAS, IN HIS CAPACITY AS
PRIVATE ATTORNEY GENERAL REPRESENTATIVE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) directs 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). As this Court has repeatedly made clear in recent years, the FAA "protect[s] pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized * * * procedures." *Id.* at 1619, 1621.

Yet the California Supreme Court has created a broad exception to the FAA's pro-arbitration mandate, holding that any arbitration agreement requiring the individualized arbitration of claims brought under California's Private Attorneys General Act of 2004 is unenforceable as contrary to California's public policy. *See Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129 (Cal. 2014). The Ninth Circuit, in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 426 (9th Cir. 2015), and again in the decision below, has held that the FAA does not preempt the *Iskanian* rule.

The question presented is:

Whether the Federal Arbitration Act preempts a state-law rule which precludes the enforcement of an agreement to arbitrate claims on an individual basis when a state declares that a private litigant has an unwaivable right to pursue certain claims on a representative basis.

CORPORATE DISCLOSURE STATEMENT

Petitioner Coverall North America, Inc. is wholly-owned by CNA Holding Corporation. Neither Coverall North America, Inc. nor CNA Holding Corporation is publicly traded, and no publicly held company holds 10% or more of either entity's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Coverall North America, Inc. ("Coverall") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Memorandum is available at *Rivas v. Coverall North America, Inc.*, 842 F. App'x 55 (9th Cir. 2021), and reproduced at Appendix ("App.") 1. The Order of the United States District Court for the Central District of California ("District Court") is not published in the Federal Supplement, but is available at *Rivas v. Coverall N. Am., Inc.*, No. SACV 18-1007 JGB (KKx), 2020 WL 1277758, at *1 (C.D. Cal. Jan. 21, 2020), and reproduced at App. 11.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 7, 2021. The Ninth Circuit denied a petition for rehearing en banc on April 6, 2021. On March 19, 2020, this Court issued an order extending the deadline to file any petition for writ of certiorari to 150 days. This Court's jurisdiction is premised on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . 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

This petition presents an important issue of federal law that impacts the enforceability of countless arbitration agreements: whether, consistent with the FAA, a state can promulgate a rule that prohibits waivers of representative claims – in this case, claims brought under California's Private Attorneys General Act of 2004 ("PAGA") – such that arbitration agreements that provide for bilateral arbitration on an individualized basis cannot be enforced in accordance with their terms. The decision below conflicts with both the FAA and the decisions of this Court. As a result, review is warranted here.

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129 (Cal. 2014), the California Supreme Court created the so-called *Iskanian* rule, which prohibits waivers of representative actions under PAGA. The *Iskanian* rule treats such waivers as contrary to public policy and unenforceable as a matter of law. According to *Iskanian*, this rule is not preempted by the FAA because the FAA governs private disputes, whereas a PAGA action is, at least in theory, a dispute between an employer and the state. The Ninth Circuit subsequently came to the same conclusion in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 433 (9th Cir. 2015), which held that the FAA did not preempt the *Iskanian* rule because representative PAGA claims are distinguishable from class actions and not incompatible with bilateral arbitration.

But, as the concurrence by Judge Bumatay in the Ninth Circuit acknowledges, *Sakkab* is inconsistent with this Court's jurisprudence because, "[b]y holding that the *Iskanian* rule is not preempted by the FAA, we interfere with 'arbitration's fundamental attributes.'" App. 9. Adherence to *Sakkab* could "undermine[] the parties' promises to each other and potentially upend[] all arbitration agreements. We now creep closer to the day that a party may always sidestep an arbitration agreement simply by filing a PAGA claim." App. 7.

That is precisely what happened in this case and, based on ever-increasing number of PAGA filings, is happening in other cases on a regular basis. Indeed, *Iskanian* and *Sakkab* have effectively nullified thousands upon thousands of arbitration agreements in which parties consented to arbitrate their disputes on an individualized basis by preventing the enforcement of their express terms. That result directly contravenes the FAA, as well as the teachings of this Court in its recent FAA decisions. Given the overwhelming importance of both the FAA and the need for uniformity on the issue of federal preemption, review by this Court is both necessary and warranted.

A. The FAA And This Court's Decision In *Epic Systems* And *Concepcion*

"Congress adopted the [FAA] in 1925 in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). The FAA, "this Court has said, establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Section 2 of the FAA makes agreements to arbitrate

"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. "Indeed, [this Court has] often observed that the [FAA] requires courts 'rigorously' to '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." *Epic Sys.*, 138 S. Ct. at 1621 (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)) (emphasis in original). This approach is in accord with the "principal purpose" of the FAA, which is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

The grounds on which those terms may be overcome are limited. Section 2 permits arbitration agreements to be declared unenforceable only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This saving clause in the FAA allows agreements to arbitration to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to an arbitration agreement or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 681-83, 687 (1996). "Under [this Court's] precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Sys.*, 138 S. Ct. at 1622 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

One such fundamental attribute is the ability to resolve claims on an individual basis, and this Court's jurisprudence makes clear that the FAA preempts state-law rules that interfere with parties' agreements to do so. In *Concepcion*, this Court considered a state law defense that prohibited class action waivers in consumer contracts. 563 U.S. at 338. Although this Court found that the defense applied in both the litigation and arbitration context, it nevertheless held that the saving clause was inapplicable because the defense "interferes with fundamental attributes of arbitration" all the same. *Id.* at 344. This is so because, notwithstanding an agreement to resolve claims individually, and "despite the traditionally individualized and informal nature of arbitration," any party could demand class-wide arbitration proceedings. *Epic Sys.*, 138 S. Ct. at 1622-23. Such a "fundamental" change to the traditional bilateral arbitration process "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 347-48. "In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 348 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* 559 U.S. 662, 685 (2010). "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" this Court held that the California state-law rule in *Concepcion* was preempted by the FAA. *Id.* at 352 (citation omitted).

In *Epic Systems*, this Court explained the broad reach of the principles laid out in *Concepcion*. The questions presented in *Epic Systems* were:

> 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? 138 S. Ct. 1612, 1619 (2018).

The Court answered those inquiries concisely:

> As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings. *Id*.

The Court held that where parties "contracted for arbitration . . . [and] proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized" procedures, "this much the [FAA] seems to protect pretty absolutely." *Id.* at 1621. Indeed, the Court made clear that even federal public policy would not be sufficient to override this choice. *Id*. at 1623. The Court warned that parties "must be alert to new devices and formulas" that manifest "judicial antagonism" toward arbitration and concluded that "a rule seeking to declare individualized arbitration proceedings off limits is . . . just such a device." *Id.* Any "argument that a contract is unenforceable *just because it requires bilateral arbitration* . . . is one that impermissibly disfavors arbitration." *Id.* at 1623 (emphasis in original).

The following year, this Court reiterated the holdings of *Epic Systems* and *Concepcion* in *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019). There, the Court considered whether an arbitration agreement that was ambiguous on the issue of

class arbitration provided an adequate basis to compel the parties to class arbitration. *Id.* at 1412. The Ninth Circuit found that it did, based on the state-law doctrine of *contra proferentem*, which resolves ambiguities against the drafter (in that case, Lamps Plus). This Court reversed. *Lamps Plus* confirmed the principle that "an equal treatment principle cannot save from preemption general rules 'that targets arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Id.* at 1418 (quoting *Epic Sys.*, 138 S. Ct. at 1622). The Court also went on to find that "ambiguity [in an arbitration agreement] does not provide a sufficient basis to conclude that all parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" *Id.* (quoting *Concepcion*, 563 U.S. at 348). Once again, as in *Concepcion* and *Epic Systems*, this Court held that the FAA preempted the state-law doctrine at issue because the rule was "flatly inconsistent" with a "'foundational FAA principle.'" *Id.* at 1418-19 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

B. California's Private Attorneys General Act Of 2004

Under PAGA, which was intended to address the shortage of government resources to pursue enforcement and the recovery of civil penalties for violation of California Labor Code (Assembly Comm. On Labor & Employment: Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended July 2, 2003, p. 4-5), an employee may bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and his or her fellow aggrieved employees. Cal. Lab. Code § 2699(a). An "aggrieved employee" –

defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" (Cal. Lab. Code § 2699(c)) – is permitted to recover civil penalties, 75 percent of which are distributed to the California Labor and Workforce Development Agency ("LWDA"), with the remaining 25 percent going to the employees. *Id.* § 2699(i). In most cases, the penalties against the employer are calculated "per pay period" for each aggrieved employee subject to the violation. *Id.* § 2699(f)(1)-(2).

Prior to commencing a PAGA action, the aggrieved employee must provide notice of the facts and theories supporting the purported Labor Code violation(s) to both the LWDA and the employer. *Id.* § 2699.3(a)(1)(A). The LDWA may opt to investigate. *Id.* § 2699.3(a)(2)(B). If it chooses not to do so, then the employee can file an action against the employer based on those violations. *Id.* § 2699.3(a)(2)(A). Similarly, if the agency chooses to investigate, but decides not to issue a citation to the employer, the employee then may commence an action. *Id.* § 2699.3(a)(2)(B). Significantly, the employee has sole control over any actions that he or she commences, without any interference, supervision, or involvement by the state.

C. *Iskanian* And *Sakkab*

Under California law, an agreement that compels the waiver of representative claims under PAGA is contrary to public policy and unenforceable as a matter of law. *Iskanian*, 59 Cal. 4th at 384, 327 P.3d at 149. In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court considered the enforceability of an arbitration agreement between an employee and employer in which the parties

agreed to resolve all disputes through bilateral arbitrations. 59 Cal. 4th at 359-60, 327 P.3d at 133. Specifically, the question before the court was whether the FAA preempts the California rule that prohibits waiver of PAGA representative claims. The court answered that question in the negative. *Id.*

The arbitration agreement in *Iskanian* contained a waiver of class actions and representative actions, and expressly provided for arbitration on an "individual" basis. In direct contravention of this agreement, the plaintiff filed in court a class action and a representative PAGA action. The trial court ultimately granted the defendant's motion to compel arbitration, and the court of appeal affirmed. On further appeal, the California Supreme Court held that a waiver of the right to bring a PAGA claim in a representative capacity contravenes public policy because it "serves to disable one of the primary mechanisms for enforcing the Labor Code." 59 Cal. 4th at 383, 327 P.3d at 149. Accordingly, the court concluded that such a waiver was unenforceable as a matter of law.

The next step of the court's analysis centered around whether the FAA preempted a state rule that invalidated waivers of PAGA claims. The court "conclude[d] that the rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." 59 Cal. 4th at 384, 327 P.3d at 149 (emphasis in original). "Simply put, a PAGA claim lies outside of 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 386-87, 327 P.3d at 151.

The following year, in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 433 (9th Cir. 2015), the Ninth Circuit addressed the same question – *i.e.*, whether the FAA preempted California's so-called *Iskanian* rule barring waiver of representative PAGA claims. Undertaking a two-step analysis, the court first determined that the *Iskanian* rule was subject to the FAA's saving clause, which allows arbitration agreements to be invalidated by generally applicable contract defenses, but not defenses that apply only to arbitration. *Id.* at 432. As to the second prong – whether the *Iskanian* rule conflicts with the FAA's objective – the court concluded it does not because, unlike class actions, PAGA claims "do not require any special procedures." *Id.* at 436. Focusing on what it contended were the "'fundamental[]' differences between PAGA actions and class actions," the court reasoned that "prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs. Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims." *Id.* at 435-36.

The dissent, by Judge N.R. Smith, rejected the majority's emphasis on the differences between class actions and PAGA actions, stating that such differences "do not change the fact that a rule prohibiting the waiver of either type of action in an arbitration agreement interferes with the parties' freedom to limit their arbitration only to those claims arising between the contracting parties." *Id.* at 443-44 (Smith,

J. dissenting). For this reason, "the *Iskanian* rule interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 444. The dissent ended with a note of caution: "Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same [previously], and were subsequently reversed in *Concepcion*. The majority now walks that same path." *Id.* at 450.

D. Factual And Procedural Background

1. The Arbitration Agreement Between Coverall And Rivas Provides For Arbitration On An Individual Basis

Petitioner Coverall is a franchisor of commercial cleaning businesses that operate under the Coverall® brand. In business since 1985, Coverall presently has over 4,700 franchisees operating in the United States. Plaintiff is one of those franchisees. On November 5, 2007, Respondent Carlos Rivas ("Rivas") entered into a written Franchise Agreement with Coverall under which he received the right to operate a commercial cleaning business using Coverall's trademarks and operating system. The Franchise Agreement affirms, among other things, the parties' agreement and understanding that Plaintiff was, and would "remain at all times," an independent contractor, and that no agency or employment relationship existed between the parties.

In the Franchise Agreement, the parties agreed to submit any disputes between them to binding bilateral arbitration. The arbitration agreement, which specifies that the FAA shall govern, requires that all disputes be arbitrated on an

individual, and not class-wide, basis. Specifically, the agreement states, in relevant part, that:

> Franchisee and Coverall agree that the arbitration shall be conducted on an individual, not a class wide basis, which restriction shall be enforceable to the fullest extent permitted by law. An arbitration between Coverall and Franchisee shall not be consolidated with any other proceeding between Coverall and any other Franchisee. App. 13-App. 14.

2. The District Court Denied Coverall's Motion To Compel Arbitration On An Individual Basis

Notwithstanding the parties' arbitration agreement, on June 7, 2018, Plaintiff filed a complaint in the District Court alleging that he had been misclassified as an independent contractor. Based on this alleged misclassification, Rivas contends that Coverall violated various provisions of the California Labor Code and purports to bring these claims under PAGA, Labor Code section 2699(f), *et seq*., on behalf of all similarly-situated franchisees.

Based on the arbitration agreement in the parties' Franchise Agreement, Coverall moved to compel individualized arbitration. The District Court denied the motion on three grounds. First, the District Court found that, while the arbitration agreement did not specifically mention "representative" arbitrations, a reading of the agreement as a whole made clear that the parties intended arbitration to proceed on an individual basis. Citing *Sakkab*, the District Court found that the arbitration agreement's mandate that arbitration "shall be conducted on an individual, not a class wide basis" does not precisely address the issue of representative claims, which

– despite a number of similarities – the court found are legally and functionally distinct from class action claims. App. 14.

Second, the District Court held that requiring PAGA claims to proceed individually was "inconsistent with the inherent nature of representative actions, which permit one party to bring a claim on behalf of other parties and the state." PAGA claims, the District Court stated, "must be brought on behalf of other aggrieved employees." In its view, requiring such claims to be arbitrated individually could be interpreted as an implied waiver of Rivas' PAGA claim, and "the *Iskanian* rule would render such a waiver unenforceable." App. 16. The District Court rejected Coverall's argument that this Court's recent decisions, including *Epic Systems*, overturned or otherwise limited the Ninth Circuit's holding in *Sakkab*, 803 F.3d at 435-36, which held that the FAA does not preempt California's public policy prohibiting waivers of representative PAGA claims. App. 17.

Finally, the District Court concluded that, because the arbitration agreement only permits individual arbitrations, PAGA claims are not within the scope of those claims encompassed by the agreement. App. 15.

3. Bound by *Sakkab*, The Ninth Circuit Panel Affirmed The Denial Of The Motion To Compel Arbitration On An Individual Basis

The Ninth Circuit affirmed, holding that *Sakkab* forecloses Coverall's argument that the FAA preempts California's rule against waivers of representative PAGA claims. The panel also rejected the claim that this Court's decisions in *Epic Systems*, 138 S. Ct. at 1612, and Lamps *Plus*, 139 S. Ct. at 1407, overruled *Sakkab*.

In doing so, the panel acknowledged its own inability to overrule circuit precedent, even where there are clear indicators from this Court that the precedent is wrong.

As the concurrence by Judge Bumatay acknowledged, *Sakkab* is inconsistent with this Court's jurisprudence. The panel, however, was constrained because it was bound to follow *Sakkab*. Yet doing so disregards the plain language of the parties' arbitration agreement and, as Judge Bumatay couched it, "potentially upends all arbitration agreements." App. 7. He therefore implored that *Sakkab* "should be revisited . . ." because it "has been seriously undermined." App. 5. Absent *Sakkab*, Judge Bumatay wrote, "this would have been a simple case. To enforce the parties' agreement, we should have just compelled arbitration of [Plaintiff's] PAGA claim on an individual basis. That is the only solution that gives proper effect to the parties' expressed intent." *Id.*. But the California Supreme Court has held that PAGA claims are representative by nature, and, under the *Iskanian* rule, any waiver of a representative PAGA claim (*i.e.*, requiring arbitration of the PAGA claim on an "individual" basis) is unenforceable. *See* App. 6. Typically, most state laws that frustrate and interfere with arbitration agreements are preempted by the FAA. *See id.* In this case, however, "the rub" is that the Ninth Circuit concluded in *Sakkab* that the *Iskanian* rule was not preempted by the FAA. App. 6.

As Judge Bumatay bluntly put it, "[t]his leaves us with several bad options." *Id.* First, the panel could find that the PAGA claim falls outside the scope of the arbitration agreement, but this option would "ignore the plain text of the parties' agreement, which is not something we can do;" second, the panel could compel

arbitration of the PAGA claim on a representative basis, despite the fact that the arbitration agreement only permitted arbitration on an individual basis; or third, the panel could find that "the arbitration agreement unenforceable because, under *Iskanian* and *Sakkab*, it works as an implied waiver of PAGA claims." App. 6, App. 7. While acknowledging that the panel's decision to pursue the third option was compelled by existing precedent, Judge Bumatay raised a red flag warning of the dangerous implications of such a ruling. Such a ruling, he noted, "while compelled by our precedent, undermines the parties' promises to each other and potentially upends all arbitration agreements. We now creep closer to the day that a party may always sidestep an arbitration agreement simply by filing a PAGA claim." App. 7.

Akin to Judge Smith's dissent in *Sakkab*, Judge Bumatay also cautioned that the Ninth Circuit should revisit its own jurisprudence before this Court reverses. Specifically, he admonished that "the writing is on the wall that the [Supreme] Court disfavors our approach. We should correct our law before being countermanded by the Court yet again." *Id*. Recognizing that "[t]he tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious" (App. 9), Judge Bumatay went on to explain:

> By holding that the *Iskanian* rule is not preempted by the FAA, we interfere with "arbitration's fundamental attributes." Indeed, its application in this case requires that the parties not arbitrate a claim *at all*. Otherwise, in other cases, *Sakkab* would mandate "representative," rather than individual, arbitration. . . . But, that is precisely the type of defense that targets an arbitration agreement "*just because it requires bilateral arbitration*," which the Court held doesn't survive the FAA." App. 9, App. 10 (citations omitted) (emphasis in original).

The concurrence also criticized *Sakkab's* holding that the *Iskanian* rule was not preempted because it enforced California's labor laws. "[S]tate law doesn't survive preemption if it 'reshape[s] traditional individualized arbitration.'" App. 10 (citing *Epic Sys.*, 139 S. Ct. at 1418 (simplified)). Finally, highlighting this Court's holding "that the FAA's saving clause's offers no protection to state laws that interfere with parties' choice to engage in individual, bilateral arbitration," the concurrence stated that "[t]o the extent that the *Iskanian* rule undermines that choice – and it clearly does – it runs afoul of the FAA and must be preempted." *Id.* Judge Bumatay closed with an explicit warning that, following two reversals by this Court relating to the FAA in two consecutive terms, the Ninth Circuit "should listen to what the [Supreme] Court is telling us and revisit our precedent before again being forced to do so." *Id.*

On January 21, 2021, Coverall filed a Petition for a Rehearing En Banc. The Ninth Circuit denied the petition on April 6, 2021. App. 19.

REASONS FOR GRANTING THE PETITION

Absent intervention from this Court, the *Iskanian* rule will continue to effectively neuter otherwise valid arbitration agreements in the workplace context because litigants can avoid their enforcement simply by alleging a PAGA claim. The California Supreme Court has decreed that the *Iskanian* rule is the law of the state, impervious to the FAA's policy favoring arbitration. In *Sakkab*, the Ninth Circuit agreed that the FAA does not preempt the *Iskanian* rule. Since those decisions, the Ninth Circuit and California Supreme Court have repeatedly refused to reconsider

Sakkab and *Iskanian*, notwithstanding clear indications from this Court that those decisions take the wrong approach to FAA preemption. Accordingly, this Court's review is urgently needed to restore uniform application of the FAA and put an end to California's latest attempt to evade this Court's FAA precedents.

Indeed, absent review by this Court, thousands upon thousands of arbitration agreements will be abrogated, and the intent of the contracting parties ignored. This is in direct contravention of Congress' decree and this Court's recognition that courts are "to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings." *Epic Sys.*, 138 S. Ct. at 1619. More broadly, without this Court's intervention, other states and their courts also will feel free to promulgate laws that are effectively arbitration-proof and beyond the purview of the FAA. For these reasons, the Court's review is imperative.

This case presents an ideal vehicle for addressing the question presented. Rivas' complaint alleges solely a PAGA claim. Because the case arises out of federal court, it does not implicate the view expressed by some justices that the FAA does not apply in state courts. Although others have filed prior petitions for writs of certiorari, the legal landscape has changed, such that the time is now right for this Court to take up review. PAGA, while once nothing more than an add-on claim that plaintiffs' counsel might tack on as an afterthought, is now often utilized as the sole instrument for recovery. This is because plaintiffs and their counsel have learned that, if PAGA is the only claim alleged, they can rely on the *Iskanian* rule to circumvent any arbitration agreements between the parties. The Court should not permit this willful

undermining of the FAA and countless workplace arbitration agreements in the state with the nation's largest economy to continue.

A. The Ninth Circuit's Decision Conflicts With The FAA And This Court's Precedents

As Judge Bumatay declared, "[t]he tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious." App. 9. The Ninth Circuit's holding that the FAA does not preempt the *Iskanian* rule prohibiting waivers of representative PAGA claims is inconsistent with both the FAA and this Court's prior decisions. The FAA was promulgated to support the public policy in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (Congress has manifested "a liberal federal policy favoring arbitration agreements.") States are not permitted to create laws – whether through the legislature or by case law – that undermine the FAA and its protection of individualized arbitration. *Concepcion*, 563 U.S. at 341. This Court has repeatedly spoken – in *Concepcion*, *Epic Systems*, and *Lamps Plus* – and it has unequivocally decreed: "The FAA requires courts to 'enforce arbitration agreements according to their terms' . . . 'to give effect to the intent of the parties.'" *Lamps Plus,* 139 S. Ct. at 1415, 1416 (quoting *Epic Sys.*, 138 S. Ct. at 1621; *Stolt-Nielsen*, 559 U.S. at 684). Notwithstanding this mandate, the Ninth Circuit's approach to FAA preemption reflected in *Sakkab* and the decision below directly contravenes this policy. For this reason, Judge Bumatay (in his concurrence) recognized "how that precedent has been seriously undermined and should be revisited . . . ." App. 5.

The *Iskanian* rule, like the rules this Court rejected in *Epic Systems* and *Lamps Plus*, unquestionably "interfere[s] with the fundamental attributes" of

arbitration by mandating arbitration on a representative basis. Like the rule struck down in *Epic*, the *Iskanian* rule improperly "seek[s] to declare individualized arbitration proceedings off limits." *Epic Sys.,* 138 S. Ct. at 1623. And as Judge Bumatay recognized, application of the *Iskanian* rule in this case "requires that the parties not arbitrate a claim at all. Otherwise, in other cases, *Sakkab* would mandate 'representative,' rather than individual, arbitration . . . But, that is precisely the type of defense that targets an arbitration agreement '*just because it requires bilateral arbitration*,' which the Court held doesn't survive the FAA." App. 9, App. 10 (citations omitted) (emphasis in original).

Like the California rule that the Supreme Court held preempted in *Concepcion*, 563 U.S. at 333, the *Iskanian* rule, as interpreted in *Sakkab,* is preempted because it replaces the streamlined dispute resolution mechanism the parties agreed to use with a substantially more onerous process. In *Concepcion,* the Supreme Court addressed a rule that "condition[ed] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at 336. Like the *Iskanian* rule, that rule rendered meaningless agreements to arbitrate bilaterally. In striking it down, the Court emphasized that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. at 348. The Court also found that class arbitration "greatly increases risks to defendants" by offering only limited judicial review of awards of

"damages allegedly owed to tens of thousands of potential claimants" that "will often become unacceptable." *Id.* at 350.

As the *Sakkab* dissent explained, the *Iskanian* rule has the exact same effects as did the rules this Court struck down in *Concepcion, Lamps Plus* and *Epic Systems*. *See Sakkab,* 803 F.3d at 444 (Smith, J., dissenting). First, PAGA claims and collective actions share the same essential elements. Like class claims, PAGA claims are "brought by an aggrieved employee on behalf of himself or herself" and "other current or former employees" who are not parties to the action. Cal. Lab. Code § 2699(a). And, in a PAGA case, much like a class action, absent employees are bound by any judgment. *Iskanian,* 59 Cal. 4th at 380, 327 P.3d at 147.

Second, resolving representative PAGA claims is "slower, more costly, and more likely to generate procedural morass" than bilateral arbitration. *Concepcion,* 563 U.S. at 348. For example, unlike individual claims, representative claims require "specific factual determinations regarding (1) the number of other employees affected by the [alleged] labor code violations, and (2) the number of pay periods that *each* of the affected employees worked." *Sakkab,* 803 F.3d at 445 (Smith, J., dissenting) (emphasis in original). Numerous courts have noted that, for these reasons, representative PAGA claims can be as unmanageable and complex as class actions. *See*, *e.g.*, *Raphael v. Tesoro Ref. & Mktg. Co.* LLC, No. 2:15-cv-02862-ODW, 2015 WL 5680310, at *3 (C.D. Cal. Sept. 25, 2015); *Salazar v. McDonald's Corp.,* No. 14-cv-02096-RS, 2017 WL 88999, at *1, 7-9 (N.D. Cal. Jan. 5, 2017); *Brown v. Am. Airlines, Inc.*, No. CV 10-8431-AG (PJWx), 2015 WL 6735217, at *4 (C.D. Cal. Oct. 5, 2015).

Third, as with class actions, resolving representative PAGA claims requires procedures that are far more complex and formal than bilateral arbitration. With an individual claim, "the employee already has access to all of his own employment records," "knows how long he has been working for the employer," and "can easily determine how many pay periods he has been employed." *Sakkab,* 803 F.3d at 446 (Smith, J., dissenting). But "the individual employee does not have access to any of this information on behalf of all the other potentially aggrieved employees" in a representative action, and the "discovery necessary to obtain these documents . . . would be significant." *Id.* at 446.

Finally, PAGA, like a class action, allows plaintiffs to aggregate monetary claims on behalf of named and absent employees, which can, and often does, create the same high stakes present in class actions. Cal. Lab. Code § 2699(g)(1); *see also, e.g.*, *Lourdes Lefevre v. Five Star Quality Care, Inc.,* No. 515CV01305VAPSPX, 2021 WL 2389884, at *6 (C.D. Cal. Jan. 7, 2021) (approving PAGA settlement amount of $3,062,000.00).

And, because the "absence of multilayered review makes it more likely that errors will go uncorrected," "[a]rbitration is poorly suited to the[se] higher stakes." *Concepcion,* 563 U.S. at 350. As *Concepcion* explained, parties "are willing to accept the costs of these errors in [an individual] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id.* But that benefit is lost when bilateral arbitration is abandoned. Indeed, it is "hard to believe that defendants would bet the company with no effective

means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351.

For these reasons, courts considering arbitration agreements that mandate individual, bilateral proceedings are left with "several bad options," to use the words of Judge Bumatay. App. 6. Courts are given a "Sophie's choice" of ignoring the plain language of the parties' arbitration agreement (by finding that the agreement does not apply to PAGA claims), compelling representative arbitration (despite the agreement only permitting arbitration on an individual basis), or finding the arbitration agreement unenforceable under *Iskanian* and *Sakkab* (because it operates as a waiver of PAGA claims). *See* App. 6, App. 7. None of these options comply with the principal purpose of the FAA: "to ensur[e] that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344 (quoting *Volt*, 489 U.S. at 478).

B. Review Is Necessary Because This Case Presents A Substantial Question Of Federal Law With Wide-Reaching Implications

The Court's review of this issue is warranted and necessary. The significance of the question presented in this case extends beyond the litigants involved. The issue, in fact, bears on thousands and thousands of workplace arbitration agreements in California, which litigants are evading with increasing frequency by bringing PAGA claims. Even beyond California, the Court's ruling in this matter would be instructive on whether a state can create claims that are effectively arbitration-proof, which is precisely what California has done with PAGA. This Court has repeatedly

intervened when state laws have attempted to abrogate the broad scope of the FAA, and this case should be treated no differently.

California plaintiffs have become wise to the limitations of arbitration agreements after *Concepcion*, *Epic*, and *Lamps Plus.* As a result, actions seeking recovery based on a sole PAGA claim have become the preferred method of plaintiffs wishing to keep their actions in court and to avoid otherwise valid arbitration agreements. As Judge Bumatay inauspiciously warned: "We now creep closer to the day that a party may always sidestep an arbitration agreement simply by filing a PAGA claim." App. 7.

Unfortunately, it appears as though that day is already upon us because PAGA-only actions have become a rising trend.[1] *See*, *e.g.*, *Contreras v. Superior Ct. of L.A. Cty.*, 61 Cal. App. 5th 461, 466 (2021); *Williams v. Superior Court*, 237 Cal. App. 4th 642, 644 (2015); *Clayborne v. Lithia Motors, Inc.*, No. 1:17-cv-00588-AWI-BAM, 2021 WL 38173, at *1 (E.D. Cal. Jan. 5, 2021); *Diaz v. Macy's W. Stores, Inc.,* No. 8:19-cv-00303-ODW (MAAx), 2021 WL 2534985, at *1 (C.D. Cal. June 21, 2021); *Kilby v. CVS Pharmacy, Inc.,* No. 09cv2051-MMA (KSC), 2018 WL 2441552, at *1 (S.D. Cal. May 31, 2018); *Provost v. YourMechanic, Inc.*. 55 Cal. App. 5th 982, 987

[1] This case provides a vivid example of how plaintiffs' attorneys have learned and adapted to this new strategy. Rivas' counsel first initiated a wage and hour action that involved both class claims and a representative PAGA action against Coverall on behalf of a different plaintiff. *Gonzalez v. Coverall N. Am., Inc.*, No. EDCV 16-2287 JGB (KKx), 2017 WL 4676576, at *1 (C.D. Cal. Apr. 13, 2017); *Gonzalez v. Coverall N. Am., Inc.*, 754 F. App'x. 594 (9th Cir. 2019). After Coverall successfully compelled arbitration in that case, the same counsel filed this wage and hour action against Coverall on behalf of Rivas. However, this time around, in an effort to thwart arbitration, the complaint alleged but one single PAGA claim.

(2020); *Brooks v. AmeriHome Mortg. Co., LLC*, 47 Cal. App. 5th 624, 627 (2020); *Hernandez v. Ross Stores, Inc.,* 7 Cal. App. 5th 171, 173 (2016).

More generally, the hike in PAGA claims overall has been significant (in all cases, not just where PAGA is the sole claim). According to data from the LWDA, there were only 759 PAGA claims filed in 2005, and 3,137 in 2013. Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the "Sue Your Boss" Law*, 49 U. Pac. L. Rev. 265 (2017), https://scholarlycommons.pacific.edu/uoplawreview/vol49/iss2/7/?utm_source=scholarlycommons.pacific.edu%2Fuoplawreview%2Fvol49%2Fiss2%2F7&utm_medium=PDF&utm_campaign=PDFCoverPages. Commencing in 2014 (the year when the *Iskanian* decision came down) to 2018, the LWDA began receiving an average of 5,707 PAGA notices each year. *See* Cal. Department of Industrial Relations, Budget Change Proposal – PAGA Unit Staffing Alignment, 7 of 8 (April 2, 2019), https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf. That number has continued to grow. According to California's Department of Labor, the number of PAGA notices is projected to exceed 7,200 claims in the 2022/2023 fiscal year. *Id.* And, defendants continue to be unsuccessful in compelling arbitration of PAGA claims, despite the existence of otherwise valid arbitration agreements. *See*, *e.g.*, *Collie v. Icee Co.*, 52 Cal. App. 5th 477, 481 (2020); *Gonzalez v. Emeritus Corp.*, 407 F. Supp. 3d 862, 866-68 (N.D. Cal. 2019); *Provost*, 55 Cal. App. 5th at 982 ; *Brooks*, 47 Cal. App. 5th at 624.

If this Court declines to grant this petition, *Iskanian* and *Sakkab* will continue to provide avenues for litigants to flout the FAA's policy favoring arbitration and its mandate that arbitration agreements be enforced according to their terms. The Ninth Circuit and the California courts have made crystal clear that they will not revisit the *Iskanian* rule. Therefore, absent intervention by this Court, *Iskanian* and *Sakkab* will remain the law in California.

CONCLUSION

For the reasons above, the Court should grant this petition for writ of certiorari.

Respectfully submitted.

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