No. 21-268

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

BRIEF OF THE RESPONDENT CARLOS RIVAS IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") requires enforcement of a waiver of the statutory right to bring a representative claim on behalf of the state for penalties, even where state law prohibits the enforcement of such waivers in *all* contracts, including arbitration agreements.

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INTRODUCTION

The Court should deny certiorari. This case presents the question of whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, preempts the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129 (2014), barring the prospective waiver of the statutory right to bring a representative claim under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698, *et seq.* The PAGA allows the state to deputize individual plaintiffs to enforce the state's Labor Code and collect penalties for violations of state law. The vast majority of those penalties go to the state, and the state is bound by the outcome of the suit. In *Iskanian*, the California Supreme Court held that a PAGA claim is essentially a "a type of qui tam action," *see Iskanian*, 327 P.3d at 148, and that a waiver of such claims would undermine the statute's purpose to increase enforcement of the Labor Code for the public's benefit. *Id.* at 149. Accordingly, a waiver of the right to bring a PAGA claim violates public policy and is not enforceable, whether that waiver appears in an arbitration provision or in any other type of contract or employment agreement.

Petitioner Coverall North America Inc. ("Coverall") insists that representative claims under PAGA interfere with arbitration's fundamental attributes—specifically, the ability to resolve claims on an individual basis—and that *Iskanian's* rule is therefore preempted by the FAA. It cites this Court's case law finding that rules mandating class-wide proceedings are preempted by the FAA, including *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), *Stolt-*

Nielsen S.A. v. AnimalFeeds Int'l Corp. 559 U.S. 662, 685 (2010), and more recently, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018), and *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019). But a representative PAGA claim is fundamentally a claim brought by the state of California for penalties, not an aggregation of individual claims for damages like a class action. An agreement "to waive 'representative' PAGA claims—that is, claims for penalties arising out of violations against other employees—is effectively an agreement to limit the penalties an employee-plaintiff may recover on behalf of the state." *Sakkab v. Luxottica Retail North America, Inc.,* 803 F.3d 425, 436 (9th Cir. 2015).

Both the California Supreme Court in *Iskanian* and the Ninth Circuit in *Sakkab* concluded that *Iskanian's* bar on the outright waiver of the right to bring representative PAGA claims is not preempted by the FAA. The *Iskanian* court reasoned that its holding was not preempted because the FAA is primarily concerned with the resolution of private disputes, and the state of California is the real party in interest in a PAGA action, not the deputized PAGA-plaintiff standing in for the state. *Iskanian*, 59 Cal.4th at 386. In a concurring opinion, several Justices agreed, noting that although "the FAA generally requires enforcement of arbitration agreements according to their terms, [this Court] has recognized an exception to this requirement for 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights.'" *Id.* at 395 (*quoting Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013)). "Accordingly, the conclusion that the arbitration agreement here is invalid insofar as it forbids

Iskanian from asserting his statutory right under PAGA in any forum does not run afoul of the FAA." *Id.*

The Ninth Circuit in *Sakkab* found that the *Iskanian* rule was a generally applicable contract defense that did not single out arbitration agreements or interfere with fundamental attributes of arbitration because parties remain free to arbitrate PAGA claims and to contract for informal or streamlined procedures when they do so; the only thing they may *not* do is the waive the claim altogether. This holding is fully consistent with this Court's precedent, including the admonition that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

The sound reasoning of *Iskanian* and *Sakkab* has not been undermined by this Court's recent decisions in *Epic Systems* and *Lamps Plus*. As the Ninth Circuit correctly determined below, those decisions simply "reiterated and reapplied" the principles of *Concepcion* and *Stolt-Nielsen*, which were robustly considered by the *Iskanian* and *Sakkab* courts at the time of those decisions. App.3.[1] Moreover, there is no

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[1] Coverall's assertion that *Epic Systems* and *Lamps Plus* were game-changers overlooks that this Court has denied review of this very issue three times since *Epic Systems* was decided. *See Five Star Senior Living Inc. v. Mandviwala*, 138 S. Ct. 2680 (2018) (denying *certiorari*); *PennyMac Financial Services, Inc. v. Smigelski*, 140 S. Ct. 223 (2019) (same); *DoorDash, Inc. v. Campbell*, No. 21-220, 142 S.Ct. 342 (Oct. 12, 2021). Alt-

(*Footnote continued*)

conflict among courts on this issue that would warrant review. On the contrary, courts have uniformly rejected the position Coverall advances here. Finally, this case is a poor vehicle for review because multiple alternate grounds exist on which to affirm the decision below.

In sum, because *Iskanian* and *Sakkab* do not conflict with this Court's precedents or with decisions of other state or federal courts, there is no basis for granting review of the Ninth Circuit's decision in this case, and the petition should be denied.

COUNTER-STATEMENT OF THE CASE

A. The Private Attorney General Act (PAGA)

The PAGA provides a mechanism for enforcement of California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the State, with a smaller share also going to affected employees. Before the PAGA was enacted, only the State could bring suit to recover such penalties. *See Iskanian*, 327 P.3d at 145–46. However, "[g]overnment enforcement proved problematic." *Kim v. Reins Int'l California, Inc.*, 9 Cal. 5th 73, 81, 459 P.3d 1123, 1127 (2020). Thus, "[t]o facilitate broader enforcement, the Legislature enacted PAGA,

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hough the Court recently granted review in *Viking River Cruises Inc. v. Moriana*, No. 20-1573, that fact only underscores that there is no reason for the Court to take up this case. As described *infra*, pp. 28-30, this case is a poor vehicle for review as there are multiple other grounds on which the decision below can be affirmed.

authorizing 'aggrieved employees' to pursue civil penalties on the state's behalf." *Id.*

A PAGA claim is fundamentally a claim on behalf of the state of California. Before bringing a PAGA claim, a litigant must first provide notice of the particular Labor Code violations at issue to the Labor & Workforce Development Agency (LWDA) and must give the LWDA an opportunity to act before the employee can be "authorized" by the state to pursue the claim. *Kim*, 9 Cal. 5th at 81, 459 P.3d at 1127; *Iskanian*, 327 P.3d at 151. The PAGA authorizes the "aggrieved employee" to recover penalties for Labor Code violations committed against himself and other employees in a representative civil action. *See* Cal. Lab. Code § 2699(g). Seventy-five percent of any penalties recovered are distributed to the LWDA "for enforcement of labor laws and education of employers and employees about their rights and responsibilities" while the remaining 25 percent is distributed to the aggrieved employees. *Id.* § 2699(i). When settling a PAGA action, the deputized PAGA plaintiff must again inform the LWDA of the terms of the settlement at the same time it seeks court approval and provide an opportunity for the state to weigh in. *See* Cal. Lab. Code § 2699(l)(2). Likewise, any judgment awarding or denying PAGA penalties must be provided to the LWDA within ten days. *See* Cal. Lab. Code § 2699(l)(3).

PAGA actions do not require class certification or notice to other employees. *Arias v. Super. Ct.*, 46 Cal. 4th 969 (2009). Furthermore, other employees are bound by a PAGA adjudication only with respect to civil penalties, just as they would be "bound by a

judgment in an action brought by the government." *Id*. at 933. The state is also bound by the outcome of the suit, just as if the LWDA itself had brought the case.

For all these reasons, the California Supreme Court has described a PAGA representative action as "a type of *qui tam* action." *Iskanian*, 327 P.3d at 148. An employee suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." *Arias*, 46 Cal.4th at 986. In this sense, "[e]very PAGA claim is 'a dispute between an employer and the *state*.'" *Kim*, 9 Cal. 5th at 81, 459 P.3d at 1127 (quoting *Iskanian*, 59 Cal.4th at p. 386).

B. The California Supreme Court's Decision in *Iskanian*

Ten years after the passage of the PAGA, the California Supreme Court considered the enforceability of a waiver of the right to bring a representative PAGA claim in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129 (2014). In *Iskanian*, the plaintiff filed both class claims and a representative claim under the PAGA, based on the defendant's violations of the California Labor Code. The defendant moved to compel arbitration under an agreement that purported to bar both class actions and representative actions like a PAGA action. The California Supreme Court considered the validity of both the class action waiver and the PAGA waiver.

With respect to the first issue, the California Supreme Court overruled its prior decision in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), that class action

waivers were unenforceable under state law when certain criteria were satisfied, finding that *Gentry's* holding was now foreclosed by this Court's rulings in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). *See Iskanian*, 327 P.3d at 133. In reaching this conclusion, the *Iskanian* court also considered and rejected the argument that the National Labor Relations Act precluded enforcement of the class action waiver in Iskanian's agreement. *See id.* at 141. The decision proved prescient, as it anticipated this Court's holding in *Epic Systems*.

As to the second issue, after careful consideration, the *Iskanian* court unanimously agreed that, unlike the class action waiver, the bar on representative PAGA claims in the agreement was unenforceable under state law, and that this rule was *not* preempted by the FAA. *See id.* at 149; 150–53. In support of this holding, the Court noted that the real party in interest under PAGA is the state, and that a bar on the pursuit of representative PAGA actions really amounted to a waiver of *the state's* right to pursue its claim through its authorized agent, the PAGA plaintiff. The *Iskanian* court reasoned that "[r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws." *Iskanian*, 327 P.3d at 152 (emphasis in original). The court concluded that an agreement purporting to waive an individual's ability to pursue a PAGA

claim on behalf of the state was unenforceable, and that the FAA did not preempt a state-law rule preserving a plaintiff's ability to bring such a claim in some forum.

This Court declined to review the result in *CLS Transp. Los Angeles, LLC v. Iskanian*, 135 S. Ct. 1155 (2015).

C. The Ninth Circuit's Decision in *Sakkab*

The validity of *Iskanian's* holding was considered anew by the Ninth Circuit Court of Appeals a year later in *Sakkab*. There, the court considered whether the *Iskanian* rule was preempted by the FAA, and, like the California Supreme Court, it concluded it was not. The Ninth Circuit held that the rule was a "generally applicable" contract defense because it "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Sakkab*, 803 F.3d at 432. The court then turned to the question whether the rule "conflicts with the FAA's purposes", and it concluded that it does not. *Id.* at 433-40. The court noted that litigants remain free to litigate or arbitrate PAGA claims, and that parties remain free to select the procedures they want to apply in arbitration. *Id.* at 434. The court noted that PAGA claims and class claims are fundamentally different and that "PAGA arbitrations therefore do not require the formal procedures of class arbitrations. *Id.* at 435-36. The court explained:

> Whether a claim is technically denominated "representative" is an imperfect proxy for whether re-

> fusing to enforce waivers of that claim will deprive parties of the benefits of arbitration. Instead, *Concepcion* requires us to examine whether the waived claims mandate procedures that interfere with arbitration, as the class claims in *Concepcion* did. Here, they do not.

Id. at 436-37. PAGA claims, the court elaborated, are not aggregations of individual actions and do not require notice to class members as is required in class actions for due process purposes. In a PAGA action, the parties remain free to engage in streamlined discovery or other methods to simplify proceedings. And insofar as a PAGA claim may be high-stakes or complex, the same is true of numerous causes of action, including anti-trust claims. *Id.* at 437-39.

Finally, the Ninth Circuit also noted "the PAGA's central role in enforcing California's labor laws." *Id.* at 439. It found that "'in all pre-emption cases' we must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Given that the PAGA creates a type of qui tam action and that "qui tam actions predate the FAA by several centuries", *see id.* at 439, the court found that the state's right to authorize qui tam actions to enforce the Labor Code was not preempted by the FAA. *Id.* at 440.

D. Factual & Procedural Background of This Case

Plaintiff Carlos Rivas is a cleaning worker, performing services subject to a "franchise agreement" with Petitioner Coverall North America Inc. ("Coverall"). A number of courts have found cleaning "franchisees" like Rivas are actually misclassified employees of their cleaning franchisor under state laws that utilize a similar or identical "ABC" test for employee status to California's test. Indeed, Coverall itself was found liable for misclassifying its cleaning franchisees under the Commonwealth of Massachusetts' identical "ABC" test for employee status on multiple different occasions. *See Coverall N. Am., Inc. v. Com'r of Div. of Unemployment Assistance*, 447 Mass. 852, 858, 857 N.E.2d 1083, 1087 (2006) (finding Massachusetts Coverall franchisee was misclassified under state unemployment law); *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80, 82 (D. Mass. 2010) (finding Massachusetts Coverall franchisees were misclassified under state wage law).[2]

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[2] *See also De Giovanni v. Jani-King Int'l, Inc.*, Civ. A. No. 07-10066-MLW (D. Mass. June 6, 2012) (finding Massachusetts cleaning franchisees were misclassified under state wage law); *Da Costa v. Vanguard Cleaning Sys., Inc.*, No. CV 15-04743, 2017 WL 4817349, at *7 (Mass. Super. Sept. 29, 2017) (finding Connecticut and Massachusetts cleaning franchisees were misclassified under state wage laws); *System4, LLC v. Ribeiro*, 275 F. Supp. 3d 297 (D. Mass. 2017) (confirming arbitrator award, holding that Massachusetts cleaning franchisee was misclassified).

Consistent with this body of law finding that Coverall has misclassified its cleaning workers under the laws of various states, Rivas filed a letter with California's Labor & Workforce Development Agency (LWDA) on December 1, 2017, alleging that Coverall has misclassified its cleaning worker "franchisees" in California as independent contractors rather than employees and has committed various violations of the Labor Code as a result.[3] When he received no response from the LWDA, Rivas filed the PAGA claim in court on June 7, 2018.

Eighteen months after the case was filed, and after filing a motion to dismiss and an answer and counterclaim against Mr. Rivas in court, Coverall suddenly changed course and moved to compel Rivas's PAGA claim to individual arbitration pursuant to the terms of his franchise agreement.[4] That agreement states:

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[3] Under Coverall's business model, cleaning workers like Mr. Rivas are sold "franchise" packages, allowing them to perform work cleaning commercial buildings. These franchise packages cost thousands of dollars, which are typically paid in an up-front down payment and then financed in part over time through deductions from the workers' pay. In addition, the workers have various expenses taken out of their paychecks, including deductions for worker's compensation insurance, cleaning supplies, and "charge-backs" when a customer fails to pay Coverall for cleaning work and that money is deducted from the worker's pay. *See* D. Ct. Dkt. No. 39, ¶¶ 8, 17.

[4] Below, Rivas argued that Coverall waived its right to compel arbitration by litigating its motion to dismiss and Rivas's motion to dismiss its counterclaim before moving to arbitrate, but the district court found it unnecessary to reach this issue because it determined that the PAGA claim was outside

(*Footnote continued*)

> Franchisee and Coverall agree that 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. Only Coverall (and its officers, directors, agents and/or employees) and Franchisee (and Franchisee's owners, officers, directors and/or guarantors) may be parties to any arbitration proceeding described in this Paragraph 21.A.

See D. Ct. Dkt. No. 65-3, ¶ 21(A)(11).

In its Motion to Compel Arbitration, Coverall asserted that its arbitration agreement does not allow for arbitration of representative claims. *See* D. Ct. Dkt. No. 65-1 at p. 8 (noting that the arbitration "provision prohibits any type of action other than one brought on an individual basis."). Coverall also expressly asked that the district court (and not an arbitrator) be the one to decide whether Rivas could proceed on his PAGA claim in arbitration on a representative basis. *See id.* at pp. 1-2.

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the scope of the arbitration agreement, or alternatively, that the agreement was unenforceable insofar as it purported to waive the right to bring a representative PAGA claim. The Ninth Circuit also found it unnecessary to address waiver.

E. The District Court's Decision

Having been asked to decide this issue, the district court ruled that Coverall's agreement does not permit the arbitration of representative claims because the agreement requires that the arbitration "shall not be consolidated with any other proceeding" between Coverall and any other franchisee and that "[o]nly Coverall… and [Plaintiff]… may be parties to any arbitration proceeding"—not the state of California. App.13-14. The district court held that because the PAGA claim is inherently representative in nature, this language in the arbitration agreement precluded arbitration of the claim. App.14-15. The district court reasoned that the PAGA claim—as a representative claim that ultimately belongs to the state of California—either fell outside the scope of the agreement altogether, or the agreement implicitly waived the right to bring the PAGA claim and was unenforceable under *Iskanian*. Either way, the claim could not be compelled to arbitration under Coverall's franchise agreement. App.15-16.

The district court next considered Coverall's argument that this Court's recent decisions in *Epic Systems* and *Lamps Plus* overruled *Sakkab* and mandated that the FAA preempts California's public policy prohibiting the waiver of representative PAGA claims. The district court rejected this argument, noting that "the axiom that a contract may not be rendered unenforceable 'just because it requires bilateral arbitration' was well known to the *Sakkab* court" and did not originate with this Court's decision in *Epic Systems*. App.16 (quoting *Epic Systems*, 138 S. Ct. at 1623). Similarly, the holding of *Lamps Plus*—

that class arbitration and individual arbitration are so 'crucially different,' that even general contract principles neutral towards arbitration could be preempted by the FAA if they compel class arbitration without the clear consent of the parties"—was "contemplated and held inapplicable" by the Ninth Circuit in *Sakkab*. App.17. The district court found that *Sakkab* remained good law, and it denied Coverall's Motion to Compel arbitration.

F. The Ninth Circuit's Decision

The Ninth Circuit affirmed. The Court found that neither *Epic Systems* nor *Lamps Plus* "expanded upon *Concepcion* in such a way as to abrogate *Sakkab*." App.3. The Court also rejected Coverall's arguments that arbitration of a representative PAGA claim would involve the same complexity and procedural formality of a class arbitration, finding that this argument was likewise rejected by *Sakkab* and that a PAGA action was fundamentally different from a class action. The Court also rejected Coverall's argument that the rule against the waiver of PAGA claims does not qualify as a generally applicable contract defense. App.4.

The Ninth Circuit denied Coverall's petition for rehearing *en banc* on April 6, 2021.

REASONS FOR DENYING THE WRIT

A. This Court's Decisions in *Epic Systems* and *Lamps Plus* do not create FAA preemption of the *Iskanian* rule.

Since *Iskanian* was decided seven years ago, defendants have repeatedly argued that its bar on predispute PAGA waivers is preempted by this Court's decision in *Concepcion*. There, this Court found that a bar on class action waivers was preempted by the FAA because it interfered with fundamental attributes of arbitration by imposing formal classwide arbitration procedures on the parties. 563 U.S. at 347-49. Both *Iskanian* and *Sakkab* carefully considered *Concepcion* and concluded that PAGA actions and class actions are fundamentally different and that *Iskanian's* rule against an outright waiver of represntative PAGA claims was not preempted by the FAA.

Coverall now attempts to breathe new life into this issue by insisting that this Court's recent precedents in *Epic Systems* and *Lamps Plus* mandate a different result. But as the Ninth Circuit correctly found below, this Court merely "reiterated and reapplied [*Concepcion's*] rule in *Epic Systems* and *Lamps Plus*." App.3. "[N]either case expanded upon *Concepcion* in such a way as to abrogate *Sakkab*." *Id.* Nothing in *Epic Systems* or *Lamps Plus* treads new ground or supports Coverall's request for review.

Epic Systems does not speak to the *Iskanian* rule at all, as it addresses whether the National Labor Relations Act requires the availability of *class* adju-

dication procedures. Likewise, *Lamps Plus* is an extension of this Court's decision in *Stolt-Nielsen* insofar as it holds that parties cannot be compelled to arbitrate *class* claims unless there is a clear contractual basis for doing so. *See Lamps Plus*, 139 S. Ct. at 1416 ("[C]ourts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'") (*quoting Stolt-Nielsen*, 559 U.S. at 684). Neither case addresses whether parties can effectively waive a representative claim for penalties on behalf of the state because the claim is allegedly inconsistent with "fundamental attributes" of arbitration.

Put simply, *Epic Systems* and *Lamps Plus* do not apply to PAGA claims because class action procedures are fundamentally different from representative PAGA claims on behalf of the state. PAGA claims do not seek to pursue "victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement," *see Iskanian*, 59 Cal. 4th at 387, which would run afoul of *Epic Systems* (if the agreement contained a class waiver) and *Lamps Plus* (if the agreement did not clearly allow for class arbitration). Instead, PAGA claims seek penalties on behalf of the state of California; "any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." *Iskanian*, 59 Cal. 4th at 388.

In any case, as set forth further below, Coverall's arguments regarding why *Epic Systems* and *Lamps Plus* require preemption of the *Iskanian* rule fail on the merits.

B. *Iskanian* and *Sakkab* are fully consistent with this Court's precedents.

The *Iskanian* Rule does not interfere with the fundamental attributes of arbitration. Coverall argues that "the *Iskanian* rule … is preempted because it replaces the streamlined dispute resolution mechanism the parties agreed to use with a substantially more onerous process." Pet. at 19. But *Iskanian* and *Sakkab* do not impose a "more onerous *process*" on defendants; they simply disallow the outright waiver of a particular type of claim. Even if Coverall's characterization of PAGA claims as necessarily more complex or onerous to arbitrate than other claims were correct (it is not), that fact still would not provide a basis for preemption under the FAA. As set forth further below, each of the arguments Coverall advances in favor of review are erroneous.

1. Representative PAGA Claims Are Distinct From Class Claims And Do Not Implicate This Court's Precedents Regarding Class Action Waivers.

As an initial matter, Coverall's analogy between class action claims and representative PAGA claims is flawed, and as a result, this Court's jurisprudence regarding class action waivers in *Concepcion*, *Epic Systems*, and *Lamps Plus* does not apply to preempt the *Iskanian* rule. Both the Ninth Circuit and the California Supreme Court have made clear that representative PAGA claims do not entail use of the procedural mechanism for bringing class action claims under Fed. R. Civ. P. 23, but involve one-on-one litigation between the state and the defendant. *See,*

e.g., *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1124 (9th Cir. 2014) ("A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief."); *Arias v. Superior Court*, 46 Cal. 4th 969, 984-86 (2009). In a PAGA case, the "dispute [is] between an employer and the *state*…", not the employer and employee. *Iskanian*, 59 Cal. 4th at 386. "The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest." *Id.* at 387. Moreover, the vast majority of penalties in a PAGA action benefit the state, not the workers.

Because the FAA is not concerned with arbitration of disputes between private parties and states or public agencies, its purposes are not frustrated by the *Iskanian* rule. This Court's case law interpreting FAA preemption focuses on agreements to arbitrate between *private parties*. Indeed, in one of the only cases in which this Court has considered the enforcement of an arbitration agreement against a state or public agency, the Court held that an agreement to arbitrate between a private party and his employer did not impact the ability of the EEOC to bring claims on behalf of the employee in question or to seek victim-specific relief on his behalf. This Court held that "[d]espite the FAA policy favoring arbitration agreements . . . [t]he FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum." *E.E.O.C. v. Waffle House, Inc.* 534 U.S. 279, 280 (2002). If an arbitration agreement were permitted to bar the state's

recovery of PAGA penalties, it would "turn[ ] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies." *Id.* at 295.

Here, a PAGA action, like the claim at issue in *Waffle House*, is not in essence a dispute between an employer and an employee "arising out of their contractual relationship," *Iskanian*, 59 Cal.4th at 386, but rather "functions as a substitute for an action brought by the government itself." *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009). The *Iskanian* rule is therefore wholly consistent with this Court's FAA preemption jurisprudence, as set forth in *Waffle House*. As the California Supreme Court recognized in *Iskanian*, "[n]othing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of *qui tam* action on behalf of the state for such remedies." 327 P.3d at 151.

Coverall insists that "the ability to resolve claims on an individual basis… [is a] fundamental attribute" of arbitration, and "the FAA preempts state-law rules that interfere with parties' agreements to do so." Pet. at 5. But there is no such thing as an "individual" PAGA claim, and Coverall's approach would effectively require outright waiver of a representative PAGA claim. As explained above, PAGA claims are inherently representative in nature because, unlike class claims, they are claims brought on behalf of the state of California. Indeed, the California Supreme Court has made clear that "[a]ll PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf." *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 185, 448 P.3d 239, 243 (2019). Likewise, the Ninth Circuit has acknowledged that

"courts have time and again reiterated that the PAGA creates only a representative right of action" and courts have not "permitted a PAGA claim to be brought in an individual capacity." *Monaghan v. Telecom Italia Sparkle of N. Am., Inc.*, 647 F. App'x 763, 770 (9th Cir. 2016).[5] In sum, there is no such thing as an "individual PAGA claim." The claim belongs to the state of California and is necessarily representative in nature. By analogizing a waiver of the right to bring representative PAGA claims to a class action waiver, Coverall is comparing apples and oranges. A litigant can still bring individual Labor Code claims and agree to forgo the procedural mechanism of a class action, but a litigant cannot bring an "individual PAGA claim." Thus, the representative action waiver amounts to an outright waiver of the PAGA claim itself. FAA preemption does not mandate the enforcement of an agreement to *waive* claims where the state has granted a non-waivable claim under the PAGA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agree-

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[5] *See also Perez v. U-Haul Co. of California*, 3 Cal.App.5th 408, 421 (2016) (holding that an employer may not compel an employee to submit part of his PAGA claim to arbitration under an agreement that bars assertion of representative claims); *Davidson v. O'Reilly Enterprises, LLC*, 2018 WL 3359681, at *3 (C.D. Cal. June 5, 2018) ("Because PAGA is a representative action undertaken on behalf of the state to enforce the Labor Code, a plaintiff cannot bring a PAGA claim on an individual basis."); *Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119, 1123 (2011) ("[P]laintiff may not and does not bring the PAGA claim as an individual claim, but as the proxy or agent of the state's labor law enforcement agencies. A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but *must* bring it as a representative action ....") (internal citation omitted).

ing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute…").

2. Representative Claims Do Not Impose Procedures or Costs That Are Incompatible with the Arbitral Process.

Insofar as Coverall complains that resolving representative PAGA claims is "slower [and] more costly," than bilateral arbitration, *see* Pet. at 20, its argument is misplaced. As an initial matter, PAGA claims do *not* impose the type of procedural complexity that Coverall claims. As the Ninth Circuit recognized in *Sakkab*, parties remain free to agree to streamlined procedures and limited discovery in arbitration, just as in any other case. *Sakkab*, 803 F.3d at 438. Moreover, "[i]t is not true … that PAGA actions are necessarily 'procedurally' complex" at all. *Sakkab*, 803 F.3d at 438. Any alleged complexity in a PAGA action typically stems from the number of violations involved, which may or may not involve many other employees depending on the size of the employer and the nature of the alleged violations. *Id.* As the Ninth Circuit recognized in *Sakkab*, "the complexity [of a PAGA action] flows from the substance of the claim itself, rather than any procedures required to adjudicate it (as with class actions)," *see id.*, and in that sense PAGA claims are no different from myriad other claims that involve significant discovery or high stakes.[6]

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[6] Coverall argues that more significant discovery is required in PAGA actions to allow the PAGA plaintiff to ascertain information about how many other aggrieved employees exist

(*Footnote continued*)

Indeed, there are many types of arbitrable claims that may be complex to litigate or have high stakes because of the nature of the claims involved; however, the FAA does not require that such claims be waived outright because they are not conducive to individual arbitration. As the Ninth Circuit recognized in *Sakkab*, "the FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." *Sakkab*, 803 F.3d at 437. Indeed, this Court has repeatedly held that many complex claims, with extremely high stakes for those involved, are nonetheless arbitrable. *See, e.g., Mitsubishi*, 473 U.S. at 637 (antitrust claims); *Shearson/American Express v. McMahon,* 482 U.S. 220, 229–33 (1987) (Securities Exchange Act claims); *id.* at 238–42 (civil RICO claims); *Pyett*, 556 U.S. at 258 (employment discrimination claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33–35 (1991) (federal civil rights claims). For example, in *American Express*, this Court held that antitrust claims could be subject to arbitration despite the complexity and "the expense involved in proving" a violation of the anti-trust laws, which necessitate market-wide evidence. 570 U.S. at 236.

The fact that a state's statutory scheme gives rise to claims that defendants find particularly complex or difficult to arbitrate does not mean that the FAA

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and the scope of the penalties owed. Pet. at 21. But the same is true of many other types of claims that require extensive and far-reaching evidence, such as anti-trust or civil RICO claims.

allows defendants like Coverall to require potential plaintiffs to waive those claims entirely. An outright waiver of Rivas's PAGA claim is not required by this Court's jurisprudence; on the contrary, such a "a prospective waiver of a party's right to pursue statutory remedies" is "against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). This court has repeatedly directed that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009) (agreement to arbitrate is not "a prospective waiver of the substantive right."); *American Express*, 570 U.S. at 238–39 (effective vindication exception to enforcement of arbitration agreements "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.").[7] By arguing that a representative PAGA claim interferes with its right to "individual, bilateral proceedings", *see* Pet. at 22, Coverall is arguing for nothing short of a waiver of the right to bring this claim in the first instance. The FAA and this Court's jurisprudence plainly do not require such a waiver.

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[7] The principle underlying this statement in *American Express* applies equally to statutory claims under state law. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (noting that "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum", and here, "plaintiff relinquishes no substantive rights the TAA or other California law may accord him.").

3. Contrary to Petitioner's contentions, the *Iskanian* rule is a rule of general applicability.

The FAA's saving clause "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract' … but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" or that "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 339, 344 (quoting 9 U.S.C. § 2). The *Iskanian* rule is a rule of general applicability that does not single out arbitration or depend upon the fact that an agreement to arbitrate is at issue. The *Iskanian* rule bars a predispute waiver of a representative claim under PAGA as contrary to public policy. *Iskanian*, 59 Cal. 4th at 384. By its plain terms, the "rule bars *any* waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Sakkab*, 803 F.3d at 432 (emphasis added). The rule does not depend on arbitration: if an employer included a term requiring its employees to waive all PAGA claims going forward, under *Iskanian*, that waiver would be invalid, regardless of what type of contract included the waiver and regardless of whether the contract contained an arbitration provision. In short, the *Iskanian* rule does not single out arbitration agreements for disfavored treatment.

4. Contrary to Petitioner's contentions, the *Iskanian* rule does not target 'bilateral' arbitration.

Similarly, nothing about *Iskanian's* rule against pre-dispute PAGA waivers targets "individual" or "bilateral" arbitration either; PAGA claims are necessarily representative in nature, and thus, the notion of an "individual"—that is, non-representative—PAGA claim" is a contradiction in terms, as explained *supra*, pp. 22-23. Because PAGA claims are inherently representative, they must go forward on a representative basis, but this fact in no way targets bilateral arbitration and is simply a feature of any type of similar qui tam action, which likewise proceeds on a bilateral basis between the defendant and the state, acting through its representative. *See Iskanian*, 59 Cal. 4th at 390 (noting that the ruling "would apply not only to the PAGA but to all qui tam actions, including the California False Claims Act, which authorizes the prosecution of claims on behalf of government entities without government supervision."). The fallacy of Coverall's argument is that by requiring "individual" arbitration of a PAGA claim, it effectively waives the claim altogether, and FAA preemption does not provide it with the cover to do so.

At bottom, *Epic Systems* and *Lamps Plus* speak to entirely different issues than *Iskanian* and *Sakkab*. *Epic Systems* holds that aggregating numerous individuals' claims into a single proceeding interferes with arbitration's fundamental attributes whereas *Iskanian* holds that the waiver of a unitary PAGA claim on behalf of the state is unenforceable. Like-

wise, *Lamps Plus* holds that parties cannot be required to engage in class-wide arbitration without a contractual basis for doing so, whereas *Sakkab* holds that litigants can arbitrate PAGA claims if they so choose, and that procedures to streamline and simplify such actions are readily available in a way that they are not in class arbitrations. Nothing in *Epic Systems* or *Lamps Plus* spoke to whether a defendant could bar an individual from asserting any claim they would otherwise be able to bring in a bilateral proceeding.

C. There is no conflict among lower courts that supports review.

Like the petitioners in *Iskanian* and other cases challenging its holding in which this Court has denied certiorari, Petitioner can point to no conflict among federal appellate or state supreme courts over whether the FAA mandates enforcement of an agreement to waive PAGA claims or similar state enforcement actions. *Iskanian* and *Sakkab* are in full agreement. Furthermore, numerous state and federal courts have considered the same question Coverall raises here—namely, whether this Court's recent precedents in *Epic Systems* and *Lamps Plus* dictate that the *Iskanian* rule barring the pre-dispute waiver of representative PAGA claims is preempted by the FAA. These courts have unanimously agreed with the Ninth Circuit in this case that *Epic Systems* and *Lamps Plus* do not disturb the sound rulings of *Iskanian* and *Sakkab*.[8]

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[8] *See*, *e.g.*, *Gonzales v. Emeritus Corp.*, 407 F. Supp. 3d 862, 867 (N.D. Cal. 2019); *Gilbert Enterprises, Inc. v. Amazon.com*,

(*Footnote continued*)

In an attempt to manufacture conflict and urgency, Petitioner raises the specter that "other states and their courts also will feel free to promulgate laws that are effectively arbitration-proof and beyond the purview of the FAA." Pet. at 17. But in the seven years since *Iskanian* was decided, this speculative fear has not come to fruition. Petitioner points to no decisions arising under similar laws of other states that would suggest that the *Iskanian* rule has given rise to a tide of laws or lawsuits that seek to undermine the FAA.[9]

2019 WL 6481697 at *7 n.3 (C.D. Cal. Sept. 23, 2019); *Rejuso v. Brookdale Senior Living Communities, Inc.*, 2019 WL 6735124, at *6 (C.D. Cal. May 22, 2019); *Whitworth v. SolarCity Corp.*, 336 F. Supp. 3d 1119, 1123 (N.D. Cal. 2018); *see also Olson v. Lyft, Inc.*, 56 Cal.App.5th 862 (2020); *Rimler v. Postmates Inc.*, No. A156450, 2020 WL 7237900, at *1 (Cal. Ct. App. Dec. 9, 2020), *review denied* (Feb. 24, 2021); *Seifu v. Lyft, Inc.*, No. B301774, 2021 WL 2200878, at *2 (Cal. Ct. App. June 1, 2021), *review denied* (Aug. 18, 2021).

[9] Coverall insists that the number of PAGA actions has been on the rise in recent years, which allegedly evinces a rising tide of plaintiffs' lawyers seeking to avoid arbitration. But there are many reasons for that increase, including the fact that California adopted a new test for independent contractor misclassification in 2018, *see Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903, 416 P.3d 1 (2018), which was codified by the Legislature in 2020, resulting in a larger number of violations by defendants not in compliance with the new law. An increase in non-compliance with the Labor Code is the logical reason for an increase in representative actions to enforce the law, and indeed, that is exactly what the PAGA is intended to achieve. In any case, the statistics Coverall cites makes clear that its real goal in filing this petition is to shield employers from liability for Labor Code violations. However, it is not this Court's role to substitute its judgment for that of the state of California, which

(*Footnote continued*)

In light of the current agreement at the appellate level among both state and federal courts over the application of preemption principles to the PAGA right of action, the reasons ordinarily justifying review by this Court are not present. *See* S. Ct. R. 10(b). This Court has repeatedly recognized as much by denying review of this very issue before, and it should do so again in this case.

D. This case is a poor vehicle for review.

Finally, even if this Court believed that its recent decisions in *Epic Systems* and *Lamps Plus* warranted review of *Sakkab* and its conclusion that the *Iskanian* rule is not preempted by the FAA, this would not be the right case for this Court to take up this question. In particular, there are several other grounds on which the decision below can be affirmed, regardless of the resolution of the issues raised by Coverall here.

First, the district court rested its decision on two alternate grounds: (1) that Coverall's agreement waived Plaintiff's right to bring a PAGA claim in any forum and was therefore unenforceable; or (2) that the representative PAGA claim fell outside of the scope of the agreement altogether because the agreement requires that all "arbitration shall be conducted on an individual basis" and that "[o]nly Cov-

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has determined that widespread violations of the Labor Code require augmented enforcement beyond the State's own capacity to bring cases.

erall … and [Plaintiff] … may be parties to any arbitration proceeding" and a PAGA claim is a claim on behalf of the state of California. App.13-14 (quoting D. Ct. Dkt. 65-3 at § 21A). The Ninth Circuit primarily considered the first line of reasoning by the district court, holding that "insofar as the … parties' arbitration agreement bars Rivas from arbitrating his PAGA claim in full, it remains unenforceable under California law." App.4. But the district court's conclusion that a representative claim under the PAGA falls outside the scope of Coverall's arbitration agreement because the agreement applies only to Rivas's own individual claims provides an alternative basis for affirmance, and, indeed, one that is logically antecedent to consideration of whether the *Iskanian* rule is preempted by the FAA. App.15. The Ninth Circuit did not find it necessary to reach this issue, but the existence of this alternative, fact-bound ground for affirmance renders this case a poor vehicle for deciding whether this Court's precedent has overruled *Sakkab*.

Moreover, as Rivas argued below, both in the district court and the Ninth Circuit, Coverall waived its right to compel Plaintiff's claims to arbitration through its litigation conduct, which included months of litigation and briefing a motion to dismiss (which led to a dismissal without prejudice and the filing of an amended complaint), followed by the assertion of counterclaims against Rivas, and briefing a motion to dismiss Coverall's counterclaim. Here, unlike in *Morgan v. Sundance Inc.*, No. 21-328 (2021), which this Court recently voted to take up, Plaintiff argued that he was prejudiced by Coverall's actions, and thus, Rivas's waiver argument will be unaffected

by the outcome in *Morgan*, which concerns whether prejudice is required for a finding of waiver. The Ninth Circuit and the district court did not reach the waiver issue because they denied Coverall's Motion to Compel arbitration on other grounds but were this Court to grant Coverall's petition for certiorari, Plaintiff would argue that this additional issue requires affirmance. For all these reasons, this case is a particularly poor vehicle for review of the question of whether the FAA preempts the holdings of *Iskanian* and *Sakkab*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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