No. _____

IN THE

Supreme Court of the United States

UBER TECHNOLOGIES, INC.,

Petitioner,

v.

DAMARIS ROSALES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), this Court held that the FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of [an] arbitration agreement[]" "providing for individualized proceedings." *Id.* at 1619, 1621, 1623.

Courts in California have created a broad but unwritten exception to the FAA's otherwise "emphatic directions." *Epic Sys.*, 138 S. Ct. at 1621. According to the California Supreme Court, claims arising under the California Labor Code Private Attorneys General Act ("PAGA")—which threaten employers with massive penalties for even trivial legal violations—are wholly exempt from the FAA, and agreements calling for individual arbitration are therefore unenforceable as to PAGA claims. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 360 (2014). The Ninth Circuit upheld this conclusion in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). And both courts have declined to reassess this conclusion after *Epic Systems*.

The question presented is:

Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private Attorneys General Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

Pursuant to this Court's Rule 29.6, undersigned counsel state that Uber Technologies, Inc. is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Uber, Uber is unaware of any shareholder who beneficially owns more than 10% of Uber's outstanding stock.

STATEMENT OF RELATED PROCEEDINGS

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

- *Rosales v. Uber Technologies, Inc.*, No. BC685555 (Cal. Super. Ct.), order issued Mar. 12, 2020;
- *Rosales v. Uber Technologies, Inc.*, No. B305546 (Cal. Ct. App.), opinion issued Apr. 30, 2021;
- *Rosales v. Uber Technologies, Inc.*, No. S269214 (Cal.), petition for review denied Aug. 11, 2021.

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

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PETITION FOR A WRIT OF CERTIORARI

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

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

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

in California have carved out an exception to that rule for PAGA claims.

As it currently stands, employees in California can escape otherwise valid and binding agreements to arbitrate disputes with their employers on an individual basis by asserting their claims under PAGA. PAGA authorizes an "aggrieved employee" to seek civil penalties "on behalf of himself or herself and other current or former employees" for a wide-range of violations of the California Labor Code. Cal. Lab. Code § 2699(a). The California Supreme Court has interpreted PAGA to permit the entry of judgments binding on employees who are not parties to the action *without* notice or any showing that the named plaintiff has typical claims or that his counsel is adequate. *Arias v. Superior Court*, 46 Cal. 4th 969, 985–87 (2009).

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), the California Supreme Court held that arbitration agreements requiring employees to arbitrate disputes with their employers individually rather than bring a PAGA action in court are void as a matter of public policy. *Id.* at 360. As a result, the so-called "*Iskanian* rule" allows employees in California to bring PAGA claims on behalf of themselves and hundreds or thousands of other "aggrieved employees" in court, often for millions of dollars in penalties—even if they expressly agreed with their employers to resolve all disputes in individual arbitration.

Both the California Supreme Court and the Ninth Circuit have concluded that the *Iskanian* rule is not preempted by the FAA. The California Supreme

Court held that a PAGA claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." *Iskanian*, 59 Cal. 4th at 386–87. *Iskanian* reasoned that a PAGA claim "is a dispute between an employer and the *state*," meaning that the state is "the real party in interest," *id.* (emphasis in original)—even though in PAGA actions it is the employee who actually files the action and has complete control over the litigation. And in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), a divided panel of the Ninth Circuit held that the *Iskanian* rule was not preempted by the FAA, but declined to adopt the California Supreme Court's reasoning. Instead, the Ninth Circuit held that the *Iskanian* rule falls within the FAA's saving clause because it supposedly "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* at 432–40.

Both the California Supreme Court and the Ninth Circuit have repeatedly refused to reconsider these holdings. They have done so even though, as Judge Bumatay recently explained, "the writing is on the wall" that *Iskanian* and *Sakkab* have "been seriously undermined" by *Epic Systems*. *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 57–58 (9th Cir. 2021) (Bumatay, J., concurring) ("Recent Supreme Court decisions . . . make clear that our precedent is in serious need of a course correction."). The Court should grant review to make clear that parties may not "sidestep an arbitration agreement simply by filing a PAGA claim." *Id.*

Like class and collective actions, PAGA actions "'fundamental[ly]' change . . . the traditional arbitration process" Congress sought to promote when it enacted the FAA. *Epic Sys.*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 347–48). In seeking to adjudicate alleged violations of the California Labor Code for hundreds or thousands of employees in a single action, PAGA actions "sacrific[e] the principal advantage of arbitration—its informality"—"and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* (quotation marks omitted; alterations in original). Like California's since-overruled prohibition on class-action waivers, *Iskanian*'s prohibition on the arbitration of PAGA claims on an individual basis "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. *Concepcion*, 563 U.S. at 352 (quotation marks omitted). *Iskanian* also invalidates arbitration "agreements precisely because they require individualized arbitration proceedings instead of [representative] ones." *Epic Sys.*, 138 S. Ct. at 1622.

Granting review would resolve an important and recurring issue affecting thousands of companies in the country's most populous state. Since *Iskanian*, PAGA has become the preferred avenue for plaintiffs (and their attorneys) to sidestep binding individual arbitration agreements. The number of PAGA filings has dramatically increased in the years after *Iskanian*, and thousands of PAGA actions are filed every year. The California Supreme Court and the Ninth Circuit have made clear that they will not change course. And absent this Court's intervention,

the unwritten and unprincipled "PAGA exception" to the FAA may spread beyond California, as other states are considering adopting laws like PAGA.

The Court should grant review to make clear that the FAA applies equally to claims asserted under PAGA, and reaffirm once again that individual arbitration agreements must be enforced according to their terms.

OPINIONS BELOW

The California Supreme Court's order denying Petitioner's petition for review is unpublished and is reproduced at App.1a. The California Court of Appeal's opinion is available at *Rosales v. Uber Technologies, Inc.*, 63 Cal. App. 5th 937 (2021) and reproduced at App.2a. The judgment of the California Superior Court of Los Angeles County is unpublished and is reproduced at App.13a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Supreme Court denied Petitioner's petition for review on August 11, 2021.

STATUTORY PROVISIONS INVOLVED

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

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the FAA in 1925 in response to "longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Congress recognized that arbitration has much to offer, "not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. Congress thus enacted the FAA to "ensur[e] that private arbitration agreements are enforced according to their terms," *Concepcion*, 563 U.S. at 344 (quotation marks omitted; alteration in original), and "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). To advance those goals, Section 2 of the FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This Court has expansively interpreted the FAA's preemptive scope, holding that the FAA preempts state laws that interfere with parties' ability to choose the efficiency and informality of individual arbitration. *Concepcion*, 563 U.S. at 344. In *Concepcion*, this Court considered the enforceability of a consumer contract providing for "arbitration of all disputes between the parties, but requir[ing] that claims be brought in the parties' individual capacity,

and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 336 (quotation marks omitted). *Concepcion* held that the FAA preempts any rule prohibiting class action waivers in arbitration agreements, including California's *Discover Bank* rule. *Id.* at 341–44.

The Court explained that Section 2's saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" but offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. The Court held that the *Discover Bank* rule "interfere[d] with fundamental attributes of arbitration"—namely, its informality, lower cost, greater efficiency, and speed—by "[r]equiring the availability of classwide arbitration." *Id.* at 344. As the Court explained, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*

2. PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties for Labor Code violations on behalf of themselves, other employees, and the State of California. Cal. Lab. Code §§ 2698 *et seq*. For California Labor Code provisions that do not themselves specify a monetary penalty, PAGA provides statutory penalties of $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *Id.* § 2699(f)(2). These penalties may be recovered by "an aggrieved employee . . . in a civil action . . . filed on behalf of

himself or herself and other current or former employees against whom one or more of the alleged violations was committed." *Id.* § 2699(g)(1).

PAGA provides that civil penalties collected from an employer "shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency" and "25 percent to the aggrieved employees." Cal. Lab. Code § 2699(i). PAGA further provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." *Id*. § 2699(g)(1). PAGA penalties can run into the hundreds of millions of dollars. *See Sakkab*, 803 F.3d at 448 (Smith, J., dissenting) (explaining that a "representative PAGA claim could . . . increase the damages awarded . . . by a multiplier of a hundred or thousand times"); *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013) (noting that "[e]ven a conservative estimate would put the potential penalties [under PAGA] in these cases in the tens of millions of dollars").

While PAGA claims "may be brought as class actions," *Arias*, 46 Cal. 4th at 981 n.5, the California Supreme Court has held that they need not comply with California's class action statute, *see id.* at 933. As a result, in California state court, a plaintiff suing on behalf of other allegedly aggrieved employees under PAGA is not required to seek or obtain class certification or provide notice of the action to absent persons. *Id.* at 929–34. Nor is an employee barred from bringing a PAGA claim after already resolving their own wage-and-hour claims against an employer through an individual settlement. *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 82–39 (2020).

These purportedly "non-class" PAGA actions can bind absent employees without notice or an opportunity to opt out. *See Arias*, 46 Cal. 4th at 987. They also are preclusive as to the defendant employers: "[I]f an employee plaintiff prevails in an action under [PAGA] for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment" and "[n]onparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations." *Id.*

Under PAGA, "[a]n aggrieved employee can only sue if California declines to investigate or penalize an alleged violation; and California's issuance of a citation precludes any employees from bringing a PAGA action for the same violation." *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021) (citing Cal. Lab. Code §§ 2699(h), 2699.3(b)(2)(A)(i)). "But once California elects not to issue a citation, the State has *no authority* under PAGA to intervene in a case brought by an aggrieved employee." *Id.* (emphasis added).

PAGA is distinct from "a traditional *qui tam* action" because such actions serve "only as 'a *partial* assignment' of the Government's claim," while "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee" and the statute "lacks the 'procedural controls' necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains 'substantial authority' over the case." *Magadia*, 999 F.3d at 677 (emphases in original). As the Ninth

Circuit recently noted, "[a] complete assignment to this degree . . . undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.*

3. In *Iskanian*, the California Supreme Court held that employees have a right to bring a PAGA action in court despite agreeing to arbitrate disputes individually. 59 Cal. 4th at 360. The court reasoned that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy" and would "frustrate[] the PAGA's objectives." *Id.* at 360, 384. The court further held that the rule it announced was not subject to the FAA, which "aims to ensure an efficient forum for the resolution of *private* disputes," because a PAGA claim is "a type of *qui tam* action" between an employer and the state. *Id.* at 382, 384 (emphasis in original). The court thus held that "the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." *Id.* at 360, 388–89.

In *Sakkab*, a divided panel of the Ninth Circuit held that the *Iskanian* rule was not preempted by the FAA but on different grounds. 803 F.3d at 432. The majority held that the *Iskanian* rule fits within Section 2's saving clause because it supposedly "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.* The Ninth Circuit further held that the *Iskanian* rule does not conflict with the FAA's purpose to overcome judicial hostility to arbitration because it "does not prohibit the

arbitration of [PAGA] claim[s]," but rather "provides only that representative PAGA claims may not be waived outright." *Id.* at 434. And the court ruled that "the *Iskanian* rule does not conflict with the FAA, because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration." *Id.* at 439.

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

4. Four years after *Iskanian*, this Court held in *Epic Systems* that agreements to arbitrate individually must be enforced according to their terms. The Court rejected the argument that the National Labor Relations Act ("NLRA") guarantees workers the right to bring class and collective actions against their employer, despite their agreements to arbitrate individually. *Epic Sys.*, 138 S. Ct. at 1619.

In reciting the question presented, the Court framed the issue broadly: "Should employees and

employers be allowed to agree that *any disputes* between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" *Epic Sys.*, 138 S. Ct. 1619 (emphasis added). And the Court reached a broad conclusion: "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*"—regardless whether the plaintiff attempts to bring a class, collective, or other type of representative action, and regardless whether the plaintiff seeks to represent private or public entities (or both). *Id.* (emphasis added).

The Court explained that the plaintiffs in *Epic Systems* "object[ed] to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones." 138 S. Ct. at 1622. But any "argument that a contract is unenforceable *just because it requires bilateral arbitration*" is "emphatic[ally]" at odds with the FAA. *Id.* at 1621, 1623 (emphasis in original). Arbitration has "traditionally [been] individualized," and even a federal statute embodying important "public policy" interests cannot override an agreement to arbitrate individually—no matter how well intentioned the law is or whether it applies to all contracts generally. *Id.* at 1622–23.

Thus, "the law is clear"—"arbitration agreements . . . must be enforced as written," absent a "clear" congressional command to the contrary. *Epic Sys.*, 138 S. Ct. at 1632. And given the widespread "judicial antagonism toward arbitration" that led to

the FAA's enactment, courts "must be alert to new devices and formulas" that would expressly or implicitly "declar[e] arbitration against public policy." *Id*. at 1623. "[A] rule seeking to declare individualized arbitration proceedings off limits is . . . just such a device." *Id.*

After *Epic Systems*, this Court held twice more that the FAA requires courts to enforce arbitration agreements according to their terms. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Court held that the FAA preempted "California's rule that ambiguity in a contract should be construed against the drafter" when used to "infer from an ambiguous agreement that [the] parties have consented to arbitrate on a classwide basis." *Id.* at 1417, 1419. Even though the rule was "neutral" and gave "equal treatment to arbitration agreements and other contracts alike," "courts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.'" *Id.* at 1418 (quoting *Epic Sys.*, 138 S. Ct. at 1623). "The FAA requires courts to 'enforce arbitration agreements according to their terms,'" and state-law rules "based on public policy" that sidestep that command "'interfer[e] with [the] fundamental attributes of arbitration.'" *Id.* at 1415, 1417–18 (quoting *Epic Sys.*, 138 S. Ct. at 1621–22).

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), this Court reiterated that the FAA "requires that we interpret the contract as written," even if, "as a practical and policy matter," such exceptions to arbitration may be desirable. *Id.*

at 528–31; *see also id.* at 531 ("we may not rewrite the statute simply to accommodate . . . policy concern[s]").

B. Factual and Procedural History

Uber is a technology company that has developed the smartphone application known as the "Uber App," which enables independent transportation providers—commonly referred to as "drivers"—to generate leads for riders in need of local transportation. *See* App.15a.

As of December 2015, drivers wishing to use the Uber App must first enter into the "Technology Services Agreement." App.4a; App.15a. The Technology Services Agreement contains an "Arbitration Provision" that is expressly governed by the FAA. App.15a-16a. Arbitration is not a mandatory condition of drivers' contractual relationship with Uber, as drivers may opt out of arbitration by submitting an opt-out notice within 30 days of executing the Technology Services Agreement. *See* App.15a.

Drivers who do not opt out agree to resolve all disputes with Uber—including those "arising out of or relating to" the "interpretation or application of [the] Arbitration Provision" and the driver's "relationship with [Uber]"—"through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." App.4a; App.16a. The Arbitration Provision also expressly calls out PAGA claims by name, providing that the parties agree "not to bring a representative action on behalf of others under PAGA in any court or in arbitration." App.4a. Drivers also agree that "any claim brought as a

private attorney general [will] be resolved in arbitration on an individual basis only, and not to resolve the claims of others." App.4a.

Respondent Damaris Rosales signed up to use the Uber App and accepted the Technology Services Agreement in March 2016. App.15a. Rosales did not exercise her right to opt out of the Arbitration Provision. *Id.*

Although Rosales agreed to resolve all disputes with Uber in individual arbitration, Rosales filed a complaint against Uber in December 2017, alleging five causes of action. App.14a. Rosales amended her complaint in April 2018 dismissing all class action claims and seeking only civil penalties under PAGA on behalf of herself and other current and former drivers who allegedly had been misclassified as independent contractors rather than employees. *Id.*; Cal. Lab. Code, § 2699(a).

Uber filed a motion to compel arbitration, arguing that Rosales should be compelled to arbitrate her PAGA claim under *Epic Systems*. *See* App.15a-22a. The trial court denied Uber's motion on March 12, 2020, holding that Rosales could not be compelled to arbitrate her PAGA claim under *Iskanian*, and that *Epic Systems* did not abrogate *Iskanian* because it did not expressly address PAGA actions. App.18a-22a.

The California Court of Appeal affirmed on April 30, 2021. App.2a. Relying primarily on three other California Court of Appeal decisions addressing the same issue, the court held that *Epic Systems* did not overrule *Iskanian*. App.8a-9a. The court stated that "*Epic Systems* addressed an issue pertaining to the enforceability of an individualized arbitration

requirement against challenges that such enforcement violated the NLRA," while "*Iskanian* . . . held that a ban on bringing PAGA actions in any forum violates public policy." *Id.* The court therefore concluded that *Epic Systems* "did not decide the *same* question [as *Iskanian*] differently." App.9a (emphasis in original).

Uber sought review of the Court of Appeal's decision from the California Supreme Court, arguing that *Iskanian* should be revisited in light of *Epic Systems*. The California Supreme Court denied Uber's petition for review on August 11, 2021. App.1a.

REASONS FOR GRANTING THE PETITION

The California Supreme Court and Ninth Circuit have endorsed a unique, unwritten exception to the FAA that directly conflicts with this Court's command that arbitration agreements providing for individualized proceedings "must be enforced according to their terms." *Epic Sys.*, 138 S. Ct. at 1620. It is clear that neither court will course correct on its own, as the California Supreme Court has declined to reassess the *Iskanian* rule many times, and the Ninth Circuit has refused to revisit its decision upholding the rule—including as recently as April 2021, when it denied a petition for rehearing en banc in *Rivas v. Coverall North America, Inc.*, No. 20-55140, Dkt. 44 (9th Cir. Apr. 6, 2021). Absent this Court's intervention, PAGA claims—which constitute an ever-increasing amount of litigation in California courts—will remain entirely off-limits to individual arbitration. This Court should grant review and hold that *Epic Systems* abrogated the *Iskanian* rule.

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

1. The FAA Applies to PAGA

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

The *Iskanian* rule is "such a device." *Epic Sys.*, 138 S. Ct. at 1623. In *Iskanian*, the California Supreme Court held that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship" but is instead "a dispute between an employer and the *state*," and the FAA "aims to promote arbitration of claims belonging to the *private* parties to an arbitration agreement." 59 Cal. 4th at 386, 388 (second emphasis added). The California Supreme Court compared PAGA actions to *qui tam* actions, since both types of suits allow for penalties that the plaintiff shares with the government. *Id.* at 382. The court thus found support in this Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), where this Court held that the EEOC could pursue an enforcement action on behalf

of an employee regardless whether that employee was bound by an individual arbitration agreement. *Iskanian*, 59 Cal. 4th at 386.

But as the Ninth Circuit recently recognized, PAGA and *qui tam* actions differ in significant respects. *Magadia*, 999 F.3d at 676–77. "[A] traditional *qui tam* action acts only as 'a *partial* assignment' of the Government's claim," as the "government remains the real party in interest throughout the litigation and 'may take complete control of the case if it wishes.'" *Id.* at 677 (emphasis in original). The same was true of the EEOC's action in *Waffle House*, as there, the EEOC deprived the employee of an independent cause of action once it filed suit, had "exclusive jurisdiction" over the enforcement action, and remained "the master of its own case" throughout the litigation. 534 U.S. at 291.

By contrast, "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Magadia*, 999 F.3d at 677 (emphasis in original). If California declines to investigate or issue a citation after receiving notice of an alleged violation from an aggrieved employee, the employee may sue the employer and "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Id.* Once the aggrieved employee files a PAGA claim in court, the dispute is solely between the employer and the aggrieved employee. The FAA should thus apply to PAGA claims just as it would to any other dispute between an employer and employee. *Iskanian*, however, held just the opposite, and created a massive loophole to the FAA that California employees have exploited in recent years to bypass

agreements calling for the individual arbitration of disputes.

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

Iskanian's holding that PAGA claims cannot be arbitrated on an individual basis even when an employee and an employer have agreed to resolve all disputes through individual arbitration cannot survive *Epic Systems*. This Court held that parties may "agree that any disputes between them will be resolved through one-on-one arbitration," and that courts must enforce arbitration agreements—"including terms providing for individualized proceedings"—according to their terms. *Epic Sys.*, 138 S. Ct. at 1619.

This Court further explained in *Epic Systems* that the FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of the arbitration agreement[]." 138 S. Ct. at 1621, 1623. Therefore, "the only solution that gives proper effect to the parties' expressed intent" is to "enforce the parties' agreement" to arbitrate all disputes between them "on an individual basis"—including disputes asserted under PAGA. *Rivas v. Coverall N. Am. Inc.*, 842 F. App'x 55, 57 (9th Cir. 2021) (Bumatay, J., concurring).

Epic Systems also held that even a federal statute embodying important federal policy interests cannot be construed as overriding private arbitration. This Court assumed that the NLRA created a federal right to collective action, and was based on important policy goals of vindicating federal labor laws. *Epic Sys.*, 138 S. Ct. at 1622. But the Court still held that employees'

individual arbitration agreements had to be enforced according to their terms. *Id.* at 1632. Although "[t]he policy may be debatable . . . [,] the law is clear: Congress has instructed that arbitration agreements . . . must be enforced as written." *Id.* If the FAA requires courts to enforce individual arbitration agreements even where a federal statutory scheme or policy is seemingly to the contrary, then *a fortiori*, it also requires enforcement of individual arbitration agreements where a law based on a state statutory scheme and state public policy contradicts the FAA.

In *Sakkab*, the Ninth Circuit nonetheless held that the *Iskanian* rule was consistent with the FAA because it supposedly was a generally applicable contract defense in that it "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." 803 F.3d at 432. But as Judge Bumatay has explained, a generally applicable contract defense "must apply to *any* contract," not just contracts involving PAGA claims, and "the defense must concern the *revocability*—not enforceability—of the arbitration agreement." *Rivas*, 842 F. App'x at 59 n.2 (Bumatay, J., concurring) (emphases in original) (citing *Concepcion*, 563 U.S. at 352–55 (Thomas, J., concurring)).

B. The *Iskanian* Rule Will Remain the Law in California Absent This Court's Intervention

Epic Systems and *Concepcion* have "seriously undermined" the California Supreme Court's and Ninth Circuit's holdings that the FAA does not preempt the *Iskanian* rule. *Rivas*, 842 F. App'x at 57

(Bumatay, J., concurring). Yet both courts have refused to course correct on their own.

The California Court of Appeal has been unwilling to disturb the *Iskanian* rule because they remain bound by controlling state Supreme Court authority. *See, e.g.*, *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 609 (2019) ("We additionally determine we remain bound by *Iskanian*."). And the California Supreme Court has refused to reconsider whether the *Iskanian* rule remains good law in light of *Epic Systems*, despite its duty to do so. *See, e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) (state courts are "bound by th[e] Court's interpretation of federal law"); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012) (per curiam) ("once the [Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law"). The California Supreme Court has denied review on this exact issue at least nine times. *See Seifu v. Lyft, Inc.*, No. S269800 (Cal. Aug. 18, 2021) (petition for review denied); *Rosales v. Uber Techs., Inc.*, No. S269214 (Cal. Aug. 11, 2021) (same); *Gregg v. Uber Techs., Inc.*, No. S269000 (Cal. June 30, 2021) (same); *Schofield v. Skip Transp.*, No. S267967 (Cal. May 12, 2021) (same); *Santana v. Postmates*, No. S267574 (Cal. Apr. 14, 2021) (same); *Campbell v. DoorDash*, No. S266497 (Cal. Mar. 10, 2021) (same); *Rimler v. Postmates*, No. S266718 (Cal. Feb. 24, 2021) (same); *Provost v. YourMechanic*, No. S265736 (Cal.

Jan. 20, 2021) (same); *Moriana v. Viking River Cruises, Inc.*, No. S265257 (Cal. Dec. 9, 2020) (same).[1]

For its part, the Ninth Circuit recently reaffirmed *Sakkab* and declined to grant rehearing en banc. *Rivas*, 842 F. App'x at 57; *Rivas v. Coverall N. Am., Inc.*, No. 20-55140, Dkt. 44 (9th Cir. Apr. 6, 2021). Though the panel in *Rivas* was bound by *Sakkab*, Judge Callahan stated throughout oral argument that *Sakkab*—and, by extension, the *Iskanian* rule at the center of *Sakkab*—is "problematic" and in "tension" with recent U.S. Supreme Court precedent (Oral Argument at 4:38, *Rivas*, No. 20-55140 (9th Cir. Nov. 19, 2020), https://bit.ly/3x6ee67).

Judge Bumatay similarly recognized "[t]he tensions between *Epic Systems/Lamps Plus* and *Sakkab* are obvious." *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring). While *Sakkab* required the panel to affirm the district court's holding that the arbitration agreement was unenforceable because it included an implied PAGA waiver—that conclusion "undermines the parties' promises to each other and potentially upends all arbitration agreements" if, as California courts have held, "a party may always sidestep an arbitration agreement simply by filing a PAGA claim." *Id.* at 58 & n.1. Judge Bumatay also noted that "the writing is on the wall that the [U.S.

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[1] Petitions for writ of certiorari are currently pending in this Court in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (U.S. May 10, 2021), *Postmates, LLC v. Rimler*, No. 21-119 (U.S. July 26, 2021), *Postmates, LLC v. Santana*, No. 21-420 (U.S. Sept. 13, 2021), and *Uber Technologies, Inc. v. Gregg*, No. 21-453 (U.S. Sept. 21, 2021). If this Court grants certiorari in any of these cases, it should hold this petition until that action is resolved.

Supreme] Court disfavors our approach" to the *Iskanian* rule, and encouraged his colleagues to "listen to what the Court is telling us and revisit our precedent before again being forced to do so." *Id.* at 58–59.

Yet neither the Ninth Circuit nor the California Supreme Court has shown any interest in reevaluating the *Iskanian* rule. This Court has not hesitated before—and should not hesitate here—to intervene when states so openly defy the FAA and when the stakes are as high as they are here. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], . . . [i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 568 U.S. at 17–18.

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

If this Court declines to review this issue now, it will discourage litigants from continuing to challenge the *Iskanian* rule through costly motions to compel arbitration that will inevitably be denied and then affirmed on appeal by either the Ninth Circuit or the California Court of Appeal. Challenges to the

Iskanian rule will reach a dead end, as fewer and fewer challenges to the *Iskanian* rule are raised.

C. Whether PAGA Claims Are Beyond the Scope of the FAA Is an Important and Recurring Issue

Since the California Supreme Court decided *Iskanian*, increasing numbers of plaintiffs have turned to PAGA as "a means . . . to avoid arbitration." Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103, 127–28 (2015). The number of annual PAGA filings has more than quadrupled since PAGA's enactment in 2004. Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016); Emily Green, *State Law May Serve as Substitute for Employee Class Actions*, Daily Journal (Apr. 17, 2014), https://bit.ly/3AVQ5lY.

In the five-year period before and after *Iskanian* was decided, PAGA filings more than doubled—a strong indication that *Iskanian* has been used to circumvent individual arbitration agreements. *See* Goodman, *supra*, at 415; *see also* Toni Vranjes, *Doubts Raised About New California PAGA Requirements*, Society for Human Resource Management (Dec. 6, 2016), https://bit.ly/36tlRZl ("Following the *Iskanian* decision, PAGA claims skyrocketed . . . ."). Today, more than fifteen new PAGA notice letters are filed every day, Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Society for Human Resource Management (Mar. 26, 2019), https://bit.ly/3wzkHX1, and over 5,000 PAGA notices are filed on average each year, Christine Baker & Len

Welsh, *California Private Attorneys General Act of 2004: Outcomes and Recommendations*, at 12 tbl. 4 (Mar. 2021), https://bit.ly/3rajTqj.

The thousands of PAGA actions filed every year represent significant risk for the companies involved. Because PAGA subjects employers to civil penalties for every violation of certain wage-and-hour laws, and because these penalties apply for every "aggrieved employee," Cal. Lab. Code § 2699(f)(2), plaintiffs bringing PAGA claims frequently seek millions of dollars in penalties. *See, e.g.*, Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 451 (2018) ("Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries.").

The viability of the *Iskanian* rule also has profound implications for employment litigation and enforcement of arbitration agreements, particularly given that California has the largest workforce of any state. *See* U.S. Bureau of Labor Statistics, *Economy at a Glance: California*, https://bit.ly/3xybqzK. And while PAGA claims are currently limited to California, legislatures in at least seven different states have recently considered or are currently considering bills to enact their own versions of PAGA.[2]

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[2] *See* H.B. 1959, 192nd Gen. Court (Mass. 2021); S.B. 1179, 192nd Gen. Court (Mass. 2021); Assemb. B. 5876, 2021 Reg. Sess. (N.Y. 2021); S.B. 12, 2021 Reg. Sess. (N.Y. 2021); 2d Substitute H.B. 1076, 67th Leg., Reg. Sess. (Wash. 2021); H.B. 5381, 2020 Gen. Assemb., Reg. Sess. (Conn. 2020); Legis. Doc. 1693, 129th Leg., 1st Reg. Sess. (Me. 2019); S.B. 750, 80th Legis. Assemb., Reg. Sess. (Or. 2019); H.B. 483, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019); S.B. 139, 2019 Gen. Assemb., Reg. Sess. (Vt. 2019);

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

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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see also Charles Thompson et al., *Employers Must Brace for PAGA-Like Bills Across US*, Law360 (June 18, 2021), https://bit.ly/3BAFGfH; Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020), https://bit.ly/3hxPHCp.