No. 21–_____

In The
Supreme Court of the United States

LYFT, INC.,

Petitioner,

v.

MILLION SEIFU,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Arbitration Act require the enforcement of a bilateral arbitration agreement providing that a worker cannot raise representative claims under California's Private Attorneys General Act, thereby preempting the contrary holding in *Iskanian v. CLS Transportation Los Angeles LLC*, 327 P.3d 129 (Cal. 2014)?

This question is also presented in *Viking River Cruises, Inc. v. Moriana*, No. 20–1573 (U.S. filed May 10, 2021), and *Coverall North America, Inc. v. Rivas*, No. 21–268 (U.S. filed Aug. 20, 2021), among other cases.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Lyft, Inc., petitioner on review, was the defendant-appellant below. Million Seifu, respondent on review, was the plaintiff-respondent below.

Other plaintiffs were also involved in this case—Stephen McFadyen, Seth Blackham, and Monica Garcia. But they settled with court approval and are no longer parties in this case.

Pursuant to Supreme Court Rule 29.6, petitioner Lyft, Inc., states that it is a publicly held corporation with no parent corporation, and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

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

Seifu et al. v. Lyft, Inc., No. BC712959 (Cal. Super. Ct), order issued October 23, 2019 (denial of Lyft, Inc.'s petition to compel arbitration).

Seifu et al v. Lyft, Inc., No. BC712959 (Cal. Super. Ct.), order issued November 6, 2019 (grant of ex parte application to enforce automatic appellate stay).

Seifu v. Superior Court of California for the County of Los Angeles, No. B303049, (Cal. Ct. App.), order issued January 23, 2020 (denial of Million Seifu's petition for writ of mandate challenging the grant of the ex parte application).

Seifu et al. v. Lyft, Inc., No. B301774 (Cal. Ct. App.), opinion issued June 1, 2021 (affirming denial of Lyft, Inc.'s petition to compel arbitration).

Seifu et al. v. Lyft, Inc., No. S269800 (Cal.), petition for review denied August 18, 2021 (declining to review the opinion affirming the denial of Lyft, Inc.'s petition to compel arbitration).

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

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PETITION FOR WRIT OF CERTIORARI

Lyft, Inc. (Lyft) petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The California Supreme Court's order denying Lyft's petition for review is unpublished and is reproduced in the appendix at App. 1. The California Court of Appeal's opinion is unpublished, but is available at 2021 WL 2200878 and is reproduced in the appendix at App. 2–11. The order and judgment of the Superior Court of California, County of Los Angeles, denying Lyft's petition to compel arbitration, is unpublished and is reproduced in the appendix at App. 12–18.

JURISDICTION

The California Supreme Court denied Lyft's petition for review on August 18, 2021. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

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

Section 2699 of the California Labor Code is reproduced in the appendix at App. 19–24.

INTRODUCTION

For years, individuals and companies have agreed to arbitrate disputes. Their arbitration agreements often include provisions requiring bilateral arbitration and foreclosing representative claims. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619–20 (2018). The Federal Arbitration Act ("FAA") requires courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619.

California courts have chafed at this mandate and developed numerous devices to avoid applying the FAA. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563

U.S. 333, 342 (2011). Those devices include rules frustrating the enforcement of provisions requiring individualized arbitration proceedings.

In *Concepcion*, this Court dealt with a California Supreme Court rule that had rendered class-action waivers in arbitration agreements unenforceable as a matter of public policy. *Id.* at 338, 340–41. This Court reversed, holding that when parties agree to resolve disputes by individualized arbitration, those agreements are enforceable under the FAA—including their class-action waivers. *Id.* at 344–52. The FAA therefore preempted California's contrary rule. *Id.*

Undeterred, California courts have recently circumvented *Concepcion* when workers pursue representative claims under California's Private Attorneys General Act ("PAGA"). PAGA authorizes an "aggrieved employee" to pursue civil penalties "on behalf of himself or herself and other current or former employees" for violations of wage-and-hour laws. Cal. Lab. Code § 2699(a) (West 2020). In *Iskanian v. CLS Transportation Los Angeles LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court refused to enforce arbitration provisions requiring individual arbitration (thereby waiving representative PAGA claims) because they violate public policy. This so-called "*Iskanian* rule" did not offend the FAA, the court asserted, because the FAA applies to *private* disputes while PAGA claims are qui tam actions in which individual workers pursue *public* claims for relief.

California courts now deem PAGA claims to be "nonarbitrable." *Brooks v. AmeriHome Mortg. Co.*, 260 Cal. Rptr. 3d 428, 432 (Ct. App. 2020). The FAA is

therefore without force in California wage-and-hour cases because a plaintiff "may always sidestep an arbitration agreement simply by filing a PAGA claim." *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 58 & n.1 (9th Cir. 2021) (Bumatay, J., concurring), *petition for cert. filed*, 2021 WL 3772913 (U.S. Aug. 20, 2021) (No. 21–268).

The *Iskanian* rule cannot be reconciled with this Court's precedent. In *Epic Systems*, this Court held that lower courts cannot disregard agreements requiring bilateral arbitration or reshape individualized arbitration by mandating representative proceedings. 138 S. Ct. at 1623. After *Epic Systems*, the Court again emphasized that parties cannot be compelled to forego "the 'traditional individualized arbitration' envisioned by the FAA" by being forced to submit to representative proceedings. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019) (citation omitted).

However, California courts have refused to revisit the *Iskanian* rule, even though "[t]he tensions between *Epic Systems/Lamps Plus*" and California's prohibition against PAGA representative-action waivers "are obvious." *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring). This Court should therefore "step in" and "force[ ] [them] to do so" by holding that the FAA "clearly" preempts the *Iskanian* rule. *Id.* This Court's intervention is critically necessary because California state and federal judges openly disagree about the FAA's impact on the *Iskanian* rule.

This case presents an ideal vehicle for the Court to address whether the FAA preempts the *Iskanian*

rule. Petitioner Lyft is a ridesharing platform that enables drivers offering transportation to connect with riders looking for transportation through a mobile phone application. Respondent Million Seifu was one such driver. He agreed to arbitrate, on an individual basis, any dispute arising from his use of Lyft's platform—contractual terms that barred him from bringing a representative PAGA action. Seifu nonetheless sued Lyft in a California court, asserting a representative PAGA claim. The trial court denied Lyft's petition to compel arbitration, and the Court of Appeal affirmed, on the basis of the *Iskanian* rule, rejecting Lyft's contention that the FAA preempted this rule.

This is an important and recurring issue. Businesses are facing an overwhelming tide of PAGA litigation. Following *Iskanian*, the number of PAGA actions filed in California has grown dramatically, with plaintiffs evading their arbitration obligations by filing PAGA claims alongside class claims or, increasingly, filing PAGA-only claims in lieu of class claims (as Seifu has done here). Because California courts believe this Court's decisions construing the FAA in *Concepcion* and *Epic Systems* do not affect the *Iskanian* rule, businesses have been denied the benefits and efficiencies of streamlined, bilateral arbitration. This Court should grant review to ensure adherence to *Concepcion* and *Epic Systems*, and to preserve the FAA's mandate in the face of California's latest effort to undermine it.

STATEMENT OF THE CASE

A. Legal Background

1. Nearly a century ago in 1925, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In Congress's judgment, arbitration offered significant benefits, "not least the promise of quicker, more informal, and often cheaper resolution for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. Congress therefore "directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable,'" establishing "a liberal federal policy favoring arbitration agreements." *Id.* (citations omitted).

The FAA thus "foreclose[s]" attempts by state courts "to undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). "State courts rather than federal courts are most frequently called upon to apply" the FAA. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012) (per curiam). "It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Id.* at 17–18. State law "is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus*, 139 S. Ct. at 1415 (citation omitted).

In *Concepcion*, this Court considered the enforceability of an agreement that provided for "'the arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" 563 U.S. at 336 (citation omitted). The plaintiff nevertheless filed a class action against the defendant. *Id.* at 337. The trial court denied the defendant's motion to compel arbitration and the Ninth Circuit affirmed. *Id.* at 337–38. This Court reversed, holding that when parties agree to resolve their disputes by individualized arbitration, the FAA requires the enforcement of that agreement, preempting contrary state rules. *Id.* at 340–52.

This Court has since reaffirmed that approach, reiterating that an arbitration agreement's representative-action waiver requires the individual arbitration of statutory claims. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231–38 (2013).

2. PAGA "authorizes an employee who has been the subject of particular Labor Code violations to file a representative action on behalf of himself or herself and other aggrieved employees." *Williams v. Superior Ct.*, 398 P.3d 69, 74 (Cal. 2017). Under PAGA, the aggrieved employee is empowered to "obtain civil penalties, which are then shared between the affected employees and the state." *Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 378 n.5 (Cal. 2017).

The California Supreme Court insists that all PAGA claims are representative actions. *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243 (Cal. 2019). But PAGA plaintiffs need not satisfy California's class action requirements. *Arias v. Superior Ct.*, 209 P.3d 923, 933 (Cal. 2009). The court considers "a PAGA representative action" to be "a type of qui tam action" akin to those authorized by the federal False Claims Act ("FCA"), because the court deems a PAGA claim to "fundamentally [be] a law enforcement action designed to protect the public," brought by the named plaintiff as a "proxy or agent of the state's labor law enforcement agencies." *Iskanian*, 327 P.3d at 147–48 (citations omitted).

3. In *Iskanian*, the California Supreme Court addressed whether the FAA required the enforcement of arbitration agreements with PAGA representative-action waivers. There, an employee had agreed to individually arbitrate his claims against his employer, foregoing the right to pursue class and representative claims in court. *Id.* at 133. The employee nonetheless filed a lawsuit asserting class and PAGA claims. *Id.* at 133–34.

The California Supreme Court applied *Concepcion* and concluded that the arbitration agreement's class-action waiver was enforceable. *Id.* at 133–37. But the court decided the PAGA representative-action waiver was *not* enforceable because "requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum [was] contrary to [California's] public policy." *Id.* at 133. The court also held that the FAA did not preempt this

PAGA rule because PAGA claims belong to the State. *Id.* at 133, 147–51. According to the California Supreme Court, "a PAGA claim lies outside the FAA's coverage" because it involves a public dispute between "an employer and the *state*" rather than a private dispute "between an employer and employee arising out of their contractual relationship." *Id.* at 150–51.

Within a year, the *Iskanian* rule divided Ninth Circuit judges. Two judges agreed that the FAA did not preempt the *Iskanian* rule. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427 (9th Cir. 2015). But Judge N.R. Smith dissented, concluding that the FAA preempted the *Iskanian* rule because, like the California rule rendering class-action waivers unenforceable in *Concepcion*, the *Iskanian* rule stood as an obstacle to the FAA's purposes and objectives. *Id.* at 440–50 (Smith, N.R., dissenting). The dissent explained that California's public policy "interest in an employee's ability to bring PAGA claims is ultimately irrelevant" to whether the FAA preempts the *Iskanian* rule. *Id.* at 449. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons," and therefore "the desirability and importance of the rule to the State's policies and purposes" cannot save it from preemption. *Id.* at 448–49 (quoting *Concepcion*, 563 U.S. at 351).

4. After *Iskanian* and *Sakkab*, this Court held in *Epic Systems* that the FAA "protect[s] pretty absolutely" agreements with representative-action waivers requiring individualized arbitration. 138 S. Ct. at 1621. *Epic Systems* thus held that courts must enforce arbitration agreements "providing for individualized proceedings" and cannot "reshape

traditional individualized arbitration" by requiring representative proceedings. *Id.* at 1619, 1623. "[T]he law is clear"—"arbitration agreements . . . must be enforced as written," absent a "clear" *congressional* command to the contrary. *Id.* at 1632.

Thereafter, this Court reiterated that the FAA requires courts to enforce arbitration agreements as written. *See Lamps Plus*, 139 S. Ct. at 1412, 1415, 1417–18; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528–31 (2019).

B. Factual and Procedural Background

Lyft's smartphone application enables drivers to connect with riders seeking transportation services. App. 3. A driver must agree to Terms of Service that include an arbitration provision requiring the driver—unless he or she opts out—to submit any claims he or she may have against Lyft (with limited exceptions) to "binding and final arbitration on an individual basis, not as a plaintiff or class member in any class, group, representative action, or proceeding." App. 3–5 (citation omitted).

This arbitration provision "is governed by the Federal Arbitration Act." App. 4 (citation omitted). And the provision expressly states that the driver and Lyft "agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004 (PAGA), California Labor Code § 2698 et seq., in any court or in arbitration." App. 4 (citation omitted).

Lyft updated the Terms of Service periodically, and required drivers to agree to the updated terms to continue offering rides through the Lyft platform. App. 5. Seifu agreed to the updated Terms of Service in July 2017 and April 2018, without opting out of the arbitration provision. App. 5.

Seifu later filed this PAGA action against Lyft, alleging that Lyft misclassified drivers as independent contractors in violation of California law. App. 5–6. Lyft promptly petitioned to compel arbitration. App. 6. Lyft argued that, notwithstanding the *Iskanian* rule, the arbitration provision's PAGA representative-action waiver was enforceable under this Court's FAA precedent, particularly because *Iskanian* was no longer good law after *Epic Systems*. App. 6.

The trial court applied *Iskanian* and denied Lyft's petition. App. 6. The California Court of Appeal affirmed on the same ground. App. 3, 7–11. In doing so, the court agreed with many other California courts in rejecting the contention that the FAA preempts the *Iskanian* rule after *Epic Systems*. App. 8–10.

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

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari because the decision below conflicts with this Court's precedent interpreting the FAA.

A. The *Iskanian* rule's prohibition against PAGA representative-action waivers cannot be reconciled with this Court's FAA decisions.

Despite this Court's precedent interpreting the FAA, pockets of "judicial antagonism toward arbitration" remain, and some courts have devised rules hostile to "individualized arbitration proceedings." *Epic Sys.*, 138 S. Ct. at 1623. The *Iskanian* rule, which prohibits the enforcement of an arbitration agreement's PAGA representative-action waiver, is just such a device. The rule cannot be squared with this Court's precedent construing the FAA, which requires the enforcement of arbitration agreements as written, including their representative-action waivers. This Court should grant review and hold that the FAA preempts the *Iskanian* rule, especially under this Court's post-*Iskanian* precedent (like *Epic Systems*).

The FAA requires courts to enforce agreements to arbitrate statutory claims, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), including statutory wage-related claims, *Gilmer*, 500 U.S. at 25 n.2; *Perry v. Thomas*, 482 U.S. 483, 486, 491 (1987). And the FAA "direct[s] [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic Sys.*, 138 S. Ct. at 1621. That includes "rigorously" enforcing "terms that specify *with whom* the parties choose to

arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Id.* (citation omitted).

Consistent with this mandate, the Court in *Concepcion* held that the FAA requires enforcement of representative-action waivers in arbitration agreements. 563 U.S. at 340–52. The Court reaffirmed *Concepcion*'s rule after *Iskanian*, holding that, under the FAA, courts must enforce arbitration provisions requiring "individualized proceedings." *Epic Sys.*, 138 S. Ct. at 1619; *accord id.* at 1621–23.

The *Iskanian* rule conflicts with *Concepcion* and *Epic Systems*. *Iskanian* refused to enforce a provision in an arbitration agreement that waived the plaintiff's ability to seek representative relief via a PAGA claim. The employee in *Iskanian* had signed an arbitration agreement in which all parties "agree[d] that class action and representative action procedures shall not be asserted." 327 P.3d at 133. But the employee nonetheless sued in court. The California Supreme Court held that arbitration provisions requiring individuals to "give up the right to bring representative PAGA actions in any forum" were "contrary to [California] public policy" and therefore unenforceable. *Id.* at 133.

Iskanian thus adopted the very rule the FAA preempts under *Concepcion* and *Epic Systems*: a rule refusing to enforce arbitration provisions requiring solely individualized proceedings. *See, e.g.*, *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring) (explaining that, after *Epic Systems*, California's prohibition against PAGA representative-action waivers "clearly" interferes with "parties' choice to engage in individual,

bilateral arbitration" and therefore "runs afoul of the FAA and must be preempted"); *Sakkab*, 803 F.3d at 442 (Smith, N.R., J., dissenting) (explaining that the *Iskanian* rule "prohibits representative action waivers in arbitration agreements" and is therefore indistinguishable from the preempted state-law rule in *Concepcion*).

B. *Iskanian*'s reasoning conflicts with the reasoning of this Court's FAA decisions.

In *Iskanian*, the California Supreme Court held that the FAA simply does not apply to PAGA claims. 327 P.3d at 133, 149–53. The court offered two related justifications. First, believing that "the FAA aims to ensure an efficient forum for the resolution of *private* disputes," *id.* at 149, the court distinguished *private* claims (subject to the FAA) from *public* claims (not subject to the FAA), *id.* at 149–50. Second, the court characterized a PAGA claim as "fundamentally a law enforcement action designed to protect the public"—"a type of *qui tam* action"—that was therefore "unwaivable." *Id.* at 147–48 (citations omitted). In the *Iskanian* court's view, "a PAGA action is a dispute between an employer and the state." *Id.* at 149. By describing a PAGA claim as "a state law enforcement action," subsequent California cases distinguish *Epic Systems* and *Concepcion* as applying only to class claims and Fair Labor Standards Act collective claims, not to "a governmental claim" like a PAGA claim. *E.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 185, 187–88 (Ct. App. 2019).

Federal courts have questioned whether these justifications are genuine. *See, e.g.*, *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 674–78 (9th Cir. 2021) (refusing to abide by the California Supreme Court's qui tam label for PAGA claims); *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1059, 1060–62 (9th Cir. 2017) (holding that, despite *Iskanian*'s insistence that PAGA claims are brought on behalf of the government, the named PAGA plaintiff's claim is filed by that individual and "it remains under his control").

Importantly, the California Supreme Court's justifications for the *Iskanian* rule rest on modes of analysis that conflict with the reasoning employed by this Court and other federal courts. The best example of this conflict between this Court's FAA precedent and *Iskanian*'s reasoning for circumventing the FAA is found in one of the three cases consolidated in the *Epic Systems* decision—*Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)—which is yet another reason that certiorari is appropriate. *See* Sup. Ct. R. 10(c) ("[A] state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

In *Epic Systems*' final sentence, 138 S. Ct. at 1632, this Court affirmed the Fifth Circuit's *Murphy Oil* decision. *Murphy Oil* was a government enforcement action brought on behalf of the National Labor Relations Board; it was not initiated by a private employee as an individual or class action. The Board's General Counsel issued an administrative complaint accusing an employer of violating the National Labor Relations Act ("NLRA") by asking

employees to agree to individual arbitration of any employment disputes. *Id.* at 1016. The General Counsel pursued NLRA claims only the government could prosecute—statutory public rights to collective action that are "enforced one way: by the Board, through its processes." *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 774–75, 780–82 (2014). Applying the NLRA, the Board ruled that the employer had committed unfair labor practices by inducing employees to waive representative proceedings through its arbitration agreements. *See id.* Nothing in the FAA compelled a contrary conclusion, the Board thought, because the General Counsel sought to vindicate rights "enforced solely by the Board—there is no private right of action under the [NLRA]." *Id.* at 781–82. After all, the NLRA "vindicates public, not private rights." *Gurley v. Hunt*, 287 F.3d 728, 732 (8th Cir. 2002). Thus, the Board's determination that the FAA must yield to the NLRA rested on the premise that there was a dispositive difference between claims initiated by and belonging to the government only and claims initiated by and belonging to private plaintiffs. *See Murphy Oil*, 361 N.L.R.B. at 779, 781–82.

But the Fifth Circuit reviewed the Board's decision, applied the FAA, and reversed. *Murphy Oil*, 808 F.3d at 1015. In construing the FAA and NLRA harmoniously—to "have 'equal importance in our review' of employment arbitration contracts"—the Fifth Circuit unmistakably applied the FAA to a government-initiated enforcement action. *Id.* (citations omitted).

In *Epic* Systems, this Court affirmed the Fifth Circuit's *Murphy Oil* decision, 138 S. Ct. at 1632,

thereby joining the Fifth Circuit in rejecting the Board's analysis. In refusing to abide by the FAA's mandate because no private right of action was implicated, *Murphy Oil*, 361 N.L.R.B. at 781–82, the Board had fastened on to a distinction between public and private claims. This was the same supposed distinction that persuaded the California Supreme Court not to apply the FAA to PAGA claims in *Iskanian*. But the Fifth Circuit overturned the Board's determination—a decision this Court affirmed in *Epic Systems*. As a result, the reasoning that *Iskanian* and its progeny rely on—i.e., their insistence that the FAA does not govern an arbitration agreement's PAGA representative-action waiver because a PAGA action is a public claim belonging to the government—cannot be squared with *Epic Systems*.

Perhaps because of the brevity of *Epic Systems*' disposition of *Murphy Oil*, the legal effect of *Epic Systems*' decision in this respect has eluded California courts' understanding. *See, e.g.*, *Olson v. Lyft, Inc.*, 270 Cal. Rptr. 3d 739, 748–49 (Ct. App. 2020) ("*Murphy Oil* did not involve the 'enforcement rights' of the NLRB"; "Nor is it correct to characterize *Murphy Oil* as a 'government enforcement action'"; "the NLRB was not pursuing public claims." (citations omitted)). However, this brevity does not change the fact that, in *Epic Systems*, this Court *did* affirm the application of the FAA to the *Murphy Oil* government enforcement action. *See* 138 S. Ct. at 1632.

In sum, while the Fifth Circuit applied the FAA to claims brought by a governmental unit (and was affirmed), California courts hold that the FAA is inapplicable to PAGA claims that belong to the State

government. Only this Court can resolve California's apparent confusion over the Court's application of the FAA to the *Murphy Oil* government enforcement action in *Epic Systems*. *Iskanian*'s fate hangs in the balance.

C. The Ninth Circuit's rationale for saving the *Iskanian* rule from preemption also conflicts with this Court's precedent.

While the Ninth Circuit agreed in *Sakkab* that the FAA does not preempt the *Iskanian* rule, it did so on a different ground than the California Supreme Court. *Sakkab*'s majority opinion decided that, although PAGA claims are subject to the FAA, the FAA's saving clause nonetheless preserved the *Iskanian* rule from preemption because the rule was a generally-applicable contract defense. 803 F.3d at 432–40. But the majority's rationale cannot be squared with this Court's precedent for three reasons.

First, while the FAA's saving clause "allows courts to refuse to enforce arbitration agreements" based on "generally applicable contract defenses," *Epic Sys.*, 138 S. Ct. at 1622 (citations omitted), this clause cannot save the *Iskanian* rule from preemption. That rule does not qualify for the saving clause's protection because *Iskanian* is expressly founded on California's "public policy," 327 P.3d at 133, and is therefore not a generally-applicable contract defense. The FAA does not preserve from preemption state or federal rules that invalidate arbitration provisions for policy reasons. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1622, 1632 (holding that arbitration agreements requiring

individual arbitration had to be enforced according to their terms regardless of any federal policy goals for vindicating federal labor laws); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533–34 (2012) (vacating decision holding arbitration agreement unenforceable based on state public policy). "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms," and courts are "not free to substitute [their] preferred economic policies for those chosen by the people's representatives." *Epic Sys.*, 138 S. Ct. at 1619, 1632.

Second, even contract defenses that supposedly have general applicability are preempted by the FAA when, in reality, such defenses "derive their meaning from the fact that an agreement to arbitrate is at issue" or "prohibit[ ] outright the arbitration of a particular type of claim." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339, 341). The *Iskanian* rule falls afoul of both of these strictures. The *Iskanian* rule prohibits outright the arbitration of an entire category of claims: "a PAGA claim lies outside the FAA's coverage," *Iskanian*, 327 P.3d at 386, so California courts consider it "nonarbitrable," *Brooks*, 260 Cal. Rptr. 3d at 432. Consequently, California courts allow plaintiffs asserting wage-and-hour claims to circumvent an arbitration agreement simply by filing a PAGA claim. *See Rivas*, 842 F. App'x at 58 n.1 (Bumatay, J., concurring). And the *Iskanian* rule is "the type of defense that targets an arbitration agreement '*just because it requires bilateral arbitration*,' which the Court held doesn't survive the

FAA." *Id.* at 59 (Bumatay, J., concurring) (quoting *Epic Sys.*, 138 S. Ct. at 1623).

Third, the FAA preempts even generally-applicable state rules that "interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. In *Concepcion*, this Court held that California's rule frustrating the enforceability of class-action waivers in arbitration agreements did just that (and was therefore preempted by the FAA). There, a state rule requiring a switch from bilateral arbitration to class proceedings made "the process slower, more costly, and more likely to generate procedural morass," called for "procedural formality," and "greatly increase[d] risks to defendants." *Id.* at 348–50. The *Iskanian* rule invalidating PAGA representative-action waivers does the same in the numerous ways explained below, and that rule must likewise be preempted by the FAA.

For example, the *Iskanian* rule mandating representative PAGA proceedings makes the litigation process slower and more costly. Plaintiffs asserting representative PAGA claims can seek to recover penalties for thousands—or even hundreds of thousands—of individuals. *See, e.g.*, *Turrieta v. Lyft, Inc.*, 284 Cal. Rptr. 3d 767, 771–72 (Ct. App. 2021) (affirming PAGA settlement for group estimated "to include a maximum of 565,000 individuals"), *petition for review filed* (Cal. Nov. 10, 2021) (No. S271721). "A PAGA action may thus cover a vast number of employees, each of whom may have markedly different experiences relevant to the alleged violations." *Wesson v. Staples the Off. Superstore, LLC*, 283 Cal. Rptr. 3d

846, 859 (Ct. App. 2021), *petition for review filed* (Cal. Oct. 19, 2021) (No. S271378). Since "a PAGA claim can cover disparate groups of employees and involve different kinds of violations raising distinct questions," PAGA actions are exceedingly complex. *Id.* at 860. Unsurprisingly, PAGA claims take years to litigate, even to settle, Christine Baker & Len Welsh, *California Private Attorneys General Act of 2004: Outcomes and Recommendations*, 9 tbl.2 (2021), https://bit.ly/3pTpDpY, and they are "substantially slower" and "substantially more costly" to litigate than individual arbitration, *Sakkab*, 803 F.3d at 445 (Smith, N.R., J., dissenting).

Representative PAGA proceedings also involve higher stakes and higher risks than bilateral arbitration. As with class claims, penalties sought in representative PAGA proceedings run into the millions—even *billions*—of dollars. *See, e.g.*, *Turrieta*, 284 Cal. Rptr. 3d at 771–772, 775 n.7 (affirming the approval of a $15 million PAGA settlement, over the objections of plaintiffs from other PAGA cases—including respondent Seifu—who claimed *billions* of dollars in PAGA liability).

Furthermore, representative PAGA proceedings involve far more procedural formality than an individual arbitration. PAGA discovery can extend "as broadly as class action discovery has been extended"; the California Supreme Court has rebuffed efforts to cabin the "broad discovery" authorized for PAGA claims. *Williams*, 398 P.3d at 74, 78, 81. The parties in a PAGA case would, "at a minimum," need "costly and time-consuming" discovery "into how many employees may have suffered violations and how many times

such violations occurred." *Teimouri v. Macy's, Inc.*, No. D060696, 2013 WL 2006815, at *17 (Cal. Ct. App. May 14, 2013).

Likewise, representative PAGA proceedings threaten to devolve into a procedural morass. "[D]etermining whether the employer committed Labor Code violations with respect to each employee" implicated by a PAGA claim "may raise practical difficulties and may prove to be unmanageable." *Wesson*, 283 Cal. Rptr. 3d at 859. "Indeed, PAGA claims may well present more significant manageability concerns than those involved in class actions" since PAGA plaintiffs need not notify other workers or satisfy class action prerequisites. *Id.* at 859–60.

These very considerations led this Court to conclude in *Concepcion* that a state-law rule barring class-action waivers was preempted by the FAA. *See* 563 U.S. at 348–50. Accordingly, as the dissent in *Sakkab* correctly concluded, the FAA preempts the *Iskanian* rule because it "burdens arbitration in the same three ways identified in *Concepcion*." *Sakkab*, 804 F.3d at 444 (Smith, N.R., J., dissenting).

II. Certiorari is also necessary to resolve the disagreement between federal and state judges over the key premise underlying the *Iskanian* rule.

In *Iskanian*, the California Supreme Court insisted that PAGA claims "lie[ ] outside the FAA's coverage" because they are qui tam law enforcement actions (akin to federal FCA claims) brought on behalf

of the government. 327 P.3d at 147–48, 150–51; *see also Brooks,* 260 Cal. Rptr. 3d at 432 (holding that a "PAGA claim" is "nonarbitrable"). But *Iskanian*'s premise that qui tam actions are inarbitrable under the FAA picks a side in a conflict between lower courts, which are divided on whether the FAA requires arbitration of qui tam and analogous PAGA claims. The division stems from a disagreement about whether there are one or two "real parties in interest" entitled to steer qui tam litigation.

When a relator files an FCA qui tam claim, the government is a real party in interest because of its underlying stake in redressing the alleged fraud. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932–34 (2009). But the government is not the only real party in interest. As this Court has explained, the FCA effectively assigns part of the government's claim to the relator, making the relator an interested party with a right to pursue the claim. *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773–74 (2000). Given this partial assignment, the government and the relator are both real parties in interest, *Eisenstein*, 556 U.S. at 934, meaning that each may assert "legal rights of their own," *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008) (emphasis omitted).

Applying this logic, some courts hold that relators who have agreed to arbitration can be compelled to arbitrate their qui tam claims. *E.g.*, *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 12-cv-63, 2013 WL 394875, at *6–8 (S.D. Ohio Jan. 31, 2013) (compelling the arbitration of a qui tam claim); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 325 (4th Cir.

2001) ("Statutory civil claims are subject to the arbitration process," and there is "no valid basis for placing the FCA claim in a different category.").

Translating this approach to PAGA, the Ninth Circuit has concluded that "an individual employee can pursue a PAGA claim in arbitration" and "can bind the state to an arbitral forum." *Valdez v. Terminix Int'l Co.*, 681 F. App'x 592, 594 (9th Cir. 2017); *see also* Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 Pepp. Disp. Resol. L.J. 203, 207–08 (2015) (acknowledging a split of authority, but concluding that "qui tam claims are arbitrable under prevailing Supreme Court precedent").

California courts take the opposite approach by insisting that the State is the *sole* real party in interest in a PAGA action. *Correia*, 244 Cal. Rptr. 3d at 179, 189–91. They acknowledge "that several federal courts have reached a different conclusion." *Id.* at 179, 190. But California courts consider those federal cases to be "unpersuasive," so they follow conflicting decisions suggesting the federal government is the sole real party in interest in a federal qui tam action. *Id.* at 179, 189–91 (citing, for example, *Mikes v. Strauss*, 889 F. Supp. 746, 755 (S.D.N.Y. 1995) ("Since the government was not a party to the [arbitration] Agreement, . . . we are not convinced that plaintiff, suing on the government's behalf, is necessarily bound by its terms.")).

California courts reason that a PAGA claim belongs to the government and that "[t]here is no individual component to a PAGA action." *Kim v. Reines*

Int'l Cal., Inc., 459 P.3d 1123, 1131 (Cal. 2020). *Contra Sakkab*, 803 F.3d at 434 (discussing "individual PAGA claims"). But this reasoning misses the point and is emblematic of the conflict between the *Iskanian* rule and this Court's FAA precedent. California courts ignore that a PAGA plaintiff who agreed to individual arbitration wields significant influence over the government's claim—even more than an FCA relator—and this extensive degree of control subjects the PAGA claim to the FAA.

"[T]he State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Magadia*, 999 F.3d at 677. "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." *Id.* (citations omitted). It makes no sense to say the aggrieved employee receives full control over the litigation of a PAGA claim, yet cannot elect arbitration. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) (indicating the FAA may apply to a governmental claim where the litigation could have been "dictated" by the individual who agreed to arbitration and the government was not "the master of its own case"); *see also Iskanian*, 327 P.3d at 158 (Chin, J., concurring) (explaining that *Waffle House* "casts considerable doubt on the majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable").

The analysis should not change when a particular arbitration agreement includes a PAGA representative-action waiver. Such a waiver will not immunize a lawless company from liability. Since PAGA is a procedural mechanism that does not create a substantive claim for the named PAGA plaintiffs, "[p]reventing [that] plaintiff from using this [PAGA] procedure has no effect on the state's property rights" in civil penalties. *Wesson*, 283 Cal. Rptr. 3d at 860 n.14. Nor would it prevent a different PAGA proxy (a fellow aggrieved worker) who did not consent to arbitration from asserting a PAGA claim. *See Sakkab*, 803 F.3d at 449 (Smith, N.R., J., dissenting).

In any event, because PAGA is a purely procedural statute allowing certain workers to recover penalties that could otherwise be sought by state agencies, *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009), the State cannot, as a matter of its own public policy, override the FAA by dictating that any *particular* aggrieved employee may invoke PAGA's representative-action procedure, *Sakkab*, 803 F.3d at 449 (Smith, N.R., J., dissenting); *see also Am. Express Co.*, 570 U.S. at 252 (Kagan, J., dissenting) ("We have no earthly interest (quite the contrary) in vindicating [state] law" where arbitration agreements are governed by the FAA.). Thus, it violates the FAA for California to adopt rules and procedures favoring one or more plaintiffs by enabling them to exploit PAGA's procedures after they enter into arbitration agreements waiving representative actions. *See Epic Sys.*, 138 S. Ct. at 1621 (holding the FAA "seems to protect pretty

absolutely" an agreement providing for individualized rather than representative procedures).

The dispute between the Ninth Circuit and California courts over whether PAGA claims cannot be arbitrated pursuant to the FAA under the *Iskanian* rule involves an important federal statute. This disagreement shows no signs of abating, *see, e.g.*, *Nazanen v. Lincoln Prop. Co., ECW*, No. G057544, 2020 WL 4999784, at *4-5 (Cal. Ct. App. Aug. 25, 2020) (declining to follow federal case law deeming PAGA claims to be arbitrable); *Correia*, 244 Cal. Rptr. 3d at 188–91 (same), and only this Court can resolve it. The FAA "establish[ed] a uniform federal law over contracts which fall within its scope." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). This Court should grant review to end this division and ensure the uniform application of the FAA.

III. Certiorari is warranted because the question of whether the *Iskanian* rule is viable under the FAA is a recurring issue of vital importance.

The *Iskanian* rule has led to an explosion of PAGA litigation and effectively gutted the FAA's mandate for wage-and-hour claims in California. This has exposed businesses that had entered into agreements with individuals for streamlined, efficient bilateral arbitration to lengthy, costly PAGA representative proceedings seeking massive civil penalties. Businesses have therefore pressed forward with FAA preemption challenges to the *Iskanian* rule despite California courts' hostility to those challenges,

resulting in numerous appeals and numerous petitions to this Court.

From its initial enactment to the present day, "PAGA lawsuits have grown at an exponential rate." Ivan Muñoz, *Has PAGA Met Its Final Match? Continued Expansion of California's Private Attorneys General Act Leads to Trade Group's Constitutional Challenge*, 60 Santa Clara L. Rev. 397, 399 (2020). *Iskanian* is a driving force behind this dramatic growth. Since *Iskanian*, PAGA claims have been seen as "a means for employees and others 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 result has been an explosion of PAGA claims." Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Soc'y for Hum. Res. Mgmt. (Mar. 26, 2019), https://bit.ly/3BukAOW. In 2005, not long after PAGA first took effect, plaintiffs filed approximately 759 PAGA lawsuits. Cale Ottens, *Lawyers Work OT on Lawsuits*, L.A. Bus. J. (Nov. 10, 2014), https://bit.ly/3vYvIT0. In comparison, at least 4,000 PAGA notices—the necessary precursor for initiating PAGA lawsuits—are now filed annually with the State. Andrew Elmore, *The State Qui Tam To Enforce Employment Law*, 69 DePaul L. Rev. 357, 372 (2020).

This is a strong indication that plaintiffs have used *Iskanian* to circumvent the individual arbitration contracts they signed, thereby flouting the FAA's mandate that requires courts to enforce those arbitration agreements as written. Plaintiffs have seized on the "loophole" created by *Iskanian* to

circumvent this Court's arbitration precedent and inundate California courts with representative PAGA claims alongside, or in lieu of, class claims. *See* Erin Coe, *Calif. Cos. Face More PAGA Suits as Iskanian Rule Stands*, Law360 (June 1, 2015, 10:49 PM), https://bit.ly/3nIpBhL. This growing flood of PAGA litigation constitutes a major risk for the many companies who are sued. The plaintiffs asserting those representative claims typically seek millions—or even billions—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"); *Turrieta*, 284 Cal. Rptr. 3d at 775 n.7 (plaintiffs in PAGA cases, including respondent Seifu, claimed Lyft's maximum PAGA liability ranged from $2 billion to more than $12 billion).

The *Iskanian* rule's role in fostering this high stakes, burdensome representative litigation has critical implications for employment litigation, since California has the largest workforce of any state. *See Economic News Release*, U.S. Bureau of Lab. Stat., https://bit.ly/3mtF3iy. These implications also threaten to expand beyond California's borders, as several states—including states like Massachusetts and New York, with their own sizable workforces—are currently considering bills that would enact versions of, or analogues to, PAGA. *See, e.g.*, Charles Thompson et al., *Employers Must Brace For PAGA-Like Bills Across US*, Law360 (June 18, 2021, 3:25 PM), https://bit.ly/3vYbpow.

Given the profound stakes involved, businesses have increasingly pressed forward with FAA preemption challenges to the *Iskanian* rule. But the California Courts of Appeal snub those challenges, unwilling to disturb the rule because they consider themselves bound by *Iskanian*. *See, e.g.*, *Williams v. RGIS, LLC*, No. C091253, 2021 WL 4843560, at *3–4 (Cal. Ct. App. Oct. 18, 2021) (collecting nine published decisions rejecting defendants' contention that, after *Epic Systems*, the FAA preempts the *Iskanian* rule). And as here, the California Supreme Court has repeatedly refused to reconsider the *Iskanian* rule after *Epic Systems* and *Lamps Plus*. *See, e.g.*, *Gregg v. Uber Techs., Inc.*, No. B302925, 2021 WL 1561297 (Cal. Ct. App. Apr. 21, 2021), *petition for review denied*, No. S269000 (Cal. June 30, 2021); *Schofield v. Skip Transport*, No. A159241, 2021 WL 688615 (Cal. Ct. App. Feb. 3, 2021), *petition for review denied*, No. S267967 (Cal. May 12, 2021); *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508 (Cal. Ct. App. Sept. 18, 2020), *petition for review denied*, No. S265257 (Cal. Dec. 9, 2020). Similarly, the Ninth Circuit has refused to correct course despite acknowledging the tensions between its circuit precedent upholding the *Iskanian* rule and this Court's own FAA precedent, *Rivas*, 842 F. App'x at 56–57, even as California state and federal courts increasingly disagree over whether *Iskanian* renders PAGA claims inarbitrable under the FAA, *see, e.g.*, *Correia*, 244 Cal. Rptr. 3d at 190–91 (disagreeing with Ninth Circuit's determination that PAGA claims can be compelled to arbitration under the FAA). As a result, while California federal courts are edging ever closer to the day when they will permit parties to "always sidestep

an arbitration agreement simply by filing a PAGA claim," "California courts have already said as much." *Rivas*, 842 F. App'x at 58 & n.1 (Bumatay, J., concurring).

In the face of lower court intransigence, defendants have turned to this Court for intervention. *See Winns v. Postmates Inc.*, 281 Cal. Rptr. 3d 460, 468 n.4 (Ct. App. 2021) (acknowledging that defendants have recently filed petitions with this Court asserting FAA preemption challenges to *Iskanian*).[1] Absent this Court's intervention, the FAA and this Court's precedent construing it will be a dead letter in California wage-and-hour actions as the ever-growing number of representative PAGA claims in California courts remain entirely off-limits to arbitration agreements requiring bilateral arbitration. Given the vital importance of this oft-recurring issue, this Court should grant review to put an end to California courts'

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[1] Petitions for writs of certiorari on this same issue are currently pending in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (U.S. filed May 10, 2021), *Postmates, LLC v. Rimler*, No. 21-119 (U.S. filed July 26, 2021), *Coverall North America, Inc. v. Rivas*, No. 21-268 (U.S. filed August 20, 2021), *Postmates, LLC v. Santana*, No. 21-420 (U.S. filed Sept. 13, 2021), *Uber Technologies, Inc. v. Gregg*, No. 21-453 (U.S. filed Sept. 21, 2021), and *Uber Technologies, Inc. v. Rosales*, No. 21-526 (U.S. filed Oct. 6, 2021). If this Court grants certiorari in any of those cases, it should hold this petition until that proceeding is resolved.

efforts to evade the FAA's mandate through the *Iskanian* rule.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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