No. 21-742

IN THE

Supreme Court of the United States

LYFT INC.,
Petitioner,
v.

MILLION SEIFU

On Petition for a Writ of Certiorari To
The California Court of Appeal

MILLION SEIFU'S RESPONSE TO RESPONDENT'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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STATEMENT OF NON-OPPOSITION

Given that the Court has already granted certiorari in the case of *Viking River Cruises Inc. v. Moriana*, No. 20-1573, Respondent Million Seifu does not oppose the Petition for a Writ of Certiorari submitted by Petitioner by Lyft, Inc. ("Lyft") in this case, if the Court will hear this case together with *Viking River*.

This case raises the question of whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, preempts the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), barring the prospective waiver of the statutory right to bring a representative claim under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698, *et seq*.

The PAGA allows the state to deputize individual plaintiffs to enforce the state's Labor Code and collect penalties for violations of state law. The majority of those penalties go to the state, and the state is bound by the outcome of the suit. In *Iskanian*, the California Supreme Court held that a PAGA claim is essentially a "a type of qui tam action," *see Iskanian*, 327 P.3d at 148, and that a waiver of such claims would undermine the statute's purpose to increase enforcement of the Labor Code for the public's benefit. *Id.* at 149. Accordingly, the Court held that a waiver of the right to bring a PAGA claim violates public policy and is not enforceable, whether that waiver appears in an arbitration provision or in any other type of contract or employment agreement.

Since *Iskanian* was decided seven years ago, defendants such as Lyft have repeatedly argued that its

bar on pre-dispute PAGA waivers has been abrogated by this Court's case law finding that rules mandating class-wide proceedings are preempted by the FAA, including *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), and more recently, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018), and *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019). Seifu disputes Lyft's assertion.

A representative PAGA claim is fundamentally a claim brought by the state of California for penalties, not an aggregation of individual claims for damages like a class action. An agreement "to waive 'representative' PAGA claims—that is, claims for penalties arising out of violations against other employees—is effectively an agreement to limit the penalties an employee-plaintiff may recover on behalf of the state." *Sakkab v. Luxottica Retail North America, Inc.,* 803 F.3d 425, 436 (9th Cir. 2015). Both the California Supreme Court in *Iskanian* and the Ninth Circuit in *Sakkab* concluded that *Iskanian's* bar on the outright waiver of the right to bring representative PAGA claims is not preempted by the FAA.

Seifu rejects Lyft's position that the sound reasoning of *Iskanian* and *Sakkab* has been undermined by this Court's recent decisions in *Epic Systems* and *Lamps Plus*. Indeed, numerous state and federal courts have considered the same question Lyft raises here and have agreed that *Epic Systems* and *Lamps Plus* do not disturb the sound rulings of *Iskanian* and *Sakkab*.[1]

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

(*Footnote continued*)

However, since the Court granted review in *Viking River*, Seifu does not oppose the grant of certiorari here, so that Seifu may present his argument to the Court as to why *Iskanian* remains good law. In particular, Seifu wishes to note that there can be no argument that the 75% of penalties recoverable in a PAGA action that is directed to the State (and not to the workers) runs afoul of this Court's prior precedents in *Concepcion*, *Epic Sys.,* and *Lamps Plus.*

Seifu presents a brief counter-statement of the case for the record.

COUNTER-STATEMENT OF THE CASE

A. The Private Attorney General Act (PAGA)

The PAGA provides a mechanism for enforcement of California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the State, of which 75% is reserved for the State and 25% is distributed to affected employees. *See* Cal. Lab. Code § 2699 (i). Before the PAGA was enacted, only the State could bring suit to recover such penalties. *See Iskanian*, 327 P.3d at 145–46. However, "[g]overnment enforcement proved prob-

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2019 WL 6481697 at *7 n.3 (C.D. Cal. Sept. 23, 2019); *Rejuso v. Brookdale Senior Living Communities, Inc.*, 2019 WL 6735124, at *6 (C.D. Cal. May 22, 2019); *Whitworth v. SolarCity Corp.*, 336 F. Supp. 3d 1119, 1123 (N.D. Cal. 2018); *Rimler v. Postmates Inc.*, No. A156450, 2020 WL 7237900, at *1 (Cal. Ct. App. Dec. 9, 2020), *review denied* (Feb. 24, 2021).

lematic." *Kim v. Reins Int'l California, Inc.*, 459 P.3d 1123, 1127 (Cal. 2020). Thus, "[t]o facilitate broader enforcement, the Legislature enacted PAGA, authorizing 'aggrieved employees' to pursue civil penalties on the state's behalf." *Id.*

A PAGA claim is fundamentally a claim on behalf of the state of California. Before bringing a PAGA claim, a litigant must first provide notice of the particular Labor Code violations at issue to the Labor & Workforce Development Agency (LWDA) and must give the LWDA an opportunity to act before the employee can be "authorized" by the state to pursue the claim. *Kim*, 459 P.3d at 1127; *Iskanian*, 327 P.3d at 151. The PAGA authorizes the "aggrieved employee" to recover penalties (not damages) for Labor Code violations committed against himself and other employees in a representative civil action. *See* Cal. Lab. Code § 2699(g).[2]

When settling a PAGA action, the deputized PAGA plaintiff must again inform the LWDA of the terms of the settlement at the same time it seeks court approval and provide an opportunity for the state to weigh in. *See* Cal. Lab. Code § 2699(l)(2). Likewise, any judgment awarding or denying PAGA penalties must be provided to the LWDA within ten days. *See* Cal. Lab. Code § 2699(l)(3).

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[2] In *Lawson, ZB, N.A. v. Superior Court*, 448 P.3d 239 (Cal. 2019) ("Lawson"), the California Supreme Court ruled that PAGA only allows for the recovery of statutory penalties, not restitution for employees for unpaid wages.

PAGA actions do not require class certification or notice to other employees. *Arias v. Super. Ct.*, 209 P.3d 923 (Cal. 2009). Furthermore, other employees are bound by a PAGA adjudication only with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Id*. at 933. The state is also bound by the outcome of the suit, just as if the LWDA itself had brought the case.

For all these reasons, the California Supreme Court has described a PAGA representative action as "a type of *qui tam* action." *Iskanian*, 327 P.3d at 148. An employee suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." *Arias*, 209 P.3d at 933. In this sense, "[e]very PAGA claim is 'a dispute between an employer and the *state*.'" *Kim*, 459 P.3d at 1127 (quoting *Iskanian*, 59 Cal.4th at p. 386, 327 P.3d 129).

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

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

Supreme Court considered the validity of both the class action waiver and the PAGA waiver.

With respect to the first issue, the California Supreme Court recognized that, following this Court's rulings in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), its prior decision in *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), was preempted by the FAA. *Gentry* had held that class action waivers were unenforceable under state law when certain criteria were satisfied.

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

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

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

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

> Whether a claim is technically denominated "representative" is an imperfect proxy for whether refusing to enforce waivers of that claim will deprive parties of the benefits of arbitration. Instead, *Concepcion* requires us to examine whether the waived claims mandate procedures that inter-

> fere with arbitration, as the class claims in *Concepcion* did. Here, they do not.

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

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

D. Factual & Procedural Background of This Case

Plaintiff Million Seifu is a driver who has performed transportation services for Lyft in California. Seifu contends here that Lyft misclassified him, like its other drivers in California, as an independent

contractor. Courts have recognized that drivers who perform transportation services for "gig economy" companies such as Lyft and Uber, are actually employees under California state law, which recently adopted the Massachusetts "ABC" test to determine employee status. *E.g.*, *People v. Uber Techs., Inc. & Lyft, Inc.*, 56 Cal.App.5th 266, 288 (2020) (affirming preliminary injunction and finding it very unlikely that Uber could justify its classification of drivers as independent contractors); *Rogers v. Lyft, Inc.,* 452 F. Supp. 3d 904, 911 (N.D. Cal. 2020) (noting that "rather than comply with a clear legal obligation, companies like Lyft are thumbing their noses at the California Legislature, not to mention the public officials", by refusing to correctly classify drivers as employees).

Seifu initiated this case on the same day that the California Supreme Court adopted the "ABC" test as the applicable test to determine employee status, which it announced in *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018). That day, April 30, 2018, Seifu filed a letter with California's Labor & Workforce Development Agency (LWDA), asserting that Lyft had misclassified him and its drivers across California as independent contractors and had committed various violations of the Labor Code as a result. When he received no response from the LWDA, as permitted under the PAGA, Seifu filed the claim in court on July 5, 2018.

On October 9, 2018, Lyft filed a Petition to Compel Individual Arbitration and Stay Proceedings Pending Arbitration. The arbitration provision that Lyft sought to enforce contains a "Representative

PAGA Waiver" that effects a wholesale waiver of the right to bring or participate in any representative action. *See* App.4 (citation omitted). Thus, while the arbitration provision requires any claims that drivers would seek to pursue against Lyft to arbitration, it specifically prohibits representative PAGA actions from proceeding in arbitration:

> Notwithstanding any other provision of this Agreement or the Arbitration Agreement, to the fullest extent permitted by law: (1) you 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, and (2) for any claim brought on a private attorney general basis, including under the California PAGA, both you and Lyft agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law).

App.4 (quoting Lyft's arbitration provision).

E. The Superior Court's Decision

On October 23, 2019, the Superior Court denied Lyft's petition to compel arbitration, explaining that Plaintiff's PAGA claim "lies outside the Federal Arbi-

tration Act's coverage because it is not a dispute between an employer and an employee rising out of their contractual relationship[,] [i]t is a dispute between an employer and the state." App.14-15 (*citing Iskanian*, 59 Cal.4th at 348, 327 P.3d 129). The court also recognized that under *Sakkab*, the FAA does not preempt this *Iskanian* rule.

In so holding, the court cited language from and agreed with *Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602 (2019), that *Epic Systems* did not overrule *Iskanian*. App.15. As the Superior Court noted, *Epic Systems* "does not address *Iskanian*'s rationale for finding that an arbitration provision waiving PAGA actions is unenforceable because a PAGA representative action is a qui tam action, where the plaintiff asserts the claim as a proxy for the state's Labor and Workforce Development Agency… All *Epic Systems* holds is that class claims under the federal Fair Labor Standards Act may be subject to arbitration if the employee signed an agreement requiring individualized arbitration." App.15 (citations omitted).

As such, the Superior Court found that *Iskanian* and *Sakkab* remained good law, and it denied Lyft's Petition to Compel arbitration.

F. The Court of Appeal's Decision

The Court of Appeal of the State of California for the Second Appellate District affirmed. In its opinion, the Court of Appeal followed "[n]umerous Courts of Appeal [who] have rejected the contention that *Iskanian* is no longer good law in the wake of *Epic*"

and, in particular adopted the "reasoning stated in *Olson*, *Correia*, and [] other authorities". App.8-9 (*citing Olson v. Lyft, Inc.*, 56 Cal.App.5th 862 (2020) and *Correia*, 32 Cal.App.5th 602).

Specifically, the Court of Appeal agreed with *Correia*'s conclusion that while "*Iskanian* held that a ban on bringing PAGA actions in any forum violates public policy" and that such a rule was not preempted by the FAA, *Epic Systems* "addressed a different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the [National Labor Relations Act]." App.9 (*quoting Correia*, 32 Cal.App.5th at 619).

Lyft's petition to the California Supreme Court for review of the decision was denied, *see Seifu v. Lyft, Inc.*, Case No. S269800, and remittitur issued on October 21, 2021.[3]

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[3] While litigating the enforceability of Lyft's arbitration clause, Lyft was able to forestall Seifu's repeated attempts to obtain a ruling that Lyft had violated the California Labor Code. Prior to adjudication on Lyft's Petition to Compel Individual Arbitration, Seifu moved for a preliminary injunction. The Superior Court first ruled on the Petition to Compel Individual Arbitration, denying the petition, then set a hearing on Seifu's preliminary injunction motion. Lyft, however, immediately appealed the order denying the petition and moved to stay the action case and remove the preliminary injunction hearing from the calendar. The Superior Court granted the stay pending appeal and removed the preliminary injunction hearing from the calendar. Seifu filed a writ of mandate seeking relief in order to proceed with his motion for a preliminary injunction pending the appeal (as he pursued only provisional relief pending appeal), but the writ request was denied. Thus, by litigating the enforceability of Lyft's arbitration clause, Lyft has been

(*Footnote continued*)

CONCLUSION

While Seifu rejects Lyft's argument that the FAA allows a defendant employer to avoid PAGA claims in which a private plaintiff collects penalties for the State, Seifu does not oppose Lyft's Petition for a Writ of Certiorari, if the Court will hear this case together with *Viking River*. Since the Court will be considering this issue, Seifu wishes to press his argument, in particular, that the State rule prohibiting a defendant from using an arbitration clause to avoid the imposition of penalties that are specifically directed to the State is not preempted by the FAA under this Court's precedents.

Respectfully submitted,

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able to stall a ruling on the lawfulness of its independent contractor classification of its drivers, for nearly four years in this case.