No. 17-____

IN THE

Supreme Court of the United States

FIVE STAR SENIOR LIVING INC. AND
FVE MANAGERS, INC.,

Petitioners,

v.

MELINDA MANDVIWALA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has made clear that the Federal Arbitration Act ("FAA") preempts state rules that (1) discriminate against arbitration agreements or (2) thwart the objectives of the FAA.

The questions presented are:

1. Whether a California rule that prohibits the enforcement of arbitration agreements with respect to representative employment claims under California's Private Attorneys General Act ("PAGA"), and that is applied to no other type of agreement, is preempted by the FAA because the rule discriminates against arbitration agreements.

2. Whether a California rule that prohibits the enforcement of arbitration agreements with respect to representative employment claims under PAGA is preempted by the FAA because the rule eviscerates bilateral arbitration agreements and thereby thwarts the objectives of the FAA.

RULE 29.6 STATEMENT

No parent corporation or publicly held company owns 10 percent or more of Five Star Senior Living Inc.'s stock. ABP Acquisition LLC, a wholly-owned subsidiary of ABP Trust, owns approximately 36 percent of Five Star Senior Living Inc.'s stock.

FVE Managers, Inc. is a wholly-owned subsidiary of Five Star Senior Living Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Five Star Senior Living Inc. and FVE Managers, Inc. (collectively, "Five Star") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

INTRODUCTION

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219-20 (1985). As this Court has emphasized, the "judicial hostility towards arbitration that prompted the FAA" has continued to "manifest[] itself in a great variety of devices and formulas." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation omitted). The California Supreme Court's "*Iskanian* rule" is such an anti-arbitration device. This petition seeks its review and invalidation in order to preserve and protect the FAA's "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

This Court has held that state-created rules that selectively disfavor arbitration are preempted by the FAA. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). This Court also has held that the "principal purpose of" the FAA is "ensuring that private arbitration agreements are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489

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[1] Five Star Senior Living Inc. was formerly known as Five Star Quality Care, Inc.

U.S. 468, 478 (1989). With fidelity to that purpose, the Court has invalidated state rules that undermine agreements to arbitrate, including, in *Concepcion*, a California rule that barred enforcement of agreements to arbitrate individually, as opposed to on a class or representative basis. *See* 563 U.S. at 344.

Nevertheless, in *Iskanian v. CLS Transportation Los Angeles, LLC*, decided in the wake of *Concepcion*, the California Supreme Court adopted a rule that conflicts with this Court's precedents. *Iskanian*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). *Iskanian* held that bilateral agreements to arbitrate on an individual basis may not be enforced when an employee brings representative claims (claims on behalf of herself *and* other employees) under California's Private Attorneys General Act ("PAGA"), Cal. Labor Code § 2698, *et seq*. Representative PAGA claims, according to the California Supreme Court, are "unwaivable" in arbitration agreements. *Iskanian*, 327 P.3d at 148. Subsequently, in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), a divided panel of the Ninth Circuit upheld the *Iskanian* rule and categorically exempted PAGA claims from a contractual requirement of bilateral, individual arbitration. With *Iskanian* and *Sakkab* in place, individual employees in California (and their attorneys) now can, and do, routinely bypass their agreements to arbitrate all claims on an individual basis.

That is exactly what Respondent Melinda Mandviwala did in this case. The Ninth Circuit, applying *Iskanian* and *Sakkab*, invalidated Mandviwala's agreement to arbitrate her claims against Five Star on an individual basis, with regard to her representative PAGA claims. Pet. App. ("App.") 2a-3a. The Ninth Circuit's decision, and the *Iskanian* and *Sakkab* decisions on which it

relies, conflict with the FAA's commands as well as decades of this Court's precedent.

If the FAA is to have the effect that Congress intended, the *Iskanian* rule must be reviewed and invalidated for two reasons. *First*, like the rules this Court recently rejected in *Kindred* and *DIRECTV*, the *Iskanian* rule is not a generally applicable contract defense, but rather, has been used exclusively to prevent arbitrations. *Second*, like the rule this Court rejected in *Concepcion*, the *Iskanian* rule interferes with the FAA's core purpose and objectives by eliminating contractual commitments to arbitrate bilaterally. Thus, for either of these reasons, the *Iskanian* rule is preempted by the FAA.

Recognizing the importance of the FAA, this Court has regularly granted certiorari to prevent states from flouting the Act's mandates. That is particularly true of cases affecting California, the state with the nation's largest workforce. Today, the PAGA-*Iskanian*-*Sakkab* regime is well-known as a means for circumventing this Court's holding in *Concepcion* and the dictates of the FAA. Indeed, the number of PAGA actions has increased exponentially since *Concepcion* was decided, and has also risen dramatically since *Iskanian* and *Sakkab* were decided. This Court's review is necessary to prevent its precedents from being undermined, as well as to ensure the appropriate application and uniform enforcement of the FAA.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. 1a-5a, is unreported and is available at 2018 WL 671138. The order of the United States District Court for the Central District of California denying Five Star's motion to compel

arbitration, App. 6a-14a, is unreported and is not available on a publicly accessible database.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its judgment on February 2, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

A. California's Private Attorneys General Act

Enacted in 2004 by the California legislature, PAGA enables private persons to bring actions against their employers seeking civil penalties for violations of California labor laws. The actions may be brought on behalf of the plaintiff and other employees.

The mechanics of the statute are straightforward. An "aggrieved employee" is permitted to file an action under PAGA against his or her employer. Cal. Labor Code § 2699(a), (c). The employee may do so on a representative basis on behalf of similarly-situated employees. *Id.* The employer may be held liable for "civil penalties" of $100 per "aggrieved employee" per pay period for the first violation of a labor code provision, and $200 per aggrieved employee per pay period for any subsequent violation of that same provision, unless the relevant provision establishes a different penalty. *Id*. § 2699(f)(2). Aggrieved employees that prevail in PAGA actions receive 25 percent of the civil penalties awarded. *Id.* § 2699(i). California's Labor and Workforce Development Agency ("LWDA") receives the remaining 75 percent. *Id*. A prevailing plaintiff also is entitled to reasonable attorney's fees and costs. *Id.* § 2699(g)(1).

Before filing a PAGA action, an aggrieved employee must provide the LWDA with written notice of the underlying violations. *See id.* § 2699.3(a)(1)(A). If the agency does not intend to investigate or take action, or if it does not respond within 65 days, the employee may file suit. *Id.* § 2699.3(a)(2)(A)-(B). From that point forward, the case is the employee's, and his or

her attorney's, to litigate. The state agency plays no role in conducting the litigation.[2]

B. *Iskanian* and *Sakkab*

1. The California Supreme Court's *Iskanian* decision held that, when an employee asserts a representative PAGA claim, an arbitration provision limiting disputes to individual claims will not be enforced. 327 P.3d at 153. In *Concepcion*, decided three years before *Iskanian*, this Court squarely rejected a California Supreme Court rule establishing that, when an individual asserts a class action claim, an arbitration agreement limiting disputes to individual claims will not be enforced. 563 U.S. at 352.

Nevertheless and notwithstanding *Concepcion*, the California Supreme Court concluded in *Iskanian* that agreements to arbitrate on an individual basis only are "contrary to public policy and unenforceable as a matter of state law" when applied to representative PAGA actions. 327 P.3d at 149. Notably, in support of its public-policy-backed conclusion, the California Supreme Court invoked Section 1668 of the California Civil Code, the same provision it had relied on as support for the California rule this Court invalidated in *Concepcion*. *See Iskanian*, 327 P.3d at 148-49; *Discover Bank v. Superior Court of L.A.*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. at 340-41.

The *Iskanian* decision announced that "a PAGA claim lies outside the FAA's coverage." *Iskanian*, 327 P.3d at 151. The California Supreme Court stated that "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA

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[2] The LWDA receives copies of proposed settlements and dispositive orders. Cal. Labor Code § 2699(l)(2)-(3).

action is a dispute between an employer and the state [agency]." *Id.* at 149. Labeling a "PAGA representative action . . . a type of *qui tam* action," *id.* at 148, the court found that "the state"—not the named plaintiff who filed suit and who has unfettered control over the litigation—"is the real party in interest." *Id.* at 151 (citing *Arias v. Superior Court*, 209 P.3d 923, 933-34 (Cal. 2009)). Because, according to the California court, a PAGA action belongs to the state and the FAA applies only to private parties, the FAA does not preempt a judicial rule prohibiting waiver of representative PAGA claims through individual-claim-only arbitration agreement provisions. *Id.* at 152-53.

2. In *Sakkab*, a divided panel of the Ninth Circuit upheld the *Iskanian* rule. 803 F.3d at 427. The majority held, first, "the *Iskanian* rule is a 'generally applicable' contract defense" within the ambit of the FAA's "saving clause," and, second, the rule "does not conflict with [the FAA's] objectives." *Id.* at 433. The latter holding was predicated on the view that representative PAGA actions are not similar to the class actions analyzed in *Concepcion*. *Id.* at 435-39. The Ninth Circuit also found that its decision was "bolstered by the PAGA's central role in enforcing California's labor laws." *Id.* at 439.

Judge N.R. Smith wrote a searing dissent. He observed that, "[d]espite ninety years of Supreme Court precedent invalidating state laws deemed hostile to arbitration, the majority today displays this same 'judicial hostility' to arbitration agreements." *Id.* at 440 (N.R. Smith, J., dissenting) (citation omitted).

The dissent detailed the similarities between the PAGA claims in *Sakkab* and the class claims in *Concepcion*. The dissent found that the "*Iskanian* rule

burdens arbitration in the same three ways identified in *Concepcion*: it makes the process slower, more costly, and more likely to generate procedural morass; it requires more formal and complex procedure; and it exposes the defendants to substantial unanticipated risk." *Id.* at 444. "Because the *Iskanian* rule stands as an obstacle to the purposes and objectives of the FAA," the dissent concluded, "there is no question—the rule must be preempted." *Id.* at 450.[3]

The dissent further disagreed with the majority's argument that the *Iskanian* rule is justified by California public policy. Judge Smith observed that, in FAA preemption analysis, "the state's purpose is irrelevant"; "[i]f the rule conflicts with the objectives of the FAA, the state rule must give way." *Id.* The dissent closed with a forecast for the majority opinion: "Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same [regarding *Discover Bank*], and were subsequently reversed in *Concepcion*. The majority now walks that same path." *Id.*

With regard to whether the *Iskanian* rule discriminates against arbitration agreements (as an independent ground for rejecting the rule, in addition to the argument that the rule frustrates the FAA's purpose), Judge Smith noted in his dissent that, because the parties had not addressed the issue, he would not resolve it. *Sakkab*, 803 F.3d at 442 n.1. Judge Smith nonetheless stated that he had "serious doubts that

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[3] The majority of federal district courts considering the issue before *Sakkab* concluded that the FAA preempts the *Iskanian* rule. *See Porter v. Nabors Drilling USA, L.P.,* No. 1:15-cv-00805-MCE-JLT, 2015 WL 13323135, at *1 (E.D. Cal. Sept. 21, 2015) (citing nine pre-*Sakkab* decisions holding that the FAA preempts the *Iskanian* rule and four decisions finding the contrary).

the rule established by *Iskanian* falls into the same category as the common law contract defenses of duress or fraud," and that "the Supreme Court did not determine in *Concepcion* whether the alleged unconscionability of failing to apply the *Discover Bank* rule was a generally applicable contract defense." *Id*.

C. Proceedings Below

1. From November 2012 to July 2014, Mandviwala was an employee of Five Star at a senior living community in California. App. 7a. At the beginning of her employment, Mandviwala voluntarily signed a "Mutual Agreement to Resolve Disputes and Arbitrate Claims." *Id.* at 16a-26a. The agreement covered all "claims" by one party against the other, defined as "any and all disputes, claims or controversies arising out of [Mandviwala's] employment or the termination of [Mandviwala's] employment which could be brought in a court." *Id.* at 17a. The parties expressly "agree[d] to waive all rights to bring, or be a party to, any class *or collective* claims against one another and agree[d] to pursue claims *on an individual basis only*." *Id.* at 23a (emphasis added). The agreement provided for Maryland law to apply to any dispute about its enforcement. *Id.* at 24a.

2. On July 17, 2015, Mandviwala filed a lawsuit against Five Star in California state court that asserted six separate claims under PAGA on behalf of herself and other aggrieved employees. *See* Appellants' Excerpts of Record, Volume II, ER0181-90, *Mandviwala v. Five Star Quality Care, Inc.*, No. 16-55084 (9th Cir. May 31, 2017), Dkt. 19-2. Mandviwala sought relief for herself and for others in the form of civil penalties for the six alleged PAGA claims, as well as unpaid wages on her own behalf for four of the six claims. *Id.* at ER0190-92.

3. Five Star timely removed the lawsuit to the United States District Court for the Central District of California. Five Star then moved, pursuant to the parties' arbitration agreement, to compel arbitration and to dismiss the lawsuit. App. 6a.

4. The district court denied the motion. It held that PAGA is a fundamental policy of California, and that the unavailability of representative PAGA claims under Maryland law demanded that California law apply. App. 9a-14a. It then held that, under *Iskanian* and *Sakkab*, the parties' agreement to resolve all claims through arbitration on an individual basis is unenforceable, and it denied the motion to compel arbitration in its entirety. *Id*. at 13a-14a.

5. Five Star appealed. The Ninth Circuit affirmed the district court's application of California law, rather than Maryland law, and the district court's resulting invocation of the *Iskanian* rule to exempt Mandviwala's representative PAGA claims from the parties' arbitration agreement. App. 2a-3a. Regarding this Court's recent decisions in *Kindred* and *DIRECTV*, which struck down rules that disfavored arbitration agreements, the panel stated that neither decision "announced new law." *Id.* at 3a. It then asserted that the "*Iskanian* rule is distinct from the rules at issue in *DIRECTV* and *Kindred* because it is a generally applicable contract defense in that it bars any waiver of a PAGA claim, regardless whether the waiver appears in an arbitration agreement." *Id.* The Ninth Circuit did not cite any non-arbitration contractual context in which the *Iskanian* rule ever has been applied.[4]

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[4] Regarding Mandviwala's individual claims for unpaid wages, the Ninth Circuit held that the terms of the arbitration agreement control and require that such claims be arbitrated.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari. The *Iskanian* rule conflicts with this Court's precedents and the carefully calibrated scheme Congress set forth in the FAA for two reasons: (1) the rule discriminates against arbitration agreements, and (2) the rule thwarts the objectives of the FAA.

First, the *Iskanian* rule clearly discriminates against arbitration agreements and thus is not a generally applicable contract defense. The *Iskanian* rule renders representative PAGA claims "unwaivable" only where enforcement of a PAGA waiver would result in arbitration. On the other hand, California courts permit the waiver of representative PAGA claims in other contexts. That pick-and-choose approach plainly violates the "equal-treatment principle" set forth in the FAA. *Kindred*, 137 S. Ct. at 1426. Accordingly, the *Iskanian* rule is preempted.

Second, the *Iskanian* rule obstructs the FAA's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478. The *Iskanian* rule thus is invalid for the same reasons that led this Court to strike down the rule prohibiting arbitration of class claims in *Concepcion*. The FAA's purpose is defeated when parties' agreements to arbitrate bilaterally are judicially invalidated. The *Iskanian* rule produces that very result. For this separate reason, the *Iskanian* rule is preempted. The Court should grant certiorari to

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Accordingly, it reversed the district court's denial of the motion to compel arbitration of Mandviwala's individual claims. App. 3a-5a.

prevent the *Iskanian* rule's continued subversion of the objectives of the FAA.

Finally, this case is an excellent vehicle for addressing the important and pressing questions presented. Both the California Supreme Court and the Ninth Circuit have declined requests to revisit the *Iskanian* rule, and this case presents a clean and direct path to address the rule's lawfulness. Moreover, the *Iskanian* rule has serious practical consequences. Since *Concepcion*, the incidence of PAGA actions has increased exponentially, and also has risen dramatically since *Iskanian* and *Sakkab*. Consequently, the number of arbitration agreements unjustly invalidated has increased enormously. Because California has approximately 12 percent of our nation's workforce, the effect of the *Iskanian* regime in that state alone fully merits this Court's grant of certiorari. Indeed, even absent a conflict of authorities, this Court repeatedly has prevented individual states from undermining the uniform application of Congress' carefully calculated, pro-arbitration policy. As long as the *Iskanian* rule remains in place, the FAA's objectives will be frustrated. The Court should grant this petition to halt the *Iskanian* rule's assault on the FAA.

I. The *Iskanian* Rule Is Not a Rule of General Applicability and Thus Is Preempted by the FAA.

The *Iskanian* rule is not a generally applicable contract defense. The Ninth Circuit's contrary holding cannot be reconciled with this Court's precedents, including its recent decisions in *Kindred* and *DIRECTV*. The erroneous conclusion that the *Iskanian* rule treats all contracts equally has caused provisions in a great number of arbitration agreements to be unlawfully invalidated. Absent this

Court's review, such unjust invalidation will continue unabated, in contravention of the FAA and this Court's precedents.

The FAA makes arbitration agreements "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 made clear the limits of the last clause: Arbitration agreements cannot be voided "by 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. Rather, only "*generally applicable contract defenses*, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis added). On many occasions, this Court has overturned rules, oftentimes from California, that selectively targeted arbitration. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 351 (2008) (reversing California court determination that a state agency had "exclusive original jurisdiction" over a type of dispute notwithstanding the parties' agreement to arbitrate all claims); *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (invalidating California labor law providing "that actions for the collection of wages may be maintained [in court] without regard to the existence of any private agreement to arbitrate." (citation omitted)); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (reversing California Supreme Court rule "refus[ing] to enforce the parties' contract to arbitrate" claims brought under California statute).

While decades of precedent from this Court demonstrate that selective targeting of arbitration agreements cannot be sustained, *Kindred* and *DIRECTV* are

especially illustrative. They highlight a particular brand of unlawful state rules: those that, nominally, are generally applicable, but that, in practice, target arbitration for disfavored treatment. As this Court explained in *Kindred*, the FAA "preempts any state rule discriminating on its face against arbitration" *and also* "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." 137 S. Ct. at 1426. And in *Kindred* and *DIRECTV*, this Court identified guideposts that reveal a discriminatory rule's true nature. Those guideposts are conspicuously present in the *Iskanian* rule. Thus, while neither *DIRECTV* nor *Kindred* created new law, they make the claim that the *Iskanian* rule is "grounds . . . for the revocation of any contract" especially untenable. 9 U.S.C. § 2.

Both *Kindred* and *DIRECTV* involved rules that, on their face, were of general applicability. In *Kindred*, this Court invalidated a Kentucky power-of-attorney rule that required specific authorization for an attorney-in-fact to waive a grantor's right to litigate in court. *See* 137 S. Ct. at 1425-26. And in *DIRECTV*, this Court invalidated the California Supreme Court's purportedly general interpretation of the term "law of your state," which the state court had employed to resurrect previously reversed anti-arbitration precedents. *See* 136 S. Ct. at 466-67. In both cases, this Court found that nominal statements of general applicability did not save the rules from their impermissible anti-arbitration targeting. *See Kindred*, 137 S. Ct. at 1427 ("[T]he state court's sometime-attempt to cast the rule in broader terms cannot salvage its decision."); *DIRECTV*, 136 S. Ct. at 469 (despite the state court's framing of the disputed rule in general contract terms, "we conclude that California courts

would not interpret contracts other than arbitration contracts the same way").

In *Kindred* and *DIRECTV*, this Court relied on characteristics that identify rules that impermissibly target arbitration. *First*, in both cases, no court could point to a single example outside the arbitration context in which the rule had been applied.[5] *Second*, in *Kindred*, the rule at issue actually was not being applied in other contractual contexts.[6]

These guideposts of impermissible hostility to arbitration are prominent and unmistakable with regard to the *Iskanian* rule. To begin, no state or federal court has cited *any* case or example outside the arbitration context in which the supposedly "generally applicable" *Iskanian* rule has been applied. In addition, the *Iskanian* rule plainly is not applied in all contractual contexts. For example, while under the *Iskanian* rule, employees may not waive representative PAGA claims in *arbitration agreements*, they may freely waive representative PAGA claims in *settlement agreements*.[7]

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[5] *See Kindred*, 137 S. Ct. at 1427 ("No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees."); *DIRECTV*, 136 S. Ct. at 470 (emphasizing that "we have found no such case" applying the rule outside the arbitration context); *id*. (highlighting "[t]he fact that we can find no similar case" in any other context).

[6] *See Kindred*, 137 S. Ct. at 1427 n.1 ("Making matters worse, the Kentucky Supreme Court's clear-statement rule appears not to apply to other kinds of agreements relinquishing the right to go to court or obtain a jury trial.").

[7] *See, e.g.*, *Villacres v. ABM Indus. Inc.*, 117 Cal. Rptr. 3d 398, 418 (Ct. App. 2010) (an employee can freely waive the right to bring PAGA claims in a settlement agreement even where "none of the settlement proceeds . . . were allocated to PAGA claims"); *Hernandez v. Best Buy Stores, LP*, No. 13cv2587 JM (KSC), 2017

Applicability to arbitration agreements, but not settlement agreements, was the precise fact that this Court found to be "another indication" that the disputed rule in *Kindred* impermissibly "ar[ose] from the suspect status of arbitration." 137 S. Ct. at 1427 n.1. In this case, it is clear that the *Iskanian* rule, although nominally general, "covertly accomplishes the . . . objective" of disfavoring arbitration agreements, *id.* at 1426, just like the rules in *Kindred* and *DIRECTV*.

The indicators of the *Iskanian* rule's anti-arbitration animus also make clear that the California Supreme Court's public policy rationale is untenable. The court stated that a prohibition on the waiver of representative PAGA claims is necessary to serve the "state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." *Iskanian*, 327 P.3d at 149. If that is true, then the policy should apply with equal force to settlement agreements: The FAA prohibits courts from picking and choosing when to apply a legal principle in a manner that disfavors arbitration. But that is *exactly* how the *Iskanian* rule is applied, barring waiver of representative PAGA claims in arbitration agreements based on an asserted public policy, but allowing such waiver in settlement agreements.

WL 2445438, at *2-3 (S.D. Cal. June 6, 2017) (settlement agreement "fully release[d] and forever discharge[d]" the defendant "from any and all PAGA claims that were asserted or could reasonably have been asserted in th[e] case") (citation omitted)); *Brooks v. Life Care Ctrs. of Am., Inc.*, SACV 12-00659-CJC(RNBx), 2015 WL 13298569, at *7 (C.D. Cal. Oct. 19, 2015) ("Defendants respond that . . . it is settled in California that parties can settle PAGA claims even when those claims were not asserted at all. They are correct.").

Moreover, the Ninth Circuit's reliance in this case on a patently erroneous legal premise, and its failure to consider the *Kindred* and *DIRECTV* guideposts, further underscore the need for review. Addressing Five Star's argument regarding the FAA's "generally applicable" exception, the Ninth Circuit panel stated that the "*Iskanian* rule . . . is a generally applicable contract defense in that it bars any waiver of a PAGA claim, regardless of whether the waiver appears in an arbitration agreement." App. 3a. As discussed, that statement does not comport with this Court's FAA jurisprudence. The *Iskanian* rule does not bar *any* waiver of a PAGA claim; it certainly does not bar such a waiver in settlement agreements. And the Ninth Circuit's decision ignores the important indicators this Court highlighted in *Kindred* and *DIRECTV*. Such blatant disregard, or misinterpretation, of this Court's recent precedents cries out for review.

The Ninth Circuit further noted that "neither *DIRECTV* nor *Kindred* announced new law" and that these "subsequent rulings . . . do not displace *Sakkab*." App. 3a. But once again, the court missed the mark. It is not *DIRECTV* or *Kindred* that "displace *Sakkab*"; the FAA and decades of this Court's precedent do so. *Sakkab* and *Iskanian* were erroneous when they were decided. *Kindred* and *DIRECTV* simply reinforced the command that state rules cannot selectively target arbitration, regardless of whether they do so expressly. Such reinforcement clearly is necessary and urgent in this context. This Court should grant Five Star's petition to ensure the uniform and appropriate enforcement of the FAA, just as it has done in other cases where courts manifested hostility toward arbitration.

Finally, the decision in this case significantly broadens the reach of the discriminatory *Iskanian* rule. For the first time, the *Iskanian* rule's effects include invalidating contracting parties' choice of law (here, Maryland law). It is well-recognized, however, that, with arbitration agreements as well as other agreements, contracting parties may "choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of [a state]." *DIRECTV*, 136 S. Ct. at 468. The decision here, invalidating the parties' contractual choice of law in order to allow enforcement of the *Iskanian* rule, further expands the already destructive anti-arbitration force of the rule. The issue presented to this Court is the validity of California's *Iskanian* rule. But the lower courts' resolution of the choice-of-law issue illustrates the *Iskanian* rule's astonishing breadth and its ever-increasing potential to invalidate broad swathes of provisions in arbitration agreements.

II. The *Iskanian* Rule Frustrates the Purposes and Objectives of the FAA.

Federal law preempts a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, the FAA preempts a state rule that obstructs "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478. The Court has repeatedly applied this principle to overturn state rules invalidating agreements to resolve claims through bilateral arbitration. *See, e.g., Concepcion*, 563 U.S. at 344-52; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*

Corp., 559 U.S. 662, 685-87 (2010). The *Iskanian* rule is no different. This Court granted certiorari in *Concepcion* to ensure that California courts would stop unlawfully invalidating bilateral arbitration agreements. This Court should grant review here for that same reason.

A. The *Iskanian* Rule Results in a Process Substantially More Time-Consuming, Costly, Complex and Risky than Bilateral Arbitration.

Like the California rule that *Concepcion* renounced, the *Iskanian* rule, as interpreted in *Sakkab*, replaces the streamlined dispute resolution mechanism agreed to by the contracting parties with a different and substantially more onerous process. In *Concepcion*, this Court addressed a rule that "condition[ed] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at 336. That rule—identical in effect to the *Iskanian* rule as interpreted by the Ninth Circuit—rendered meaningless agreements to arbitrate bilaterally.

In *Concepcion*, this Court emphasized that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. Further, the Court found, class arbitration "greatly increases risks to defendants" by offering only limited judicial review of awards of "damages allegedly owed to tens of thousands of potential claimants" that "will often become unacceptable." *Id.* at 350. As the *Sakkab* dissent explained, the *Iskanian* rule has the same effects. *See* 803 F.3d at 444 (N.R. Smith, J., dissenting). It thus should

meet the same fate: invalidation under the FAA because it thwarts the objectives of arbitration and the statute Congress enacted to protect those objectives.

First, like the resolution of class actions, the resolution of representative PAGA claims is "slower, more costly, and more likely to generate procedural morass" than bilateral arbitration. *Concepcion*, 563 U.S. at 348. For example, unlike individual claims, representative claims require "specific factual determinations regarding (1) the number of other employees affected by the labor code violations, and (2) the number of pay periods that *each* of the affected employees worked." *Sakkab*, 803 F.3d at 445 (N.R. Smith, J., dissenting).

Second, as with class actions, resolution of representative PAGA claims requires procedures far more complex and formal than bilateral arbitration. For example, with an individual claim, "the employee already has access to all of his own employment records," "knows how long he has been working for the employer," and "can easily determine how many pay periods he has been employed." *Sakkab*, 803 F.3d at 446 (N.R. Smith, J., dissenting). But discovery for a representative claim is much more complex. "[T]he individual employee does not have access to any of this information on behalf of all the other potentially aggrieved employees," and the "discovery necessary to obtain these documents . . . would be significant." *Id.* at 446. Parties enter into bilateral arbitration agreements precisely to avoid such burdensome discovery. Absent intervention by this Court, the *Iskanian* rule will continue to defeat the choices that the parties have made.[8]

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[8] The *Sakkab* majority's assertion that "there is no need to protect absent employees' due process rights in PAGA

Third, for every additional aggrieved employee implicated in a representative PAGA action, there is an increase in the civil penalties an employer may be ordered to pay. And because the "absence of multi-layered review makes it more likely that errors will go uncorrected," "[a]rbitration is poorly suited to the[se] higher stakes." *Concepcion*, 563 U.S. at 350. As this Court explained in *Concepcion*, parties "are willing to accept the costs of these errors in [an individual] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id.* But any contemplated benefits are lost when bilateral arbitration is jettisoned. Indeed, it is "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 351. This Court should grant certiorari to prevent California courts from continuing to undermine the parties', and Congress', true intentions.[9]

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arbitrations" is erroneous. 803 F.3d at 436. "[N]onparty employees . . . are bound by the judgment in an action brought under" PAGA. *Arias*, 209 P.3d at 934. Thus, while PAGA may not include every one of Rule 23's formal requirements for class certification, the involvement in representative PAGA claims of nonparty aggrieved employees unquestionably necessitates procedures far more complex and formal than bilateral arbitration.

[9] The Ninth Circuit provides that representative PAGA claims may be compelled into a group arbitration process. *Sakkab*, 803 F.3d at 444. For the reasons discussed, as in *Concepcion*, the FAA preempts such judicially-compelled group arbitration when the parties have agreed to bilateral arbitration and claims-resolution. Notably, since *Iskanian*, some California courts have gone even further, holding that representative PAGA claims may not be compelled to arbitration *at all* (at least absent the state's consent). *See*, *e.g., Tanguilig v. Bloomingdales, Inc.*, 210 Cal.

B. The Reasoning Used to Evade *Concepcion* and Uphold the *Iskanian* Rule Is Deeply Flawed.

The California Supreme Court and the Ninth Circuit relied on untenable arguments to defend the *Iskanian* rule. The unsound justifications put forth by the two courts cannot salvage this arbitration-destroying rule.

First, the *Iskanian* court's reliance on the proposition that an employee's representative PAGA claims are not subject to the FAA because they are not "private" claims is unavailing. In *Iskanian*, the California Supreme Court stated that the FAA simply does not apply because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state [agency]." 327 P.3d at 149. Under that logic, states can subvert the FAA merely by asserting some nominal interest in a claim and labeling as "private attorneys general" the plaintiffs who bring it. Even two concurring justices in *Iskanian* found this rationale to be a "novel theory, devoid of case law support." *Id.* at 157 (Chin, J., concurring in the judgment). Such a broad exclusion from the FAA is, at the least, unprecedented. It is itself a compelling reason for this Court to grant review.

Second, the *Iskanian* court's reliance on *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) is misplaced. In *Iskanian*, the California Supreme Court asserted that a private individual's representative PAGA claim is akin to the government enforcement action this

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Rptr. 3d 352, 353-55 (Ct. App. 2016), *cert. denied*, 138 S. Ct. 356 (2017). For the same reasons, this invalidation of bilateral arbitration provisions likewise is preempted.

Court addressed and precluded from arbitration in *Waffle House*. But the actions in *Iskanian* and *Waffle House* are not remotely similar. The action in *Waffle House* was filed not by a private person, but by a federal agency—the Equal Employment Opportunity Commission (EEOC). The EEOC had "exclusive jurisdiction over the claim" *before* it filed suit; deprived "the employee [of an] independent cause of action" *when* it filed suit; and was "the master of its own case" *after* it filed suit. 534 U.S. at 291; *see also Preston*, 552 U.S. at 359 (in *Waffle House*, "the Court addressed the role of an agency . . . as prosecutor, pursuing an enforcement action in its own name[.]"). The EEOC was "in command of the [litigation] process," *Waffle House*, 534 U.S. at 291, and was not party to any arbitration agreement, *see id.* at 294. Accordingly, the FAA did not bar the agency from litigating its case in court. In striking contrast, any influence the LWDA has over a PAGA action ceases when the agency decides not to pursue the case, and "less than 1 percent of PAGA notices have been reviewed or investigated [by the LWDA]." Legislative Analyst's Office, Labor Code Private Attorneys General Act Resources (Mar. 25, 2016), http://www.lao.ca.gov/Publications/Report/3403. The employee, and the counsel he or she chooses to retain, have complete control over the claims, including determining the violations alleged; the relief sought; the universe of employees represented; and whether and how the case is settled. No decision by the employee or the employee's counsel requires the agency's consent. Where, as here, a private plaintiff who signed an agreement to arbitrate controls the claims, "to the extent [*Waffle House*] is relevant," it points in the opposite direction and "*does* suggest that the FAA preempts the [*Iskanian*] rule." *Iskanian*, 327 P.3d at 158 (Chin, J., concurring in the judgment)

(quotation marks and alterations omitted). The state court's reliance on *Waffle House* to justify the invalidation of arbitration provisions is a fundamental error. The court's reliance is further misplaced because *Waffle House* concerned a *federal* agency and the corresponding issue of the interplay between *two federal statutes*.

Third, the *Iskanian* and *Sakkab* courts' likening of PAGA claims to *qui tam* claims is similarly unsound. To begin, the question whether a state rule—such as PAGA—is preempted by federal law, is different from the question of whether a federal law—such as the federal *qui tam* statute—conflicts with another federal law. As the dissent in *Sakkab* explained, "[u]nder *Concepcion*, if a state rule authorizing a qui tam action frustrated the purposes or objectives of the FAA, that rule would certainly be invalidated." 803 F.3d at 449 n.7 (N.R. Smith, J., dissenting). But even if the inquiries regarding conflicts between state and federal laws, and conflicts between two federal laws, were identical, the analogy between PAGA actions and *qui tam* actions would be misplaced. In contrast to the lack of state governmental involvement in PAGA actions, the federal government maintains substantial control over *qui tam* actions. For example, while the federal government is considering whether to intervene in a *qui tam* case—a period which often lasts for years—the plaintiff-relator cannot serve the complaint, let alone litigate the case or negotiate a settlement. 31 U.S.C. § 3730(a)(2). Further, if the federal government initially declines to intervene, "a showing of good cause" will permit it to intervene later and assume total control over the litigation. 31 U.S.C. § 3730(c)(3). PAGA claims thus are nothing like *qui tam* claims. Accordingly, the *qui tam* analogy asserted

by the California Supreme Court and the Ninth Circuit is unfounded.[10]

Fourth, *Sakkab*'s reliance on "public policy" also cannot insulate representative claims from the FAA. The *Sakkab* decision sought to "bolster[]" its affirmance of the *Iskanian* rule by emphasizing "PAGA's central role in enforcing California's labor laws," and the rule's "explicit purpose . . . to preserve the deterrence scheme the legislature judged to be optimal." 803 F.3d at 439 (citation omitted). But state public policy has no place in FAA preemption analysis. On that score, *Concepcion* again removed any doubt: "States cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*." 563 U.S. at 351 (emphasis added). A contrary conclusion would permit states to insulate claims from arbitration and the reach of the FAA merely by referencing an "important" public policy that the rule allegedly serves.

* * *

In sum, it is only by ignoring or misinterpreting this Court's FAA preemption jurisprudence, including "the basic precepts enunciated in *Concepcion*," *Sakkab*, 803 F.3d at 440 (N.R. Smith, J., dissenting), that the courts in *Iskanian* and *Sakkab* arrived at the conclusion that the *Iskanian* rule is not preempted. And that erroneous conclusion has led to the unjust invalidation

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[10] The relationship between a federal statute (such as the federal *qui tam* statute) and the FAA is itself both complex and context-specific. *See, e.g., Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.*, No. 16-307 (cert. granted, Jan. 13, 2017). The Court need not resolve the question of how the FAA interacts with federal *qui tam* statutes in order to address the questions presented by a state statute like PAGA.

of an immense number of arbitration agreements, including the agreement here. This Court should grant review to prevent continued judicial nullification of the intent of parties who have agreed to arbitrate—the very problem that Congress sought to remedy when it passed the FAA.

III. This Case Is an Ideal Vehicle for Addressing the Important Issues Presented in this Petition.

This Court's review is required to prevent the *Iskanian* rule's continued and unfettered circumvention of the FAA. *Iskanian* and *Sakkab* provide an end run around *Concepcion* and this Court's FAA jurisprudence. The invalidation of an ever-increasing number of arbitration provisions will continue unless this Court acts. Because of the consequences of *Iskanian* and *Sakkab*, and because of this case's suitability as a vehicle for resolving the questions presented, the Court should grant certiorari.

A. This Petition Cleanly Presents Ripe, Impactful and Pressing Questions that Require this Court's Review.

This case is an ideal vehicle for review of the important questions it presents.

First, the issues presented are ripe for review. The Ninth Circuit and the California Supreme Court have made clear they are committed to the *Iskanian* rule. Indeed, the Ninth Circuit declined the opportunity to review the *Iskanian* rule when it denied a petition for rehearing *en banc* in *Sakkab*. *See* Order Denying Petition for Rehearing En Banc, *Sakkab*, No. 13-55184 (9th Cir. Feb. 2, 2016), Dkt. 115. The California Supreme Court also has denied requests to review its *Iskanian* holding. *See, e.g.*, *Hernandez v. Ross Stores,*

Inc., 212 Cal. Rptr. 3d 485, 486 (Ct. App. 2016), *review denied* (Mar. 29, 2017). Quite clearly, the issues now before this Court are no longer percolating in California courts, state or federal.

Second, this case squarely raises the questions presented. The Ninth Circuit's decision invalidating Five Star's bilateral arbitration provision is based entirely on its own precedent in *Sakkab* and the California Supreme Court's precedent in *Iskanian*. App. 3a. This petition thus presents a clean and direct opportunity for the Court to examine the *Iskanian* rule.

Third, *Iskanian* and *Sakkab* have substantial real-world implications. Leaving those decisions in place would cause widespread harm. For example, the torrent of PAGA actions that began after *Concepcion* has only increased and accelerated in the wake of *Iskanian* and *Sakkab*. Between 2005 and 2013, the number of PAGA notices filed with the LWDA increased by more than 400 percent, reaching 3,137 in 2013.[11] "The immediate impact of the *Iskanian* decision [was] an increase in PAGA representative actions."[12]

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[11] Emily Green, *State Law May Serve as Substitute for Employee Class Actions*, L.A. Daily Journal (Apr. 17, 2014), https://www.dailyjournal.com/articles/266212.

[12] Tim Freudenberger et al., *Trends in PAGA Claims and What It Means for California Employers*, Corporate Counsel, Inside Counsel (Mar. 19, 2015), http://web1.beta.insidecounsel.com/2015/03/19/trends-in-paga-claims-and-what-it-means-for-califo?slreturn=1522050847.

By 2014, the number of PAGA notices had climbed to 6,307.[13] That number now approaches *8,000*.[14]

That *Iskanian* and *Sakkab* are fueling the dramatic increases in PAGA suits cannot be disputed. *See, e.g.*, Matthew Goodman, Comment, *The Private Attorney General Act: How to Manage the Unmanageable,* 56 Santa Clara L. Rev. 413, 415 (2016) ("The fact that PAGA claims cannot be waived by agreements to arbitrate contributes heavily to the prevalence of these suits."). Unless this Court reviews the question whether the FAA preempts the *Iskanian* rule, the number of arbitration agreements invalidated and the number of representative PAGA actions filed will continue to rise and accelerate.

Fourth, the size of California's workforce means that *Iskanian* and *Sakkab* directly affect a large proportion of Americans. California contains approximately 12 percent of the American workforce. *See* News Release, Bureau of Labor Statistics, *The Employment Situation—February 2018* 4 (Mar. 9, 2018), https://www.bls.gov/news.release/pdf/empsit.pdf (nationwide civilian labor force as of January 2018 was 161,115,000); News Release, Bureau of Labor Statistics, *State Employment and Unemployment—January 2018* 10 (Mar. 12, 2018), https://www.bls.gov/news.release/pdf/laus.pdf (California civilian labor force as of

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[13] *See* Dep't of Indus. Relations, State of California Budget Change Proposal 1 (submitted Jan. 7, 2016), http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf.

[14] *See id.* at 2 ("The volume of PAGA notices is as high as 635 notices per month[.]"); Legislative Analyst's Office, Mem. on A.G. File No. 2017-035 (Nov. 27, 2017), http://lao.ca.gov/ballot/2017/170607.pdf, at 2 ("In recent years, the state has received between 4,000 and 8,000 PAGA notices annually.").

January 2018 was 19,294,630). Many of these workers and their employers have agreed to arbitrate disputes on an individual, bilateral basis. The result of *Iskanian* and *Sakkab* is the nullification of those agreements. Enforcement of the parties' intent to arbitrate, as mandated and guaranteed by the FAA, thus is dependent on this Court's review.

Fifth, while the impact of the *Iskanian* rule in California is sufficiently great to merit a grant of certiorari, the effects of the rule are now poised to spread. As many scholars and commentators have made clear, the combined forces of PAGA, *Iskanian*, and *Sakkab* create a playbook for any state seeking a path around *Concepcion*. For instance, a Stanford Law Review Note entitled "State Court Resistance to Federal Arbitration Law" outlines tactics that allow states to evade this Court's FAA jurisprudence. *See* Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1163 (2015) ("[S]ome courts have developed legal theories that . . . effectively render the FAA moot in certain circumstances. The most prominent example of this is the application of the Private Attorneys General Act (PAGA) in California courts."). The Note encourages states to "develop[] novel theories that function as valid work-arounds to preemption" and characterizes *Iskanian* as "representative of this approach." *Id.* at 1167-68.

Other observers likewise have hailed the *Iskanian*/*Sakkab* rule as a means of evading this Court's FAA decisions. One commentator noted that *Sakkab* is "undoubtedly an important and guiding decision for legislators and other states trying to fill the deterrence gap created by *Concepcion*." Amaan A. Shaikh, Comment, *The Post-*Concepcion *Contract Landscape:*

The Role Socially Conscious Business Can Play, 57 Santa Clara L. Rev. 223, 238 (2017). Another called PAGA a model for "private aggregate enforcement of consumer and employment laws without triggering FAA preemption or vulnerability to contractual class waivers." Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to* Concepcion, 46 U. Mich. J.L. Reform 1203, 1208-09 (2013). And still another—in an article whose title begins, aptly, "Circumventing *Concepcion*"—asserts that the "key benefit" of a state statute akin to PAGA now "is that it bypasses any arbitration agreement in a consumer contract." Aaron Blumenthal, Comment, *Circumventing* Concepcion: *Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal. L. Rev. 699, 742 (2015). The author then expresses concern that this Court might reject the *Iskanian* rule. *Id.* at 743. Those are examples of the many voices "urging other states and cities to follow" California's lead by adopting PAGA-like legislation. Josh Eidelson, Bloomberg, *California Helps Workers Sue Their Bosses. New York Has Noticed* (Sept. 29, 2017), https://www.bloomberg.com/news/articles/2017-09-29/california-helps-workers-sue-their-bosses-new-york-has-noticed.

In *Kindred*, this Court expressed the concern that "copycatting" of Kentucky's anti-arbitration precedent would result absent invalidation of the clear-statement rule. The Court observed that upholding the Kentucky rule at issue "would make it trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it." 137 S. Ct. at 1428. Just as declining to invalidate the clear-statement rule in *Kindred* would have "allow[ed] States to pronounce *any* attorney-in-fact incapable of signing an arbitration agreement," *id.*, declining to

review the *Iskanian* rule will allow states to readily evade the FAA. This Court should grant certiorari to prevent the widespread circumvention of the FAA that has been triggered by PAGA and the *Iskanian* rule.

B. This Petition Is Especially Well-Suited for a Grant of Certiorari.

Although this Court has denied prior petitions for certiorari challenging the *Iskanian* rule, this petition is a superior vehicle for addressing whether the arbitration-destroying rule is preempted by the FAA.

First, the fact that the Court has denied prior petitions raising similar questions presented does not in any way detract from the compelling nature of this petition, or the need for the Court's review. The Court, of course, often denies petitions before determining to take up a particular legal question, sometimes to allow percolation or to await a preferable vehicle for review. Such was the case with the rule considered in *Concepcion*: This Court denied at least eight petitions seeking review of that California rule before granting certiorari.[15]

Second, this case is the best vehicle that has come before the Court seeking review of the questions presented. The previous petitions that challenged the *Iskanian* rule were neither as compelling, nor as clean,

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[15] *See Athens Disposal Co. v. Franco*, 558 U.S. 1136 (2010) (No. 09-272); *T-Mobile USA, Inc. v. Janda*, 555 U.S. 813 (2008) (No. 07-1331); *T-Mobile USA, Inc. v. Lowden*, 555 U.S. 813 (2008) (No. 07-1330); *T-Mobile USA, Inc. v. Ford*, 553 U.S. 1065 (2008) (No. 07-1103); *T-Mobile USA, Inc. v. Gatton*, 553 U.S. 1064 (2008) (No. 07-1036); *Cir. City Stores, Inc. v. Gentry,* 552 U.S. 1296 (2008) (No. 07-988); *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976); *Cty. Bank of Rehoboth Beach, Del. v. Muhammad*, 549 U.S. 1338 (2007) (No. 06-907).

nor as ripe for review. Five of the six previously filed petitions came from California state courts, thereby implicating this Court's divergent opinions as to whether the FAA applies in state courts. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-97 (1995) (Thomas, J., dissenting).[16] And four of those five petitions were plagued by another shortcoming: *Sakkab* either had not yet been decided or the *Sakkab* request for *en banc* review had not been ruled on at the time of each denial. As a result, for those petitions, there was a possibility that the Ninth Circuit might find *Iskanian* preempted without this Court's intervention.

Furthermore, while the sixth petition sought review of a Ninth Circuit decision (*Bloomingdale's Inc. v. Vitolo*, 137 S. Ct. 2267 (2017) (No. 16-1110)), the respondent in that case emphasized that, in her view, the case was a deeply flawed vehicle for certiorari due to procedural issues not present here. The respondent stressed that there was a serious question as to whether the plaintiff had standing. The standing question had been remanded to the district court for further review and was unresolved. *Vitolo*, Respondent's Brief in Opposition, 14 (May 15, 2017). Thus, the *Iskanian* rule was not necessarily a case-dispositive legal issue. Moreover, the respondent also highlighted the fact that the Ninth Circuit had remanded the issues for further proceedings. *Id.* at 15.

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[16] The five previous cert denials from state courts are: *Bloomingdale's Inc. v. Tanguilig*, 138 S. Ct. 356 (2017) (No. 16-1503); *Apple Am. Grp., LLC v. Salazar*, 136 S. Ct. 688 (2015) (No. 15-100); *CarMax Auto Superstores Cal., LLC v. Areso*, 136 S. Ct. 689 (2015) (No. 15-236); *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015) (No. 14-790); *CLS Transp. L.A., LLC v. Iskanian*, 135 S. Ct. 1155 (2015) (No. 14-341).

Thus, the question presented to this Court was potentially premature and not cleanly framed.

Third, because PAGA is a California-specific statute, the Court should not delay review for want of a conflict. The mere fact that states manifest their hostility to arbitration in different ways, through their own laws and rules, does not insulate such laws and rules from review. The Court repeatedly has granted certiorari to examine state-specific rules alleged to disfavor arbitration. For example, in *Preston*, the Court granted certiorari, absent conflicting authorities, to review a California rule that barred arbitration of disputes involving California-based talent agents. 552 U.S. at 351-53. In *Kindred*, the Court did the same—the Kentucky Supreme Court's clear-statement rule had not been addressed by any other appellate court. *See also, e.g.*, *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 18 (2012) (rejecting Oklahoma Supreme Court's rule that reflected judicial hostility to arbitration). It is clear that a state rule that undermines arbitration, and that conflicts with both the FAA and this Court's precedents, merits review. Such is the case here, where the *Iskanian* rule contravenes this Court's settled FAA jurisprudence, including its decisions in *Concepcion*, *DIRECTV*, and *Kindred*.[17]

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[17] The fact that the Ninth Circuit held that Mandviwala's individual, non-PAGA claims should be arbitrated also does not counsel against review. This Court frequently has granted certiorari to review FAA preemption issues in cases where some claims had been ordered to arbitration. *See, e.g.*, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 224-25 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620-24 & n.9 (1985); *Southland*, 465 U.S. at 5.

CONCLUSION

In sum, this petition is a perfectly suited vehicle for review of the *Iskanian* rule and the ever-increasing dangers to arbitration it presents. Five Star respectfully requests that this Court grant the petition to address the critical question whether the *Iskanian* rule is preempted by the FAA.

Respectfully submitted,

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