No. _____

In the
Supreme Court of the United States

YOURMECHANIC, INC.,
Petitioner,

v.

JONATHAN PROVOST,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SOPHIA BEHNIA
Counsel of Record
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104
Telephone: 415.433.1940
Facsimile: 415.399.8490
sbehnia@littler.com

Counsel for Petitioner

June 18, 2021

QUESTION PRESENTED

This Petition for Writ of Certiorari ("Petition") seeks review of an issue of first impression before this Court involving the irreconcilable conflicts between California courts' interpretation and application of the Federal Arbitration Act ("FAA") and California's Labor Code Private Attorneys General Act of 2004 (Labor Code section 2698, *et seq*.) ("PAGA") that, like a class or collective action, allows aggrieved employees to seek monetary recovery on a representative basis on behalf of other employees.

Petitioner YourMechanic, Inc. ("YourMechanic" or "Petitioner") and Respondent Jonathan Provost ("Provost" or "Respondent") entered into a binding and enforceable arbitration agreement under the FAA. That agreement requires not only bilateral arbitration of all claims but also arbitration of all threshold issues – including disputes over arbitrability and whether Respondent was properly classified as an independent contractor. Nevertheless, Respondent sued Petitioner in court and asserted a representative claim on behalf of hundreds of others, contending the pre-dispute waiver of his representative PAGA claim is unenforceable under California law.

California courts at all levels hold that such a pre-dispute waiver in an arbitration agreement violates California public policy. They have also held that this state law-created prohibition of pre-dispute waivers is not preempted by the FAA. California's courts have expanded this flawed reasoning in this case, holding that a clear and unmistakable

delegation clause requiring arbitration of all threshold disputes is unenforceable and that the predicate issue of whether Respondent was an independent contractor is not arbitrable because Respondent filed a PAGA claim, notwithstanding the fact that only an employee may pursue a PAGA claim on behalf of the State of California ("State") under the plain language of the PAGA statute.

The questions presented are:

(1) Whether the FAA requires enforcement of a bilateral arbitration agreement that includes a pre-dispute waiver of representative claims, including under PAGA.

(2) Whether under the FAA a dispute regarding the arbitrability of a plaintiff's independent contractor classification in a PAGA action must be resolved by an arbitrator pursuant to a valid and enforceable delegation clause.

(3) Whether under the FAA a dispute regarding a plaintiff's independent contractor classification is a private contractual dispute that must be arbitrated before the plaintiff may pursue a PAGA action as an "aggrieved employee" where the parties have agreed to arbitrate that threshold dispute.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner YourMechanic, Inc. provides the following corporate disclosure statement: Petitioner YourMechanic, Inc. has no parent corporation and no publicly held company owns 10% or more of Petitioner's stock/equity.

STATEMENT OF RELATED PROCEEDINGS

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

- *Provost v. YourMechanic, Inc.,* No. 37-2017-00024056-CU-OE-CTL (Cal. Super. Ct.), order issued August 9, 2019;

- *Provost v. YourMechanic, Inc.,* No. D076569 (Cal.Ct. App.), opinion issued October 15, 2020;

- *Provost v. YourMechanic, Inc.,* No. S265736 (Cal.), petition for review denied January 20, 2021.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

This Petition seeks review of the irreconcilable conflict between California courts' refusal to enforce valid arbitration agreements under the FAA that include pre-dispute waivers of representative PAGA claims, and the FAA, which requires enforcement of arbitration agreements as written. It further seeks review of California courts' refusal to enforce valid delegation clauses that require an arbitrator to determine, in the first instance, the arbitrability of a dispute regarding the plaintiff's classification and in turn, standing as an employee to pursue a PAGA claim as a proxy for the State. Finally, even assuming that a court should determine this issue of arbitrability, the FAA requires that the threshold issue of the plaintiff's classification must be arbitrated in a PAGA action when his or her classification is in dispute and that dispute is expressly covered by an arbitration agreement.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ("*Concepcion*") and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) ("*Epic*"), this Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements must be enforced as written under the FAA. *Epic*, 138 S.Ct. 1612 quoting *Concepcion*, 563 U.S. at 341 ("The FAA … preempts any state rule discriminating on its face against arbitration – for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.") The California Supreme Court ignored this directive in *Iskanian v. CLS Transportation Los Angeles, LLC,* 327 P.3d 129 (Cal. 2014) ("*Iskanian*"), and prohibited

enforcement of pre-dispute waivers of PAGA claims and the enforcement of arbitration agreements governed by the FAA that require individual arbitration of a PAGA claim (the "*Iskanian* Rule").

In *Epic*, this Court reaffirmed that courts "must be alert to new devices and formulas" that declare arbitration against public policy and that "a rule seeking to declare individualized arbitration proceedings off limits is … just such a device." *Epic*, 138 S.Ct. at 1623. *Iskanian* created such an improper device by declaring that California's public policy underlying PAGA invalidates individual, private arbitration agreements that are otherwise valid and enforceable under the FAA. *Iskanian's* interpretation of PAGA cannot stand under *Epic* because it is a judicially constructed device prohibiting enforcement of otherwise valid private contracts requiring individualized arbitration proceedings.

In *Concepcion* and *Epic*, this Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements must be enforced as written under the FAA. Courts are not free to disregard or "reshape traditional individualized arbitration" by applying rules that demand class, collective, or representative adjudication of certain claims. *Epic,* 138 S.Ct. at 1623. While California courts follow *Concepcion* and *Epic* when a party to an individualized arbitration agreement tries to assert class or collective claims, they refuse to do so when a party asserts representative claims under PAGA.

Through the instant action, California courts have now extended the misguided *Iskanian* Rule to prohibit arbitration of all threshold questions of arbitrability in PAGA actions. In *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S.Ct. 524, 528 (2019) ("*Henry Schein*"), this Court made clear that delegation clauses must be enforced as written even if the arguments for delegation are "wholly groundless." Nevertheless, California courts have held that disputes over the arbitrability of the predicate issue of independent contractor status is not subject to arbitration in a PAGA case regardless of the existence of a valid and enforceable delegation clause. California courts have also ignored the FAA and this Court's instruction that arbitration agreements must be enforced as written by holding that a plaintiff's independent contractor classification is not arbitrable, even where establishing employee status is a prerequisite to bringing a PAGA claim and the parties have expressly contracted to arbitrate independent contractor classification, so long as the plaintiff is challenging their status under the guise of a PAGA claim.

This Court's intervention is warranted, both to reaffirm the FAA and its policy in favor of bilateral arbitration of all actions (whether individual, class, collective, or representative) and to reassert that arbitration agreements must be enforced as written. This includes the enforcement of valid and enforceable delegation clauses and the arbitration of threshold issues to which the parties have agreed, regardless of the underlying claims. Under *Iskanian*, neither *Concepcion* nor the FAA itself imposes any restraint

on plaintiffs alleging violations of the California Labor Code under PAGA on behalf of hundreds, even though they agreed to arbitrate, not litigate, and to do so individually, not as a representative. In the wake of *Iskanian* and the flood of California decisions re-affirming it, California plaintiffs have moved away from class and collective actions and embraced PAGA actions, which California courts have insulated from the FAA, creating a procedural device that allows all of the benefits of a class or collective action in violation of bilateral arbitration agreements and this Court's precedent.

The Court should accept review of this case and reject the *Iskanian* Rule and the California cases relying on it to avoid enforcement of pre-dispute representative action waivers, valid delegation clauses, and express terms requiring arbitration of disputes regarding the nature of the parties' private, contractual relationship. The California Supreme Court has had ample opportunity to reverse the *Iskanian* Rule based on this Court's decision in *Epic* but has repeatedly refused to do so. California courts, encouraged by the California Supreme Court's adherence to the *Iskanian* Rule, have now extended that Rule to prohibit enforcement of delegation clauses, and to permit plaintiffs to challenge their status as an independent contractor, even where they have agreed to arbitrate that issue, provided the plaintiff has brought a PAGA action. It is left to this Court to close this state law-created loophole to the enforcement of arbitration agreements created by California courts. This case is the vehicle to do so.

There is no doubt about the importance and recurring nature of the issue. The number of PAGA representative claims have increased dramatically since *Concepcion* and *Epic*. PAGA actions filed by plaintiffs who agreed to arbitrate individually, but nonetheless are litigating representatively, threaten millions of dollars in liability and have become a cost of doing business in California. These developments have denied contracting parties the benefit of their bargains and the efficiencies of bilateral arbitration. This Court's review is necessary to safeguard the FAA and to ensure that bilateral arbitration agreements are enforced according to their terms, including terms that require an arbitrator to decide issues of arbitrability and the arbitration of predicate issues such as independent contractor status, regardless of the underlying claim.

OPINIONS BELOW

The California Court of Appeal's opinion is available at *Provost v. YourMechanic, Inc.,* 269 Cal.Rptr.3d 903 (2020) and reproduced in the Appendix ("App.") at App.-B (App-2-App-19). The judgment of the Superior Court of San Diego County is unpublished and reproduced at App.-C (App-20-App-22).

JURISDICTION

The California Supreme Court declined to exercise its discretionary review on January 20, 2021. On March 19, 2020, this Court extended the deadline to file any certiorari petition due on or after that date

to 150 days. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2 ("Section 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."

STATEMENT OF THE CASE

A. The FAA and This Court's Decisions in *Concepcion* and *Epic*

The FAA declares a liberal policy favoring the enforcement of arbitration clauses: "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 … *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2, emphasis added; see *Concepcion,* 563 U.S. at 339.

In enacting the FAA, Congress sought to overcome widespread judicial hostility to the enforcement of arbitration agreements. *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). As this Court explained, the FAA permits private parties to "trade the procedures … of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31 (1991) citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, the FAA's "principal purpose … is to ensure that private arbitration agreements are enforced *according to their terms*." *Concepcion*, 563 U.S. at 344, emphasis added.

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.,* 460 U.S. 1, 22 (1983). The FAA amounts to a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Perry v. Thomas,* 482 U.S. 483, 489 (1987) quoting *Moses H. Cone,* 460 U.S. at 24. "By its terms, the [FAA] leaves no place for the exercise of discretion by a … court, but instead mandates that … courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc., v. Byrd,* 470 U.S. 213, 218 (1985) citing 9 U.S.C. §§ 3, 4.

Section 2's final phrase, often referred to as its "saving clause," permits courts to apply "generally applicable contract defenses, such as fraud, duress, or unconscionability," to invalidate arbitration agreements. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The saving clause encompasses the basic principle that arbitration agreements, just like other contracts, should not be enforced if they were procured by fraud or otherwise lack mutual consent. *Id.* The saving clause does not, however, allow states to invalidate arbitration agreements through "defenses that apply only to arbitration" or "that target arbitration … by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic*, 138 S.Ct. at 1622, alteration omitted. To the contrary, the FAA preempts all conflicting state laws intended to frustrate the purpose of the FAA, *i.e.*, laws that apply stricter requirements to arbitration agreements than to contracts generally. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

In *Concepcion* this Court emphasized that the FAA preempts state-law rules that interfere with the parties' ability to choose bilateral arbitration. In so doing, this Court addressed California's "*Discover Bank* rule," which prohibited class-action waivers in both litigation and arbitration included in consumer contracts as "unconscionable." 563 U.S. at 340. This Court held that the FAA preempted the *Discover Bank* rule, explaining that the rule "sacrific[ed] the principal advantage of arbitration - its informality - and ma[de] the process slower, more costly, and more likely to generate procedural morass than final

judgment." *Id.* at 347, 348. Because it stood "as an obstacle to the accomplishment of the FAA's objectives," the *Discover Bank* rule was preempted. *Id.* at 343.

In *Epic*, this court reaffirmed that *Concepcion's* holding regarding class-action waivers was equally applicable to collective-action waivers. *Epic* involved three consolidated cases through which employees, seeking to pursue collective actions, argued that contractual provisions requiring bilateral arbitration of employment disputes are illegal under the National Labor Relations Act ("NLRA") and that such illegality is a "ground[]" that "exists at law … for the revocation of any contract." 9 U.S.C. §2. This Court rejected the argument, holding that the FAA's saving clause does not apply because the employees were not arguing that their arbitration agreements were extracted by "fraud or duress or in some other unconscionable way that would render *any* contract unenforceable." 138 S.Ct. at 1622. Rather, they objected to the agreements "precisely because they require individualized arbitration proceedings instead of class or collective ones." *Id.*

Through *Epic*, this Court reaffirmed that in enacting the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms - including terms providing for individualized proceedings." *Id.* at 1619. This Court also re-enforced *Concepcion*'s "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures," and by cautioning

that "we must be alert to new devices and formulas" that aim to interfere with the fundamental purpose of arbitration. *Id.* at 1623.

B. This Court's Decision in *Henry Schein*

When parties have "clearly and unmistakably" agreed to delegate questions of arbitrability to an arbitrator, that contractual agreement must be enforced and the arbitrator must decide the threshold issues. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002). As recently emphasized by this Court in *Henry Schein, Ind. v. Archer & White Sales, Inc.*, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." 139 S.Ct. 524, 531 (2019).

In *Henry Schein, Inc.*, this Court rejected the assertion that a court can decline to enforce the delegation clause in an arbitration agreement, finding that the FAA must be interpreted as written, which in turn, requires the contract in question to be interpreted as written. *Id.* at 529. Accordingly, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.,* 139 S.Ct. at 529.

It is now well-settled that, where the parties delegate questions of arbitrability to the arbitrator, a

court may not usurp the arbitrator's role and answer those questions even if it believes the answers are obvious. *Id.*

C. California's Private Attorneys General Act

The California legislature enacted PAGA to "supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Arias v. Sup.Ct.,* 209 P.3d 923, 933 (2009). PAGA allows "aggrieved employees," acting as a private attorney general, to recover monetary penalties for California Labor Code violations from employers on a representative basis on behalf of themselves and other aggrieved employees. Cal. Lab. Code §2699(a). An "aggrieved employee" is defined as "any person who was employed by the alleged violator and against whom one or more alleged violations was committed." Cal. Lab. Code § 2699(c). Importantly, "[n]ot every private citizen can serve as the state's representative. Only an aggrieved *employee* has PAGA standing." *Kim v. Reins International California, Inc.,* 459 P.3d 1123, 1127 (2020), emphasis added.

The California Labor Code provides distinct definitions for the terms "employee" and "independent contractor." *See, e.g.*, Cal. Lab. Code §§ 3351, 3353. PAGA authorizes only employees, not independent contractors, to pursue remedies under PAGA. *Iskanian*, 327 P.3d at 157 ("a person may not bring a PAGA action unless he or she is 'an aggrieved employee' (§ 2699, subd. (a)), i.e., a person 'who was employed by' the alleged Labor Code violator and

'against whom' at least one of the alleged violations 'was committed' (§ 2699, subd. (c)). In other words, as the majority explains, by statute, only 'employees who ha[ve] been aggrieved by the employer' may bring PAGA actions.") (con. op. of Chin, J.)

An employee bringing a PAGA claim may seek monetary penalties not only for Labor Code violations committed against him, but also on a representative basis for similar infractions against other employees. *See* Cal. Lab. Code §2699(a)*; see also id.* §2699(g)(1). Indeed, as long as an employee alleges that he was "affected by at least one Labor Code violation," he may "pursue penalties for all the Labor Code violations committed by that employer[,]" even if not imposed against him directly. *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502, 504 (Cal. Ct. App. 2018).

Remedies for a PAGA claim are assessed against the employer on a "per pay period" basis for each "aggrieved employee" affected by each claimed violation of the Labor Code. Cal. Lab. Code §2699(f)(2). PAGA authorizes a penalty of $100 per aggrieved employee per pay period for the first violation, and $200 per aggrieved employee per pay period for any subsequent violation (unless the underlying provision of the Labor Code provides for a different civil penalty). *Id.* The employees keep 25% of any civil penalties recovered and remit the remaining 75% to the State. *Id.* §2699(i). A prevailing employee is also "entitled to an award of reasonable attorney's fees and costs." *Id.* §2699(g)(1).

Before filing a PAGA suit, the employee must give written notice of the alleged Labor Code violation to the State's Labor and Workforce Development Agency ("LWDA"). *Id.* §2699.3(a)(1)(A). If the agency either notifies the employee that it does not intend to investigate or simply fails to respond within 65 days, the employee is free to commence a civil action. *Id.* §2699.3(a)(2)(A). Once the action is commenced, the private plaintiff controls the litigation in its entirety; the PAGA statute does not authorize the LWDA or any other state actor to direct, intervene, or seek to dismiss the employee's action.

D. *Iskanian* and the Ninth Circuit's Decisions in *Sakkab* and *Magadia*

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that a pre-dispute agreement in which an employee agrees to arbitrate all claims individually and to forgo his right to pursue a representative PAGA action is unenforceable as against public policy. Specifically, the California Supreme Court (1) barred enforcement of private arbitration agreements governed by the FAA that are otherwise valid, binding, and enforceable, and (2) prohibited enforcement of representative PAGA waivers in such FAA-governed arbitration agreements. *Id.*

In so doing, the California Supreme Court determined that a bilateral arbitration agreement wherein an employee agrees to forgo a PAGA claim on a representative basis is "unenforceable as a matter of state law." 327 P.3d at 149. It opined that such an

agreement is "contrary to public policy" because allowing employees to waive their statutory right to file a representative PAGA claim would "disable one of the primary mechanisms for enforcing the Labor Code." *Id.*

Despite *Concepcion,* the California Supreme Court concluded that the FAA did not preempt the state-law prohibition of representative PAGA waivers. *Id.* at 149-53. The court reasoned that "the rule against PAGA waivers does not frustrate the FAA's objectives 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." *Id.* at 149. In making this determination, the California Supreme Court found that a PAGA representative action is a type of *qui tam* action in which the State is always the real party in interest. *Id.* For that reason, the court opined that "a PAGA claim lies outside the FAA's coverage." *Id.* at 151. The court supported its conclusion by citing *EEOC v. Waffle House*, 534 U.S. 279 (2002), in which this Court held that an action actually brought by the Equal Employment Opportunity Commission ("EEOC") to vindicate injury to an employee was not precluded by the employee's arbitration agreement.

After *Iskanian*, a divided panel of the Ninth Circuit agreed that "the FAA does not preempt the *Iskanian* rule." *Sakkab v. Luxottica N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015). However, the *Sakkab* majority did not embrace *Iskanian*'s reasoning on FAA preemption or its reliance on *Waffle House*. Instead, the *Sakkab* majority held that "[t]he *Iskanian* rule

does not conflict with [the FAA's] purposes" because, in its view, representative PAGA actions are not as incompatible with traditional arbitration as class actions. *Id.* at 433-34. The "critically important distinction," according to the Ninth Circuit, is that PAGA claims are not governed by Rule 23, and thus "do not require the formal procedures of class arbitrations." *Id.* at 436.

Judge N. Randy Smith dissented, concluding that the panel majority had "essentially ignore[d] the Supreme Court's direction in *Concepcion*." *Id.* at 440. Judge Smith observed that the California Supreme Court's rule in *Iskanian* – like the rule invalidated in *Concepcion* – "interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration." *Id.* at 444. He noted that "[t]he *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.* Judge Smith concluded: "Numerous state and federal courts have attempted to find creative ways to get around the FAA. We did the same [in prior cases], and were subsequently reversed in *Concepcion*. The majority now walks that same path." *Id.* at 450.

Moreover, just weeks ago, on May 28, 2021, the Ninth Circuit issued its opinion in *Magadia v. Wal-Mart Associates,* in which it expressly diverged from the California Supreme Court's reasoning that a PAGA representative action is a type of *qui tam*

action. ___ F.3d ___, Case 19-16184, 2021 WL 2176584 (May 28, 2021). Specifically, the Ninth Circuit opined that despite similarities, "PAGA differs in significant respects from traditional *qui tam* statutes." *Id.* at p. 13. In short, "[w]hile California may be *a* 'real party in interest,' *Iskanian,* 59 Cal. 4th at 387, a PAGA suit also implicates the interests of other third parties." *Id.* at p. 15, emphasis in original. "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Id.* at p. 16, emphasis in original. As the Ninth Circuit reasoned, "[a] complete assignment to this degree – an anomaly among modern *qui tam* statutes – undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees."

E. Factual and Procedural Background

Petitioner YourMechanic is a technology services provider that provides a web-based platform through which individuals in need of automotive services can connect with a network of independent providers of automotive services. Court of Appeal Clerk's Transcript ("CT") 424. Any independent mechanic who wishes to utilize the YourMechanic platform to locate service requesters in need of automotive services must first review and sign the Technology Services Agreement ("TSA") governing their use of the platform. CT 425.

Respondent had no time constraints on his review of the TSA on his device. CT 426. To advance past the screen that contained the full text of the TSA,

Respondent scrolled to the bottom of the webpage and clicked a button, which stated, "I HAVE READ AND ACCEPT THE TERMS OF SERVICE." App-5; CT 426-427, 430-451. Directly above this button, it stated "[b]y clicking 'I accept', you expressly acknowledge that you have read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that you agree to be bound by the terms and conditions of the Agreement, and that you are legally competent to enter into this Agreement with [YourMechanic]." CT 426-427, 453-473. Although he had the option to do so, Respondent did not opt out of the Arbitration Provision. App-5.

The TSA makes clear that Respondent was entering into it as an independent contractor. CT 457 ("It is understood by the parties that you are an independent contractor. Nothing in this Agreement shall in any way be construed to constitute that you are an employee, officer, director, or agent of Company.")

The TSA contains a mutual arbitration provision ("Arbitration Provision") which in part provided: "Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to all disputes between you and the Company, as well as all disputes between you and the Company's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes ***arising out of or related to your relationship with the Company***, including termination of the relationship." App-5,

emphasis added. The Arbitration Provision states that arbitration is "governed by the Federal Arbitration Act." App-5.

The Arbitration Provision also contains a "delegation clause" whereby all "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision . . . shall be decided by an Arbitrator and not by a court or judge." CT 469.

In addition, the Arbitration Provision contains a representative action waiver ("PAGA Waiver") which provides in part that "… (1) You and Company agree not to bring a representative action on behalf of others under the [PAGA], in any court or in arbitration, and (2) for any claim brought on a private attorney general basis-i.e., where you are seeking to pursue a claim on behalf of a government entity-both you and Company agree that any such dispute shall be resolved in arbitration on an individual basis only …, and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding …" CT 469.

Despite his express agreement to arbitrate his disputes with YourMechanic, Respondent's operative pleading includes a single claim for civil penalties under PAGA. CT 49-93, 100-107. YourMechanic filed its Motion to Compel Arbitration and Stay Judicial Proceedings ("Motion"), in which it argued that while Respondent purports to only seek civil penalties under

PAGA, a private dispute still exists as to whether he was an employee or an independent contractor. CT 289-310. YourMechanic also argued that, at a minimum, the parties' TSA required the court to delegate the issue of arbitrability of Respondent's classification to the arbitrator. *Id*. Finally, YourMechanic argued that the parties' PAGA Waiver should be enforced because *Iskanian* can no longer be applied after this Court's decision in *Epic*. *Id*.

The trial court denied the Motion, holding that, per *Iskanian*, arbitration cannot be compelled because no arbitration agreement exists between YourMechanic and the State and arbitration of the misclassification issue would impermissibly split the PAGA claim into an individual claim and a representative claim. App-20-App-22.

The California Court of Appeal affirmed without addressing key aspects of YourMechanic's argument, including the applicability of the delegation clause. App-2-App-19. The court relied extensively on *Iskanian* for the proposition that "*Iskanian* found unenforceable predispute waivers requiring employees to relinquish the right to assert a PAGA claim on behalf of other employees, as such waivers violated public policy…" and "[t]he *Iskanian* court also found the FAA did not preempt this state law rule invalidating waivers in arbitration agreements of the right to bring representative PAGA actions." App.-9. The court considered and rejected YourMechanic's argument that this Court's decision in *Epic* effectively abrogated *Iskanian* and required FAA preemption. App.-17-App-18. It noted that since *Epic*, the

California courts have continued to find private predispute waivers of PAGA claims unenforceable because *Epic* "'… addressed a different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated' the [NLRA]." App.-17 (quoting *Correia v. NB Baker Electric, Inc.*, 244 Cal.Rptr.3d 177, 187 (2019). Accordingly, the court determined that "[b]ecause we reaffirm our conclusion that *Iskanian* has not been overruled, we are bound to follow it." App.-18.

The California Supreme Court denied YourMehanic's Petition for Review. App.1.

REASONS FOR GRANTING THE PETITION

Without this Court's intervention, California will continue to apply *Iskanian* to deny California companies the benefit of their bargain. The time is right for this Court to put an end to this unfairness by reviewing and rejecting the *Iskanian* Rule and reiterating that arbitration agreements, including delegation clauses, must be enforced according to their terms regardless of the underlying claims.

Whether the FAA preempts the *Iskanian* Rule is also at issue in *Viking River Cruises, Inc. v. Moriana,* No. 20-1573 docketed May 13, 2021 ("*Viking*"), another petition pending before this Court. If this Court concludes that the disposition of the issues in this Petition might be affected by its decision in *Viking*, Petitioner asks that the Court defer final action on this Petition pending that decision. If the

Court ultimately grants certiorari in *Viking*, Petitioner urges the Court to grant review here and consolidate the cases for decision, or, in the alternative, to hold this case pending its decision in *Viking*.

A. *Epic* Overruled *Iskanian*'s Prohibition of Pre-Dispute Waivers of the Right to Bring a PAGA Claim

This Court in *Epic* cautioned that courts "must be alert to new devices and formulas" that declare arbitration against public policy and that "a rule seeking to declare individualized arbitration proceedings off limits is … just such a device." *Epic*, 138 S.Ct. at 1623. The *Iskanian* Rule is just that – a judicially created decree that prohibits or interferes with valid contracts requiring bilateral arbitration and the enforcement of their terms as written. The *Iskanian* Rule fails both prongs of the preemption test: (1) it is not a rule of general applicability; rather it derives its meaning from the fact that an arbitration agreement is at issue; and (2) it stands as an obstacle to the accomplishment of the FAA's objectives by adding significant cost, time, and complexity to the resolution of claims that are inconsistent with the parties' agreement to arbitrate. *Concepcion*, 563 U.S. at 340, 343.

In *Iskanian,* the California Supreme Court held that PAGA was "established for a public reason" and that a pre-dispute employment agreement waiving a PAGA claim "is contrary to public policy." *Iskanian*, 327 P.3d at 148-150. However, a state statutory

scheme, as important as it may be, cannot override the FAA's objective of enforcing arbitration agreements. As this Court has explained, only a "contrary congressional command" can override the FAA. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); see *Concepcion*, 563 U.S. at 343 ("nothing in [the FAA] suggests an intent to preserve state-law rules")). *Epic* further elaborated on this principle, holding that even a federal statute embodying important federal policy interests could not override the FAA. *Epic*, 138 S.Ct. at 1622-23, 1627-28. In other words, absent a clear congressional command, no public policy, federal or otherwise, can override the FAA.

As this Court instructed in both *Concepcion* and *Epic,* courts may not utilize contract defenses to "declare individualized arbitration proceedings off limits." *Epic,* 138 S.Ct. at 1623. Yet that is exactly what the *Iskanian* Rule does. *Iskanian* declares individualized arbitration off-limits with respect to PAGA claims, notwithstanding the parties' clear agreement to resolve their disputes bilaterally. Just like the repudiated defense in *Concepcion* and *Epic,* "the *Iskanian* rule interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration"- *i.e.*, to arbitrate on an individualized basis-and therefore "interferes with the fundamental attributes of arbitration." *Sakkab,* 803 F.3d at 444 (dis. op. of Smith, J.)

This Court has struck down every similar attempt by a legislature or court to create a rule allowing

parties to avoid their arbitration agreements by bringing class, collective, or representative actions. *See, e.g.*, *Kindred Nursing Centers Limited Partnership v. Clark,* 137 S.Ct. 1421, 1426–27 (2017) (FAA preempted Kentucky rule); *Nitro-Lift Techs., L.L.C. v. Howard* 568 U.S. 17, 21 (2012) (*per curiam*) (FAA preempted Oklahoma law); *Marmet Health Care Ctr., Inc. v. Brown* 565 U.S. 530, 533 (2012) (*per curiam*) (FAA preempted West Virginia law).

In *Kindred Nursing*, this Court reaffirmed that "[t]he FAA thus preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'" 137 S.Ct. at 1426. The *Iskanian* Rule purports to override private arbitration agreements in favor of a state law-created rule, and directly conflicts with this Court's opinions in *Concepcion, Epic,* and *Kindred Nursing*. *Id.* at 1426-28; *Epic*, 138 S.Ct. at 1621-23.

The similarities between class, collective, and representative actions underscore that the reasoning of *Concepcion* and *Epic* forecloses the *Iskanian* Rule. For example, a single employee filing a representative PAGA claim can seek to proceed on behalf of hundreds or thousands of other employees. In fact, PAGA permits a plaintiff to allege Labor Code violations that *did not even affect plaintiff*; it "allows … a person affected by at least one Labor Code violation committed by an employer … to pursue penalties for *all* the Labor Code violations committed by that employer." *Huff,* 233 Cal.Rptr.3d at 504, emphasis added. A single representative PAGA claim can thus

subject an employer to extraordinary potential liability. That enormous increased risk, to which the parties did not agree – and indeed specifically contracted to avoid through agreement to individual arbitration – fundamentally alters the bargain the parties struck, gives rise to the same "risk of '*in terrorem*' settlements" that this Court decried in *Concepcion*, and is inconsistent with the stated purposes of the FAA. *Conception,* 563 U.S. at 351.

Concepcion and *Epic* teaches one central lesson: under the FAA, courts must "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.*; *Epic*, 138 S. Ct. at 1619. State law rules prohibiting class, collective, or, as here, representative action waivers – including PAGA waivers – all convert the agreed-upon individualized arbitration into something that is "not arbitration as envisioned by the FAA" and cannot "be required by state law." *Concepcion*, 563 U.S. at 351.

The California Supreme Court attempts to shield the *Iskanian* Rule from preemption by asserting that "a PAGA claim lies outside the FAA's coverage …" because it is "not a dispute between an employer and an employee arising out of their contractual relationship," but rather "is a dispute between an employer and the state …" *Iskanian,* 327 P.3d at 148-150. However, the effort to avoid the FAA's preemptive effect conflicts with multiple decisions of this Court which squarely hold that states may not categorically place specific claims beyond the FAA's reach by conceptualizing them as particularly intertwined with state interests. *Marmet Health Care*

Center, Inc., 565 U.S. 530; *Kindred Nursing,* 137 S.Ct. at 1426–27; *Nitro-Lift Techs., L.L.C.,* 568 U.S. 17, 21.

Further, as detailed by the Ninth Circuit in *Magadia,* the California Supreme Court's attempt to designate PAGA claims as *qui tam* actions likewise cannot stand due to the stark differences between PAGA actions and *qui tam* actions. Simply calling a PAGA claim a *qui tam* claim does not make it such when it is in fact asserted and controlled by private individuals with very limited oversight by the government. Stripped of its mere title as a *qui tam* action, it is clear that the denomination of PAGA claims as an action "by" the State is simply a device constructed to attack arbitration agreements "*just because [they] require[] bilateral arbitration*" in violation of the FAA. *Epic,* at 1623, emphasis in original.

As the Ninth Circuit reasoned in *Magadia*, "[o]n close inspection, PAGA has several features consistent with traditional *qui tam* actions – yet many that are not." *Id.* at 12. The similarities, however, are not sufficient to categorize PAGA actions as *qui tam* actions: "Despite these similarities, however, PAGA differs in significant respects from traditional *qui tam* statutes." *Id.* at 13. As the Ninth Circuit detailed, "[f]irst, PAGA explicitly involves the interests of others besides California and the plaintiff employee – it also implicates the interests of nonparty aggrieved employees. By its text, PAGA authorizes an 'aggrieved employee' to bring a civil action 'on behalf of himself or herself and *other current or former employees*.'" *Id.* at 13, emphasis in original. Next, "PAGA requires that

'a portion of the penalty goes not only to the citizen bringing the suit but *to all employees affected* by the Labor Code violation.'" *Id.* at 13. "Finally, a judgment under PAGA binds California, the plaintiff, *and* the nonparty employees from seeking additional penalties under the statute … PAGA therefore creates an interest in penalties, not only for California and the plaintiff employee, but for nonparty employees as well." *Id.* at 14. This feature conflicts with *qui tam's* underlying assignment theory. *Id.* at 14 citing *Stalley v. Catholic Health Initiatives,* 509 F.3d 517, 522 (8th Cir. 2007).

Further, as the Ninth Circuit explained, "a traditional *qui tam* action acts only as 'a *partial* assignment' of the Government's claim. *Id.* at 15 citing *Vermont Agency v. United States ex rel. Stevens,* 529 U.S. 765, 773 (2000). "In contrast, PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Id.* at 16. "A complete assignment to this degree – an anomaly among modern *qui tam* statutes – undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.* at 16.

Regardless, the *Iskanian* Rule is preempted by the FAA under *Epic* even assuming a PAGA claim can be categorized as a *qui tam* action. An individual may agree with another private party to not bring a representative action under the FAA. This agreement does not impose any limitations on the State. The *Iskanian* Rule cannot attempt to end-run the FAA by focusing on contract formation and concluding that

PAGA waivers are unenforceable because the State never agreed to them in the first place. This Court explained in *Kindred* that the FAA applies to contract formation just as it does with contract enforcement: "the [FAA] cares not only about 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'." *Kindred Nursing*, 137 S.Ct. at 1428. Thus, "[a] rule selectively finding arbitration contracts invalid because [they are] improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 1428.

B. *Henry Schein* Requires Arbitration of Any Dispute Over the Arbitrability of the Parties' Relationship Under the FAA

In this case, the California Court of Appeal expanded the *Iskanian* Rule to prohibit enforcement of the parties' agreement to arbitrate any threshold arbitrability disputes as required by the Arbitration Provision's delegation clause.

This Court has held that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63, 68-69 (2010). The Court recently reiterated that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S.Ct. at 529. Courts may not deviate from this because the agreement must be enforced as written under the FAA

regardless of a court's view on whether the arbitration agreement applies. *Id.* at 529; *Rent-A-Center*, 561 U.S. at 69. This remains true even if "the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* at 529. Thus, courts must first look to whether there is an agreement to arbitrate arbitrability, and if so, it must disregard disputes over the validity of the agreement and send such disputes to the arbitrator. *Rent-A-Center*, 561 U.S. at 69-70, n.1.

It is undisputed that the parties' Arbitration Provision includes a delegation clause that clearly and unmistakably requires them to arbitrate all disputes, with certain limited exceptions not applicable here, regarding the arbitrability of any dispute between them, including disputes regarding the interpretation, enforceability or validity of the Arbitration Provision. App.-5; CT 469. Petitioner argued before the lower courts that Respondent's independent contractor status was a private, contractual dispute that must be resolved before Respondent can proceed with a PAGA claim. Respondent disagreed, and asserted that independent contractor status is not an arbitrable dispute when brought as part of a PAGA claim. Under such circumstances, the FAA requires, as directed by this Court in *Rent-A-Center* and *Henry Schein*, that this dispute over arbitrability be sent to the arbitrator.

The California Court of Appeal's analysis is silent on this issue – not even mentioning the word "delegation clause" – and engaging in no analysis as to the arbitrability of the predicate issue of Respondent's

classification as an independent contractor. *See absence from* App.-B.

This decision is flatly inconsistent with the decisions of this Court. *Henry Schein*, 139 S.Ct. at 528 (holding that "courts must respect the parties' decision" to delegate arbitrability questions to the arbitrator "as embodied in the contract"). Review is needed to reconcile the flawed conclusion of the California Court of Appeal in failing to enforce the parties' valid delegation clause and ruling on issues that were expressly reserved solely for the arbitrator to decide.

C. The Parties' Agreement to Arbitrate Disputes Over Respondent's Independent Contractor Status is a Private Dispute That Must be Arbitrated Under the FAA

In *Iskanian,* the California Supreme Court determined that "the agreement requiring an *employee* as a *condition of employment* to give up the right to bring representative PAGA actions in any forum is contrary to public policy" and unenforceable under California law. *Iskanian,* 327 P.3d 129, 133, 148-149, emphasis added. In so doing, the *Iskanian* court determined that the FAA's broad mandate was inapplicable to its analysis because "[t]he 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 …" *Id.*, emphasis added.

In contrasting the FAA from PAGA, *Iskanian* defined a private dispute by referencing Section 2 of the FAA, which "is most naturally read to mean a dispute about the respective rights and obligations of parties in a contractual relationship." *Id.* at 149-150. Conversely, the *Iskanian* Court reasoned that PAGA claims are public disputes because "[a]n *employee* plaintiff suing ... under the [PAGA] … represents the same legal right and interest as state labor law enforcement agencies…" *Id.* at 147, emphasis added.

The *Iskanian* Court's analysis relies entirely on the plaintiff's undisputed status as an *employee*, and only employees may bring a PAGA claim. In this case, Respondent agreed he was an independent contractor and agreed to arbitrate any disputes regarding that classification. Nevertheless, in defiance of the FAA and this Court's mandate to enforce arbitration agreements as written, the lower court refused to send Respondent's dispute over his independent contractor status to arbitration. Instead, the lower court decided that the question of Respondent's status as an independent contractor is "part of" Respondent's PAGA claim, despite the fact that if Respondent is properly classified as an independent contractor as he agreed, he cannot bring a PAGA claim to begin with.

As set forth above, the *Iskanian* Rule is categorically preempted. But assuming *arguendo* it is not entirely preempted (and it is), the lower court improperly expanded the boundaries of the Rule in this matter by applying it to a purely private contractual dispute regarding Respondent's independent contractor status. Reclassifying a private

dispute regarding the parties' rights and obligations under their agreement as a public one interferes with the FAA's mandate that arbitration agreements must be enforced as written and its goals of promoting arbitration as an efficient forum for private dispute resolution. Courts must adhere to the rule that any doubts are to be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp.,* 460 U.S. 1, 24-35. Otherwise, courts will undermine the FAA based on public policy in violation of the preemption analysis set forth in *Concepcion* and *Epic.*

A number of federal courts have examined whether a misclassification controversy must be resolved pursuant to the parties' arbitration agreement before the substantive portions of a plaintiff's claim can proceed. These courts have held that before a plaintiff can assert claims under a statute applying only to employees and that purportedly invalidates the arbitration agreement, the issue of whether the plaintiff is an employee or independent contractor (and/or the arbitrability of that issue) must first be resolved by an arbitrator. *See Johnston v. Uber Technologies, Inc.,* No. 16-CV-03134-EMC, 2019 WL 4417682, at *5 (N.D. Cal., Sept. 16, 2019) ("Although under the Uber agreement, the question of the validity of class waivers is to be decided by 'a civil court of competent jurisdiction,' the Court cannot properly reach that legal question regarding the relationship between the WARN Act and the FAA until the threshold finding is made that Plaintiff is an employee (who is subject to the WARN Act's protection)"); *Richemond v. Uber Techs., Inc.,* 263 F. Supp. 3d 1312, 1317 (S.D. Fla. 2017) ("Pursuant to the

Arbitration Provision, the Arbitrator is responsible for deciding the threshold issue of whether Richemond's relationship with Uber is that of an employee or an independent contractor"); *Olivares v. Uber Techs., Inc.,* 2017 WL 3008278, at *3 (N.D. Ill. July 14, 2017) (the Court finds that the arbitrator is responsible for determining the threshold issue of whether plaintiff's relationship with Uber is that of employee or independent contractor"); *Lamour v. Uber Techs., Inc.,* 2017 WL 878712, at *12-13 (S.D. Fla. Mar. 1, 2017) (compelling plaintiff "to arbitrate (and sustain) his claim of employment status ***before*** he can claim … that the NLRA invalidates the class and collective action waiver he voluntarily accepted[ ]") (emphasis in original).

Review is required to preclude further expansion of the *Iskanian* Rule enabling plaintiffs who simply allege a PAGA claim to avoid their contractual obligation to arbitrate.

D. The Questions Presented Warrant this Court's Review in this Case

This Court's intervention is warranted, both to reaffirm the FAA and its policy in favor of bilateral arbitration of all actions (whether individual, class, collective, or representative) and to reassert the enforceability of a valid and enforceable delegation clause, and the parties' agreement to arbitrate threshold issues like independent contractor status, regardless of the underlying claims. The California Supreme Court in *Iskanian* failed to faithfully apply *Concepcion* to representative litigation, which is

materially similar to class actions. Instead, it created an improper device by declaring that California's public policy underlying PAGA invalidates individual, private arbitration agreements that are otherwise valid and enforceable under the FAA. California's courts have now expanded that device to prohibit delegation clauses and the arbitration of purely private contractual disputes.

The California Supreme Court's decision in *Iskanian* opened the floodgates for PAGA litigation, with plaintiffs moving away from class and collective actions to avoid their binding and enforceable arbitration agreements. This case is a prime example, where Respondent originally filed a class action complaint but then dismissed those claims while amending to add a single PAGA claim ***specifically to avoid the obligation to arbitrate*** after YourMechanic sought to enforce the Arbitration Provision. Similar examples abound in California. *Castillo v. Cava Mezze Grill, LLC*, 2018 WL 7501263 at *4-5 (C.D. Cal. Dec. 21, 2018) (plaintiff sought leave to amend to bring a single PAGA claim and dismiss class action allegations after defendant invoked individual arbitration agreement); *Burrola v. United States Security Associates, Inc.*, 2019 WL 480575 at *10 (S.D. Cal. Feb. 7, 2019) (the court compelled individualized arbitration of the plaintiff's class-action claims but granted the plaintiff's request to add a PAGA claim citing *Iskanian)*; *Prasad v. Pinnacle Property Management Services, LLC*, 2018 WL 4586960 at *2 n.3, *5-6 (N.D. Cal. Sept. 25, 2018) (court compelled individualized arbitration of the plaintiff's class-action claims but, citing *Iskanian*,

granted plaintiff's request to add a PAGA claim). Indeed, the proliferation of PAGA claims brought by private plaintiffs in California underscores that the *Iskanian* Rule is a device to thwart enforcement of private FAA-governed arbitration agreements.

Further, in just the three years since *Epic*, California appellate courts have affirmed numerous decisions refusing to enforce representative PAGA waivers, notwithstanding arguments that the *Iskanian* Rule is irreconcilable with *Epic*. *See, e.g.*, *Contreras v. Superior Ct.*, No. B307025, 275 Cal.Rptr.3d 741 (Cal. Ct. App. 2021); *Rosales v. Uber Technologies, Inc.,* B305546, 278 Cal.Rptr.3d 285 (Cal. Ct. App. April 30, 2021), *review filed; Schofield v. Skip Transp., Inc.*, No. A159241, 2021 WL 688615 (Cal. Ct. App. Feb. 23, 2021), *review denied* (May 12, 2021); *Santana v. Postmates, Inc.*, No. B296413, 2021 WL 302644 (Cal. Ct. App. Jan. 29, 2021), *review filed* (Mar. 10, 2021); *Rimler v. Postmates Inc.*, No. A156450, 2020 WL 7237900 (Cal. Ct. App. Dec. 9, 2020), *review denied* (Feb. 24, 2021); *Provost v. YourMechanic, Inc.*, 269 Cal.Rptr.3d 903 (Cal. Ct. App. 2020), *review denied* (Jan. 20, 2021); *Olson v. Lyft, Inc.*, 270 Cal.Rptr.3d 739 (Cal. Ct. App. 2020); *Collie v. Icee Co.*, 266 Cal.Rptr.3d 145 (Cal. Ct. App. 2020), *review denied* (Nov. 10, 2020); *Correia*, 244 Cal.Rptr.3d 177; *Moriana v. Viking River Cruises,* No. B297328, 2020 WL 5584508 (Cal. Ct. App. Sept. 18, 2020), *review denied* (Dec. 9, 2020); *Ramos v. Superior Ct.*, 239 Cal.Rptr.3d 679 (Cal. Ct. App. 2018), *as modified* (Nov. 28, 2018).

As these decisions indicate, the California Supreme Court has had ample opportunity to revisit

Iskanian in light of *Epic*, but it has repeatedly declined to do so. *See, e.g.*, *Schofield,* 2021 WL 688615, *review denied* (May 12, 2021); *Provost*, 269 Cal.Rptr.3d 903, *review denied* (Jan. 20, 2021); *Rimler*, 2020 WL 7237900, *review denied* (Feb. 24, 2021); *Collie,* 266 Cal.Rptr.3d 145, *review denied* (Nov. 10, 2020); *Moriana,* 2020 WL 5584508, *review denied* (Dec. 9, 2020).

This Court has not hesitated to intervene when states so openly defy the FAA and when the stakes are as high as they are here. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), … [i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.,* 568 U.S. at 17-18. This Court needs to grant review and make clear to the California Supreme Court that representative litigation, just like class and collective actions, is subject to the FAA and that all terms of otherwise valid arbitration agreement, including delegation clauses and the agreement to arbitrate other threshold disputes, must be enforced as written and agreed upon by the parties.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

SOPHIA BEHNIA
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104
Telephone: 415.433.1940
Facsimile: 415.399.8490
sbehnia@littler.com

Counsel for Petitioner

June 18, 2021