S274671

Case No. S_____

IN THE
SUPREME COURT OF CALIFORNIA

UBER TECHNOLOGIES, INC.,

Defendant and Appellant,

v.

ERIK ADOLPH,

Plaintiff and Respondent.

PETITION FOR REVIEW

FROM AN OPINION AFFIRMING AN ORDER
DENYING MOTION TO COMPEL ARBITRATION AND AN ODER
GRANTING PRELIMINARY INJUNCTION
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NOS. G059860 CONSOLIDATED WITH G060198

FROM AN ORDER DENYING MOTION TO COMPEL ARBITRATION AND
ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION
SUPERIOR COURT OF THE STATE OF CALIFORNIA, ORANGE COUNTY
CASE NO. 30-2019-01103801
HON. KIRK H. NAKAMURA, JUDGE

Andrew Spurchise
Bar No. 245998
aspurchise@littler.com
LITTLER MENDELSON, P.C.
900 Third Avenue
New York, NY 10022.3298
Telephone: 212.583.9600
Facsimile: 212.832.2719

Sophia Collins
Bar No. 289318
sbehnia@littler.com
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
Telephone: 415.433.1940
Facsimile: 415.399.8490

(*Additional Counsel Listed on Following Page*)

Anthony Ly
Bar No. 228883
aly@littler.com
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067.3107
Telephone: 310.553.0308
Facsimile: 310.553.5583

Attorneys for Defendant and Appellant
UBER TECHNOLOGIES, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. ISSUES PRESENTED

(1) Must a clear and unmistakable delegation clause requiring that an arbitrator decide all threshold questions, including the enforceability of a written arbitration provision, be enforced under the Federal Arbitration Act ("FAA") regardless of whether the underlying action alleges a claim under the California Labor Code Private Attorneys General Act ("PAGA")?

(2) Where parties expressly agreed to arbitrate a dispute regarding the plaintiff's independent contractor status and/or a dispute "arising out of or related to" their contract, which encompasses the dispute regarding whether plaintiff was correctly classified as an "independent contractor," must that dispute be arbitrated under the FAA before the plaintiff can proceed as a proxy for the State of California ("State") in accordance with the PAGA's requirement that all representatives of the State be a "person who was employed by the alleged violator and against whom one or more of the alleged violations was committed"?

II. REASONS FOR GRANTING REVIEW

This Petition for Review (the "Petition") presents significant issues of first impression involving irreconcilable conflicts between California courts' interpretation and application of the PAGA and the FAA, which requires enforcement of arbitration agreements as written. In *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*") and *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 ("*Epic*"), the U.S. Supreme Court held that when parties agree to resolve

their disputes by individualized arbitration, those agreements are fully enforceable under the FAA. Courts are not free to disregard or "reshape traditional individualized arbitration" by applying rules that demand collective or representational 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 asserts class or collective action claims, in reliance on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*"), they do not do so when a party asserts representative claims under the PAGA. Given the U.S. Supreme Court's directive that "[t]he 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[]'" in contrast to this Court's *Iskanian* rule, review is necessary to maintain statewide harmony and uniformity of decision. (*Epic,* 138 S.Ct. 1612*; Kindred Nursing Centers Limited Partnership v. Clark* (2017) 137 S.Ct. 1421, 1426 quoting *Concepcion,* 563 U.S. at 341.)

Indeed, this Petition presents this Court with the first opportunity to address the U.S. Supreme Court's anticipated opinion in *Viking River Cruises, Inc. v. Moriana* (2020) 2020 WL 5584508 ("*Viking River Cruises*") (Supreme Court Case No. 20-1573), which is expected by the end of June. Specifically, the U.S. Supreme Court granted review of the threshold issue of whether the FAA requires enforcement of a bilateral arbitration agreement including arbitration of claims brought under the

PAGA. (*Id.*) In short, the U.S. Supreme Court will decide whether the FAA preempts California's *"Iskanian* rule," which precludes enforcement of arbitration agreements that require employees to bring claims under the PAGA as individual matters in arbitration instead of representative claims in Court. (*Id.*) While the U.S. Supreme Court's resolution of this significant legal question is unknown at this time, it is anticipated its opinion will be issued before any merits briefing on this Petition occurs. Thus, granting review will give this Court the first opportunity to address the U.S. Supreme Court's opinion and resolve any ambiguities that might result.

Specifically, this Petition raises an issue of first impression as to whether a delegation clause requiring an arbitrator to resolve all threshold questions of enforceability and arbitrability must be enforced in a PAGA action. The U.S. Supreme Court has made clear that delegation clauses must be enforced as written even if the arguments for delegation are "wholly groundless." (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 528.) To date, this Court has not provided guidance on the interplay between the FAA and the PAGA as it relates to: (1) the question of arbitrability of the predicate issue of independent contractor status; and (2) the enforceability of an arbitration agreement where a plaintiff's status as an alleged employee is in dispute and the plaintiff contends that the PAGA, which may only be pursued by employees, precludes the plaintiff from having to arbitrate the parties' dispute over his or her classification. Review should be granted to give clarity to this critical issue of

importance with statewide implications that continues to arise before the lower courts on a regular basis.

Moreover, relying on inapposite decisions involving plaintiffs who were undisputedly employees able to pursue PAGA claims under the express provisions of the PAGA statute, lower courts have repeatedly denied arbitration of the threshold classification issue based on the mere *allegation* that the plaintiff was an "employee" authorized to pursue PAGA claims on behalf of the State. This conclusion is flawed because it cannot be presumed that a plaintiff can stand in the shoes of the State when only an "employee" may do so under the plain language of the PAGA statute. (Labor Code §§ 2699(a), (c) (allowing "any person who was *employed by* the alleged violator and against whom one or more of the alleged violations was committed" to file a PAGA claim) emphasis added.)

Further, when the classification designation arises from a contract between the parties, it is a dispute regarding the parties' rights and obligations in their contractual relationship. This Court has held that disputes regarding "the respective rights and obligations of parties in a contractual relationship" fall "naturally" within the scope of the FAA and are arbitrable private disputes even if alleged alongside a PAGA claim. (*Iskanian*, 59 Cal.4th 384-385, 391.) Given this, it is imperative that this Court resolve the inconsistencies between its opinion in *Iskanian*, which indicates that a classification dispute is a private dispute distinct from a PAGA claim requiring arbitration under the FAA, and the repeated decisions of the Court of Appeal

uniformly denying arbitration of the predicate issue when a PAGA claim is alleged.

This Court should grant review to provide clarity for California courts regarding PAGA's standing requirement and whether the FAA and the parties' contractual delegation clause requires arbitration of disputes regarding a plaintiff's classification. This issue was not addressed in *Iskanian*. Clarification as to the scope of the Court's ruling in *Iskanian* is required because the plaintiff in *Iskanian* was undisputedly an employee with standing under PAGA. This Court has yet to speak as to the interplay between the PAGA and the FAA when the employment status of the plaintiff is in dispute.

Employers in California are facing an onslaught of PAGA representative claims, which have exploded in quantity since *Concepcion* and *Epic* rejected other avenues for evading agreements to arbitrate individually. PAGA actions filed by plaintiffs who agreed to arbitrate issues of enforceability and arbitrability, disputes regarding their classification, and/or disputes on an individual basis only, are improperly avoiding FAA preemption and well-established U.S. Supreme Court precedent. The issues raised through this Petition impact whether plaintiffs will be limited in utilizing PAGA to circumvent their arbitration agreements in light of PAGA's express standing requirement to avoid "private plaintiff abuse," the FAA's mandate that arbitration agreements must be enforced as written, and the U.S. Supreme Court's reiteration that FAA preemption must be rigorously enforced to eliminate "new devices

and formulas" aimed at curtailing individualized arbitration. (*Iskanian*, 59 Cal.4th at 387, 391; *Epic,* 138 S.Ct. at 1623.)

Accordingly, Defendant and Appellant Uber Technologies, Inc. ("Uber") respectfully requests this Court review the Fourth Appellate District, Division Three's unpublished opinion affirming the denial of Uber's motion to compel arbitration and order preliminarily enjoining the parties' arbitration to settle these important issues of law. (CRC, Rule 8.500(b)(1).) A copy of the Fourth Appellate District, Division Three's unpublished opinion is attached hereto as "Exhibit A" and will be cited as "Op."

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Uber is a company that builds software, including the Uber Eats App, to connect consumers seeking a service with independent businesses providing that service. (Clerk's Transcript, Volume 1, page 22 ("1-CT-299 ¶3".) The Eats App connects restaurants with consumers in need of food and delivery providers available to deliver it. (*Id*. ¶4.) Any delivery provider who wishes to access the Eats marketplace must first enter into an agreement with Portier, LLC, a wholly-owned subsidiary of Uber engaged in the business of providing lead generation to independent providers of delivery services through the Eats marketplace. (*Id*., ¶¶7-8.)

To access the Eats marketplace, delivery providers download Uber's Eats App and establish an account. (1-CT-300, ¶7.) On March 19, 2019, Plaintiff and Respondent Erik Adolph

("Adolph") created an account to use the Eats App to generate leads for delivery service requests through the Eats marketplace. (6-CT-1547 ¶12.) Adolph could not access the Eats marketplace until he electronically accepted the Technology Services Agreement ("TSA") which included an arbitration provision (the "Arbitration Provision"), which he did on March 19, 2019. (6-CT-1547 ¶¶8, 12.)

To accept the Arbitration Provision, Adolph first had to sign into the Eats App, where the Arbitration Provision was available for review by clicking a hyperlink presented on the screen. (6-CT-1546 ¶9.) Adolph was free to spend as much time as he wished reviewing the Arbitration Provision. (*Id.*) However, to advance past the screen with the Arbitration Provision hyperlink to actively use the Eats App, Adolph had to click "YES, I AGREE". (6-CT-1546; 1550-1551.) After clicking "YES, I AGREE," Adolph was prompted to confirm his acceptance a second time. (6-CT-1547, ¶9; 1552-1553.) After Adolph twice confirmed his acceptance of the Arbitration Provision, he could view it anytime online at http://partners.uber.com. (6-CT-1547 ¶10.) Adolph does not dispute that he accepted the Arbitration Provision. (2-CT-366.)

The Arbitration Provision broadly requires delivery providers, *if they do not opt out,* to individually arbitrate *all* disputes arising out of or related to the agreement or their relationship with Uber. (6-CT-1547-1548, ¶¶12-13; 1554-1577.) Specifically, the Arbitration Provision provides, in relevant part, as follows:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA"). Except as it otherwise provides, this Arbitration Provision applies to any dispute, past, present or future, arising out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement terminates …
>
> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration ... Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**
>
> Except as provided in Section 15.3(v), below, regarding the Class Action Waiver and PAGA Waiver, such disputes include disputes arising out of or relating to interpretation, application, enforceability, revocability or validity of this Arbitration Provision, or any portion of the Arbitration Provision …
>
> Except as it otherwise provides, this Arbitration Provision also applies to all disputes between you and the Company or Uber,[1] as well as all disputes between

[1] The Arbitration Provision identifies Uber Technologies, Inc. as an intended third-party beneficiary. (2-CT-326; 6-CT-1571-1572, 1595 §15.3(i).)

> You and the Company's or Uber'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 or Uber, including the formation or termination of the relationship. Except as it otherwise provides, this Arbitration Provision also applies to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the … Fair Labor Standards Act … and state statutes, if any, addressing the same or similar subject matters, and all other similar federal, state and/or local statutory and common law claims.

(2-CT-303 ¶12; 6-CT-1595 §15.3(i) (underline added).)

Adolph did not dispute that his agreement to arbitrate was voluntary. (6-CT-1682-1704.) Adolph was provided 30 days to opt out of the Arbitration Provision, which he could have done by simply sending an email to "optout-portier@uber.com" or by sending an opt-out notice by regular mail. (2-CT-329-330; 6-CT-1548 ¶14, 1599, §15.3(viii).) While numerous individuals opted out of the Arbitration Provision, Adolph did not. (6-CT-1548 ¶14.)

B. Procedural Background

On October 10, 2019, Adolph filed a putative class action complaint. (1-CT-46-55.) Adolph alleged that he and a putative class of Uber delivery drivers in California were misclassified as

contractors rather than employees. (1-CT -48 ¶4.) Adolph contended that Uber failed to indemnify him and the putative class for certain alleged business expenditures and sought restitution and equitable relief under California Business & Professions Code section 17200. (1-CT-48-49, 53-54.)

Uber promptly sought to compel arbitration of Adolph's claims on an individual basis, to strike Adolph's class allegations, and stay all court proceedings pending final disposition of the arbitration. (1-CT-58-172.) In response, Adolph filed a First-Amended Complaint by stipulation through which he added a third claim for civil penalties under the PAGA on behalf of Adolph and other "aggrieved employees," alleging Adolph and other drivers were misclassified as contractors. (1-CT-205-231.) Uber withdrew its petition to compel arbitration. (1-CT-232-236.)

On March 11, 2020, Uber filed a Renewed Petition to Compel Arbitration and a Stay of Proceedings. (1-CT-240-300; 2-CT-302-352.) On July 10, 2020, the trial court granted the petition in part. (2-CT-431-433.) In so doing, the trial court found that Adolph did not dispute he agreed to arbitrate (2-CT-431) and that the class action waiver was enforceable under *Epic* and *Iskanian*. (*Id.* at 432.) The trial court compelled arbitration of Adolph's first two claims for damages and restitution on an individual basis and stayed the PAGA claims. (*Id.* at 433.)

Adolph did not comply. Adolph instead asked Uber to stipulate to dismiss his individual claims without prejudice and to permit him to proceed solely on the PAGA claim. (3-CT-611 ¶4, 614-617.) Uber declined to stipulate because Adolph was

attempting to avoid arbitration in contradiction of the FAA and the terms of the Arbitration Provision. (3-CT-611-612, ¶5; 616-17.) On July 23, 2020, Uber submitted a demand for arbitration with the Judicial Arbitration and Mediation Services ("JAMS") asking for declaratory relief as to whether Adolph was properly classified as an independent contractor. (3-CT-640-647; 611-612 ¶5, 618-634.) Uber did not seek to arbitrate whether any "aggrieved employees" could obtain civil penalties under the PAGA – that claim remained stayed pending arbitration of the dispute as to whether Uber properly classified Adolph as an independent contractor. (3-CT-643.)

In response, on July 29, 2020, Adolph filed a Motion for Leave to File a Second-Amended Complaint alleging only a PAGA claim. (2-CT-470-496.) On September 3, 2020, Adolph filed a Motion for Preliminary Injunction, seeking to enjoin the arbitration from proceeding. (2-CT-472-496.) Adolph candidly admitted, the entire purpose of the Second-Amended Complaint was to evade arbitration by strategically choosing to dismiss certain claims without prejudice to revive them later. (2-CT-452:1-14, 454:28-455:5, 457 ¶5, 484:7-10; 3-CT-27-612, 636.) Uber opposed. (3-CT-724-900; 4-CT-902-1068.)

After a hearing and further court-ordered briefing (4-CT-1092-1200; 5-CT-1202-1436), the trial court granted Adolph's motions, permitting Adolph to dismiss his first two claims for damages without prejudice. (5-CT-1466-1470.) The trial court also granted Adolph's motion for preliminary injunction on the basis that he was likely to prevail on the issue of whether his

PAGA claim was arbitrable under *Iskanian*. (5-CT-1468-1469.) Adolph filed his Second-Amended PAGA Complaint on January 21, 2021 (5-CT-1484-1493), and on January 27, 2021, Uber filed a Notice of Appeal of the Order Granting the Preliminary Injunction. (5-CT-1494-1500; 6-CT-1502.)

On February 23, 2021, Uber filed a petition to compel arbitration under the FAA to compel arbitration of the parties' disputes as to whether Adolph was properly classified as an "independent contractor." (6-CT-1513-1669.) Uber requested the PAGA claim be stayed pending arbitration of this threshold issue. (6-CT-1513:5-11; 6-CT-1708-1721.) Adolph opposed (6-CT-1682-1704) and on March 15, 2021, also moved to strike the Petition to Compel Arbitration (6-CT-1670-1678, 1722-1731), which Uber opposed. (6-CT-1695-1707.)

On April 22, 2021, the trial court denied the motion to strike, rejecting Adolph's argument that Uber's Petition to Compel Arbitration was an improper motion for reconsideration. (6-CT-1732-17333.) The trial court also denied Uber's Petition to Compel Arbitration finding that Uber could not arbitrate the dispute regarding whether Adolph was an "employee" rather than a "contractor" because, under appellate precedent, the State must "consent" to the Arbitration Provision. (6-CT-1734-1735 *citing Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

On May 3, 2021, Uber filed its Notice of Appeal from the order denying Uber's Petition to Compel Arbitration. (6-CT-1744-1763.) On May 24, 2021, the Court of Appeal consolidated the two

appeals. On April 11, 2022, the Fourth Appellate District, Division Three issued its opinion which was not certified for publication, through which it affirmed the lower court's denial of Uber's Petition to Compel Arbitration and grant of preliminary injunction. (Op.) No Petition for Rehearing was filed.

IV. ARGUMENT

A. Disputes Regarding Arbitrability And The Enforceability Of An Arbitration Agreement Must Be Arbitrated In Accordance With A Delegation Clause Under The FAA Regardless Of Alleged Employment-Related Statutes.

The FAA declares a liberal policy favoring enforcement of arbitration agreements. (*Epic*, 138 S.Ct. at 1623; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223, 235.) Under the FAA, "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy … shall be valid, irrevocable, and enforceable …" (9 U.S.C. § 2.) California similarly expresses a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Pinnacle*, 55 Cal.4th at 235 n.4.) Here, it is not disputed that the parties agreed to a valid Arbitration Provision which is governed by the FAA, and it includes a clear and unmistakable delegation clause, which must be enforced regardless of a court's position on the issue of arbitrability. (6-CT-1595 §15.3(i); *Henry Schein v. Archer and White Sales, Inc.* 139 S.Ct. at 529.)

This Petition involves a critical issue of first impression unresolved by this Court – The intersection of the FAA and

PAGA and whether a delegation clause may be disregarded for purposes of a PAGA claim where the predicate issue of plaintiff's standing as an "aggrieved employee" to step into the shoes of the State under PAGA is disputed. (Lab. Code § 2699(a).)

1. The FAA Mandates Enforcement Of Delegation Clauses To Resolve Arbitrability Issues.

The U.S. Supreme Court has held that, under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' where it is "clearly and unmistakably" provided by their arbitration agreement. (*Rent-A-Center, W., Inc. v. Jackson* (2010) 561 U.S. 63, 68-69; *AT&T Techs., Inc. v. Commc'ns Workers of Am.* (1986) 475 U.S. 643, 649.) This includes an agreement for an arbitrator to decide issues "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Id.* at 68-69.)

A clear and unmistakable delegation clause must be enforced regardless of the parties' or the court's position on whether the dispute at issue should be arbitrated. (*Henry Schein*, 139 S.Ct. at 529; *Rent-A-Center*, 561 U.S. at 69.) In *Henry Schein,* the Court made clear that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." (*Id.* at 529.) The delegation clause must be enforced even if a court believes or concludes that "the argument that the arbitration agreement applies to a particular dispute is wholly groundless" because when the parties' contract delegates the arbitrability question to an arbitrator, "the court must respect the parties' decision as embodied in the contract." (*Id.* at

528-529.) Consequently, 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. (*Rent-A Center*, 561 U.S. at 69-70, n.1.)

Contrary to the FAA and *Henry Schein*, California courts are routinely disregarding clear and unmistakable delegation clauses, instead presuming that PAGA forbids arbitration of any issue arising in an action alleging only a PAGA claim. Specifically, even where a clear and unmistakable delegation clause requires arbitration regarding enforceability of the arbitration agreement, that clause must be disregarded if the plaintiff alleges the PAGA renders the agreement unenforceable. This is precisely what the U.S. Supreme Court has held is prohibited – the refusal to enforce a delegation clause simply because it believed that the position regarding enforceability and arbitrability was "wholly groundless." (*Henry Schein*, 139 S.Ct. at 528 (unanimously holding "courts must respect the parties' decision" to delegate arbitrability questions to the arbitrator, even if the court believes the argument for arbitration is "wholly groundless"); *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407, 1415 ("[t]he FAA requires courts to 'enforce arbitration agreements according to their terms.'").)

2. Delegation Clauses Should Be Enforced Where The Parties Dispute The Plaintiff's Employment Status And The Plaintiff Contends An Employment-Related Statute Invalidates The Parties' Arbitration Agreement.

The FAA demands the enforcement of delegation clauses

and thus, they are enforced even where the plaintiff alleges that an employment-related statute renders the arbitration agreement unenforceable. This logical conclusion complies with U.S. Supreme Court precedent and precludes plaintiffs from circumventing the FAA and their agreements to arbitrate issues of arbitrability by simply alleging a PAGA claim, which may not apply in the first instance under the plain language of the PAGA statute. Accordingly, in analogous federal cases where the plaintiffs argued that the National Labor Relations Act or the Worker Adjustment and Retraining Notification Act ("WARN Act") invalidated the parties' arbitration agreement, the courts enforced the delegation clause to require the arbitrator to first determine if the arbitrator or the court should decide the plaintiff's classification.

For instance, in *Ali v. Vehi-Ship, LLC* (N.D. Ill. 2017) 2017 WL 5890876, at *5, the court found that as a preliminary matter, "[t]he arbitrator must decide whether a dispute about the parties' work relationship falls within the scope of the arbitration clause." The drivers had contractually agreed to an independent contractor relationship along with binding arbitration subject to a class and collective action waiver as well as a delegation clause incorporated by reference. (*Id*. at *1-3.) The truck drivers claimed that they were entitled to invalidate the waiver under Section 7 of the NLRA – a protection afforded only to "employees." (*Id*.)

The court held that because of the delegation clause, the plaintiffs' challenge to the arbitration agreement had to be resolved by an arbitrator, not the court. The court explained that

plaintiffs' "presume[] they are entitled to the raft of statutory protections that comes with employment, …[b]ut the argument skips a step: are these Plaintiffs even covered by the NLRA?" (*Id.* at *5.) As the court further explained," [t]o decide whether the Agreement's arbitration clause [is unenforceable], it must first be decided whether the Plaintiffs were employees or independent contractors." (*Id.*) Otherwise, the court would have invalidated the arbitration agreement – an issue for the arbitrator – based purely on an allegation under a statute that may not apply at all, circumventing the parties' arbitration agreement and the FAA. (*Id.*; *see Richemond v. Uber Techs., Inc.* (S.D. Fla. 2017) 263 F.Supp.3d 1312, 1317 ("adjudication of the Plaintiffs' attacks on the Arbitration Provision [including the argument that it is violates the National Labor Relations Act] should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability.")

A similar result was reached in *Lamour v. Uber Techs., Inc.* (S.D. Fla. Mar. 1, 2017) 2017 WL 878712. The *Lamour* court enforced a delegation clause, holding that "even if Section 7 [of the NLRA] barred a collective action waiver in a voluntary arbitration agreement, the Court would still compel Plaintiff to arbitrate his claim of employment status before he can claim, as a defense to arbitration, that the NLRA invalidates the class and collective action waiver he voluntarily accepted." (*Id.* at *12-13.; *see Johnston v. Uber Technologies., Inc.* (N.D. Cal. 2019) 2019 WL 4417682 (holding that the court "cannot properly reach [the] legal question regarding the relationship between the WARN Act and

the FAA [and address whether the WARN Act invalidates the class action waiver] until the threshold finding is made that Plaintiff is an employee (who is subject to the WARN Act's protection).")

Although the plaintiffs in each of these cases argued their claims were not subject to arbitration based on a statute applying only to "employees," those courts enforced the arbitration agreements as written, delegating the enforceability and arbitrability issues to the arbitrator to resolve in compliance with the FAA. These cases properly enforced the FAA because the FAA precludes courts from substituting their finding for the arbitrator's even if the alleged statute at issue could potentially invalidate an arbitration agreement. This Court's intervention is critical to resolve the discrepancy between the U.S. Supreme Court's mandate that delegation clauses must be enforced in contrast to California courts' routine application of the *Iskanian* rule to avoid FAA preemption and the enforcement of arbitration agreements as written, including the enforcement of delegation clauses.

B. Alternatively, The Parties' Private Classification Dispute Must be Arbitrated.

This Court in *Iskanian* determined that "an *employee's* right to bring a PAGA action is unwaivable . . ." (*Iskanian,* 59 Cal.4th at 360, 383-84, emphasis added.) In so doing, this Court determined that the FAA and its broad mandate did not apply 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.) However, it also explains why Adolph must arbitrate his dispute regarding his classification, which according to this Court's analysis of private versus public claims, is a private disputes governed by the FAA because it is a "dispute[s] about the respective rights and obligations of parties in a contractual relationship." (*Id.* at 384-85.) This Court distinguished a PAGA claim as a public dispute because it is a *qui tam* claim whereby "[a]n *employee* plaintiff suing ... under the [PAGA] … represents the same legal right and interest as state labor law enforcement agencies…" (*Id.* at 380 (emphasis added), 382.) Thus, "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." (*Id.* at 386, emphasis added.)

Within this Court's analysis in *Iskanian* lies the key distinction of first impression to be resolved – whether a plaintiff's claim of misclassification most closely resembles a private or public dispute. Applying this Court's reasoning in the context of the FAA's broad coverage and policy favoring arbitration requires a finding that the classification dispute is a private dispute subject to FAA preemption.

1. Only Employees Have Standing To Be A Proxy Of The State Under The PAGA.

This Court also reiterated what is made clear by the plain language of the PAGA statute: that only employees may bring PAGA claims on behalf of the State. In a PAGA action, "aggrieved *employees*" may sue an *employer* on behalf of themselves and other aggrieved *employees* for Labor Code violations. (*Iskanian,* 59 Cal.4th at 381; Labor 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." (Labor Code § 2699(c), emphasis added.) 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.* (2020) 9 Cal.5th 73, 82, emphasis added.)

This Court explained that the standing requirement was the Legislature's intent to avoid abusive litigation by allowing only employees to act as the State's proxies:

> In crafting the PAGA, the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute qui tam actions. The Legislature instead chose to limit qui tam plaintiffs ***to willing employees*** who had been aggrieved by the employer in order to avoid "private plaintiff abuse.

(*Iskanian*, 59 Cal.4th at 387, emphasis added.)

Accordingly, the PAGA's plain language, as explained by this Court and consistent with the legislative history, requires that a plaintiff must be an *employee* of the defendant to have standing to assert a PAGA claim.

2. The Gateway Misclassification Issue Is Subject To FAA Preemption And Must Be Arbitrated As A Preliminary Matter.

Iskanian provided the analysis for identifying private disputes governed by the FAA when it determined that private damage claims and class action waivers may be covered by arbitration agreements. (*Iskanian*, 59 Cal.4th at 391.) This

analysis is consistent with the FAA and preemption principles as it recognizes that disputes that are private in nature remain arbitrable even when they are pursued alongside a PAGA claim. (*Id.*)

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. (*Id.* at 384; *Henry Schein*, 139 S.Ct. at 530.) 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. at 24-35.) Otherwise, courts will undermine the FAA based on public policy in violation of the preemption analysis set forth in *Concepcion* and *Epic.*

Lower courts should be instructed to apply this standard so they may correctly conclude that disputes regarding whether the Labor Code applies under an otherwise valid and enforceable arbitration agreement is a private dispute. In such situations, courts should apply the FAA and require the parties to arbitrate independent contractor status (a private dispute) while staying the PAGA claim (a public dispute not subject to arbitration). (9 U.S.C. §3.)

Review should be granted because this Court must reconcile the PAGA's express standing requirement, which was created by the Legislature to avoid "private plaintiff abuse," with lower courts' decisions holding that *alleged* PAGA claims automatically qualify as the State's claims to preclude arbitration

of disputes that are private in nature. Without clarification from this Court, lower courts will continue to misapply *Iskanian* and inapposite "PAGA splitting" cases to invalidate agreements to arbitrate parties' contractor relationship.

a. A Dispute Regarding The Parties' Rights And Obligations In A Contractual Relationship Is A Private Dispute Subject To The FAA.

The FAA's focus is on "private disputes, not disputes between an employer and a state agency—parties with no contractual relationship." (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1246; *Iskanian*, 59 Cal.4th at 188-89. (). The litmus test to determine the scope of claims precluded from arbitration focuses on the claims' substance. (*Esparza*, 13 Cal.App.5th at 1246; *Iskanian*, 59 Cal.4th at 388 (courts must avoid semantics and analyze the substance of a claim that could be pursued outside arbitration without violating the FAA.)) Alleged misclassification falls within the FAA's coverage because it is not a PAGA claim at all; it is a predicate private dispute between the parties regarding the nature of their contractual relationship.

The parties' dispute here is a dispute about their "rights and obligations" under an indisputably valid contract, whereby they expressly agreed that they were engaged in an independent contractor relationship. This dispute between two private parties is exactly the type of dispute this Court held is governed by the FAA and outside of the PAGA's purview. (*Iskanian*, 59 Cal. 4th at 385-86.) It does not meet the narrow definition of a public

dispute, and more specifically, a *qui tam* action under *Iskanian* but instead falls "naturally" within the FAA's coverage of "a controversy thereafter arising out of such contract or transaction …" (*Id.*, at 380, 384-85.)

Moreover, until it is determined that a defendant is subject to the Labor Code, there can be no dispute between the defendant and the State. This threshold status issue does not impact the State's ability to exercise its right to litigate PAGA claims; it only affects whether a plaintiff has the requisite standing to serve as the State's proxy. This clear-cut dispute regarding the parties' rights and obligations is analogous to the numerous cases identified in *Iskanian* as involving only private disputes. (*Id.,* at 385–386 citing, for example, *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 and distinguishing between employee specific relief such as back pay that must be arbitrated and claims by the EEOC.)

As this Court stated in *Iskanian*, "[r]epresentative actions under the PAGA … do not displace the bilateral arbitration of private disputes…" (*Id.*, at 387.) If overlap exists with claims that could be pursued by both the State and by individuals in their individual capacities, "the claims retain *their private nature* and continue to be covered by the [FAA]. To hold otherwise would allow a rule of state law to erode or restrict the scope of the [FAA]—a result that cannot withstand scrutiny under federal preemption doctrine." (*Esparza*, 13 Cal.App.5th at 1234, emphasis added.)

This principle was affirmed in *ZB, NA v. Superior Court of*

San Diego Cty. (2019) 8 Cal. 5th 175, where this Court held that a plaintiff's unpaid wage claims were arbitrable even though they were intertwined with the PAGA claim. (*Id.* at p. 182.) In other words, a plaintiff cannot use the *Iskanian* rule to circumvent the FAA and immunize private, non-PAGA disputes from arbitration. Indeed, the FAA requires courts to compel arbitration of non-PAGA claims, even if they are intertwined with PAGA claims. (*Mandviwala v. Five Star Quality Care, Inc.* (9th Cir. 2018) 723 Fed. App'x 415, 417 (reversing and remanding for arbitration because "distinguish[ing] between individual claims for compensatory damages … and PAGA claims … reduces the likelihood that *Iskanian* will create FAA preemption issues").)

As explained above, numerous federal courts have compelled arbitration of private disputes even when presented with arguments by plaintiffs that their arbitration agreements are invalidated by statute. In these cases, the statutes, like the PAGA, applied only to employees and thus, the courts correctly concluded that the plaintiffs' status as an employee must first be arbitrated. (*Johnston*, 2019 WL 4417682, at *5 ("…[T]he 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"); *Lamour,* 2017 WL 878712, at *12-13 (compelling plaintiff "to arbitrate 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); *Ali,* 2017 WL 5890876, * 5 (resolution of employment status in arbitration

required because determination of whether arbitration agreement is unenforceable under the NLRA requires a determination of whether "Plaintiffs [are] even covered by the NLRA"); *Sakyi v. Estee Lauder Companies, Inc.* (D.D.C. 2018) 308 F.Supp.3d 366, 382 (whether the plaintiff was an employee or independent contractor is a gateway question for arbitration before determining if agreement was unenforceable under the NLRA); *Richemond,* 263 F.Supp.3d 1312, 1317 ("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.* (N.D. Ill. July 14, 2017) 2017 WL 3008278, at *3 ("the arbitrator is responsible for determining the threshold issue of whether plaintiff's relationship with Uber is that of employee or independent contractor").)

These cases correctly concluded that the FAA requires arbitration of the parties' private dispute as agreed, avoiding the potential immunization of private disputes from the FAA based purely on an *allegation* that plaintiff has standing as an employee to invoke a statute applicable only to employees. California courts should apply a similar approach to comply with both the FAA and the plain language of the PAGA, which requires that only employees may act as a proxy for the State.

b. PAGA Is Not A *Qui Tam* Statute And The Fiction That It Is Should Not Preclude A State Statute From FAA Preemption.

In *Iskanian* this Court concluded that PAGA is a *qui tam*

statute by which the State is the real party in interest and thus, the State must consent to arbitration. (*Iskanian,* 59 Cal.4th at 384-386; *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 991; *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 469, 472.) However, this conclusion conflicts with multiple decisions of the U.S. Supreme 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 Ctr., Inc. v. Brown* (2012) 565 U.S. 530, 533; *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421, 1426–27; *Nitro-Lift Technologies, L.L.C. v. Howard* (2012) 568 U.S. 17, 21.) Indeed, the Ninth Circuit recently undermined *Iskanian's* rationale for refusing to apply the FAA to PAGA claims. (*Magadia v. Wal-Mart Associates* (9th Cir. 2021) 999 F.3d 668, 675-677.)

In *Magadia*, the Ninth Circuit found that PAGA claims "depart from the traditional criteria of *qui tam* statutes" even though there are some similarities. (*Id.* at 676-678.) As the Ninth Circuit noted, "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 676, emphasis in original.) This conflicts with a *qui tam* action, which is brought solely in the name of the state, and "[b]y definition, . . . vindicates an injury to the government, not an injury to the relator [plaintiff]." . (*People ex rel Alzaya v.*

Hebb (2017) 18 Cal.App.5th 801, 830-831.) PAGA does not satisfy this definition because it implicates third party interests, "requiring 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.'" (*Magadia*, 999 F.3d at 676, emphasis added.)

The Ninth Circuit further noted, "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*.) The court indicated that "[t]his feature is atypical (if not wholly unique) for qui tam statutes" which conflicts with *qui tam* statutes where "the real interest is the government's, which the government assigns to a private citizen to prosecute on its behalf." (*Id*.)

Magadia distinguishes a PAGA claim from *qui tam* claims for another important reason. "[A] traditional *qui tam* action acts only as 'a *partial* assignment' of the Government's claim (*id.* at 677, *citing Vermont Agency v. U. S. ex rel. Stevens* (2000) 529 U.S. 765, 773), while, "[i]n contrast, PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." (*Magadia*, 999 F.3d at 677.) Once the LWDA decides not to pursue a PAGA claim, the State loses all control over the litigation. (*Id*.) The employee chooses what claims to bring, what Labor Code violations to allege, what relief to seek, what employees to represent, and if and under what terms to settle the case. (A. Blumenthal, "Circumventing *Concepcion*:

Conceptualizing Innovative Strategies to Ensure Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver," 103 CAL. L. REV. 699, 743 (2015).)[2]

The State complete assignment of a PAGA claim stands in stark contrast to *qui tam* actions where the government may intervene by statute in the litigation and the private plaintiff's actions are both limited and tied to decisions by the government. (31 U.S.C. §§ 3730(a)(2); 3730(c)(3).) The Ninth Circuit explained that, "[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." (*Magadia*, 999 F.3d at 677, emphasis added; *see Stalley v. Catholic Health Initiatives* (8th Cir. 2007) 509 F.3d 517, 522 ("[the] absence of procedural safeguards giving the executive branch control over the prosecution of the action and the proceeds is powerful evidence that [the legislature] did not mean [the statute] to function as a *qui tam* statute.")

Given these critical distinctions, California courts have

---

[2] *Iskanian's* reliance on *EEOC,* 534 U.S. 279, is misplaced because that decision concerned a suit actually filed by a federal agency, the Equal Opportunity Employment Commission ("EEOC"), where the EEOC remained "in command of the [litigation] process" and despite filing the claim, it did not sign an arbitration agreement. The FAA did not preclude the EEOC from litigating in court because the EEOC was in fact the party prosecuting the claim in court. (*Id*. at 291, 294.) As Justice Chin recognized in *Iskanian*, *Waffle House* is "inapposite" because "Iskanian is a party to the arbitration agreement in this case," unlike the EEOC in *Waffle House*. (*Iskanian,* 59 Cal.4th at 396 (Chin, J. concurring op.).)

mistakenly concluded that PAGA is a *qui tam* action and that the State is the only "real party in interest." (*Iskanian*, 59 Cal.4th at 382; citing *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399) (the government is always a real party in interest in a *qui tam* action).) Thus, this Court erred when it concluded 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 [i]t is a dispute between an employer and the state…"" (*Iskanian*, 59 Cal.4th at 386-87.) More accurately, a PAGA claim is a dispute between the individual plaintiff and the "employer." This is particularly true where the plaintiff's employment status is in dispute. In that scenario, the plaintiff's arbitration agreement must be enforced *before* it is determined that the plaintiff has standing to pursue a PAGA claim. Since, by statute, no individual is entitled to seek PAGA penalties without an employment relationship, it cannot be said that the claim is only brought on behalf of the State when the plaintiff's employment classification is in dispute.

C. Review Is Necessary To Provide Guidance To Lower Courts That Are Relying On Inapposite Cases Resulting In A Violation Of The FAA.

This Court should grant review because the critical interplay between the FAA and the PAGA has significant ramifications and has been addressed in numerous appeals. (*Contreras,* 61 Cal.App.5th 461; *Schofield v. Skip Transp., Inc.*, (2021) 2021 WL 688615; *Santana v. Postmates, Inc.* (2021) 2021 WL 302644; *Rimler v. Postmates Inc.* (2020) 2020 WL 7237900; *Provost,* 55 Cal.App.5th 982; *Olson v. Lyft, Inc.* (2020) 56

Cal.App.5th 862; *Collie v. Icee Co.* (2020) 52 Cal.App.4th 477; *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602; *Moriana,* 2020 WL 5584508; *Ramos v. Superior Ct.* (2018) 28 Cal.App.5th 1042.) Additionally, this Petition presents this Court with the first opportunity to address the U.S. Supreme Court's anticipated opinion in *Viking River Cruises*, which will decide whether the FAA applies to a PAGA claim and is expected by the end of June. (Supreme Court Case No. 20-1573.) Therefore, the issue presented is an important issue of law that would benefit from Supreme Court review.

1. Review Is Needed To Address The Lower Courts' Reliance On The Fiction Of PAGA As A *Qui Tam* Action.

In *Contreras*, *Correia*, and their progeny, several Courts of Appeal have erroneous relied on the assumption that PAGA is a *qui tam* statute such that the State is the only real party in interest for purposes of a PAGA claim. (*Correia*, 32 Cal.App.5th at 622 ("the state is the owner of the claim and the real party in interest").) Review is needed to provide guidance as to the lower courts' reliance on the fiction of the PAGA as a *qui tam* action to avoid FAA preemption.

In *Contreras,* 61 Cal.App.5th 461, the Court of Appeal reasoned that "(c)haracterizing the process as resolving only an 'arbitrability,' 'delegatable' or 'gateway' issue, or the adjudication of an 'antecedent' fact, does not extinguish the risk to the state that it is an arbitrator, not a court, who nullifies the state's PAGA claim." (*Contreras,* 61 Cal.App.5th at 474.) *Contreras* reached this conclusion largely by relying on a decision that did

not involve any classification dispute – *Correia,* 32 Cal.App.5th at 622. (*Contreras*, 61 Cal.App.5th at 474.) The defendant in *Correia* sought to arbitrate *the merits of the PAGA claim itself*, not any threshold or gateway issue. (*Id.*, 32 Cal.App.5th at 620.) Arbitration of the PAGA claim itself is very different from arbitration of the classification dispute because the latter does not have any impact on the State's ability to seek penalties for Labor Code violations. For example, if Adolph is found by an arbitrator to be an "independent contractor," the State could directly seek penalties for alleged Labor Code violations. (Lab. Code §§ 203, 1197.1.) *Contreras* does not support the conclusion that arbitration of the parties' classification dispute would prevent the State from enforcement of employment laws. In any case, California's interests and public policy cannot stand as an obstacle to the FAA, which requires enforcement of the Arbitration Provision. (*Kindred Nursing,* 137 S.Ct. at 1426–1427 (FAA preempted Kentucky rule); *Nitro-Lift Techs., L.L.C.,* 568 U.S. at 21 (FAA preempted Oklahoma law); *Marmet Health Care Ctr., Inc.,* 565 U.S. at 533 (FAA preempted West Virginia law).)

2. Lower Courts Are Relying on Inapposite Cases Where Plaintiff Was Undisputedly An Employee.

Lower courts are erroneously reasoning that sending the parties' classification dispute to arbitration would constitute impermissible "splitting" of a PAGA claim, relying on *Provost,* 55 Cal.App.5th at 993. *Provost* in turn relied upon *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 and subsequent cases holding that a "PAGA action is not divisible into separate

arbitrable 'individual' and nonarbitrable representative components …" (*Provost*, 55 Cal.App.5th at (citing *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 and *Perez v. U-Haul Co. of Calif.* (2016) 3 Cal.App.5th 408, 421).)

The cases relied on by *Provost* are materially inapposite, however, because they did not address the core classification dispute. The plaintiffs in those cases were undisputedly employees.[3] The courts addressed a completely different question: whether the *undisputed* employee plaintiffs could be required to individually arbitrate whether they were "aggrieved" before proceeding to litigate under the PAGA on behalf of other "aggrieved employees." (*Williams*, 237 Cal.App.4th at 648-649; *Hernandez*, 7 Cal.App.5th at 176-79; *Perez,* 3 Cal.App.5th at 419-22.) As noted above, under PAGA, a plaintiff is not "aggrieved" if he or she does not experience one or more Labor Code violations. (Labor Code § 2699(c), emphasis added.)

These cases are inapposite because the plaintiffs undisputedly satisfied the PAGA's and the Legislature's requirement that a plaintiff must be a "willing employee" to avoid "private plaintiff abuse." (*Iskanian*, 59 Cal.4th at 387.) Instead of addressing the arbitrability of the classification issue, the courts concluded that the plaintiffs were not required to arbitrate whether they were "aggrieved" employees—*i.e.,* that they had personally been subject to an underlying Labor Code violation—

---

[3] The remaining cases following *Williams* cited by the *Provost* court likewise involved no dispute over the classification of the plaintiffs as "employees." (*Jarboe v. Hanless Auto Group* (2020) 53 Cal.App.5th 539, 557; *Brooks v. AmeriHome Mortg. Co., LLC*

before they could bring a PAGA claim. (*Williams*, 237 Cal.App.4th at 649; *Hernandez*, 7 Cal.App.5th at 178-79; *Perez,* 3 Cal.App.5th at 420-21.) As the *Perez* court correctly recognized, that inquiry necessarily requires a determination of whether the employer actually committed a Labor Code violation—the very subject of a PAGA action. (*Perez*, 3 Cal.App.5th at 414.)

The *Provost* court applied *Williams* and its progeny and similarly viewed the issue as being whether the plaintiff may arbitrate the issue of being "aggrieved." (*Provost*, 55 Cal.App.5th at 996 ("[w]e conclude [defendant's] contention in this case in support of arbitration falls within the ambit of [*Williams* and its progeny].") However, the actual issue was whether a plaintiff with disputed standing as an employee to pursue a PAGA claim must arbitrate his or her classification before it can be said whether or not the PAGA statute applies in the first instance to allegedly invalidate an arbitration agreement. Because *Provost* framed the issue incorrectly, it did not consider cases such as *Johnston*, *Ali*, *Sakyi*, *Lamour*, and *Richemond*, which properly enforced a delegation clause and/or required the parties to arbitrate the plaintiff's misclassification dispute as a private dispute encompassed within the relevant arbitration agreement.

Review by this Court is needed to address the specific issue regarding the arbitrability of a classification dispute. In every other context outside of PAGA, there is no question that a plaintiff would be obligated to arbitrate the issue of employment status. The issue that this Court must resolve is what happens

---

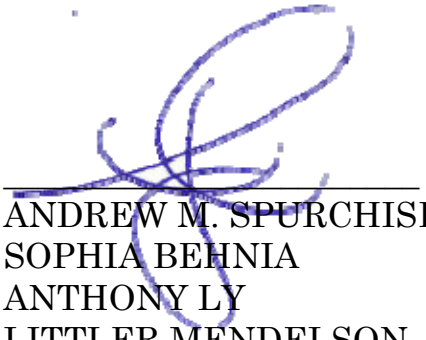
(2020) 47 Cal.App.5th 624, 629.)

when as here, there is a conflict between the FAA and PAGA? The answer is straight-forward—the FAA's preemption case law mandates that when there is a direct conflict between any state law, including PAGA, and the FAA, the *conflict must be resolved in the FAA's favor.* (*Garcia v. Superior Court* (2015) 236 Cal.App.4th 1138, 1144, *as modified* (May 27, 2015) *as modified* (June 2, 2015) ("If a state law interferes with the FAA's purpose of enforcing arbitration agreements according to their terms, the FAA preempts the state law provision, no matter how laudable the state law's objectives."); *Nitro-Lift Technologies, L.L.C.,* 568 U.S. at 22 ("[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").)

V. CONCLUSION

Uber respectfully requests this Court grant this Petition and resolve the important questions of law it presents.

DATED: May 20, 2021



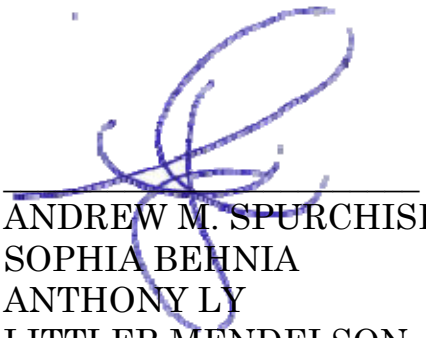
ANDREW M. SPURCHISE
SOPHIA BEHNIA
ANTHONY LY
LITTLER MENDELSON, P.C.

Attorneys for
Defendant and Appellant
UBER TECHNOLOGIES, INC.

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Petition for Review of Appellant Uber Technologies, Inc. is produced using 13-point font Century Schoolbook type including footnotes and contains 8,297 words including footnotes and excluding the cover information, table of contents, tables of authorities, signature blocks, this certificate, and the attached Fourth Appellate District, Division Three opinion, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: May 20, 2021



ANDREW M. SPURCHISE
SOPHIA BEHNIA
ANTHONY LY
LITTLER MENDELSON, P.C.

Attorneys for
Defendants and Appellants
UBER TECHNOLOGIES, INC.

EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIK ADOLPH, Plaintiff and Respondent, v. UBER TECHNOLOGIES, INC., Defendant and Appellant.	G059860 (consol. w/ G060198) (Super. Ct. No. 30-2019-01103801) O P I N I O N

Appeals from orders of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Littler Mendelson, Andrew Spurchise, Sophia Behnia, and Anthony Ly for Defendant and Appellant.

Desai Law Firm, Aashish Y. Desai, Maria Adrianne De Castro; Goldstein, Borgen, Dardarian & Ho, Andrew Paul Lee and Mengfei Sun for Plaintiff and Respondent.

INTRODUCTION

A claim under the Labor Code Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (PAGA), may only be brought by an "aggrieved employee." (Lab. Code, § 2699, subd. (a).) Plaintiff Erik Adolph contends that Uber Technologies, Inc. (Uber) misclassified employees as independent contractors and seeks civil penalties against Uber under PAGA. Before he began working for Uber, Adolph signed an arbitration agreement, under the terms of which all disputes between them are to be resolved in arbitration and which purported to waive Adolph's right to assert a PAGA claim. The California Supreme Court has held, however, that PAGA claims are not subject to arbitration and that an agreement waiving the right to bring a representative claim under PAGA violates public policy and is unenforceable. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384 (*Iskanian*).) Based on *Iskanian* and the cases following it, the trial court denied Uber's petition to compel arbitration.

Uber contends on appeal that the initial question of whether Adolph is an employee—who may bring a representative PAGA claim—or an independent contractor—who may not—must be determined in arbitration. We disagree. California case law is clear that the threshold issue of whether a plaintiff is an aggrieved employee in a PAGA case is not subject to arbitration. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Adolph was a driver for UberEATS, a meal delivery service. The company through which drivers are connected with those in need of UberEATS' services is owned by Uber. Before he began making deliveries for UberEATS in March 2019, Adolph created an account to use the UberEATS app. In creating his account, Adolph accepted an arbitration agreement, which "is governed by the Federal Arbitration Act," and which "applies to any dispute, past, present or future, arising out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement

terminates." The parties do not dispute the terms of the arbitration agreement or that Adolph accepted the arbitration agreement.

The arbitration agreement contains a waiver of all representative PAGA claims, whether in court or in arbitration. It also provides that the validity of the PAGA waiver may only be resolved in court, not through arbitration, and that if the PAGA waiver is found to be unenforceable, the litigation of PAGA claims must be stayed pending the outcome of arbitrable individual claims.

In October 2019, Adolph filed a putative class action complaint against Uber, claiming that Uber had misclassified employees as independent contractors, and had therefore failed to reimburse the class members for necessary work expenses. The complaint alleged two causes of action: (1) violation of Labor Code section 2802, and (2) violation of Business and Professions Code section 17200. Uber filed a petition to compel arbitration of Adolph's individual claims, strike the class action allegations, and stay all court proceedings. The parties stipulated to allow Adolph to file a first amended complaint adding a third cause of action for civil penalties under PAGA.

After the amended complaint was filed, Uber filed a renewed petition to compel arbitration. The trial court granted the petition compelling arbitration of Adolph's individual claims in the first two causes of action, found that the class claims on the first two causes of action were waived, and stayed the PAGA cause of action.

Adolph then filed a motion for leave to file a second amended complaint, which would include only the PAGA cause of action, and a motion for preliminary injunction to prevent the arbitration from proceeding. The trial court granted both motions. Uber filed a notice of appeal from the order granting the preliminary injunction, appeal No. G059860.

Adolph filed the second amended complaint alleging a single cause of action under PAGA. Uber filed a petition to compel arbitration of Adolph's independent contractor status and of all issues of enforceability or arbitrability. The petition requested

that the PAGA claim be stayed pending arbitration on the threshold issue of whether Adolph was an aggrieved employee entitled to assert the PAGA claim. Adolph both opposed and moved to strike the petition. The trial court denied the petition to compel arbitration, and Uber filed a notice of appeal, appeal No. G060198.

This court granted the parties' joint motion to consolidate appeal Nos. G059860 and G060198.

DISCUSSION

I. Standard of Review

Because the evidence is not in conflict, we review the order denying a petition to compel arbitration de novo. (*Banc of California, National Assn. v. Superior Court* (2021) 69 Cal.App.5th 357, 367.) The trial court's order granting a preliminary injunction is reviewed for abuse of discretion. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Olson v. Hornbrook Community Services Dist.* (2021) 68 Cal.App.5th 260, 268.)

II. The Federal Arbitration Act

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) "establishes 'a liberal federal policy favoring arbitration agreements.'" (*Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S.Ct. 1612, 1621] (*Epic*).) By its terms, the FAA applies to any "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy" and makes those provisions "valid, irrevocable, and enforceable." (9 U.S.C. § 2.) The arbitration provision in the agreement between Adolph and Uber provides that it is to be governed by the FAA, and the agreement unquestionably involves commerce. The FAA is therefore implicated in this case.

III. Under California Law, PAGA Claims Are Not Arbitrable

In California, PAGA authorizes an employee to bring an action for civil penalties against his or her employer on behalf of the state for violations of the Labor Code. The California Supreme Court has held that because a PAGA claim is brought on

behalf of the state, which is not a signatory to the employment agreement, a PAGA claim is not subject to any arbitration agreement between the employee and the employer, despite the FAA's broad terms. "[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. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian, supra*, 59 Cal.4th at pp. 386-387.) "[A] PAGA representative action necessarily means that this claim cannot be compelled to arbitration based on an employee's predispute arbitration agreement absent some evidence that the state consented to the waiver of the right to bring the PAGA claim in court." (*Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 624-625 (*Correia*).) There is no evidence or argument that the state of California has consented to arbitrate the PAGA claim in this case.

In *Epic*, the United States Supreme Court held that class action waivers in arbitration agreements are enforceable. (*Epic, supra*, 138 S.Ct. at p. 1619.) The plaintiff employee in that case was pursuing FLSA and California overtime claims on a class-wide basis. (*Id.* at p. 1620.) Numerous courts have held that *Iskanian* survives *Epic* because "the cause of action at issue in *Epic* differs fundamentally from a PAGA claim." (*Correia, supra*, 32 Cal.App.5th at p. 619.) "Although the *Epic* court reaffirmed the broad preemptive scope of the Federal Arbitration Act [citation], *Epic* did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum. We thus conclude the trial court properly ruled the waiver of representative claims in any forum is unenforceable." (*Id.* at p. 609; see *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 471-472; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 872; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 673.) We see no reason to diverge from clear California authority in this case.

IV. Whether Adolph Is Entitled to Assert PAGA Claims Against Uber Must Be Decided by the Court, Not an Arbitrator

California cases uniformly hold that whether a plaintiff is an aggrieved employee who may assert a PAGA claim is a matter to be decided by the court, not by an arbitrator, even if the parties signed an arbitration agreement. In *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, the defendant company sought to require the plaintiff to arbitrate whether he was an employee or an independent contractor before proceeding with a representative PAGA claim, based on the parties' arbitration agreement. (*Id.* at p. 987.) The appellate court rejected the defendant company's argument: "[T]hreshold issues involving whether a plaintiff is an 'aggrieved employee' for purposes of a representative PAGA-only action cannot be split into individual arbitrable and representative nonarbitrable components." (*Id.* at p. 996.) The court also held that, because the state is the real party in interest in a PAGA claim, such a claim cannot be ordered to arbitration without the state's consent, despite any arbitration agreement between the nominal plaintiff and the defendant. (*Id.* at pp. 997-998.)

Contreras v. Superior Court, supra, 61 Cal.App.5th 461 reached the same conclusion, holding that PAGA claims cannot be sent to arbitration without the state's consent (*id.* at p. 472), and that the preliminary question of whether the plaintiff is an employee or an independent contractor must be decided by the court, not an arbitrator (*id.* at pp. 473-475).

Uber argues these cases were decided improperly. Uber contends that PAGA is not a true qui tam statute, and the state is not actually the real party in interest. "'Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.'" (*Iskanian, supra,* 59 Cal.4th at p. 382.) The *Iskanian* court held that although a portion of the penalty goes to all the employees affected by the employer's

violation rather than only to the "'informer,'" a PAGA claim still meets all the elements of a qui tam action. (*Ibid.*) Uber cites *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668, 676, in which the Ninth Circuit held a PAGA claim is not a true qui tam action. However, *Magadia* was addressing standing under Article III of the United States Constitution, not the arbitrability of the status of an aggrieved employee, and it is therefore not instructive here. We disagree that California courts have erred in concluding that a PAGA claim is outside the FAA because it is not a dispute between an employer and an employee arising out of an arbitration provision in the employment agreement.

Uber also contends that *Iskanian* and the cases following it improperly obstruct the FAA's objective to promote arbitration. Uber asks this court to reconsider those cases because the United States Supreme Court's reasoning in *Epic* that arbitration agreements must be enforced according to their terms (*Epic, supra*, 138 S.Ct. at p. 1619) is "equally applicable" to the PAGA claim in the present action. Uber fails to note, however, that its own arbitration provision treats PAGA claims differently than any other type of claim. The arbitration provision in Uber's agreement with Adolph purports to waive all representative PAGA claims, gives the courts the exclusive jurisdiction to consider whether the waiver is valid, and requires that any PAGA claims be resolved in court and not in arbitration. Although the arbitration provision does not explicitly grant to the courts the authority to determine whether a PAGA claimant is an aggrieved employee, the provision's retention of all other authority over a PAGA claim in the court makes this a fair inference.

The issue whether a plaintiff's status as an aggrieved employee of Uber should be decided by the court or an arbitrator was decided against Uber in *Rosales v. Uber Technologies, Inc.* (2021) 63 Cal.App.5th 937. The court in *Rosales* relied on the opinions in *Provost v. YourMechanic, Inc., supra*, 55 Cal.App.5th 982 and *Contreras v. Superior Court, supra*, 61 Cal.App.5th 461, and held that Uber's arguments did not

compel the court to depart from those authorities. (*Rosales v. Uber Technologies, Inc.*, *supra*, at p. 942.)

Uber cites several federal cases in support of its argument that the issue of arbitrability should have been decided by an arbitrator, rather than the court. (See *Ali v. Vehi-Ship, LLC* (N.D.Ill., Nov. 27, 2017, No. 17 CV 02688) 2017 U.S.Dist. Lexis 194456; *Richemond v. Uber Technologies, Inc.* (S.D.Fla. 2017) 263 F.Supp.3d 1312, 1317; *Lamour v. Uber Technologies, Inc.* (S.D.Fla., Mar. 1, 2017, No. 1:16-CIV-21449-Martinez/Goodman) 2017 U.S.Dist. Lexis 29706.) Uber also cites cases in which the courts decided that issues of misclassification of an employee must be resolved before substantive issues can be addressed. (See *Johnston v. Uber Technologies, Inc.* (N.D.Cal., Sep. 16, 2019, No. 16-cv-03134-ECM) U.S.Dist. Lexis 161256; *Sakyi v. Estee Lauder Companies, Inc.* (D.D.C. 2018) 308 F.Supp.3d 366, 382; *Ali v. Vehi-Ship, LLC, supra*; *Lamour v. Uber Technologies, Inc., supra.*) In addition to being counter to California authority, these cases address the arbitrability and enforceability of an arbitration clause against a claim under the federal National Labor Relations Act or other federal law, not California's PAGA.[1]

The United States Supreme Court heard arguments on March 30, 2022, in the case of *Viking River Cruises, Inc. v. Angie Moriana*, case no. 20-1573 (*Viking*). In *Viking,* employee Moriana signed an arbitration provision before starting work for Viking

---

[1] Uber also cites *Mohamed v. Uber Technologies, Inc.* (9th Cir. 2016) 848 F.3d 1201 for the proposition that the arbitration provision applies to the determination of all arbitrability questions. But Uber fails to fully cite the case. The full quote (a part of which is cited on page 34 of appellant's opening brief), reads: "The 2014 Agreement clearly and unmistakably delegated the question of arbitrability to the arbitrator under all circumstances. Neither delegation provision was unconscionable. Thus, all of Plaintiffs' challenges to the enforceability of the arbitration agreement, save *Gillette's challenge to the enforceability of the PAGA waiver in the 2013 Agreement*, should have been adjudicated in the first instance by an arbitrator and not in court." (*Id.* at p. 1208, italics added.) That opinion also reads: "The question of arbitrability as to all but Gillette's PAGA claims was delegated to the arbitrator." (*Id.* at p. 1206.)

River Cruises. The provision required arbitration of any dispute arising out of her employment, and prohibited class or representative actions or private attorney general proceedings. Moriana later brought a single PAGA claim against Viking River Cruises; the trial court denied Viking River Cruises's petition to compel an individualized arbitration, the appellate court affirmed, and the California Supreme Court denied a petition for review. The question presented by the petition for writ of certiorari is: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA."

The *Viking* petition seemingly acknowledges how this court must rule in the present case given the current state of the law: "The time is right for this Court to put an end to this unfairness by reviewing and rejecting the *Iskanian* rule. The decision below and its refusal to budge in light of *Epic* make clear that no matter how clearly this Court underscores the importance of the FAA and enforcing parties' agreements to arbitrate bilaterally, the California courts will stick with *Iskanian* unless and until this Court directs them otherwise. Only this Court can check California's insistence that there is something special about representative PAGA actions that places them outside the scope of [*AT&T Mobility LLC v.*] *Concepcion* [(2011) 563 U.S. 333], outside the scope of *Epic*, and outside the scope of the FAA."

Unless and until the United States Supreme Court or the California Supreme Court directly overrules it, the courts of this state must follow the rule of *Iskanian* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), which establishes that the trial court did not err by concluding that the initial issue of whether Adolph can pursue a PAGA claim as an aggrieved employee must be decided by the trial court, not an arbitrator.

DISPOSITION

The orders are affirmed. Respondent to recover costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.

PROOF OF SERVICE

I, the undersigned, state: I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is LITTLER MENDELSON, P.C., 333 Bush Street, 34th Floor, San Francisco, California 94104. On May 20, 2022, I served the foregoing document(s) described as:

PETITION FOR REVIEW

On the following parties:

Aashish Y. Desai, Esq.
Adrianne De Castro, Esq.
DESAI LAW FIRM, P.C.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626
Tel: (949)614-5830
Fax: (949)271-4190
aashish@desai-law.corn
adrianne@desai-law.com
sonia@desai-law.com
Attorneys for Plaintiff and Aggrieved Employees

Andrew P. Lee (SBN 245903)
David Borgen, Of Counsel (SBN 099354)
Mengfei Sun (SBN 328829)
GOLDSTEIN, BORGEN, DARDARIAN & HO
155 Grand Avenue, Suite 900
Oakland, CA 94612
Tel: (510) 763-9800
Fax: (510) 835-1417
alee@gbdhlegal.com
dborgen@gbdhlegal.com
msun@gbdhlegal.com
Attorneys for Plaintiff and Aggrieved Employees

California Court of Appeals 4th District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

VIA ELECTRONIC SERVICE VIA TRUEFILING: I caused the above-entitled document(s) to be served through the Court of Appeal, First Appellate District's Electronic Filing System, TrueFiling, at the website https://www.truefiling.com, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

Orange County Superior Court
HON. KIRK NAKAMURA
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

VIA U.S. MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with Littler Mendelson, P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 20, 2022 at Clayton, California.

Maria R. Flores

4861-0926-2367.7 / 073208-1840

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Uber Technologies, Inc. v. Erik Adolph**
Case Number: **TEMP-P7EMWEDS**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **sbehnia@littler.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Adolph - 5.20.22 - Petition for Review to CA Supreme Ct.

Service Recipients:

Person Served	Email Address	Type	Date / Time
Aashish Y. Desai	aashish@desai-law.corn	e-Serve	5/20/2022 2:31:01 PM
Adrianne De Castro	adrianne@desai-law.com	e-Serve	5/20/2022 2:31:01 PM
Adrianne De Castro 187394	sonia@desai-law.com	e-Serve	5/20/2022 2:31:01 PM
Andrew P. Lee 245903	alee@gbdhlegal.com	e-Serve	5/20/2022 2:31:01 PM
David Borgen 099354	dborgen@gbdhlegal.com	e-Serve	5/20/2022 2:31:01 PM
Mengfei Sun 328829	msun@gbdhlegal.com	e-Serve	5/20/2022 2:31:01 PM
Andrew Spurchise 245998	aspurchise@littler.com	e-Serve	5/20/2022 2:31:01 PM
Anthony Ly 228883	Aly@littler.com	e-Serve	5/20/2022 2:31:01 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/20/2022

Date

/s/Sophia B. Collins

Signature

B. Collins, Sophia (289318)

Last Name, First Name (PNum)

Littler Mendelson, PC

Law Firm