IN THE SUPREME COURT OF CALIFORNIA

LAURO SANCHEZ,

Plaintiff/Respondent,

v.

MC PAINTING,

Defendant/Appellant.

PETITION FOR REVIEW

On Review from the Court of Appeal for the Fourth Appellate District, Division One, Court of Appeal Case No. D078817

Justices Dato, Haller, and Irion

After an Appeal from the Superior Court of San Diego County
The Honorable Timothy B. Taylor, Dept. C-72, (619)450-7072
Case No. 37-2020-00030754-CU OE-CTL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

Pursuant to California Rules of Court, Rule 8.208, Appellant MC Painting, identifies the following entities and persons that have either: (1) an ownership interest of 10 percent or more in the party filing this certificate (Cal. Rules of Court, Rule 8.208, subd. (e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, Rule 8.208, subd. (e)(2)):

Names of Interested Entity/Person

1. Kerry Lewis
2. Michael Lewis

Nature of Interest

Owners of MC Painting

DATED: May 27, 2022

Respectfully submitted,

FINCH, THORNTON & BAIRD, LLP

By */s/ Marlene C. Nowlin*
CHAD T. WISHCHUK
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I

ISSUES PRESENTED FOR REVIEW

MC Painting presents the following issues for review:

1. Do courts have a duty to balance all competing interests when asked to stay or hold a case in abeyance pending an imminent U.S. Supreme Court ruling that could reverse applicable law?

2. Do the interests of justice require that cases, including MC Painting's, be stayed or held in abeyance pending an imminent U.S. Supreme Court ruling that could reverse applicable law?

II

WHY THE COURT SHOULD GRANT REVIEW

This petition raises two questions of statewide importance regarding a court's duties pending an imminent U.S. Supreme Court ruling that could reverse existing law. Review under Rule of Court 8.500(b)(1) is needed to guide courts in light of *Viking River Cruises, Inc. v. Moriana* (No. 20-1573) (cert. granted Dec. 15, 2021) ("*Viking Cruises*").[1] *Viking Cruises* will determine whether trial courts and Courts of Appeal state-wide must enforce bilateral arbitration under the FAA notwithstanding plaintiffs' representative claims under the California Private Attorneys Generals Act ("PAGA") by answering this question: Is the "*Iskanian* rule" preempted by the FAA?[2]

[1] See U.S. Supreme Court Grant of Cert. citing *Iskanian v. CLS Transp. Los Angeles*, LLC, 327 P.3d 129 (Cal. 2014) ("Grant of Cert.," Attachment A). The Court of Appeal took judicial notice of the Grant of Cert. on April 22, 2022. (Attachment B, Court of Appeal Opinion ("Opinion"), p. 8.)

[2] The *Iskanian* Rule was established in *Iskanian v. CLS Transp. Los Angeles*, LLC, 327 P.3d 129 (Cal. 2014) ("*Iskanian*").

Like *Viking Cruises*, the present and numerous other representative PAGA cases involve a PAGA cause of action and a valid arbitration agreement governed by the FAA where, based on the *Iskanian* rule, courts denied bilateral arbitration despite the employee's waiver of the right to pursue a representative PAGA claim (collectively "PAGA Cases"). Therefore, if *Viking Cruises* holds the *Iskanian* rule is preempted by the FAA, defendants in numerous pending PAGA Cases would be entitled to halt state court litigation and compel bilateral arbitration under the FAA. Consequently, unless PAGA Cases are stayed or held in abeyance, parties would be forced to needlessly litigate issues in state court that are ultimately sent to arbitration. This would, in effect, deny the parties and the courts economic and other benefits of arbitration under the FAA.

Accordingly, in the interests of justice, MC Painting and other litigants have requested that PAGA Cases be held in abeyance and/or stayed or deferred until after the high court decides *Viking Cruises*. While some Courts stayed or deferred PAGA Cases, others, including the Court of Appeal here, refused to do so without balancing the competing interests. (See Opinion, p. 6.) Contrary to the Court of Appeal's conclusory ruling, courts are not free to disregard a U.S. Supreme Court grant of certiorari forecasting that existing law on issues raised by the litigants is about to be reversed. Under these circumstances, courts have a responsibility to, at a minimum, consider, analyze, and balance all competing interests and provide the parties with their reasoning. This was not done in MC Painting's case.

Given the potential waste of litigant and judicial resources and resulting loss of crucial benefits of arbitration under the FAA, courts need guidance on their duties to balance the interests and stay or defer decisions when faced with an imminent U.S. Supreme Court decision that could alter applicable law. These are important issues of law that critically affect the rights of the parties. There is a lack of uniformity at the trial and appellate levels on these issues.

Accordingly, the Court should grant review to establish the duties and clarify the law for trial courts and reviewing courts alike. Alternatively, MC Painting asks the Court to grant review and hold this case to await the outcome of *Viking Cruises.*

III

BACKGROUND

A. The Sanchez PAGA Action

MC Painting is a California corporation engaged in commercial and industrial painting. (CT 0078.)[3] Although its principal place of business is in California, MC Painting also performs work in Nevada, Arizona, Oregon, and Hawaii. (*Id*.) Sanchez is a former employee who began working for MC Painting on February 2, 2018. MC Painting regularly enters into arbitration agreements with its employees. Arbitration allows both sides to timely and efficiently resolve their disputes and to significantly reduce costs as compared with traditional litigation. (*Id*.) MC Painting relies on the principles

[3] References to the Clerk's Transcript submitted to the Fourth Appellate District will be in the following format: CT [Page].

embodied in the Federal Arbitration Act ("FAA") and the U.S. Supreme Court's consistent affirmation of the FAA when it enters into arbitration agreements with its employees such as Sanchez.

When he was hired, Sanchez was provided and signed an Arbitration Agreement ("Agreement") which, in relevant part, provides as follows:

> In connection with any dispute, claim or controversy ("Claim(s)") arising out of or in any way related to the employment, or having any relationship or connection whatsoever with the employment of (including the termination thereof), or the association between…the Parties agree to submit the Claims(s) to binding arbitration by JAMS pursuant to its then-effective rules for employment arbitration
>
> . . . .
>
> All issues and questions concerning the construction, validity, enforcement, and interpretation of this Agreement shall be governed, and construed in accordance with the Federal Arbitration Act, 9 U.S.C., Sec. 1, *et seq.*, without giving effect to any conflict of law. . . . **The Parties each further understand that they are knowlingly and voluntarily waiving their right to a jury trial.** Employee agrees Employee is waiving the right to bring, or to participate in a class action, representative action, or collective action, whether filed in a court of law or in arbitration, against Company ("Class Action Waiver"). The Parties agree that any arbitration will proceed on an individual basis. No other parties or their claims shall be joined, nor shall the arbitrator shave authority to do so . . . .

(CT 0079, 0083 [emphasis in original.)

After his employment with MC Painting ended, Sanchez ignored the Agreement by filing a lawsuit with the San Diego County Superior Court alleging class and individual claims for "general unpaid wages," "prejudgment interest on any unpaid compensation," "liquidated damages," "unpaid minimum wages," "unpaid overtime compensation," "unpaid meal period wages," and "prejudgment interest on any unpaid compensation." (CT 0007-0033.) Thereafter, Sanchez filed a dismissal of all class and individual claims ("Dismissal"), followed by a First Amended Complaint ("FAC"). (CT 0034, 00174, 00176.)

The FAC asserts a sole PAGA cause of action. Pursuant to the Agreement, MC Painting filed its Petition to Compel Arbitration supported by a Memorandum In Support of the Petition and a declaration from MC Painting's Chief Executive Officer, Kerry Lewis (CT0065-0144.) Sanchez filed his Opposition on or about March 15, 2021. (CT0146-155.) The Opposition admitted as follows:

> The parties in this matter do not dispute the existence of an arbitration agreement between Plaintiff and Defendant or that the agreement states the arbitration shall be governed by the Federal Arbitration Act. In fact, on October 23, 2020, after reviewing the arbitration agreement, Plaintiff agreed to request dismissal of class and individual allegations without prejudice so that he can proceed under PAGA only. (CT 0147.)

Relying on *Iskanian*, Sanchez then argued that the Agreement cannot be enforced. (Id.) MC Painting filed its Reply in support of MC Painting's Petition on May 25, 2021. (CT 016.)

B. The Order Appealed From

Relying on the *Iskanian* rule, the trial court denied MC Painting's Petition To Compel Arbitration on April 2, 2021, on the grounds that: (a) once the class and individual allegations were dismissed only the representative PAGA claim remained; (b) the state is the owner of the PAGA claim; and (c) there is no evidence that the state consented to arbitration. (CT 0169-0171.) MC Painting timely filed and served its Notice of Appeal on April 13, 2021. (CT173.)

C. The U.S. Supreme Court Granted Certiorari On The Same FAA Preemption Question Presented Here and In Numerous Other PAGA Cases

On December 15, 2021, the U.S. Supreme Court granted certiorari in *Viking Cruises* to decide the same FAA preemption issue presented by MC Painting and numerous other PAGA Cases: Whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA. (See Grant of Cert, MJN, Exhibit 2.) The grant of certiorari in *Viking Cruises* states:

> In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), this Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements are fully enforceable under the Federal Arbitration Act ("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. The FAA allows the parties not only to choose arbitration but to retain the benefits of arbitration by maintaining its

> traditional, bilateral form. While California courts follow *Concepcion* and *Epic* when a party to an individualized arbitration agreement tries to assert class-action claims, they refuse to do so when a party to such an agreement asserts representative claims under the California Private Attorneys General Act ("PAGA"), which—like a class action—allows aggrieved employees to seek monetary awards on a representative basis on behalf of other employees. See *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). As a result, *Concepcion* and *Epic* have not caused bilateral arbitration to flourish in California, as this Court intended, but have merely caused FAA-defying representational litigation to shift form.
>
> The question presented is: Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

("Grant of Cert.," Attachment A [emphasis added].)

D. The Court Of Appeal's Decision

MC Painting asked the Court of Appeal to reverse the trial court's April 2, 2021 order or, alternatively, defer its decision until after *Viking Cruises* is decided. (See, e.g., AOB 13, 31-32, Reply Br. P. 8, 10-13, and MJN.)[4] MC Painting's Opening Brief presented this

[4] References to Appellant's Opening Brief in the Court of Appeal will be in the following format: AOB [Page]. References to Appellant's Reply Brief will be in the following format: Reply Br. [Page]. References to Appellant's Motion for Judicial Notice will be as follows: MJN.

issue: "Whether [the Court of Appeal] should hold this appeal in abeyance until after the United States Supreme Court decides *Viking Cruises*." (See, AOB 14.)

MC Painting also asked the Court of Appeal to take judicial notice of *Viking Cruises*. (MJN, Rep. Br. 6, fn2.) The Court of Appeal took judicial notice of *Viking Cruises* but summarily refused to defer its decision stating:

> MC Painting asks that we "hold" this appeal "in abeyance" until the Supreme Court decides *Viking River Cruises*. However, under stare decisis we do not have the discretion to question whether *Iskanian* was correctly decided and we are duty bound to apply it in this appeal unless and until the United States Supreme Court declares it to be an incorrect statement of federal law. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Obviously, MC Painting can continue to raise this issue as it pursues the appellate process.

(Opinion, p. 6 [emphasis added.]

In this way, the Court of Appeal affirmed the trial court's order based on *Iskanian*, commenting that MC Painting can continue to raise these issues to this Court. (*Id*.)

IV

DISCUSSION

A. Courts Have a Duty To Balance The Interests Pending Imminent Binding Decisions of the U.S. Supreme Court

The U.S. Supreme Court is about to decide a critical federal preemption issue which will profoundly impact this and numerous pending PAGA Cases: Whether the FAA preempts the *Iskanian* Rule

which holds that an agreement that waives an employee's right to bring a PAGA representative action is unenforceable. (Grant of Cert., MJN, Exhibit 2.) The U.S. Supreme Court's pointed statements granting certiorari in *Viking Cruises* forecast the *Iskanian* rule may soon be overturned and preempted by the FAA. (*Id*.)

The grant of certiorari in *Viking Cruises* warns that courts are not free to disregard "traditional individualized arbitration" by applying rules like PAGA "that demand collective or representational adjudication of certain claims." (*Id*.) If the U.S. Supreme Court rules that the FAA preempts the *Iskanian* rule as forecasted, MC Painting, and numerous other defendants in PAGA Cases, would be entitled to enforce their arbitration agreements and compel plaintiffs to arbitrate PAGA Cases on an individual basis, rather than as representatives on behalf of other employees.[5] Here, Sanchez admits MC Painting's appeal presents the same question about to be decided in *Viking Cruises.* (Respondent's Brief ("RB"), p. 15, 36-37.) Thus, there is no dispute *Viking Cruises* will be binding here and in numerous other PAGA Cases.

[5] State courts applying federal law are bound by decisions of the U.S. Supreme Court. (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 ("*Elliott*").) If U.S. Supreme Court precedent directly applies to a case involving a federal question, the state court should follow that case, even if it appears that the reasons for the precedent-setting decision have been rejected in some other line of decisions. (*Scheiding v. General Motors Corp.* (2000) 22 Cal. 4th 471, 478 ("*Scheiding*")).

In sum, *Viking Cruises* will be outcome-determinative in this and many pending PAGA Cases where the named plaintiff signed an arbitration agreement subject to the FAA that waives the right to bring representative PAGA claims. Forcing litigants to proceed with PAGA Cases in court now, and then a second time in arbitration should *Viking Cruises* overturn the *Iskanian* rule, would completely frustrate the FAA's "overarching purpose" which is to allow parties to opt into "efficient, streamlined procedures tailored to the type of dispute." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344-345 ("*Concepcion*").)

Based on the grant of certiorari in *Viking Cruises*, the Court of Appeal and other courts in PAGA Cases should balance all competing interests pending the outcome of binding U.S. Supreme Court cases like *Viking Cruises* and stay cases or defer decisions. (*Landis v. N. Am. Co.* (1936) 299 U.S. 248, 254-255 ("*Landis*")].) (Emphasis added.) Despite cases like *Landis* and *Concepcion*, courts, including the Court of Appeal here, are not balancing the competing interests but rather are summarily denying requests to stay or defer rulings in PAGA Cases. The courts require guidance on these issues.

1. Balancing the Interests And Deferring Decisions Pending an Imminent U.S. Supreme Court Ruling Is Consistent With A Court's Inherent Duties

As this Court previously acknowledged:

> It is well established, in California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial

> proceedings that are pending before it, and that one important element of a court's inherent judicial authority in this regard is "the power … to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."

(*People v. Engram* (2010) 50 Cal.4th 1131, 1146 ("*Engram*") [quoting *Landis, supra,* 299 U.S. 248, 254-255.) (Emphasis added.)

Despite cases like *Engram* and *Landis*, the Court of Appeal summarily denied MC Painting's request to hold its decision in abeyance on the ground that it cannot disagree with binding California Supreme Court precedent. (Ct. of Appeal Opinion, p. 6.) Contrary to the Court's contention, MC Painting's request to hold its appeal in abeyance did not require the Court to disagree with binding precedent. Instead, MC Painting asked the Court of Appeal to defer to whatever the U.S. Supreme Court decides in *Viking Cruises*. (See, e.g., AOB 13, 14, 31-32 and Reply Br. P. 8, 10-13.)

In light of the potential case-altering impact of *Viking Cruises* on this and other PAGA Cases, courts have a responsibility to balance all competing interests and to defer to *Viking Cruises*. (*Id*.) Despite cases like *Landis*, however, the Court of Appeal sidestepped its duty to do so. (Opinion, p. 6.) Some trial courts have similarly refused to balance the interests and stay PAGA Cases despite *Viking Cruises's* potential impact on the rights of the parties. (See, e.g., *Medrano v.*

Windsor Gardens Healthcare Ctr. of Fullerton, LLC, No. 30-2021-01179331-CU-OE-CXC, slip op. at 2 (Orange Super. Ct. Feb. 25, 2022) (Claster, J.).)

In contrast, other trial courts have concluded that due to *Viking Cruises*, absent a stay, there is real risk that the parties to PAGA Cases will needlessly litigate an issue that is ultimately sent to arbitration. (See, e.g., *Caldera v. Glasswerks LA, Inc*., No. 20STCV45749 (L.A. Super. Ct. Mar. 4, 2022) (Hammock, J.) (tentative affirmed by court) ("Caldera").) Those courts have expressed that "needlessly litigating the claims" would result in "significant waste." (*Abreau v. Prospect Med. Holdings, Inc.*, No. 20STCV21447, slip op. at 3 (L.A. Super. Ct. Feb. 28, 2022) (Murphy, J.) ("*Abreau*"); *McKillop v. OneHalloweenNight, Inc.*, No. 34-2017-00206815-CU-OE-GDS, slip op. at 5 (Sacramento Super. Ct. Feb. 23, 2022) (Sueyoshi, J.) ["[J]udicial economy and substantial justice compel the determination that this matter be stayed pending a decision in the U.S. Supreme Court."]); *Canakie v. Safran Cabin, Inc.*, No. 30-2021-01222644-CU-OE-CXC (Orange Super. Ct. Jan. 27, 2022) (Wilson, J.) (accord).)

There is a lack of uniformity among trial and appellate courts regarding their inherent responsibilities pending a U.S. Supreme Court ruling that could reverse applicable law. This is an important issue which requires the Court's guidance.

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2. There Is Real Risk Litigants Will Lose the Benefits of FAA Arbitration Unless Courts Balance All Competing Interests And Defer Or Stay PAGA Cases

MC Painting's request that the Court of Appeal hold its decision in abeyance pending the outcome of *Viking Cruises* triggered the Court of Appeal's duty to analyze and balance all competing interests. *(Engram, supra*, 50 Cal.4th at 1146; *Landis, supra*, 299 U.S. at 254-255.) The Court of Appeal failed to do so. Rather than provide a reasoned balancing of the competing interests, the Court of Appeal, in effect, ordered MC Painting to defend Sanchez's representative PAGA claim in court now despite the real risk that it may litigate the same claim, again, in arbitration following *Viking Cruises*. (Opinion, p. 6.) Litigating the claims twice would deny MC Painting the economic benefits of traditional, bilateral arbitration and cause significant waste of judicial resources. (*Concepcion, supra,* 563 U.S. at 344-345, *Engram, supra*, 50 Cal.4th at 1146; *Landis, supra*, 299 U.S. at 254-255.) Such a result is directly contrary to the principles set forth in *Engram* and *Landis*.

Moreover, plaintiffs like Sanchez will suffer no prejudice by a deferral. Sanchez's sole remaining cause of action is a "representative claim," for which he claims to be acting as a "a *qui tam* proxy authorized by the State of California" to seek only civil penalties. (RB at 27.) Thus, there is no urgency to resolve MC Painting's appeal prior to the U.S. Supreme Court's decision in *Viking Cruises* especially given the significant expenditure of judicial and litigant

resources required to resolve this appeal in court now. Such expenditure of resources would be unnecessary and wasteful if the high court overturns the *Iskanian* Rule and requires enforcement of bilateral arbitration agreements governed by the FAA. Therefore, the interests of judicial economy and substantial justice required that these interests be considered and that MC Painting's appeal be held in abeyance pending the outcome of *Viking Cruises*. (See *Engram, supra,* 50 Cal.4th at 1146, *Landis, supra,* 299 U.S. at 254-255.)

Courts of Appeal regularly balance the interests and hold cases in abeyance pending resolution of another case, decision, writ petition, or other external factor that could moot or dispose of issues on appeal. (See, e.g., *City of Dana Point v. California Coast Com.* (2013) 217 Cal.App.4th 170, 209 [appeals held in abeyance because final resolution of issues in related consolidated case may moot the issues raised on appeal.]; *People v. Bennet* (1998) 17 Cal.4th 373, 381-382 [appeal held in abeyance pending the outcome of hearing on an order to show cause.]; *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 589-590 [consolidated appeals and cross-appeal held in abeyance until receipt of notice of a city resolution]; *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 301, fn.6 [Court of Appeal deferred consideration of the appeal of trial court's denial of class certification, as "that appeal would become moot upon the finality of this decision"]; *Mediterranean Exports, Inc. v. Superior Court of San Mateo County* (1981) 119 Cal.App.3d 605, 611 [appeal held in abeyance pending disposition of a writ proceeding].)

Ninth Circuit courts similarly balance the interests and decide to stay further proceedings after the Supreme Court grants review in FAA preemption cases. (See, e.g., *Hughes v. S.A.W. Entmt, Ltd.*, 2017 WL 6450485, at *2-10 (N.D. Cal. Dec. 18, 2017) (staying proceedings after the Supreme Court granted review in *Epic Systems Corp. v. Lewis*); *Robledo v. Randstad* US, L.P., 2017 WL 4934205, at *1-6 (N.D. Cal. Nov. 1, 2017) (same); *McElrath v. Uber Techs., Inc.*, 2017 WL 1175591, at *5-7 (N.D. Cal. Mar. 30, 2017) (same); Alvarez v. T-Mobile USA, Inc., 2010 WL 5092971, at *3 (E.D. Cal. Dec. 7, 2010) (staying proceedings after the Supreme Court granted review in *AT&T Mobility LLC v. Concepcion*, and citing several other cases doing the same).[6]

Other courts have similarly balanced the interests and held appeals and cases in abeyance pending a U.S. Supreme Court decision. (See *In re Embry* (6th Cir. 2016) 831 F.3d 377, 382 ("*Embry"*) [granting motion to hold case in abeyance pending decision of U.S. Supreme Court decision on the same key constitutional issues]; *Chowdhury v. WorldTel Bangl. Holding, Ltd.* (2nd Cir. 2014) 746 F.3d 42, 47-48 [resolution of appeal held in abeyance pending the high court's review of a petition for certiorari on similar issues in another in-circuit case which was later granted]; *Winters v. United States* (D.S.D., Feb. 28, 2019), CIV 16-5052/CR 03-50003, 2019 U.S. Dist. LEXIS 32171, at *3-4 [granting

[6] The *Iskanian* Court relied on *EEOC v. Waffle House, Inc*. (2002) 534 U.S. 279 ("*Waffle House*") conceding federal authority must be considered on FAA preemption issues.

government's request to hold case in abeyance after the high court granted a petition for writ of certiorari arising from a case on the same issues out of the North Carolina Eastern District court]; see also *Preferred Care Partners Mgmt. Grp., L.P. v. Alexander* (Ky. Ct. App. 2017) 530 S.W.3d 919, 921-22 [held appeal in abeyance "out of an abundance of caution and judicial economy," after the U.S. Supreme Court granted certiorari in three related cases involving similar issues of arbitrability].)

Soon, the U.S. Supreme Court will answer this critical question: Does the FAA preempt the *Iskanian* Rule? If so, MC Painting, and numerous other PAGA Case defendants, are entitled to enforce their arbitration agreements by compelling plaintiffs to arbitrate on an individual basis, rather than in court as PAGA representatives on behalf of other employees. (See Grant of Cert., MJN, Exhibit 2.) After the Supreme Court resolves these questions, courts will be well positioned to handle PAGA Cases fairly and efficiently. However, if PAGA Cases are not stayed or held in abeyance, the U.S. Supreme Court's invalidation of the *Iskanian* rule may come too late and litigants entitled to the benefits of arbitration may be out of luck. (See, e.g., *Embry*, *supra*, 831 F.3d at 382.)

The Court of Appeal should have performed the above analysis and concluded that MC Painting should not be forced now to litigate a representative PAGA action in court and forego the benefits of arbitration under the FAA and their arbitration agreements. Notwithstanding the foregoing authorities, the Court of Appeal

abrogated its duty to consider, analyze, and balance the interests. (See, e.g., *Engram, supra,* 50 Cal.4th at 1146, *Landis, supra,* 299 U.S. at 254-255.)

V

CONCLUSION

If the U.S. Supreme Court decides that the FAA preempts the *Iskanian* rule, Sanchez and other plaintiffs in PAGA Cases would be required to arbitrate their claims individually. Consequently, unless MC Painting's appeal and other PAGA cases are stayed or deferred, parties could be forced to needlessly litigate issues in state court that are ultimately sent to arbitration. This would negate the benefits of arbitration under the FAA. Therefore, whether courts are duty-bound to balance all competing interests and stay or hold cases in abeyance are important issues that impact courts and litigants statewide.

For each of the foregoing reasons, the Court should grant review to establish the duties and clarify the law for trial and reviewing courts alike. Alternatively, MC Painting asks the Court to grant review and await the outcome of *Viking Cruises*, and then remand for consideration under whatever rule the U.S. Supreme Court sets in *Viking Cruises*.

DATED: May 27, 2022

Respectfully submitted,

FINCH, THORNTON & BAIRD, LLP

By */s/ Marlene C. Nowlin*
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CERTIFICATE OF WORD COUNT

Certificate Of Compliance Pursuant To
California Rules Of Court, Rule 8.204, Subdivision (c)(1)

I certify that:

The attached brief is produced on a computer and consists of 4,150 words as counted by Microsoft Office Word 365, the word-processing program used to generate the brief.

DATED: May 27, 2022

Respectfully submitted,

FINCH, THORNTON & BAIRD, LLP

By */s/ Marlene C. Nowlin*
CHAD T. WISHCHUK
MARLENE C. NOWLIN
Attorneys for Appellant MC Painting

ATTACHMENT A

20-1573 VIKING RIVER CRUISES, INC. V. MORIANA

DECISION BELOW: 2020 WL 5584508

LOWER COURT CASE NUMBER: B297327

QUESTION PRESENTED:

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), this Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements are fully enforceable under the Federal Arbitration Act ("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. The FAA allows the parties not only to choose arbitration but to retain the benefits of arbitration by maintaining its traditional, bilateral form. While California courts follow *Concepcion* and *Epic* when a party to an individualized arbitration agreement tries to assert class-action claims, they refuse to do so when a party to such an agreement asserts representative claims under the California Private Attorneys General Act ("PAGA"), which—like a class action—allows aggrieved employees to seek monetary awards on a representative basis on behalf of other employees. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). As a result, *Concepcion* and *Epic* have not caused bilateral arbitration to flourish in California, as this Court intended, but have merely caused FAA-defying representational litigation to shift form.

The question presented is:

Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

CERT. GRANTED 12/15/2021

ATTACHMENT B

Filed 4/22/22

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAURO SANCHEZ, Plaintiff and Respondent, v. MC PAINTING, Defendant and Appellant.	D078817 (Super. Ct. No. 37-2020-00030754-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Request for judicial notice granted. Order affirmed.

Finch, Thornton & Baird, Chad T. Wishchuk and Marlene C. Nowlin for Defendant and Appellant.

Moon & Yang, Kane Moon, Allen Feghali and Enzo Nabiev for Plaintiff and Respondent.

MC Painting appeals from an order denying its petition to compel arbitration of a Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) action brought by a former employee, Lauro Sanchez. In denying the petition, the trial court followed *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), which held that a worker's right to pursue a representative PAGA action cannot be waived and that this state law rule is not preempted by the Federal Arbitration Act (FAA).

On appeal, MC Painting contends *Iskanian* is no longer controlling because it has been "overruled" by the United States Supreme Court in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (*Epic Systems*). But in *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619–620 (*Correia*) and more recently again in *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 997–998, review denied January 20, 2021, S265736 (*Provost*), other panels of this court rejected that identical claim. We see no compelling reason to depart from these cases.

Alternatively, MC Painting asks that we stay this appeal until the United States Supreme Court decides the FAA preemption issue in *Moriana v. Viking River Cruises, Inc.* (Sept. 18, 2020, B297327) [nonpub. opn.], cert. granted *sub nom. Viking River Cruises v. Moriana* (Dec. 15, 2021, No. 20-1573), ___ U.S. ___ [211 L.Ed.2d 421] (*Viking River Cruises*).) However, we cannot disagree with binding California Supreme Court precedent based on the mere possibility that a future United States Supreme Court decision will overrule *Iskanian*. After also rejecting MC Painting's contention that the trial court abused its discretion by considering Sanchez's tardy opposition papers, we affirm the order denying the petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

MC Painting is in the business of painting, concrete restoration, stucco patching, and related services. In February 2018, it hired Sanchez, who signed a Spanish language arbitration agreement. In English, it states in part:

> "In connection with any dispute, claim, or controversy ('Claim(s)') arising out of or in any way related to the employment, . . . whether based in contract, tort, or statutory duty or prohibition, the Parties agree to submit the Claim(s) to binding arbitration . . . ." [¶] . . . [¶]
>
> "All issues and questions concerning the construction, validity, enforcement, and interpretation of this Agreement shall be governed by, and construed in accordance with, the Federal Arbitration Act . . . . Employee agrees Employee is waiving the right to bring . . . a class action, representative action, or collective action . . . ."

In 2020, Sanchez filed a putative class action complaint against MC Painting alleging wage and hour claims. Later, Sanchez voluntarily dismissed his claims without prejudice, with the exception of a representative PAGA cause of action.[1]

MC Painting petitioned to compel arbitration. Citing *Iskanian*, Sanchez opposed the motion stating, "the California Supreme Court has been abundantly clear that representative PAGA claims are not subject to arbitration." After an unreported hearing, the trial court denied the petition,

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1 The request for dismissal is not in the record on appeal; however, the parties' briefs agree that Sanchez's only remaining claim is a representative PAGA action. (See *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 586, fn. 5 [order sustaining demurrer not in record, but established by the parties' briefs].) Moreover, the order denying the motion to compel arbitration is consistent with the briefs, stating "the class and individual allegations have been dismissed from the [first amended complaint], leaving only the representative PAGA claim."

stating, "*Iskanian* remains good law" and "several appellate courts" have held that a "PAGA plaintiff may not be required to arbitrate" without the state's consent.

DISCUSSION

A. *The Trial Court Correctly Determined That Sanchez's Agreement to Arbitrate Representative PAGA Claims is Unenforceable.*

PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) "The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities." (*Iskanian*, at p. 381.) A PAGA action is, therefore, " ' "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." ' " (*Iskanian*, at p. 387.)

"[A]n arbitration 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." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) This state law is not preempted by the FAA 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 [Labor and Workforce Development] Agency." (*Iskanian,* at p. 384.) If these holdings remain good law, the waiver contained in MC Painting's arbitration agreement is not enforceable.

MC Painting contends *Iskanian* is no longer good law, its FAA preemption holding having been "effectively overruled" by the United States Supreme Court in *Epic Systems*, *supra*, 138 S.Ct. 1612. But we have already

rejected this same contention twice—in *Correia*, *supra*, 32 Cal.App.5th 602 and *Provost*, *supra*, 55 Cal.App.5th at pp. 997–998.

As we explained in *Correia*, the claim in *Epic Systems* differed "fundamentally from a PAGA claim" because the employee there was "asserting claims *on behalf of other employees*," whereas a PAGA plaintiff has "been deputized by the state" to act " 'as "the proxy or agent" of the state' " to enforce the state's labor laws. (*Correia*, *supra*, 32 Cal.App.5th at pp. 619–620.) Because *Epic Systems* did not decide the same question presented in *Iskanian*, the *Correia* court concluded its "interpretation of the FAA's preemptive scope [did] not defeat *Iskanian*'s holding or reasoning for purposes of an intermediate appellate court applying the law." (*Correia*, at p. 620.) *Correia* further held that "[w]ithout the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement." (*Correia,* at pp. 621–622.)

Moreover, as we explained in *Provost*, more than a year after *Epic Systems* was decided, the California Supreme court reaffirmed *Iskanian* in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 (*ZB, N.A.*). (See discussion in *Provost*, *supra*, 55 Cal.App.5th at p. 998.) *ZB, N.A.* cited *Iskanian* with approval, including its holding that an employee's predispute agreement waiving the right to bring a representative PAGA claim is unenforceable and this rule is not preempted by the FAA. (*ZB, N.A.,* at p. 185.) "*Iskanian* established an important principle: employers cannot compel employees to waive their right to enforce the state's interests when the PAGA has empowered employees to do so." (*ZB, N.A.*, at p. 197.) "Because we reaffirm

our conclusion that *Iskanian* has not been overruled, we are bound to follow it." (*Provost*, at p. 998.)[2]

B. *This Appeal Should Not Be Stayed*

In *Viking River Cruises*, the Court of Appeal held that *Epic Systems* did not overrule or invalidate the *Iskanian* rule against PAGA waivers. After the California Supreme Court denied review in *Moriana*, the United States Supreme Court granted certiorari to consider whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative PAGA claims. (*Viking River Cruises, supra,* B297327, cert. granted *sub nom. Viking River Cruises v. Moriana* (Dec. 15, 2021, No. 20-1573) ___ U.S. ___ [211 L.Ed.2d 421].)[3]

MC Painting asks that we "hold" this appeal "in abeyance" until the Supreme Court decides *Viking River Cruises*. However, under stare decisis we do not have the discretion to question whether *Iskanian* was correctly decided and we are duty bound to apply it in this appeal unless and until the United States Supreme Court declares it to be an incorrect statement of federal law. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Obviously MC Painting can continue to raise this issue as it pursues the appellate process.

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2 Other cases uniformly concluding that *Epic Systems* did not overrule *Iskanian* include: *Collie v. Icee Company* (2020) 52 Cal.App.5th 477, 482 review denied November 10, 2020, S264524; *Contreras v. Superior Court of Los Angeles County* (2021) 61 Cal.App.5th 461, 471–472; *Herrera v. Doctors Medical Center of Modesto, Inc.* (2021) 67 Cal.App.5th 538, 549–550; and *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 872.

3 MC Painting's request for judicial notice of the Supreme Court's docket in *Viking River Cruises* and "Question Presented" is granted. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

C. *The Court Did Not Abuse Its Discretion In Considering Sanchez's Late Opposition Papers*

Where, as here, a lawsuit is already pending, a defendant may file a petition to compel arbitration in lieu of filing an answer to a complaint. (Code Civ. Proc., § 1281.7.) MC Painting did so here on December 23, 2020, with a proof of service by mail to an address in California filed the same date. The hearing was scheduled for April 2, 2021. Absent an extension of time, Sanchez's response was due 15 after service—that is, January 7, 2021. (*Id.,* §§ 1290.6, 1013)! But he did not file opposition until March 15, 2021.

Where no timely opposition is filed, the allegations of a petition to compel arbitration are deemed admitted. (*Taheri Law Group, A.P.C. v. Sorokurs* (2009) 176 Cal.App.4th 956, 962 (*Taheri*).) MC Painting invoked that rule, but the trial court allowed the late filing, stating:

> "[E]ven if [Code of Civil Procedure] section 1290.6 applies, the statute specifically allows the court to extend the time for filing an opposition for good cause. [MC Painting] has failed to show that the court has no good cause to consider the late opposition brief or that it has suffered undue prejudice by the tardy filing. To the contrary, it appears that [MC Painting] was able to timely file and serve an 11-page reply on the merits."

In a two-paragraph argument at the end of its opening brief, MC Painting contends that the order should be reversed because Sanchez filed an untimely response. But as the trial court correctly noted, Code of Civil Procedure section 1290.6 expressly allows an extension of time "for good cause"—and MC Painting makes no argument that the trial court abused its discretion in determining good cause existed here.

In any event, the consequence of an untimely opposition is merely that the *factual* allegations in the petition are deemed admitted. The trial court still must draw legal conclusions from those deemed admitted facts. (*Taheri*,

supra, 176 Cal.App.4th at p. 962). Here, the petition alleges: (1) MC Painting is a California corporation; (2) in the construction industry; (3) engaged in interstate commerce; (4) Sanchez signed the arbitration agreement; and (5) the allegations in Sanchez's complaint arise out of or relate to his employment. Even assuming these allegations are deemed true, the court remained free to draw the *legal conclusion* that the arbitration agreement was unenforceable under *Iskanian* as to the representative PAGA claims. Thus, even assuming for the sake of discussion that the trial court abused its discretion in considering late opposition, any such error was harmless.

DISPOSITION

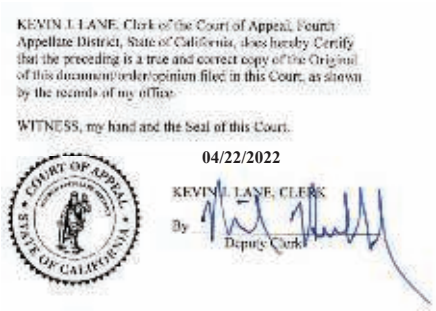
The request for judicial notice is granted. The order is affirmed. Sanchez is entitled to recover costs on appeal.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.


KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

04/22/2022

KEVIN J. LANE, CLERK

By Deputy Clerk

ATTACHMENT C

Filed 5/11/22

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAURO SANCHEZ, Plaintiff and Respondent, v. MC PAINTING, Defendant and Appellant.	D078817 (Super. Ct. No. 37-2020-00030754-CU-OE-CTL) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

THE COURT:

In accordance with California Rules of Court, rule 8.264(a)(2) and (b)(1), on its own motion the court modifies the opinion filed on April 22, 2022 to correct a clerical error as follows:

On page 8, after "WE CONCUR," delete "HALLER, Acting P.J." and replace it with "HUFFMAN, Acting P.J."

There is no change in judgment.

HUFFMAN, Acting P. J.

Copies to: All parties

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

05/11/2022

KEVIN J. LANE, CLERK

By _____, Deputy Clerk

IN THE SUPREME COURT OF CALIFORNIA

LAURO SANCHEZ,

Plaintiff/Respondent,

v.

MC PAINTING,

Defendant/Appellant.

PROOF OF SERVICE

On Review from the Court of Appeal for the Fourth Appellate District, Division One, Court of Appeal Case No. D078817

Justices Dato, Haller, and Irion
After an Appeal from the Superior Court of San Diego County
The Honorable Timothy B. Taylor, Dept. C-72, (619)450-7072
Case No. 37-2020-00030754-CU OE-CTL

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I, Ada Meraz, declare that:

I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California, where the electronic transmission and mailing occurred; and my business address is 4747 Executive Drive, Suite 700, San Diego, California 92121-3107, Email: ameraz@ftblaw.com. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing within Federal Express pursuant to which the correspondence will be deposited with Federal Express this same day in ordinary course of business. I caused to be served the following document. I caused to be served the following document(s): PETITION FOR REVIEW, via electronic mail and by placing a copy thereof in a separate envelope for each addressee listed as follows:

Kane Moon, Esq. Allen Feghali, Esq. Enzo D. Nabiev, Esq. Moon & Yang, APC 1055 West Seventh Street, Suite 1880 Los Angeles, California 90017 Telephone: (213) 232-3128 Facsimile: (213) 232-3125 Email: kane.moon@moonyanglaw.com allen.feghali@moonyanglaw.com enzo.nabiev@moonyanglaw.com	ATTORNEYS FOR RESPONDENT LAURO SANCHEZ (SERVED TRUEFILING)
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Hon. Timothy Taylor, Department C-72 San Diego County Superior Court Civil Division 330 West Broadway San Diego, California 92101-3827	SUPERIOR COURT (SERVED OVERNIGHT DELIVERY)

PROOF OF SERVICE

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For those marked "Served TrueFiling," I transmitted a PDF version of the above document by TrueFiling electronic service. I then sealed the envelope(s) and, either deposited it/each with Federal Express or placed it/each for collection and mailing on May 27, 2022, at, San Diego, California, following ordinary business practices.

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

Executed on May 27, 2022.

Ada Meraz

Ada Meraz

2540.010/3NR5972.axm

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