No. 21-453

IN THE

# Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND RASIER-CA, LLC,

*Petitioners*,

v.

JONATHON GREGG,

*Respondent.*

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

## BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The question presented in this petition is of significant interest to the RLC's members, who have long believed that this issue merits the Court's review and have recently urged the Court to grant certiorari in two other cases presenting the same question. *See Viking River Cruises, Inc. v. Moriana* (No. 20-1573); *Postmates, LLC v. Rimler* (No. 21-119). The California

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[1] Counsel for all parties have consented to the filing of this brief and received timely notice of its filing. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), prevents employers and employees from agreeing that all of their potential claims against each other should be resolved through bilateral arbitration; employees are deprived of the power to make such an agreement with respect to potential claims under the California Private Attorneys General Act (PAGA), no matter how much they might want to trade the right to bring that representative claim for other benefits. Given their rights under federal law, this outcome should be understood as bad for employers and employees alike.

In effect, California has placed its own labor-law claims outside the scope of the Federal Arbitration Act (FAA) by simply designating a part of the recovery as the property of the State. And that is a huge proportion of national labor-law claims: Current U.S. Bureau of Labor Statistics figures show that over 11% of all nonfarm employees in the United States are in California. That means that, when it comes to one of the most critical areas of law for retailers in the Nation's most populous State, there might as well not be an FAA at all.

The Court should not permit this divergence between California and the rest of the States to remain in place. In practice, the situation is no different from one in which there is a deep and entrenched circuit conflict: Nationwide businesses like the RLC's members must learn to accommodate themselves to one set of rules in one jurisdiction, and a different set in another, with no end in sight, despite an on-point federal statute prescribing a single nationwide approach to enforce freely chosen arbitration agreements. And as petitioners ably explain, the *Iskanian* rule is in the

teeth of this Court's decisions in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), precisely because it exempts a set of representative claims from the force of the FAA even though those claims are in effect indistinguishable from the other "class" or "collective" claims that this Court has prevented States from placing off limits when agreeing to individualized arbitration. Pet. 16-20. Absent this Court's intervention, the only way a uniform, nationwide approach to individualized arbitration agreements will emerge is if other States follow California's lead and begin ignoring this Court's precedents as well.[2]

The Court should not delay review on this issue any longer. Indeed, this is not the first petition filed for consideration for the current Term raising the question of whether the *Iskanian* rule should be abrogated by this Court as inconsistent with the FAA. As in this case, the petitioners in *Viking River Cruises* and *Postmates* have asked this Court to consider whether, contrary to *Iskanian*'s view, "the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." 20-1573 Pet. i. And the California Court of Appeal's decision below relied on the same precedent as the decisions in *Viking River Cruises* and *Postmates*—namely, *Iskanian* and *Correia v. NB Baker Electric, Inc.*, 244 Cal. Rptr. 3d 177, 189-90 (Ct. App. 2019). In

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[2] This is not an idle concern: At least seven States have recently considered adopting PAGA-like statutes that mirror the California model. Pet. 25 & n.2; *see also* Braden Campbell, *Calif. Private AG Law: Coming to a State Near You?*, Law360 (Feb. 21, 2020), https://www.law360.com/articles/1245815.

all of these appeals, the California Court of Appeal refused to reconsider *Iskanian* in light of *Epic Systems*, reiterating its view from *Correia* that *Epic Systems* resolved a "different issue" than the PAGA question from *Iskanian*. *Correia*, 244 Cal. Rptr. 3d at 187; *see also* Pet. App. 12a-13a; 21-119 Pet. App. 4a-6a; 20-1573 Pet. App. 5-6. And the petitions in *Viking River Cruises* and *Postmates* raised markedly similar arguments in favor of certiorari as those presented here.

The RLC filed an amicus brief in support of the petitioners in *Viking River Cruises* and *Postmates*, arguing that this Court should review *Iskanian* in light of its FAA precedent. The *Viking River Cruises* petition will soon be scheduled for review at an upcoming conference. *Postmates* will likely be considered during one of the Court's January conferences, and this petition is likely to be considered at the same time. The RLC is thus filing this brief supporting the petitioners as amicus curiae for the same reasons it supported the petitioners in *Viking River Cruises* and *Postmates*. Importantly, the California Supreme Court continues to show no interest in reconsidering *Iskanian*. And the petitioners here ably explain why any further delay in granting review is not justified. Pet. 20-21. Thus, the RLC strongly believes that the Court should grant review in at least one of these cases and ensure that this important question of federal preemption receives the plenary review it requires. In so doing, this Court should reverse the *Iskanian* rule and restore nationwide consistency to the rule that the FAA protects the rights of both employers and employees to affirmatively choose bilateral arbitration over other means of resolving their disputes.

## SUMMARY OF THE ARGUMENT

The RLC files this brief in support of the petitioners, just as it supported petitioners in *Viking River Cruises* (No. 20-1573) and *Postmates* (No. 21-119). The RLC remains deeply concerned about the harm that California's *Iskanian* rule—which, alone among the States, insulates representative claims from bilateral arbitration agreements—does to the uniform enforcement of the FAA. The RLC's prior amicus briefs raised three main concerns, which still necessitate this Court's review:

First, this status quo creates an intolerable inconsistency across different jurisdictions that is fundamentally unfair to businesses (and employees) in California vis-à-vis their competitors in other States. Second, if the Court is interested in reviewing the *Iskanian* rule—and it should be—then the time to do so is now, as future vehicles that reach this Court are likely to present esoteric twists on the question presented, rather than the direct challenge to *Iskanian* that is well-presented here and in the other pending petitions. Third, and finally, California's approach is clearly incorrect, as it violates not only this Court's recent precedents like *Concepcion* and *Epic Systems*, but even older cases that stand for the uncontroversial proposition that States cannot exempt particular kinds of claims from bilateral arbitration agreements without running afoul of the FAA.

Accordingly, this Court should grant certiorari to review either this petition or one of the other pending petitions raising the same challenge to *Iskanian*, and resolve the palpable tension between *Iskanian* and this Court's cases in favor of its own well-settled approach.

## ARGUMENT

### For The Reasons Described In The RLC's Prior Amicus Briefs In *Viking River Cruises* And *Postmates*, This Court Should Grant Certiorari.

The RLC files this amicus brief in support of petitioners' request for the Court to review the *Iskanian* rule for the same reasons set forth in its earlier briefs in support of a grant in *Viking River Cruises* and *Postmates*. The RLC does not want to burden the Court with a word-for-word duplication of those arguments here. Instead, the Court can refer to those earlier briefs for a more detailed explication of why the business community is seeking certainty regarding the continued viability of the *Iskanian* rule.

1. The RLC files in support of the current petition because nothing about the RLC's views on the issues as presented in those prior briefs has changed in the intervening months. Thus, the RLC believes it is critical to reiterate to the Court the importance of granting certiorari in one of these pending petitions raising identical challenges to *Iskanian*.

Indeed, exactly the same concerns the RLC identified in its prior briefs continue to exist. *Iskanian* has created an intolerable inconsistency between California and all other state and federal jurisdictions regarding the general enforceability of arbitration agreements. *See, e.g.*, 21-119 RLC Amicus Br. at 6-11. *Iskanian*'s exception to the FAA for PAGA claims is not supported by the language of the FAA or this Court's case law. And this unsupported, nationwide inconsistency in treatment of arbitration agreements is exactly the kind of issue this Court has routinely been

required to address through petitions for certiorari. Pet. 6-7, 11-14.

This inconsistency does not just exist amongst the States. Indeed, there are stark differences in how California state courts and federal district courts sitting in California apply *Iskanian* to representative and class claims under PAGA. *See, e.g.*, 21-119 RLC Amicus Br. at 10. This results in different outcomes when a defendant attempts to enforce an arbitration agreement depending on the plaintiffs' choice of forum even within the State.

The uncertainty created by *Iskanian* is plainly disruptive to business interests. Pet. 20-26. *Iskanian* requires California businesses to approach arbitration agreements under two incompatible regimes, placing California businesses at a distinct disadvantage compared to their competitors in other states who operate under the uniform approach to arbitration envisioned by Congress in the FAA.

2. In addition to the practical difficulties created by *Iskanian*, the problematic legal underpinnings of the *Iskanian* rule continue unabated, regardless of its clear conflict with this Court's case law, including *Concepcion*, *Epic Systems*, and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). *See, e.g.*, 21-119 RLC Amicus Br. at 11-13; Pet. 17-23. Indeed, esteemed jurists like Judges N.R. Smith,[3] Callahan,[4] and Bumatay[5] have

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[3] *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 448 (9th Cir. 2015) (Smith, J., dissenting).

[4] Pet. 22.

[5] *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 59 (9th Cir. 2021) (Bumatay, J., concurring), *petition for cert. pending*, No. 21-268 (filed Aug. 20, 2021).

expressed clear discomfort with the continued application of *Iskanian* after *Concepcion* and *Epic Systems*. Pet. 11, 22-23. Because an express circuit or state-court split over the *Iskanian* rule is not possible given the currently unique nature of California's PAGA, *but see* 21-119 RLC Amicus Br. at 3 n.2, the disagreement between judges in the only federal circuit court that currently addresses PAGA further justifies this Court's consideration of the matter.

Importantly, neither the Ninth Circuit nor the California Supreme Court have shown any interest in reconsidering *Iskanian* through a detailed and well-reasoned decision applying *Epic Systems* or *Lamps Plus*. As the petition details (at 21-22), the California Supreme Court has denied petitions seeking review of this exact issue at least nine times since December 2020. And the Ninth Circuit declined to grant rehearing en banc this year in *Rivas*, choosing not to readdress its decision in *Sakkab* after *Epic Systems*. Pet. 22-23. Thus, although this Court has repeatedly reminded state and federal courts that Congress intended to create a consistent, nationwide system for enforcing arbitration agreements, Pet. 6-7, 11-14, both the Ninth Circuit and the California Supreme Court have ignored those warnings. This intransigence strongly implies that these courts will continue to affirm *Iskanian* in the face of future decisions by this Court upholding the FAA—absent a grant and review of the *Iskanian* rule itself.[6]

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[6] Indeed, the Third Appellate District of the California Court of Appeal recently issued a published decision following *Iskanian* in response to arguments raised about the *Iskanian* rule's

Additionally, as the RLC has previously explained, the opportunities for this Court to address *Iskanian* through a clean vehicle will diminish with time, especially if the Court denies certiorari in the multiple pending petitions raising an identical question presented to the one raised here. *See, e.g.*, 21-119 RLC Amicus Br. at 11-16. If the Court were to deny these petitions, companies that have entered into arbitration agreements with employees in California will no longer believe that they have any opportunity for relief from *Iskanian*. That result would place further settlement pressure on companies facing PAGA claims, especially when PAGA claims can often result in massive damages awards for relatively minor technical errors. Pet. 25. Thus, future vehicles that reach this Court will likely raise esoteric or narrower alternatives to the question presented here, making it more difficult for this Court to reach the underlying validity of the *Iskanian* rule itself. Denying certiorari on the pending petitions will also further embolden the California Supreme Court and Ninth Circuit to continue to ignore the issue despite the significant concern surrounding *Iskanian* within the business community and even amongst the judges themselves. Thus, granting certiorari in one of the pending petitions is imperative.

3. This petition is an ideal vehicle to address the *Iskanian* rule. There are multiple petitions currently pending before the Court that ask the Court to consider the validity of *Iskanian*: *Viking River Cruises,*

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viability after *Epic Systems*. *Williams v. RGIS, LLC*, --- Cal. Rptr. 3d ----, 2021 WL 4843560 (Ct. App. Oct. 18, 2021). This further confirms that no Appellate District of the California Court of Appeal is likely to find a reason to depart from *Iskanian* either.

*Inc. v. Moriana* (No. 20-1573), *Postmates, LLC v. Rimler* (No. 21-119), and *Coverall N. Am., Inc. v. Rivas* (No. 21-268).[7] These petitions all raise identical questions presented, and either arise from a California Court of Appeal decision refusing to reconsider *Iskanian* in light of *Epic Systems* and *Lamps Plus*, or from the Ninth Circuit (*Rivas*) reaching the same conclusion.

The present petition is consistent with these other petitions, and also represents an appropriate vehicle to consider the question presented. The Court of Appeal below relied entirely on its previous decision in *Correia* to reject petitioners' argument that *Epic Systems* requires reconsideration of *Iskanian*. Pet. App. 12a-13a. This is the exact same analysis at issue in these other pending petitions. In addition, the petition is narrowly focused, as it only requests that the Court resolve the viability of *Iskanian* even though additional issues were addressed by the Court of Appeal below.[8] Pet. i. Finally, resolving the question

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[7] This Court recently denied certiorari in *DoorDash, Inc. v. Campbell*, No. 21-220, which raised the same question presented. As noted in the petition filed in that case, 21-220 Pet. 17 n.1, however, petitioner DoorDash reached a settlement with PAGA plaintiffs, including the respondent, and the settlement was undergoing approval by the trial court, making that a particularly poor vehicle for resolving the question presented.

[8] Below petitioners raised two challenges regarding the trial court's denial of its motion to compel arbitration. Pet. App. 7a-8a. First, they argued that the issue of whether the respondent is an "aggrieved employee" who could bring a PAGA claim must be resolved by the arbitrator, not the court. *Id.* at 8a-11a. Second, they claimed that *Iskanian* was wrongly decided in light of *Epic Systems*, and that the PAGA waiver signed by respondent was enforceable. *Id.* at 12a-13a. The Court of Appeal rejected

presented is outcome determinative, as invalidating *Iskanian* would require dismissal of respondent's complaint and would require proceedings to move forward through arbitration. Pet. 15-16.

No matter what, the RLC believes that the Court should grant any of the above petitions and address this question presented. Indeed, as petitioners request (at 22 n.1), if the Court chooses to grant certiorari in one of the earlier petitions identified *supra*, such as *Viking River Cruises* or *Postmates*, the RLC agrees that the Court should hold this petition. But any of *Viking River Cruises*, *Postmates*, or the present petition provide the Court with an ideal opportunity to correct *Iskanian* and to remove this unnecessary and unsupported burden from the business community.

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both arguments. *Id.* at 13a. Petitioners have dropped the first argument, and only seek certiorari on the second argument.

## CONCLUSION

This Court should either grant this petition outright or grant review in *Viking River Cruises* (No. 20-1573) or *Postmates* (No. 21-119), and hold this petition pending disposition of one of those petitions.

Respectfully submitted,

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