No. 14-341

IN THE

Supreme Court of the United States

CLS TRANSPORTATION LOS ANGELES, LLC,

Petitioner,

v.

ARSHAVIR ISKANIAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF

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I. Introduction

Review is proper and warranted for three reasons. First, as a threshold matter, jurisdiction is appropriate under 28 U.S.C. § 1257(a) and supported by *Southland Corp. v. Keating*, 465 U.S. 1 (1984) ("*Southland*") and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-85 (1975) ("*Cox Broadcasting*"). Second, review is vital to uphold the preemptive effect of the Federal Arbitration Act ("FAA") and ensure that arbitration agreements are enforced according to their terms. Third, intervention is necessary to quell the growing conflict between state and federal courts on this issue. Thus, this Court should grant certiorari and reverse the California Supreme Court's decision that a waiver of a Private Attorney General Act ("PAGA") representative action in an employment arbitration agreement is unenforceable.

II. The Petition Should Be Granted.

A. This Court Has Jurisdiction To Review The Decision Below.

In an attempt to dissuade this Court from considering the merits of the Petition, Respondent vainly argues that the Court lacks jurisdiction. The law is otherwise.

The judgment of the court below is *final* within the meaning of 28 U.S.C. § 1257(a). A remand by the court below does not strip this Court of its jurisdiction to review the decision. *See, e.g., Cox Broadcasting*, 420 U.S. at 477 - 485. *Cox Broadcasting* instructs that even when a state court decision has been remanded to a lower court, "[t]here are now at least four categories of such cases in which the

Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257." *Id.* at 477. The fourth category described in *Cox Broadcasting* is applicable when reversal of the state court's decision on the federal issue "would be preclusive of any further litigation," and refusal to grant immediate review "might seriously erode federal policy." *Id.* at 482-83. *See also Southland*, 465 U.S. at 6.

The circumstances here fit neatly into the fourth category described in *Cox Broadcasting*. The effect of the judgment below disposes of the federal issue in the case and nullifies a representative action waiver provision in a valid arbitration agreement. Reversal on this issue would preclude further litigation in court as it would necessitate the court below to compel arbitration. In addition, the refusal to grant immediate review would erode federal policy favoring the enforcement of arbitration agreements according to their terms. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.") Moreover, and contrary to Respondent's assertion, delaying review will undoubtedly lead to prolonged litigation, one of the very risks the parties sought to eliminate by contracting for arbitration and expressly waiving the right to class and representative actions. *See Southland*, 465 U.S. at 7-8 ("[T]o delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate.") Respondent invites this Court to speculate that Mr. Iskanian will agree to arbitrate his

individual PAGA claim (unlikely) or that CLS will agree to arbitrate the PAGA representative action (also unlikely). (Respondent's Brief in Opposition, p. 27.) That speculation does nothing to nullify the clear ruling of the California Supreme Court that a PAGA waiver in an arbitration agreement is unenforceable and thus violative of the FAA.

The Court recently accepted jurisdiction of an action in the same procedural posture. *See Carmax Auto Superstores California, LLC v. Fowler*, 134 S.Ct. 1277 (2014) (granting certiorari and issuing a summary disposition, without addressing jurisdiction, vacating and remanding on the issue of whether the FAA preempted a California rule that class action waivers in employment arbitration agreements were invalid). *See also Sonic-Calabasas A, Inc. v. Moreno*, 132 S.Ct. 496 (2011) (granting certiorari and issuing a summary disposition vacating and remanding on issues concerning whether the waiver of a California Labor Commissioner administrative hearing in an employment arbitration agreement was invalid). Indeed, this Court frequently grants certiorari petitions seeking review of state court judgments denying efforts to compel arbitration. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 489 n.7; *Southland*, 465 U.S. at 6-8; *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same). A reversal of this issue in the decision below, that a PAGA waiver is unenforceable in an arbitration agreement, would terminate litigation on the merits of the dispute in favor of arbitration, whereas a failure to immediately review this issue would seriously erode the fundamental policies

of the FAA. *See Southland*, 465 U.S. at 6-7. Accordingly, jurisdiction exists to review the decision below.

B. The California Supreme Court Appears to Misunderstand The Preemptive Effect Of The FAA.

This Court was clear in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013), in instructing courts in California that an arbitration agreement must be enforced according to its terms, and that state "public policy", however noble, is irrelevant. It appears, however, that the California Supreme Court believed that PAGA is a new exception to the rule. In order to ensure a proper application of FAA preemption for the large number of citizens residing in California, certiorari is warranted.

C. The Conflict Between State And Federal Courts Continues To Grow.

During the pendency of this petition, the conflict and confusion in the lower state and federal courts has escalated.

1. Federal Courts

Since the filing of the Petition, several additional federal courts have declined to follow the decision of the California Supreme Court below, explaining that the FAA preempts California law regarding the unenforceability of PAGA waivers. *Lucero v. Sears Holdings Mgmt. Corp.*, No. 3:14-cv-01620, Doc. No. 6 at 7, (S.D. Cal. Dec. 3, 2014) (order granting motion to compel arbitration and stay

action) ("[T]he Court reaches the same conclusion as several other courts on this matter—the FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims."); *Mill v. Kmart Corp.,* No. 14-cv-02749-KAW, 2014 WL 6706017 (N.D. Cal. Nov. 26, 2014) at *7 (order granting Defendant's motion to compel arbitration and stay action) (finding a PAGA waiver enforceable and not "substantively unconscionable" under *Concepcion* and the FAA); *Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13-CV-01619, 2014 WL 4961126 at *11 (E.D. Cal. Oct. 1, 2014) ("It is clear that the majority of federal district courts find that PAGA action waivers are enforceable because a rule stating otherwise is preempted by the FAA and *Concepcion*. As such, this Court holds that representative PAGA waivers are enforceable."); *Langston v. 20/20 Companies, Inc.*, No. 8:14-CV-01360, 2014 WL 5335734 at *7-8 (C.D. Cal. Oct. 17, 2014) (order granting motion to compel individual arbitration of PAGA claims) ("The California Supreme Court's rule against representative PAGA claim waivers treats arbitration agreements disfavorably."); *Chico v. Hilton Worldwide, Inc.*, No. 2:14-cv-05750, 2014 WL 5088240 at *12 - 13 (C.D. Cal. Oct. 7, 2014) (order granting petition to compel arbitration and stay action) ("The Court . . . concludes that the FAA preempts California's rule against PAGA waivers. The "principal purpose" of the FAA is to "ensure that private arbitration agreements are enforced according to their terms ." [*Concepcion*, 131 S.Ct. 1740, 1749]."). *See also Fardig v. Hobby Lobby Stores, Inc.*, No. SAC V 14-00561 JVS (ANx), 2014 WL 4782618 at *4 (C.D. Cal. Aug. 11, 2014).

These federal courts recognize that the California Supreme Court's decision is hostile to arbitration

agreements in direct contravention of the FAA. As the court in *Langston*, No. 8:14-CV-01360, 2014 WL 5335734 at *7-8, explained:

> While concluding that an employee's agreement not to bring a representative PAGA action is contrary to public policy if it takes place before any dispute arises, the [California Supreme Court] nevertheless explained that, after a labor dispute arises, an employee is free to choose not to bring a representative PAGA claim. *See Iskanian,* 327 P.3d at 383. Moreover, after a dispute arises, an employee may agree to "resolve a representative PAGA claim through arbitration." *Id.* at 391. Thus, although the court asserts that the basis for holding representative PAGA claim waivers unconscionable is that an employee cannot waive a right that properly belongs to the government, the court nevertheless acknowledges that an employee may actually sometimes waive the government's right to bring a PAGA claim. *See id.* That inconsistency illuminates the fact that, it is not an individual's ability to waive the government's right that drives the court's rule, but rather the court's general disfavor for pre-existing agreements to arbitrate such claims individually.

As Respondent points out, however, there is also one federal court which follows the decision below. *Martinez v. Leslie's Poolmart, Inc.*, No. 8:14-CV-01481-CAS, 2014 WL 5604974 at *5 ("Although [Defendant] cites to one decision where a court in this district declined to follow *Iskanian,*

that court's reasoning rested on the premise that the FAA would likely preempt a California rule precluding waiver of representative PAGA claims. *See Fardig v. Hobby Lobby Stores Inc.,* 2014 WL 4782618 (C.D.Cal. Aug. 11, 2014). As discussed above, this Court already concluded in *Cunningham* that the FAA does not preempt such a rule, and the Court declines to reconsider that ruling absent binding federal authority to the contrary.") Thus, review here is necessary to provide guidance to federal courts and uphold the majority of federal decisions on this issue. The lower courts are in need of "binding federal authority" that only this Court can provide.

2. State Courts

Meanwhile, unsurprisingly, there have been a series of state court cases following the decision of the California Supreme Court on the issue of preemption of PAGA waivers. *See, e.g., Ramos v. Fry's Electronics, Inc.*, No. B246404, 2014 WL 6269307 at *14 (Cal.App. 2 Dist. Nov. 17, 2014) (unpublished) ("The [*Iskanian*] Court's analysis makes clear that an arbitration provision that precludes representative PAGA claims, but permits individual PAGA claims, is still contrary to public policy and therefore unenforceable."); *Brown v. Superior Court*, No. H037271, 2014 WL 5409196 at *6-7 (Cal.App.6 Dist. Oct. 24, 2014) (unpublished) ("[A]n agreement [to waive a PAGA action] 'is contrary to public policy and unenforceable as a matter of state law.' [*Iskanian*, 59 Cal.4th at 384]."); *Ybarra v. Apartment Investment & Mgmt. Co.*, No. B245901, 2014 WL 4980896 at *2 (Cal.App.2 Dist. Oct. 7, 2014) (unpublished) ("Given the conclusions reached by the California Supreme Court in *Iskanian,* we are bound to find that the representative action waiver in

the parties' arbitration agreement is unenforceable as a matter of law."); *Jones v. J.C. Penny Corp., Inc.*, No. B246674, 2014 WL 4387577 at *6 (Cal.App. 2 Dist. Sept. 5, 2014) (unpublished) ("*Iskanian* holds that an employee cannot waive the right to bring a representative PAGA action. . . . As such, Jones's representative action waiver is unenforceable."); *Bergiadis v. Fed Loya Ins. Agency, Inc.* No. B249276, 2014 WL 5469743 at *8 (Cal.App. 2 Dist. Oct. 29, 2014) ("As an express waiver is prohibited [by *Iskanian*], an implied waiver of PAGA claims cannot be read into the Agreement.")

The decisions are incompatible, and demonstrate the irreconcilable conflict between federal and "state law" on an issue of central importance to the FAA and the U.S. Constitution. This legal quandary is further complicated by the practical effect of promoting forum shopping in removable diversity cases. Allowing this ever-widening rift to grow is "unnecessarily complicating the law and breeding litigation from a statute [the FAA] that seeks to avoid it." *Allied-Bruce Terminix Cos., Inc.,* 513 U.S. at 275. Review therefore is necessary to end the conflict, and to uphold the preemptive effect of the FAA.

III. Conclusion

The California Supreme Court's decision in *Iskanian* has led to inconsistency, uncertainty and confusion in an area of critical importance. This Court has jurisdiction to review this important issue of federal law, and certiorari is warranted.

Respectfully submitted,

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