# The PAGA Preemption Battle Knocking On High Court's Door

By **Felix Shafir, Peder Batalden and John Querio** (August 3, 2021)

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The Court of Appeals of California recently decided Winns v. Postmates Inc.,[1] the latest in a series of cases at the intersection of California wage and hour law and federal arbitration law that highlight the conflict between the California Supreme Court and the U.S. Supreme Court over whether federal law preempts state law in this area.

This conflict is likely to come before the Supreme Court soon.

For years, California courts have been inundated with a flood of wage and hour class actions. These lawsuits often circumvented employment arbitration agreements governed by the Federal Arbitration Act, or FAA, because California courts typically declined to enforce the class action waivers in those agreements.

That began to change, however, with the Supreme Court's 2011 decision in AT&T Mobility LLC v. Concepcion,[2] which held that the FAA requires the enforcement of class action waivers and preempts contrary state rules.

Workers sought to sidestep Concepcion by turning, in ever-growing numbers, to representative actions brought under California's Private Attorneys General Act. PAGA "empowers employees to sue on behalf of themselves and other aggrieved employees to recover civil penalties previously recoverable only by the Labor Commissioner."[3]

This litigation strategy eventually bore fruit in 2014 in Iskanian v. CLS Transportation Los Angeles LLC,[4] where the California Supreme Court decided that California public policy prohibited the enforcement of an arbitration agreement's PAGA representative-action waiver.

Iskanian further concluded that the FAA did not preempt this rule because the FAA applies solely to the arbitration of claims belonging to private parties, whereas PAGA lawsuits are a type of qui tam action in which workers pursue public, not private, claims for relief. In a 2-1 opinion, the U.S. Court of Appeals for the Ninth Circuit subsequently agreed that the FAA did not preempt Iskanian's PAGA rule.[5]

To date, the Supreme Court has not expressly addressed whether the FAA preempts Iskanian's PAGA rule. However, as the number of PAGA representative actions has grown sharply, companies have renewed their preemption challenges to this rule, vigorously arguing that Iskanian and the Ninth Circuit's 2015 decision in Shukri Sakkab v. Luxottica Retail North America Inc. are no longer good law in light of subsequent Supreme Court precedent, such as the 2018 decision in Epic Systems Corp. v. Lewis.[6]

Companies contend this intervening precedent and the FAA requires the enforcement of PAGA representative-action waivers.

California Courts of Appeal have repeatedly rejected this argument, most recently in Winns v. Postmates Inc.[7] But there is a mounting division of opinion between state and federal

judges over Epic's impact. This disagreement has now reached the doorstep of the Supreme Court, which will soon decide whether to take up a new round of preemption challenges to Iskanian's PAGA rule.

**The State-Federal Disagreement Over Iskanian**

Initially, most federal district courts concluded that, under Concepcion, the FAA preempted Iskanian's PAGA rule.[8] But the Ninth Circuit reached a contrary determination in Sakkab — although U.S. Circuit Judg Judge N. Randy Smith dissented based on the same conclusion as the majority of lower federal courts.

Despite the Sakkab majority's endorsement of Iskanian, disagreement has continued to fester between state and federal jurists over the relationship between the FAA and PAGA. This division has only grown since the Supreme Court decided Epic, which concluded that the FAA preempted state rules rendering arbitration provisions unenforceable for requiring individualized arbitration.[9]

Federal judges have recognized the impact of Epic on Iskanian. For instance, in Rivas v. Coverall North America Inc.,[10] the Ninth Circuit recently acknowledged that "tension exists between Supreme Court case law" and Sakkab's endorsement of Iskanian's PAGA rule. U.S. Circuit Judge Patrick Bumatay's concurring opinion expanded on this point, explaining that the tensions between Epic and Sakkab are obvious.[11]

Judge Bumatay emphasized that intervening Supreme Court decisions, including Epic, seriously undermined Sakkab, and Iskanian's PAGA rule now "clearly ... runs afoul of the FAA and must be preempted."[12]

Other federal judges have agreed that it is difficult if not impossible to square Epic with the PAGA rule. For example, in 2020 in McGovern v. US Bank NA[13] U.S. District Judge Cathy Ann Bencivengo explained that "[i]t is difficult to reconcile Epic with Sakkab." And in 2020 in Echevarria v. Aerotek Inc.,[14] U.S. District Judge Beth Labson Freeman noted that Epic "'may foreshadow a reversal of Sakkab" and concluded that "the impact of Epic on Sakkab presents a serious legal question."

In contrast, California courts — including the Court of Appeal's recent decision in Winns v. Postmates — insist that Epic is distinguishable because it involved purely private class and collective claims.[15]

According to such opinions, California courts have uniformly rejected the argument that Epic overruled Iskanian because "the employee in Epic Systems was 'asserting claims on behalf of other employees,' whereas a plaintiff who brings a PAGA action has 'been deputized by the state' to act '"as 'the proxy or agent' of the state"' to enforce the state's labor laws."[16]

Moreover, federal and state courts disagree over whether the FAA applies to PAGA claims regardless of Epic.

Abiding by the California Supreme Court's view that PAGA claims are a type of qui tam action — like those brought under the federal False Claims Act — and thus are law enforcement actions lying outside the FAA's coverage,[17] California appellate courts insist that PAGA claims fall outside the FAA's purview.[18] But there is a conflict among courts over whether qui tam claims — including PAGA claims — are subject to arbitration under the FAA.[19]

Some courts have determined that the named individual who brings a federal qui tam claim on behalf of the government, and who has agreed to arbitrate, can be compelled to arbitrate the qui tam claim under the FAA.[20]

The Ninth Circuit has largely agreed, rejecting the view that PAGA categorically prohibits arbitration,[21] and instead concluding that "an individual employee can pursue a PAGA claim in arbitration" and "can bind the state to an arbitral forum."[22]

California courts take the opposite approach by insisting that, in a PAGA action, the state is the sole real party in interest capable of agreeing to arbitration.[23] They acknowledge "that several federal courts have reached a different conclusion."[24]

But California courts consider those federal cases to be "unpersuasive," and instead they follow conflicting federal decisions suggesting the government is the sole real party in interest in a federal qui tam action.[25]

In short, by maintaining that PAGA claims fall outside the scope of the FAA,[26] California courts have picked a side in a split of authority over whether qui tam claims are subject to arbitration under the FAA, putting them directly at odds with the Ninth Circuit's contrary conclusion that "an individual employee, acting as an agent for the government, can agree to pursue a PAGA claim in arbitration" under the FAA.[27]

**Conflict Over the FAA's Impact on Iskanian Arrives at the Supreme Court**

The Supreme Court has previously declined to review whether the FAA preempts Iskanian's PAGA rule.[28]

But since then, the divisions over the interplay between the FAA and PAGA — and particularly over the impact of the high court's intervening 2018 decision in Epic on Iskanian and Sakkab — have sharpened.

One of the earliest post-Epic cases addressing this issue has now reached the high court via a petition for writ of certiorari filed in 2021 in Viking River Cruises Inc. v. Moriana.[29] In the face of those mounting divisions, the Supreme Court may yet agree to take up the issue in its next term.

In Moriana, the Superior Court denied a motion to compel arbitration in a PAGA action. The California Court of Appeals affirmed, rejecting the argument that Epic invalidated Iskanian.[30]

The defendant petitioned the Supreme Court for a writ of certiorari, asking the high court to decide "[w]hether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA."

Moriana was the first of several such petitions. In 2020 in Provost v. YourMechanic Inc.[31] and Rimler v. Postmates Inc.,[32] the California Courts of Appeal likewise affirmed the denial of motions to compel arbitration in PAGA cases after concluding that Epic did not overrule Iskanian. Both defendants petitioned for writs of certiorari in YourMechanic Inc. v. Provost[33] and Postmates LLC. v. Rimler,[34] respectively.

Additional petitions are likely coming. For example, in Rivas v. Coverall North America, the

Ninth Circuit recently stayed the issuance of the mandate to allow the defendant to petition for a writ of certiorari, signaling that Rivas is headed to the Supreme Court.

Consequently, intermediate appellate court decisions refusing to enforce PAGA representative-action waivers in arbitration agreements — like the recent ruling in Winns v. Postmates — may not be the last word on Iskanian's PAGA rule.

Should the Supreme Court take up one or more of the new FAA preemption challenges to Iskanian, any high court decision mandating the enforcement of PAGA representative-action waivers may stem the torrent of PAGA cases that has followed Iskanian.

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***Disclosure: The authors' firm filed an amicus brief, on behalf of the Washington Legal Foundation, supporting the petition for a writ of certiorari in Viking River Cruises Inc. v. Moriana.***



[1] Winns v. Postmates Inc. , 2021 WL 3046592 (Cal. Ct. App. July 20, 2021).

[2] AT&T Mobility LLC v. Concepcion , 563 U.S. 333 (2011).

[3] ZB, N.A. v. Superior Court , 448 P.3d 239, 243 (Cal. 2019).

[4] Iskanian v. CLS Transportation Los Angeles LLC , 327 P.3d 129 (Cal. 2014).

[5] Sakkab v. Luxottica Retail N. Am., Inc ., 803 F.3d 425 (9th Cir. 2015).

[6] Epic Systems Corp. v. Lewis , 138 S. Ct. 1612 (2018).

[7] Winns v. Postmates Inc., 2021 WL 3046592.

[8] Nanavati v. Adecco USA, Inc . (collecting cases).

[9] See Epic, 138 S. Ct. at 1621–23.

[10] Rivas v. Coverall North America Inc. , 842 F. App'x 55, 56 (9th Cir. 2021).

[11] Id. at 59 (Bumatay, J., concurring).

[12] Id. at 57, 59.

[13] McGovern v. US Bank NA , 362 F. Supp. 3d 850, 862 n.5 (S.D. Cal. 2019) reconsidered on other grounds, 2020 WL 4582687 (S.D. Cal. Aug. 10, 2020).

[14] Echevarria v. Aerotek Inc. , 2019 WL 3207812, at *2 (N.D. Cal. July 16, 2019).

[15] Winns, 2021 WL 3046592, at *4–5.

[16] Id. at *5 (quoting Correia v. NB Baker Elec., Inc ., 244 Cal. Rptr. 3d 177, 187–88 (Cal. Ct. App. 2019)).

[17] Iskanian, 327 P.3d at 147–48, 151.

[18] Correia, 244 Cal. Rptr. 3d at 185, 190.

[19] Id. at 179, 190–91.

[20] E.g., United States ex rel. Hicks v. Evercare Hospital , 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015); Deck v. Miami Jacobs Bus. Coll. Co ., 2013 WL 394875, at *6–8 (S.D. Ohio Jan. 31, 2013).

[21] See Sakkab, 803 F.3d at 434.

[22] Valdez v. Terminix Int'l Co. Ltd. P'ship , 681 F. App'x 592, 594 (9th Cir. 2017).

[23] Correia, 244 Cal. Rptr. 3d at 179, 189–91.

[24] Id. at 179, 190.

[25] Id. at 179, 189–91 (citing Mikes v. Strauss , 889 F. Supp. 746, 755 (S.D.N.Y. 1995), and United States ex rel. Welch v. My Left Foot Children's Therapy, LLC , 2016 WL 3381220, at *5–6 (D. Nev. June 13, 2016)).

[26] Id. at 192 n.3.

[27] Valdez, 681 F. App'x at 594.

[28] See, e.g., Bloomingdale's, Inc. v. Vitolo , 137 S. Ct. 2267 (2017); CLS Transportation Los Angeles, LLC v. Iskanian , 574 U.S. 1121 (2015).

[29] Case no. 20–1573.

[30] Moriana v. Viking River Cruises , 2020 WL 5584508, at *1–2 (Cal. Ct. App. Sept. 18, 2020).

[31] Provost v. YourMechanic Inc. , 269 Cal. Rptr. 3d 903, 905, 913–14 (Cal. Ct. App. 2020).

[32] Rimler v. Postmates Inc. , 2020 WL 7237900, at *1–2 (Cal. Ct. App. Dec. 9, 2020).

[33] YourMechanic Inc. v. Provost, Case no. 20–1787.

[34] Postmates LLC. v. Rimler, Case no. 21–119.