No. 20-1573

IN THE

# Supreme Court of the United States

VIKING RIVER CRUISES, INC.,

*Petitioner*,

v.

ANGIE MORIANA,

*Respondent*.

**On Writ Of Certiorari**
**To The California Court of Appeal**
**Second Appellate District**

## BRIEF OF UBER TECHNOLOGIES, INC. AND POSTMATES, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER VIKING RIVER CRUISES, INC.

THEANE EVANGELIS
*Counsel of Record*
BLAINE H. EVANSON
BRADLEY J. HAMBURGER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tevangelis@gibsondunn.com

*Counsel for Amici Curiae Uber Technologies, Inc. and Postmates, LLC*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

## TABLES OF AUTHORITIES

**Page(s)**

## TABLES OF AUTHORITIES

**Page(s)**

## TABLES OF AUTHORITIES

**Page(s)**



### Statutes

## TABLES OF AUTHORITIES

**Page(s)**

## TABLES OF AUTHORITIES

**Page(s)**

### Other Authorities

## TABLES OF AUTHORITIES

**Page(s)**

## INTEREST OF *AMICI CURIAE*[1]

Uber Technologies, Inc. is a technology platform that operates several marketplaces that connect service providers with customers. Most relevant to this litigation, Uber operates a rideshare platform that serves as a digital marketplace connecting passengers in need of transportation with drivers providing transportation services. Postmates, LLC is a wholly owned subsidiary of Uber that operates a platform connecting consumers with local merchants such as restaurants and grocery stores and, if requested by a consumer, local independent contractors ("couriers") who deliver food and other items from those merchants. Drivers and couriers who use Uber's platform do so pursuant to a contract that includes an arbitration provision, from which they may opt out. The arbitration provision commits both contracting parties to resolve all disputes between them in individual arbitration.

Uber and Postmates have an interest in the outcome in *Viking River Cruises, Inc.* v. *Moriana* because, in the wake of *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), numerous plaintiffs have sought to skirt the terms of their contracts—requiring them to resolve disputes in individual arbitration—by filing actions in court under the California Labor Code Private Attorneys General Act ("PAGA")

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amici* and its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties to this case have filed blanket consents with the Court to allow submission of *amicus* briefs.

against Uber and Postmates. *See*, *e.g.*, *Clyburn* v. *Postmates, LLC*, No. 21CV002052 (Alameda Super. Ct. Nov. 5, 2021); *Rimler* v. *Postmates Inc.*, No. CGC-18-567868 (S.F. Super. Ct. July 5, 2018); *Santana* v. *Postmates Inc.*, No. BC720151 (L.A. Super. Ct. Sept. 5, 2018). Uber and Postmates have therefore filed multiple petitions for a writ of certiorari that pose the same question presented in this case: whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act ("FAA") with respect to claims asserted under PAGA. Pet. for a Writ of Cert., *Uber Techs., Inc.* v. *Rosales*, No. 21-526 (Oct. 6, 2021), response requested, Nov. 10, 2021; Pet. for a Writ of Cert., *Uber Techs., Inc.* v. *Gregg*, No. 21-453 (Sept. 21, 2021), response requested, Nov. 10, 2021; Pet. for a Writ of Cert., *Postmates, LLC* v. *Santana*, No. 21-420 (Sept. 13, 2021), response requested, Dec. 13, 2021; Pet. for a Writ of Cert., *Postmates, LLC* v. *Rimler*, No. 21-420 (July 26, 2021), response requested, Sept. 20, 2021. These petitions are currently pending before the Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1619 (2018). In *Epic*, this Court held that the FAA "protect[s]" individual arbitration agreements "pretty absolutely," and requires courts "to enforce, not override, the terms of [an] arbitration agreement[]" "providing for individualized proceedings." *Id.* at 1619, 1621, 1623.

Despite this Court's and the FAA's "emphatic directions" (*Epic*, 138 S. Ct. at 1621), California courts

have created a de facto exception to the FAA that allows employees in California to avoid arbitration by asserting their California Labor Code claims under PAGA. *Iskanian* v. *CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 360 (2014). According to those courts, a PAGA claim is a "kind of qui tam action" that falls outside the scope of the FAA's coverage, and thus cannot be compelled to individual arbitration. *Id.* at 386; *see also*, *e.g.*, *Correia* v. *NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 620 (2019).

But PAGA actions are not *qui tam* actions—they are *private* actions—and so the reasoning used by California courts fails on its own terms. In a *qui tam* action, the government seeks to remedy a public harm, with a small bounty provided as an incentive to private plaintiffs who bring actions on behalf of the government. By contrast, named plaintiffs in a PAGA action assert their own harm from purported violations of the California Labor Code. PAGA plaintiffs are permitted to seek significant monetary relief for themselves and all other similarly "aggrieved employees," with a portion of the recovered penalties reverting to the state. Moreover, while the government may intervene in and dismiss or settle a *qui tam* litigation at any time, a PAGA plaintiff has complete control over the litigation, and the decision to settle and at what amount (subject only to court approval).

PAGA actions are functionally the same as traditional class actions, and thus agreements not to pursue class actions and PAGA actions are both subject to the FAA's rule requiring enforcement of arbitration agreements that require individualized proceedings and prohibit representative ones. Plaintiffs in Califor-

nia are plainly circumventing this binding, well-established rule by filing class claims as PAGA actions. And in refusing to grant defendants' motions to compel arbitration, California courts are denying defendants their contractual right, guaranteed by the FAA, to all the benefits of individualized arbitration. *See AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). The Court should reverse California's latest attempt to undermine the FAA's strong policy in favor of individual arbitration.

## ARGUMENT

### I. PAGA ACTIONS ARE FUNDAMENTALLY DIFFERENT FROM *QUI TAM* ACTIONS AND ARE SUBJECT TO THE FAA.

In *Iskanian*, the California Supreme Court held that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship," but rather a "dispute between an employer and the *state*." 59 Cal. 4th at 386–87 (emphasis in original). The court did not rest its conclusion on its interpretation or construction of the PAGA statute. Instead, the court stated that PAGA is a "kind of qui tam action" because an aggrieved employee sues as "the proxy or agent" of the state's labor law enforcement agencies to recover "civil penalties paid largely into the state treasury." *Id.* at 386–88.

The California Supreme Court's characterization of PAGA as a *qui tam* statute was wrong, and this Court is not bound by that determination. *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (explaining that the Court is not bound by a state court's characterization of the effect of a state law); *Fed. Land Bank of New Orleans* v. *Crosland*, 261 U.S. 374, 378 (1923)

("The characterization of the act by the [state] Supreme Court as distinguished from the interpretation of it does not bind this Court."). Indeed, even the Ninth Circuit in *Sakkab* v. *Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), although erroneously refusing to enforce an individual arbitration agreement as to PAGA claims, correctly declined to adopt *Iskanian*'s reasoning that PAGA claims fall outside the scope of the FAA's coverage. *Id.* at 432–40; *see also Magadia* v. *Wal-Mart Assocs., Inc.*, 999 F.3d 668, 676 (9th Cir. 2021) ("PAGA differs in significant respects from traditional *qui tam* statutes.").

### A. *QUI TAM* ACTIONS REMEDY PUBLIC HARMS SUFFERED BY THE GOVERNMENT, WHEREAS PAGA COMPENSATES FOR PRIVATE HARMS OF AGGRIEVED EMPLOYEES.

In a *qui tam* suit, the *government* suffers a "violation of a legally protected right" and assigns its right to seek relief for that injury to the relator who "suffered no such invasion." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *see also Magadia*, 999 F.3d at 674 (explaining that "[a] *qui tam* statute permits private plaintiffs, known as relators, 'to sue in the government's name for the violation of a public right'") (quoting *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 n.* (2016) (Thomas, J., concurring)).

*Qui tam* provisions were adopted by the American Colonies primarily as informer statutes, which deputized private citizens to sue for various violations of the law and receive a share of the fine the violators owed to the government. *See Vt. Agency*, 529 U.S. at 776. Within its first decade, Congress included *qui tam* provisions giving informers the right to bring suit under statutes penalizing everything from illegal

trade with Indian tribes (*see* Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474), to misfeasance in census taking (*see* Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102; *see also* Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (allowing informers to sue for, and receive share of, penalty in illegal slave trade with foreign nations); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (allowing informers to sue for, and receive share of, penalty for importing liquor without paying duties); Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133 (allowing informers to sue for, and receive share of, penalty for harboring runaway mariners); Act. of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (allowing informers to sue for, and receive share of, penalty for failing to comply with certain postal requirements)).

These and other *qui tam* statutes encouraged informers to come forward with information regarding crimes that did not involve an injured witness "who would otherwise bring information to the attention of ordinary law enforcement." Robert W. Fischer, Jr., *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement* 20 UCLA L. Rev. 778, 795 (1973). Thus, the paradigmatic *qui tam* plaintiff "has no interest in the matter … except as such informer." *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905); *see also* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 345 (1989) ("The qui tam litigant is not personally injured by the defendant's challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution.").

In line with this tradition, the federal False Claims Act ("FCA") (*see* 31 U.S.C. § 3729 *et seq.*) originated during the Civil War to "hold out to a confederate a strong temptation to betray his coconspirator."

Congressional Research Service, *Qui Tam: The False Claims Act and Related Federal Statutes*, at 6 (Apr. 26, 2021), https://bit.ly/3uayVzS (citation omitted). It prohibits various frauds against the government, including making false claims. *See* 31 U.S.C. § 3729. And the FCA entitles *any* private person to bring suit in the name of the federal government for injuries suffered by the government. *See id.* § 3730(b); *see also Vt. Agency*, 529 U.S. at 791 (discussing statute).

A PAGA action is an inherently different claim because it "arises, first and fundamentally, out of" the "contractual relationship between the … employee and the employer" (*Iskanian*, 59 Cal. 4th at 395 (Chin, J., concurring)), and may be brought only by an employee "affected by at least one of the violations alleged in the complaint" (*Huff* v. *Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 754 (2018)). PAGA is "meant to protect *employees*," and thus "[o]nly an *aggrieved employee* has PAGA standing." *Kim* v. *Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 81, 83 (2020) (first emphasis added); *see also Williams* v. *Superior Court*, 3 Cal. 5th 531, 546, 548 (2017) (explaining that PAGA was adopted "for the benefit of the state's workforce" and to "afford[] employees workplaces free of Labor Code violations").

Unlike *qui tam* plaintiffs, PAGA plaintiffs can pursue penalties for themselves and also "recover penalties for Labor Code violations suffered by other employees"—even for unrelated California Labor Code violations. *Huff*, 23 Cal. App. 5th at 753–54; *compare* Cal. Lab. Code § 2699(a) (authorizing an "aggrieved employee" to bring a civil action "on behalf of himself or herself and other current or former employees"), *with* 31 U.S.C. § 3730(b)(1) (authorizing a private person to bring a civil action "for the person and for the

United States Government … in the name of the Government").

In other words, PAGA does not authorize a private person to recover for an injury suffered by the state of California; instead, it entitles "aggrieved employees" to seek significant monetary relief *for their own injuries*, and for those of other absent employees, arising out of their contractual relationship with their employers. *See Iskanian*, 59 Cal. 4th at 395 (Chin, J., concurring); *see also Magadia*, 999 F.3d at 677 ("a PAGA suit … implicates the interests of other third parties").

### B. THE GOVERNMENT RETAINS GREATER CONTROL IN *QUI TAM* SUITS THAN IN PAGA ACTIONS.

Another fundamental difference between a PAGA action and a *qui tam* suit in that the government retains far greater control over *qui tam* litigation than PAGA litigation.

A *qui tam* action involves only a "partial assignment" by the government to a private person of the right to pursue relief for an injury suffered by the government. *Vt. Agency*, 529 U.S. at 773. As a result, "[t]he government remains the real party in interest throughout the litigation and 'may take complete control of the case if it wishes.'" *Magadia*, 999 F.3d at 677 (quoting *United States ex rel. Taxpayers Against Fraud* v. *Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994)).

Under the FCA, for example, even after the government declines to pursue a claim, it may intervene in whole or in part throughout a *qui tam* plaintiff's litigation. *See* 31 U.S.C. § 3730(b)(2), (c)(3). The gov-

ernment may even dismiss an FCA suit it initially declined to pursue, over a *qui tam* plaintiff's objections. *See id.* § 3730(c)(2)(A); *see, e.g.*, *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (noting that the government may intervene solely to dismiss and recognizing that the FCA may "permit the government to dismiss a qui tam action without actually intervening in the case at all"); *Swift* v. *United States*, 318 F.3d 250, 251 (D.C. Cir. 2003) (similar). California retains similar control over a *qui tam* action brought under state law. *See* Cal. Gov't Code § 12652(f)(2)(A) (providing the state with the right to intervene in a case it "initially declined" to pursue, where "the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff").

But a PAGA action "represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Magadia*, 999 F.3d at 677 (emphasis in original). Consistent with this full assignment, private plaintiffs suing under PAGA have far more latitude than plaintiffs suing under a true *qui tam* statute like the FCA, and have discretion akin to that of named plaintiffs in a class action.

In a PAGA action, once the state declines to pursue a claim, the private plaintiff is in full control to frame the allegations and control the litigation. The state has no authority under PAGA to intervene or to dismiss a PAGA action over an aggrieved employee's objection. *See* Cal. Lab. Code § 2699; *Magadia*, 999 F.3d at 677; Aaron Blumenthal, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 Cal.

L. Rev. 699, 743 (2015) ("PAGA suits ... differ from qui tam actions because the government cannot intervene in the suit and cannot exercise control over the litigation."). If the government wishes to intervene in a private plaintiff's PAGA suit, it must seek leave to do so under the California Rules of Civil Procedure in the same way any other interested party would. *See* Cal. Code Civ. Proc. § 387.

Another key difference between a PAGA action and a *qui tam* action is control over settlement. The government may settle a FCA claim it chose not to originally pursue, even when the *qui tam* plaintiff objects. *See* 31 U.S.C. § 3730(c)(2)(B); *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 754 (5th Cir. 2001) (en banc) (holding that even where the government does not intervene, it "may settle a case over a relator's objections"). And even when a *qui tam* plaintiff chooses to settle an FCA claim, some courts have held that the government retains "veto" authority over the settlement. *See*, *e.g.*, *United States ex rel. Michaels* v. *Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017); *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335, 342–43 (6th Cir. 2000); *Searcy* v. *Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997); *contra United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994); *see also* Christopher C. Frieden, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 Emory L.J. 1041, 1078 (1998) (explaining that the plain language of the FCA supports the view that the government has an absolute right to veto a settlement). By contrast, though a court must approve a PAGA settlement and notice of a settlement must be

supplied to the California Labor and Workforce Development Agency (*see* Cal. Lab. Code § 2699(l)(1)–(2)), a PAGA plaintiff retains unilateral control over the decision to settle and at what amount without input from the government.

Finally, in a *qui tam* action, the reward that a plaintiff receives is a portion of a forfeiture to the government as a form of bounty. *See*, *e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 ("the one half thereof to the use of the United States, and the other half to the informer; but where the prosecution shall be first instituted on behalf of the United States, the whole shall accrue to their use"). And the portion of the penalty award given to the FCA plaintiff depends on the level of government involvement in the litigation. *See* 31 U.S.C. § 3730(d)(1)–(2).

But under PAGA, a plaintiff prevails by establishing a civil penalty against the defendant tied directly to the number of violations suffered by the plaintiff and other aggrieved employees. The plaintiff recovers twenty-five percent of that penalty (regardless of the government's involvement) and shares that amount with all other affected employees. *See* Cal. Lab. Code § 2699(i). These penalties can be significant, given that judgments in a PAGA action can exceed tens of millions of dollars. *See Magadia*, 999 F.3d at 672 (reversing the district court's award of $100,000,000 in damages and penalties to plaintiff on his Labor Code and PAGA claims).

## II. REPRESENTATIVE PAGA ACTIONS ARE AKIN TO TRADITIONAL CLASS ACTIONS.

PAGA actions are, in practice, essentially indistinguishable from class actions, and it is no surprise that PAGA claims skyrocketed in California after *Iskanian*

held that agreements to arbitrate PAGA claims are unenforceable. Plaintiffs have simply recast thousands of class action claims as PAGA actions, and defendants in those cases are being forced to litigate claims under PAGA that they and their employees agreed to pursue in individual arbitration. The result has been a blatant end-run around this Court's precedents upholding agreements for individual arbitration.

In a class action, the private plaintiff files suit to seek relief on behalf of themselves and others similarly situated who have suffered the "same injury." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348–49 (2011) (citations omitted). The same is true with PAGA, as the named plaintiff in a PAGA action seeks relief on behalf of himself and other aggrieved employees. *See* Cal. Lab. Code § 2699(a); *Sakkab*, 803 F.3d at 442–43 (Smith, J., dissenting) ("Class actions and PAGA actions both allow an individual … to bring an action on behalf of other people or entities."). And as in class actions, the relief that absent aggrieved employees receive is premised on the adjudication of the named plaintiff's suit, since their recovery is directly tied to the number of violations the named plaintiff can prove. *Williams*, 3 Cal. 5th at 547–48.

In a class action, absent parties are bound by the judgment or settlement. *Williams*, 3 Cal. 5th at 548. So too with a PAGA action. *See* Cal. Lab. Code § 2699(a), (g); *Williams*, 3 Cal. 5th at 548.

Discovery in class actions and PAGA actions also is often sweeping in scope. For example, in *Williams* the California Supreme Court held that PAGA discovery should extend "as broadly as class action discovery has been extended." 3 Cal. 5th at 547–48; *see also Sakkab*, 803 F.3d at 446 (Smith, J., dissenting) (noting

that "the discovery required in a representative PAGA claim is vastly more complex than would be required in an individual arbitration").

PAGA actions threaten defendants with liability on the same scale as class actions. Under PAGA, civil penalties are assessed against the employer in the amount of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Cal. Labor Code § 2699(f)(2). As a result, aggregated claims often seek millions of dollars in penalties. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 451 (2018). These "staggering" penalties "often greatly outweigh any actual damages." Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016) (citation omitted). And just like many class actions, the threat of "a devastating loss" in a PAGA action means that defendants are often "pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

Given the functional similarities between PAGA actions and class actions, in the wake of *Iskanian*, a growing number of plaintiffs and their counsel have turned to pursuing PAGA actions in court as a way of avoiding agreements to arbitrate on an individual basis.

Uber and Postmates have seen first-hand the explosive growth of PAGA claims in the wake of California's exempting PAGA from individual arbitration. Soon after the California Supreme Court decided *Iskanian*, the Ninth Circuit ruled in *Mohamed* v. *Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), that

although Uber's arbitration agreement is enforceable, "the PAGA waiver should be severed from the arbitration agreement" and PAGA claims should "proceed in court on a representative basis." *Id.* at 1206; *see also O'Connor* v. *Uber Techs., Inc.*, 904 F.3d 1087, 1092 n.2 (9th Cir. 2018) (noting PAGA waivers are severable from arbitration agreements). Following *Mohamed*, plaintiffs shifted from filing class actions to asserting PAGA claims against Uber to avoid individual arbitration, leading to the filing of PAGA-only actions, such as the *Gregg* and *Rosales* cases pending before this Court. The same is true as to Postmates. In the *Rimler* and *Santana* actions that are now pending before this Court, plaintiffs repackaged what are essentially class claims as PAGA actions in order to avoid arbitration.

Uber and Postmates are not alone. *See*, *e.g.*, *Kim*, 9 Cal. 5th at 82 (plaintiff settled individual claims and pursued only his PAGA claim in court); *Brown* v. *Ralphs Grocery Co.*, 28 Cal. App. 5th 824, 831 (2018) (after trial court granted Ralph's "request to arbitrate the non-PAGA claims on an individual basis, and stayed the PAGA claims until completion of the arbitration," plaintiff amended "her complaint to drop her individual claims and proceed only on her PAGA claims"). In the years since *Concepcion*, PAGA claims have increasingly replaced class actions as a vehicle to pursue claims under the California Labor Code.

In 2005, two years after PAGA was passed, plaintiffs filed a total of 759 PAGA actions. Emily Green, *State Law May Serve as Substitute for Employee Class Actions*, Daily Journal (Apr. 17, 2014), https://bit.ly/3AVQ5lY. By 2013, that number rose to 3,137 and by 2016, post-*Iskanian*, it was more than 5,000. *See id.* As of 2019, more than 35,000 PAGA

actions had been filed in total.[2] And the number of PAGA claims will only continue to rise, in part because of the California Supreme Court's recent decisions applying provisions of the California Labor Code to out-of-state employers and employees. *See Ward* v. *United Airlines, Inc.*, 9 Cal. 5th 732, 760–61 (2020); *Oman* v. *Delta Air Lines, Inc.*, 9 Cal. 5th 762, 789 (2020).

---

[2] Anthony J. Oncidi & Cole D. Lewis, *California Class Actions and PAGA ("Probably All is Going to the Attorneys") Claims Continue to Overwhelm the State*, The National Law Review (Feb. 4, 2019), https://bit.ly/3senqoo; *see also* Goodman, 56 Santa Clara L. Rev. at 415; Green, *State Law May Serve as Substitute*, *supra*; Ashley Hoffman, *Private Attorneys General Act: Reform Needed to Stop Abuse Forcing Employers into Costly Settlements*, Cal Chamber (Jan. 2021), https://bit.ly/2XJCwVQ ("PAGA lawsuits have increased more than 1,000% from the law's first year in effect" and notices to the Labor and Workforce Development Agency are "anticipated to grow to more than 7,000 by 2022").

## CONCLUSION

The FAA applies to PAGA just like any other state law, and requires enforcement of arbitration agreements that require individualized proceedings and prohibit representative actions. The Court should reverse.

Respectfully submitted,

THEANE EVANGELIS
*Counsel of Record*
BLAINE H. EVANSON
BRADLEY J. HAMBURGER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tevangelis@gibsondunn.com

*Counsel for Amici Curiae Uber Technologies, Inc. and Postmates, LLC*

February 7, 2022