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

RESPONDENT'S PETITION FOR REHEARING

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QUESTION PRESENTED

Whether the Court's opinion in this case should be modified to remain consistent with the Court's holdings on the merits of the Federal Arbitration Act preemption issues encompassed by the question presented, while avoiding unwarranted and incorrect resolution of the unbriefed issues of contract construction and state law statutory standing upon which the disposition rests.

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INTRODUCTION

Respondent Angie Moriana respectfully seeks rehearing of the Court's decision in this case solely to the extent the disposition rests on two issues of state law that are outside the question presented, were not briefed by the parties, are inconsistent with a definitive ruling of the state's highest court, and cannot in any event be authoritatively resolved by this Court.

This case presented the question whether the Federal Arbitration Act (FAA) preempts California's "*Iskanian* rule," which prohibits enforcement of agreements that purport to waive an employee's entitlement to pursue "representative" claims under California's Private Attorneys General Act (PAGA). As to that question, the Court's decision holds: (1) the FAA *does not* preempt the *Iskanian* rule that prohibits use of an arbitration agreement to waive an employee's entitlement to pursue "representative" claims on behalf of the State for PAGA civil penalties, *see* slip op. 7-17, 20-21; but (2) the FAA *does* preempt *Iskanian* to the extent it incorporates a rule of "claim joinder" precluding enforcement of an arbitration agreement that separates a plaintiff's "individual" PAGA representative claim (seeking penalties on behalf of the State for Labor Code violations personally experienced by the plaintiff) from her "non-individual" PAGA representative claim (seeking penalties for violations affecting other employees) and requires arbitration only of the former. *See* slip op. 17-21. This petition does not seek rehearing of those holdings.

However, the Court's disposition of this case in Part IV of the majority opinion rests on further determinations that go beyond the Court's resolution of the federal question presented and involve unbriefed

issues of state-law contract interpretation and statutory construction that (1) exceed the Court's authority to issue definitive rulings on matters of federal law, and (2) are contrary to the contract language and applicable California law. Specifically, the Court's conclusion that Viking "is entitled to compel arbitration of Moriana's individual [PAGA] claim," slip op. 21, is based on the Court's interpretation of the severability clause in the parties' arbitration agreement which, like other issues of contract construction, is "not [a question] of federal law." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The Court's further statement that "the correct course is to dismiss" the non-individual PAGA claims for lack of "statutory standing" is based on the Court's reading of "PAGA's standing requirement," a matter of state statutory construction as to which the California Supreme Court has already spoken in an earlier case. Slip op. 21.

These state-law issues fall outside the question presented. The parties' briefs did not address them and only glancingly cited the relevant contract language and state-law standing precedents. Moreover, as Justice Barrett's opinion concurring in part and in the judgment points out, the Court's state-law conclusions are "disputed." Conc. op. 1. As explained below, the severability ruling is contrary to the contract's explicit language and the parties' stated intent to prohibit arbitration of any PAGA claims, and the Court's views on statutory standing contradict the California Supreme Court's definitive construction of PAGA's plain language in *Kim v. Reins Int'l Cal., Inc.*, 459 P. 3d 1123, 1128-29 (2020).

Under these circumstances, Ms. Moriana respectfully submits that the most appropriate course would be for the Court to explain that the consequences of its

preemption rulings for the disposition of Viking's requests for "arbitration on an individual basis" and "dismiss[al of] Plaintiff's representative claim," JA 66, depend on the state courts' resolution of controlling state-law issues of contractual severability and statutory standing. The Court should accordingly reverse in part the state court's holding that the *Iskanian* rule is not preempted and remand for proceedings not inconsistent with its federal-law rulings to enable the state courts to determine the severability and statutory standing questions. Such a disposition would be consistent with the Court's answers to the question presented and with its longstanding recognition that it lacks authority to rule authoritatively on state-law matters.

Ms. Moriana respectfully requests rehearing to the limited extent necessary to modify Part IV of the Court's opinion and the Court's disposition of the case to conform with these principles.

ARGUMENT

I. The Court's resolution of the state-law issues departs from its customary practice.

The disposition of this case based on the Court's construction of the severability clause and its view of PAGA statutory standing is inconsistent with the Court's usual decisional practices in several respects.

Neither issue was decided by the courts below because, until this Court's decision, what the Court described as the "claim joinder" aspect of *Iskanian* prevented state courts from dividing a PAGA representative claim into "individual" and "non-individual" components as the Court's preemption ruling now requires. Moreover, the state-law issues fall outside the

question on which this Court granted certiorari, which solely concerned "[w]hether the [FAA] requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." Pet. i. That question neither explicitly nor implicitly encompasses the construction of the contract's severability clause or the issue of statutory standing. Not surprisingly, then, the parties did not brief either issue: Viking's briefs did not quote the severability clause or mention statutory standing, while Ms. Moriana's brief quoted the severability language only once and cited the California Supreme Court's leading opinion on PAGA standing, *Kim*, only with respect to other subjects.

This Court ordinarily "do[es] not decide in the first instance issues not decided below," and "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). The Court is "especially" unwilling to address such issues "where, as here, the matter falls outside the question presented and has not been thoroughly briefed." *Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.16 (2016).

The Court's resolution of the severability and statutory standing issues is especially unusual because they are exclusively governed by state law. The Court has long recognized that state courts, not this Court, have ultimate authority to issue definitive state-law rulings. *Green v. Neal's Lessee*, 31 U.S. 291, 298 (1832). That principle applies fully to matters governed by common law. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *see, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 & n.3 (2019). State courts likewise have "final authority" to construe state statutes,

Brown v. Ohio, 432 U.S. 161, 167 (1977), and the "statutory standing" conclusion expressed in Part IV of the Court's opinion—that "PAGA does not allow" a person whose individual PAGA claim is subject to arbitration to maintain non-individual representative claims in court, slip op. 21—is self-evidently a matter of state statutory construction. *Cf. Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302-03 (2017) ("statutory standing" is a matter of "statutory interpretation").

The primacy of state courts with respect to such matters is so complete that, in cases originating in state court and reviewed under 28 U.S.C. § 1257, the Court generally lacks *jurisdiction* to resolve state-law questions. *See Murdock v. City of Memphis*, 87 U.S. 590, 630-33 (1874); *see also BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1540 (2021) ("Concerned with the constitutional implications of allowing federal courts to review questions of state law, the Court in *Murdock* construed [§ 1257] as authorizing this Court to examine only issues of federal law contained within state court judgments and decrees."). Thus, when reviewing state-court judgments, "[o]rdinarily" this Court "considers only federal questions and does not review questions of state law." *Missouri ex rel. Wabash Ry. v. Pub. Serv. Comm'n*, 273 U.S. 126, 131 (1927).

The Court has stated that in some circumstances it may have power to address state-law issues not decided by the state courts below, if they arise in the course of the Court's deliberations over a question of federal law (usually due to supervening changes in state law). *See id.* at 131. Even in those rare circumstances, the Court generally recognizes that it is "appropriate to refer the [state-law] determination to the state court." *Id.*; *see, e.g.*, *Bell v. Maryland*, 378 U.S.

226, 237 (1964) ("It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law.").

Thus, even if this Court's jurisdiction to decide a federal issue raised and decided by the state courts might give it authority to decide unresolved state-law issues bearing on the consequences of that decision, the Court's customary practice has long been to decide only the federal issue while "leav[ing] the state courts free to decide any questions of substantive state law not yet passed upon in th[e] litigation." *Orr v. Orr*, 440 U.S. 268, 283 (1979). In cases under the FAA, this Court has adhered to that practice by allowing state courts on remand to decide issues of state law that determine the proper disposition of an action in light of the Court's preemption rulings. *See, e.g., Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012). There is no reason to depart from that practice here.

II. The Court's state-law rulings are inconsistent with plain contractual and statutory language and controlling California precedent.

A. With respect to the federal issue of FAA preemption posed by the question presented, this Court first held, correctly, that the FAA *does not* require enforcement of an arbitration agreement that *waives* the right to bring a PAGA representative action on behalf of the state, either for penalties attributable to the violations suffered by an individual

or for other affected employees. *See* slip op. 11-17, 20-21. The Court then held that the FAA does require enforcement of agreements to arbitrate only a "portion" of a representative action, which the Court described as the "individual" component. *See id.* at 17-21.

The Court's further conclusion that these holdings require Ms. Moriana to arbitrate her "individual" PAGA claim rests on the "severability" provision in the arbitration agreement's "Class Action Waiver." That provision states: "In any case in which (1) the dispute is filed as a ... representative or private attorney general action and (2) a civil court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the ... representative and/or private attorney general action *must be litigated in a civil court of competent jurisdiction*, but the portion of the Class Action Waiver that is *enforceable* shall be enforced in arbitration." JA 90 (emphasis added). Contrary to the Court's conclusion, this language plainly provides that Ms. Moriana's "individual" PAGA claim must be litigated in court, because this Court determined that the contract's waiver of that representative, private attorney general claim was *unenforceable*, not that it was *enforceable*.

As the Court's opinion recognized, the "Class Action Waiver" expressly barred Ms. Moriana from bringing *any* representative or private attorney general action in arbitration or in court. Slip op. 5; JA 89. The Court further acknowledged that all PAGA actions are "representative" insofar as they are brought on behalf of the state, slip op. 6, and "*Iskanian*'s principal rule prohibits waivers of 'representative' PAGA claims in [this] sense," *id.* at 7. This "principal" rule, the Court held, is *not* preempted by the FAA. Slip op. at 15-16; *id.* at 21 ("*Iskanian*'s rule remains valid to

that extent."). Rather, the FAA preempts only *Iskanian*'s "secondary rule," *id.* at 5, which, by barring enforcement of an agreement that divides a representative PAGA action into "individual" and "non-individual" claims, precludes arbitration limited to the former. *See id.* at 17-20.

Under these principles, the Court recognized, Viking's PAGA waiver "remains *invalid*" insofar as it would require "a wholesale waiver of PAGA claims," whether individual or non-individual. Slip op. 20-21 (emphasis added). To be sure, any "portion" of the waiver that remains *valid* is still, under the severability clause, enforceable in arbitration. *Id.* at 21. But the "portion" of the waiver that *prohibited* Ms. Moriana from asserting *any* representative PAGA claim, individual or not, was not valid and thus could not be enforced in arbitration. Because this Court determined the arbitration agreement's prohibition of individual PAGA claims to be *unenforceable*, the severability clause unambiguously requires Ms. Moriana's PAGA action to be "litigated in court."

If Viking's arbitration agreement had carved out an "individual claim" exception to its prohibition of representative PAGA actions, that portion of its agreement would have been valid and enforceable. But that is not what the agreement says. It waives even individual PAGA representative claims and has no enforceable "portion" concerning such claims that may be enforced in arbitration.

In concluding otherwise, the Court turned the severability clause upside down. As a result, it required the parties to arbitrate a claim they expressly agreed *not* to arbitrate, violating "[t]he most basic corollary of the principle that arbitration is a matter of consent":

"a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." Slip op. 18.

B. As the Court's opinion recognizes, even if the parties had an enforceable agreement to arbitrate individual PAGA claims while excluding non-individual claims from arbitration, the FAA would not require enforcement of an agreement that waived non-individual PAGA claims altogether. Slip op. 21. The Court's conclusion that the representative claims should nonetheless be dismissed rested not on preemption, but on its the view that, under California law, an individual lacks statutory standing to pursue "non-individual PAGA claims once an individual claim has been committed to a separate proceeding." *Id.*

The Court cited the California Supreme Court's statement in *Kim* that PAGA does not allow standing to members of the "general public," 459 P.3d at 1133, to support the conclusion that "a plaintiff can maintain PAGA claims in an action only by virtue of also maintaining an individual claim in that action," slip op. at 21. But *Kim*, a unanimous decision of the California Supreme Court, holds almost the exact opposite. It *rejects* the view that a plaintiff whose individual injuries have been redressed loses standing to pursue PAGA representative claims. 459 P.3d at 1129. Relying on PAGA's plain language, *Kim* holds that the statute "has only two requirements for PAGA standing": (1) the plaintiff must have been "employed by the alleged violator," and (2) "one or more of the alleged violations" must have been "committed" against the plaintiff. *Id.* at 1128-29 (quoting Cal. Labor Code § 2699(c)). The Court in *Kim* distinguished "general public" standing under a different statute from the

more limited "aggrieved employee" standing under PAGA, which excludes "general public" standing by restricting standing to (1) employees (2) who have suffered violations, without regard to whether they have live claims for economic redress. Thus, if Ms. Moriana's "individual" PAGA claim is consigned to arbitration, she will still have statutory standing as an employee against whom a violation has been committed.

Even on its own terms, the Court's view of standing would not require dismissal of the non-individual claims. The consequence of an order compelling arbitration of a claim is that the claim is stayed, not dismissed. Cal. Code Civ. P. § 1281.4. Typically, the court eventually enters judgment on the claim in accordance with the arbitrator's award (unless the award is subject to vacatur). *Id.* § 1287.4. Meanwhile, the claim remains pending in court until judgment is entered. Accordingly, if maintaining an individual claim were required for standing to pursue non-individual claims, Ms. Moriana would satisfy that requirement even if compelled to arbitrate.

C. Although the Court's resolution of the severability and standing issues was incorrect under California law, Ms. Moriana does not ask that the Court now decide those issues in her favor. She addresses the merits only to confirm Justice Barrett's observation that the issues are genuinely "disputed." The approach to such disputed state-law issues most in keeping with this Court's customary practices, and the limits of its authority, is to allow the state courts to address them on remand.

As Justice Sotomayor's concurring opinion points out, the Court's state-law decisions will not bind the California courts, which may "have the last word" in

"an appropriate case." Conc. op. 1-2; *see also Schuykill Trust Co. v. Pennsylvania*, 302 U.S. 506, 512 (1938) (holding that this Court's expressed understanding of state law does not bind state courts in remand proceedings); *Ga. Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 623-24 (1936) (same). But until the last word is spoken, judges overseeing hundreds of pending PAGA cases in the California courts will struggle to apply this Court's severability analysis (including in cases where its application is difficult because the severability language is not identical to Viking's) and to determine whether to follow this Court's view of PAGA standing or the principles set forth in PAGA and *Kim*. The resulting confusion, expense, and delay—the antithesis of what arbitration under the FAA is meant to accomplish—could readily be avoided if this Court refrained from addressing state-law issues. Doing so would also avoid any possible suggestion that the parties to this case are not as entitled as parties in other cases to an authoritative *state-court* construction of state law.

It is, of course, appropriate for the Court to identify state-law issues that may require resolution to determine the effect of its preemption rulings on the claims in this case. But the Court should specify that any decision of those issues is a matter for the state courts on remand.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing solely for the purpose of modifying Part IV of its opinion to state that the Court does not decide the state-law issues of severability and standing and that its disposition is limited to reversal in part of the state court's holding that the *Iskanian* rule is not

preempted by the FAA and remand for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATION OF COUNSEL OF RECORD

I, Kevin T. Barnes, counsel of record for respondent Angie Moriana, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Kevin. T. Barnes

Dated: July 1, 2022