No. 22-_____

In The
Supreme Court of the United States

FORWARDLINE FINANCIAL, LLC and
FORWARDLINE PAYMENT SERVICES, LLC,

Petitioners,

v.

BRANDON AHLMANN,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

BECKY S. JAMES
Counsel of Record
LISA M. BURNETT
DYKEMA GOSSETT LLP
333 South Grand Avenue
Suite 2100
Los Angeles, CA 90071
(213) 457-1800
BJames@dykema.com
LMBurnett@dykema.com

REBECCA L. TORREY
THE TORREY FIRM
1626 Montana Avenue
Suite 647
Santa Monica, CA 90403
(310) 310-2992
Rebecca@torreyfirm.com

Counsel for Petitioners ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This case arises from the same scenario that was recently addressed in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 596 U.S. ___, 142 S. Ct. 1906 (June 15, 2022). California Petitioners ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC (collectively "ForwardLine") hired Respondent Brandon Ahlmann, and the parties agreed to arbitrate "any and all claims" arising from that employment relationship" and to "pursue arbitration solely in an individual capacity, and not as a representative or class member in any purported class or representative proceeding." When Ahlmann was later fired, he filed a complaint against ForwardLine under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code § 2698 *et seq*. The California courts rejected ForwardLine's efforts to compel arbitration based on their conclusion that *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348 (2014), precluded arbitration of PAGA claims. Subsequently, this Court decided *Viking River Cruises* and held that the Federal Arbitration Act preempts *Iskanian* to the extent the latter bars enforcement of agreements to arbitrate individual PAGA claims brought by the employee who claims to have suffered the Labor Code violations. The question presented is:

Whether, in light of *Viking River Cruises*, a mutual pre-dispute agreement to arbitrate all claims arising from the employment relationship is enforceable as to PAGA claims asserted by an employee-plaintiff arising

QUESTION PRESENTED – Continued

from Labor Code violations allegedly committed against him, and whether the intervening development of this holding in *Viking River Cruises* calls for the Court to grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration ("GVR").

PARTIES

The following individuals or entities are or were parties to the proceedings below:

ForwardLine Financial, LLC

ForwardLine Payment Services, LLC

Brandon Ahlmann

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14(b)(ii) and 29.6, Petitioners state as follows:

ForwardLine Financial, LLC, is wholly owned by parent corporation TVG-ForwardLine Holdings, LLC.

ForwardLine Payment Services, LLC, is wholly owned by parent corporation TVG-ForwardLine Holdings, LLC.

No publicly held company owns 10% or more of the stock of ForwardLine Financial, LLC, ForwardLine Payment Services, LLC, or TVG-ForwardLine Holdings, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case arises from, and is related to, the following proceedings in the California Superior Court for the County of Los Angeles, the California Court of Appeal, Second District, Division Three, and the California Supreme Court:

STATEMENT OF RELATED PROCEEDINGS
– Continued

Ahlmann v. ForwardLine Financial, LLC, et al., Los Angeles County Superior Court Case No. 19VECV01352, order denying motion to compel arbitration issued February 10, 2020.

Ahlmann v. ForwardLine Financial, LLC, et al., California Court of Appeal Case No. B304367, judgment issued November 12, 2021.

Ahlmann v. ForwardLine Financial, LLC, et al., California Supreme Court Case No. S272381, order denying discretionary review issued February 23, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC (collectively "ForwardLine") petition for a writ of certiorari to review the judgment of the California Court of Appeal, Case No. B304367.

OPINIONS BELOW

The California Superior Court order of February 10, 2020, denying ForwardLine's motion to compel arbitration is unpublished and is reproduced at App. 22-34. The California Court of Appeal's order of November 12, 2021, affirming denial of ForwardLine's motion is unpublished and is reproduced at App. 1-20. The California Supreme Court's order of February 23, 2022, denying discretionary review is unpublished and is reproduced at App. 21.

STATEMENT OF JURISDICTION

The California Court of Appeal issued its unpublished decision affirming denial of ForwardLine's motion to compel arbitration on November 12, 2021. App. 1. ForwardLine petitioned for review in the California Supreme Court on December 21, 2021. The state supreme court denied discretionary review on February 23, 2022. App. 21. ForwardLine applied for and was granted an extension of time in which to file a petition for writ of certiorari in this matter to and including

July 23, 2022. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

ForwardLine Financial and ForwardLine Payment Services (collectively "ForwardLine") come before this Court in the wake of its opinion in *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (June 15, 2022), which addressed the scope of FAA preemption in the context of California's Private Attorneys General Act ("PAGA"), Cal. Labor Code § 2698 *et seq*. ForwardLine submits *Viking River Cruises* is controlling here, and that the Court should therefore grant the instant petition, vacate the California Court of Appeal's decision, and remand the matter to the California Court of

Appeal for further proceedings consistent with this Court's opinion in that matter.

PAGA has created a quagmire for employers and a boon for plaintiffs' lawyers in recent years. The leading state supreme court opinion interpreting its scope is *Iskanian v. CLS Transport Los Angeles*, 59 Cal.4th 348 (2014), which purports to prohibit pre-dispute waivers of PAGA claims to the extent that they are "representative." Many courts, including the California Court of Appeal below, have erroneously read *Iskanian* as effectively prohibiting pre-dispute agreements to arbitrate *any* claim brought under PAGA, under the logic that all PAGA claims are, by their nature, "representative," in that the plaintiff is suing on behalf of the state, as well as possibly on behalf of other employees. *Viking River Cruises* rejects that broad reading of the term "representative," and instead distinguishes between PAGA claims brought by the employee who allegedly suffered the violations, and PAGA claims brought on behalf of other, absent employees. In both instances the plaintiff is acting as an agent of the state, but in the former case the parties' relationship is such that bilateral agreements to arbitrate are enforceable under the FAA; to the extent *Iskanian* is read to hold otherwise, it is preempted. *Viking River Cruises*, 142 S. Ct. 1906, Slip Op. at 21-22.

This case, like *Viking River Cruises*, involves a single plaintiff, whose arbitration agreement with his former employer covers all disputes arising from the employment relationship and precludes arbitration of class or representative claims. The California Court of

Appeal's reasoning in upholding the denial of ForwardLine's motion to compel arbitration was the same as that which has now been rejected in *Viking River Cruises*, namely that all PAGA claims are necessarily "representative" actions and therefore that the arbitration agreement is not enforceable as to any PAGA claims.

I. Statement of Facts

In August 2018, ForwardLine hired Ahlmann as a loan representative in the sales department. App. 23. ForwardLine's offer letter to Ahlmann read in pertinent part (italics supplied by state court of appeal):

> While we of course hope that your employment relationship with the Company will be mutually satisfying and rewarding, we recognize that disputes can sometimes occur. Therefore, as a condition of your employment, the Company requires that you hereby agree that any and all disputes, claims, or proceedings between you and the Company arising out of or relating to your employment with the Company, the nature, terms, or enforceability of this letter agreement, or any dispute of any nature between you and the Company shall be settled by a binding and final arbitration held before a single arbitrator from the Judicial Arbitration Mediation Service, Inc. ("JAMS"). Arbitration shall be held in the County of Los Angeles, California, and shall be pursuant to the laws of the State of California. *Each party may pursue arbitration solely in an individual*

> *capacity, and not as a representative or class member in any purported class or representative proceeding. The arbitrator may not consolidate more than one person's or entity's claims, and may not otherwise preside over any form of representative or class proceeding.* The arbitrator shall also have the power to impose any sanction against any party permitted by California law. The arbitration award shall be final. Judgment on any arbitration award may be entered into any court in the County of Los Angeles.

Ahlmann signed the offer letter, including the above arbitration clause, and returned it to Forward-Line. App. 23-25. As part of his hiring process, Ahlmann also signed an employee handbook acknowledgement, certifying, among other things, the at-will nature of the employment relationship, and that Mr. Ahlmann had read and was familiar with the contents of the employee handbook, and agreed to follow the guidelines and policies contained therein. App. 23-25.

Section V.A. of the employee handbook, entitled "Arbitration" ("Arbitration Agreement"), specifies arbitration as the sole means of resolution for "[a]ny and all employment-related disputes" between Ahlmann and Forwardline. The Arbitration policy provides in full as follows:

> Any and all employment-related disputes between you and the Company will be resolved through final and binding arbitration in accordance with the agreement letter

> voluntarily signed by you and the Company at the time of employment.

App. 24-25.

Ahlmann's performance and attendance were well below expectations from the beginning, as ForwardLine explained in its briefing below, and ForwardLine worked with him to resolve the problems. But in February 2019, Ahlmann received two separate further formal discipline reports, one for violation of a work rule and one for insubordination. He was terminated for deficient performance in March 2019, just seven months after his hire.

II. Procedural History

On June 26, 2019, Ahlmann sent written notice to the Labor & Workforce Development Agency ("LWDA") regarding ForwardLine's alleged Labor Code violations. The LWDA declined to intervene.

On September 19, 2019, Ahlmann filed in the Los Angeles Superior Court his complaint in the underlying case, alleging one claim against ForwardLine under California's Private Attorneys General Act ("PAGA"), Cal. Labor Code §§ 2698-2699.5, on behalf of "himself and other current and former aggrieved employees" of ForwardLine, based on alleged failure to provide meal and rest breaks and to timely pay wages during and after termination as well as to reimburse business expenses. On October 25, 2019, ForwardLine timely moved to compel arbitration of these claims.

On November 25, 2019, Ahlmann elected to file an amended complaint rather than litigate the arbitration motion as it stood at that time. The operative First Amended Complaint contained identical claims to the original Complaint plus new PAGA claims for ForwardLine's alleged failure to pay minimum wages, to pay overtime wages, and to provide complete and accurate wage statements. All of the PAGA violations are alleged to have been suffered by Ahlmann himself, as well as "other current and former aggrieved employees" who are nowhere described or named.

On January 2, 2020, ForwardLine made a timely Renewed Motion to Compel Arbitration. In particular, ForwardLine argued that the arbitration provision in the parties' employment agreement required that all claims arising out of Ahlmann's alleged Labor Code violations were subject to the parties' arbitration agreement.[1] ForwardLine pointed out that, while the California Supreme Court has held that employment agreements that require the employee to waive PAGA claims outright are contrary to public policy and therefore unenforceable, it has not held that agreements that require arbitration of PAGA claims are unenforceable. ForwardLine further argued that any such rule would be preempted by the Federal Arbitration Act ("FAA"), which requires enforcement of the arbitration agreement here. On January 23, 2020, Ahlmann filed

[1] On briefing the motion to compel arbitration, both sides construed the FAC as containing additional claims to relief that were not brought under PAGA. The trial court rejected that construction, as noted below, and it was not raised on appeal.

his opposition, arguing he should not be compelled to arbitrate because his ostensibly "individual" claims could not be separated from the PAGA claims, and the PAGA claims are non-arbitrable.

On February 10, 2020, the trial court issued an order denying ForwardLine's motion and allowing the case to continue in the trial court. App. 22-34. The court interpreted the California Supreme Court's opinion in *Iskanian* to prohibit arbitration agreements that require arbitration of PAGA claims. App. 30. The court further explained that the FAA did not preempt such a prohibition because PAGA claims are public, not private, claims. App. 30. Finally, the court interpreted the FAC to allege only PAGA claims, as evidenced by the prayer for relief which is limited to civil penalties under PAGA, and the court therefore saw no need to bifurcate the claims into arbitrable and non-arbitrable claims. App. 33. Accordingly, the court denied ForwardLine's motion to compel arbitration. App. 34.

ForwardLine timely appealed, in California Court of Appeal Case No. B304367. Shortly before oral argument, the court of appeal requested supplemental briefing regarding the "representative capacity" language in the parties' arbitration agreement. In its supplemental briefing, ForwardLine argued that the term "representative" in the agreement referred to claims brought on behalf of others, as distinguished from claims based on alleged violations as to Ahlmann himself.

Following supplemental briefing and oral argument, the court of appeal issued a ruling in favor of Ahlmann on November 12, 2021. The court of appeal reasoned that a claim for civil penalties under PAGA is a representative action to resolve a dispute between an employer and the state and therefore the bilateral arbitration agreement between Ahlmann and ForwardLine did not apply. App. 14-15. "Moreover," it continued, "because the arbitration clause expressly precludes the parties from pursuing arbitration 'as a representative . . . in any purported . . . representative proceeding,' the clause cannot be construed to cover a representative PAGA action without running afoul of the *Iskanian* rule prohibiting PAGA waivers." App. 6.

ForwardLine filed a petition for review with the California Supreme Court on December 21, 2021, specifically citing the factual and legal similarities between this case and the pending matter of *Viking River Cruises* in this Court as a reason to grant review. The California Supreme Court summarily denied discretionary review on February 23, 2022. App. 21. Remittitur has issued and the case is actively being litigated in the superior court.

REASONS FOR GRANTING THE PETITION

I. Standard for Grant-Vacate-Remand Order

The standard for an order granting a writ of certiorari, vacating the judgment, and remanding the case ("GVR") is well known: "[a] GVR is appropriate when

'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons v. Hall* 558 U.S. 220, 225 (2010) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). That standard is amply met here, for the reasons set forth below.

II. The California Court of Appeal's Decision Must Be Re-Examined Following This Court's Opinion in *Viking River Cruises*

The California Court of Appeal's decision is expressly founded on the proposition that all PAGA claims are of necessity representative actions for which pre-dispute agreements to arbitrate are not enforceable under *Iskanian*. That is exactly the proposition that this Court recently rejected in *Viking River Cruises*. Thus, the California Court of Appeal's decision is no longer good law, and this Court should grant, vacate, and remand the matter for further proceedings consistent with its opinion in *Viking*.

A. The Facts of This Case Are On All Fours With Those of *Viking River Cruises*

In *Viking River Cruises*, the defendant company had hired a California employee, Angie Moriana, as a representative in its sales department. *Viking River Cruises*, 142 S. Ct. 1906, Slip Op. at 5. The parties

mutually agreed to arbitrate all disputes arising out of the employment relationship, and further agreed that "class, collective, and representative" proceedings could not be brought in arbitration. *Id*. After the employment relationship ended, the disgruntled now-former employee brought a PAGA action in the superior court alleging Labor Code violations suffered by herself personally and violations allegedly suffered by others. *Id*. at 5-6, 17-18, 21. The defendant-employer moved to compel arbitration based on the broad language of the parties' bilateral agreement and the fact that at least some of the claims arose from the parties' employment relationship. *Id*. at 6, 17-18, 21. But the employer lost, based on California state courts' reading *Iskanian* to mean that all PAGA claims are representative because the employee "represents" the state. *Id*. at 17-18, 21. The employer then appealed to this Court, which rejected that construal of the word "representative" in favor of a more nuanced approach to arbitration in the context of single-plaintiff PAGA actions.

The fact pattern here is precisely parallel to that of *Viking River Cruises*. As in *Viking*, here a California employer and employee (to wit, in each case a sales representative) entered into a mutual agreement to arbitrate all disputes arising out of the employment relationship, which agreement also provided that arbitration was to be pursued on an individual basis and not as part of a "class or representative" proceeding. App. 4. As in *Viking*, after the end of the employment relationship, the aggrieved employee brought a single-plaintiff PAGA action alleging Labor Code violations

suffered personally, as well as violations allegedly incurred by unnamed others, and the employer moved – unsuccessfully – to compel arbitration on an individual basis pursuant to the pre-dispute agreement. App. 4, 21-34. Finally, as in *Viking*, here the employer appealed and lost based on the California Court of Appeal's misinterpretation of *Iskanian* as precluding enforcement of individual agreements to arbitrate all claims arising from the employment relationship. App. 5-20. There is no factual daylight between this case and *Viking River Cruises*, and accordingly ForwardLine should be afforded the same result as the employer in that case. *See Tison v. Ariz.*, 481 U.S. 137, 180 n.18 (1987) (fundamental principle of justice to treat like cases alike and different cases differently); *Davila v. Davis*, 137 S. Ct. 2058, 2075 (2017) (Breyer, J., dissenting) (recognizing "basic legal principle" requiring courts to "treat like cases alike").

B. The California Court of Appeal's Legal Analysis Is Invalidated by *Viking River Cruises*

The California Court of Appeal made the same legal error here as it did in the state court appeal underlying *Viking River Cruises*, and ForwardLine is entitled to avail itself of this Court's intervening correction, which occurred mere weeks ago and while ForwardLine's appellate rights had yet to be exhausted. *See Henderson v. United States*, 568 U.S. 266, 271 (2013) (noting general rule that in event of change in law during pendency of appeal, appellate courts are

required to apply the new law); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969) (same); *Ziffrin v. United States*, 318 U.S. 73, 78 (1943) (same). Specifically, the California Court of Appeal based its ruling on an over-expansive interpretation of the term "representative" as applied to single-plaintiff PAGA actions. That interpretation was expressly rejected in *Viking River Cruises*, and therefore the decision below is no longer good law.

In *Viking River Cruises*, the Court recognized that the *Iskanian* rule encompasses two distinct meanings of the word "representative." *Viking River Cruises*, 142 S. Ct. 1906, Slip Op. at 6. "In the first sense, PAGA actions are 'representative' in that they are brought by employees acting as representatives – that is, as agents or proxies – of the State." *Id*. "But PAGA claims are also called 'representative' when they are predicated on code violations sustained by other employees." *Id*. at 6-7. The Court further explained that "*Iskanian's* principal rule prohibits waivers of 'representative' PAGA claims in the first sense," i.e., preventing parties from "waiving representative standing to bring PAGA claims in a judicial or arbitral forum." *Id*. at 7. "But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate 'individual PAGA claims for Labor Code violations that an employee suffered,' on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA." *Id*. at 7.

It is this secondary rule that the Court rejected in *Viking River Cruises* as being preempted by the FAA.

Noting first that PAGA actions differ fundamentally from class actions in numerous material respects, the Court then construed PAGA as creating a single agent-single principal non-class representative action, and observed, "[n]on-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law." *Id*. at 13, 15. It then found a conflict between the categorical prohibition on splitting PAGA suits into individual and non-individual causes of action and controlling federal statutory and case law requiring the enforcement of arbitration agreements to which the individual plaintiff, as representative of the state, has bilaterally agreed with his or her employer to arbitrate. In particular, the Court noted that the *Iskanian* rule's "prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate, and does so in a way that violates the fundamental principle that arbitration is a matter of consent." *Id.* at 17-18 (citations and internal quotation marks omitted). The end result is coercion of parties to give up rights owed to them under the FAA, whether by forgoing arbitration altogether or by submitting to a range of claims and issues at arbitration that is different than what the parties contracted for. *Id*. at 20.

That result compelled reversal. *Id.* at 21. Specifically, the Court held that the FAA required that Moriana's claims be split into individual PAGA claims arising from Labor Code violations that she personally

suffered, and which were subject to the parties' arbitration agreement, and other claims brought on behalf of absent others, which were not. *Id.* at 21. In sum, "the rule that PAGA actions cannot be divided into individual and non-individual claims . . . is preempted." *Id.* Ultimately, the Court concluded that the non-individual PAGA claims would have to be dismissed because "PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding." *Id*. (citing Cal. Lab. Code §§ 2699(a), (c) (plaintiff has standing to bring non-individual PAGA claim only by bringing individual claims in same action)).

The same result is required here. The California Court of Appeal failed to make any distinction between Ahlmann's individual and non-individual PAGA claims – despite having had the chance to do so following the parties' supplemental briefing, in which counsel for ForwardLine expressly argued this point. App. 14-15, 17-18.[2] The entire underpinning of the Court of

[2] The court of appeal further erred in concluding that it could not excise the purportedly invalid waiver of representative PAGA claims and enforce the arbitration agreement as to the individual PAGA claims based on the lack of a severability clause in the offer letter. App. at 19 n.6. California law expressly provides that "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599. To the extent the bar on arbitration of representative PAGA claims could be read as an invalid waiver of PAGA claims, that clause should be severed while the clause

Appeal's decision is that all PAGA claims are "representative" and therefore not subject to FAA preemption because PAGA actions are disputes "between the employer *and the state*." *See*, *e.g.*, App. 9, 16, 19 (italicized throughout opinion). This conclusion is no longer valid in light of *Viking River Cruises*'s explicit recognition of the availability of a mutually contracted-for arbitral forum as to individual PAGA claims.

Ahlmann and ForwardLine entered into a bilateral agreement to arbitrate disputes arising from their employment relationship. Ahlmann brought PAGA claims that are expressly alleged to have arisen from Labor Code violations that he personally suffered. Per *Viking River Cruises*, the arbitration agreement is enforceable as to those claims, and to the extent *Iskanian* holds otherwise, it is preempted by the FAA. The Court should grant, vacate, and remand here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, the decision of the Court of Appeal should be vacated, and the matter should be remanded for further proceedings in accordance with the opinion in *Viking River Cruises v.*

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requiring arbitration of individual claims is enforced, just as in *Viking*.

Moriana, No. 20-1573, 596 U.S. ___, 142 S. Ct. 1906 (June 15, 2022).

Respectfully submitted,

BECKY S. JAMES
Counsel of Record
LISA M. BURNETT
DYKEMA GOSSETT LLP
333 South Grand Avenue
Suite 2100
Los Angeles, CA 90071
(213) 457-1800
BJames@dykema.com
LMBurnett@dykema.com

REBECCA L. TORREY
THE TORREY FIRM
1626 Montana Avenue
Suite 647
Santa Monica, CA 90403
(310) 310-2992
Rebecca@torreyfirm.com

Counsel for Petitioners ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC

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