

No. 22-75

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**

BRIEF IN OPPOSITION

DOUGLAS HAN
Counsel of Record
SHUNT TATAVOS-GHARAJEH
TALIA LUX
JUSTICE LAW CORPORATION
751 N. Fair Oaks Avenue, Suite 101
Pasadena, California 91103
Telephone: (818) 230-7502
Facsimile: (818) 230-7259
Email: dhan@justicelawcorp.com

*Counsel for Respondent
Brandon Ahlmann*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE FACTS	1
PROCEDURAL HISTORY	2
REASONS FOR DENYING THE WRIT	4
A. Contrary to Petitioners’ Contention, Viking River is Inapposite to the Case at Bar	5
B. Assuming <i>Arguendo</i> Respondent Alleged an Individual PAGA Claim Which Must be Compelled to Arbitration, Petitioners’ Position that Respondent’s Representative Claim Must be Dismissed Is Improper	9
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page
CASES	
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006)	6
<i>Garrido v. Air Liquide Indus. U.S. LP</i> , 241 Cal.App.4th 833 (2016)	7
<i>Iskanian v. CLS Transp. Los Angeles</i> , 59 Cal.4th 348 (2014).....	<i>passim</i>
<i>Kim v. Reins Int'l California, Inc.</i> , 9 Cal.5th 73 (2020).....	8, 10
<i>Lawrence v. Charter</i> , 516 U.S. 163 (1996)	5
<i>Viking River Cruises, Inc. v. Moriana</i> , 14 S.Ct. 1906 (2022)	<i>passim</i>
<i>Volt Info. Scis. v. Bd. of Trs.</i> , 489 U.S. 458 (1989)	11, 12
STATUTES	
Federal	
9 U.S.C. § 2	6
28 U.S.C. § 2106	4
California	
California Code of Civil Procedure Section 1281.2	11, 12
Labor Code Section 201	2
Labor Code Section 202	2

TABLE OF AUTHORITIES – Continued

	Page
Labor Code Section 203	2
Labor Code Section 204	2
Labor Code Section 226(a)	2
Labor Code Section 226.2	2
Labor Code Section 226.3	2
Labor Code Section 226.7	2
Labor Code Section 510	3
Labor Code Section 512(a)	3
Labor Code Section 1174	3
Labor Code Section 1194	3
Labor Code Section 1197	3
Labor Code Section 1197.1	3
Labor Code Section 1198	3
Labor Code Section 2698	2
Labor Code Section 2699.3	2
Labor Code Section 2800	3
Labor Code Section 2802	3

STATEMENT OF THE FACTS

On or around August 7, 2018, Petitioners Forwardline Financial, LLC and Forwardline Payment Services, LLC (collectively, “Petitioners”) offered Respondent Brandon Ahlmann (“Respondent”) a position as a loan representative which was to begin on August 20, 2018. Respondent’s offer letter contained a purported arbitration provision, signed by Respondent, which reads:

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 enforceable 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.

App. 3-4. Respondent worked for Petitioners until around March 2019.

◆

PROCEDURAL HISTORY

Respondent's complaint seeks civil penalties against Petitioners under California Labor Code sections 2698 *et seq.* (the Private Attorney's General Act of 2004 "PAGA"). On June 26, 2019, pursuant to Labor Code section 2699.3, Respondent provided written notice to the California Labor and Workforce Development Agency ("LWDA"). Respondent's LWDA notice letter set forth his alleged claims and their bases under PAGA, thereby giving the LWDA an opportunity to decide whether it wanted to investigate the claims. The LWDA decided not to investigate Respondent's PAGA claim.

On September 18, 2019, Respondent filed a representative PAGA lawsuit, alleging violations of Labor Code sections 2698 *et seq.* Respondent's representative PAGA action is predicated on violations of Labor Code sections 201, 202, 203, 204, 226(a), 226.2, 226.3, 226.7,

510, 512(a), 1174, 1194, 1197, 1197.1, 1198, 2800, and 2802, and seeks to recover civil penalties.

Shortly after Respondent filed his complaint, on October 25, 2019, Petitioners filed a motion to compel arbitration. In their motion, Petitioners argued the trial court should compel Respondent's PAGA claim to arbitration due to Respondent's reference to "statutory penalties" in paragraph 32 of the complaint. Petitioners argued the reference to "statutory penalties" constitutes an arbitrable issue, pursuant to the parties' arbitration agreement.

In response to Petitioners' motion, and to clarify Respondent was only pursuing civil penalties pursuant to PAGA, Respondent filed a First Amended Complaint ("FAC") on November 25, 2019. The FAC removed the reference to "statutory penalties" in paragraph 32 of the complaint, clarifying the penalties Respondent is seeking in paragraph 37 are "civil" penalties.

On January 20, 2020, in response to the FAC, Petitioners filed a renewed motion to compel arbitration. On February 10, 2020, the trial court denied Petitioners' renewed motion to compel arbitration. The trial court held, Petitioners could not compel Respondent to arbitrate his PAGA claim because, in relevant part, under *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348 (2014), a waiver of a representative action under PAGA violates public policy. App. 30 (discussing *Iskanian*, 59 Cal.4th at 348. Moreover, the trial court

emphasized that Respondent’s FAC seeks only civil penalties – not statutory penalties. App. 29.

On February 14, 2020, Petitioners filed a Notice of Appeal. After the parties submitted their briefing, on August 27, 2021, the Court of Appeal requested supplemental briefing pertaining to the plain language in the arbitration provisions at issue. On November 12, 2021, the Court of Appeal denied Petitioners’ appeal, holding Petitioners failed to satisfy their burden to establish a valid agreement to arbitrate Respondent’s representative PAGA claim. App. 6. The Court of Appeal also held, “because the arbitration clause expressly precludes the parties from pursuing arbitration ‘as a representative . . . in any purported . . . representative proceeding,’” the clause runs afoul of *Iskanian*’s rule prohibiting PAGA waivers. *Id.*

On December 21, 2021, Petitioners filed a petition for review with the California Supreme Court. On February 23, 2022, the California Supreme Court denied Petitioners’ petition for review. App. 21.

◆

REASONS FOR DENYING THE WRIT

Pursuant to 28 U.S.C. § 2106, Respondent asks this Court to grant its Petition for Writ of Certiorari, vacate the California Court of Appeal’s judgment, and remand the case back to the trial court in light of this Court’s decision in *Viking River Cruises, Inc. v. Moriana*, 14 S. Ct. 1906 (2022). A “GVR” order is “potentially” appropriate where:

recent developments that [the Supreme Court] has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject given the opportunity for further consideration, and where it appears that such a re-determination may determine the ultimate outcome of the litigation.

Lawrence v. Charter, 516 U.S. 163, 167 (1996).

A. Contrary to Petitioners' Contention, *Viking River* Is Inapposite to the Case at Bar.

In *Viking River Cruises, Inc. v. Moriana*, 14 S. Ct. 1906 (2022), this Court decided the narrow issue of whether the Federal Arbitration Act (“FAA”) preempts the rule “invalidat[ing] contractual waivers of the right to assert representative claims under California’s Labor Code Private Attorneys General Act of 2004” (“PAGA”), as set forth in *Iskanian*, 59 Cal.4th 348. 14 S. Ct. at 1913. This Court held, *Iskanian*’s rule prohibiting a “wholesale waiver” of PAGA claims is not preempted. *Id.* at 1924-25. In other words, this Court upheld *Iskanian*’s rule rendering PAGA representative waivers unenforceable. Instead, this Court preempted the rule that “PAGA actions cannot be divided into individual and non-individual claims.” *Id.* at 1925.

Moriana executed an arbitration agreement which included a representative PAGA waiver. *Id.* at 1916.

The arbitration agreement also contained a severability provision which specified, if the waiver was found invalid, any representative PAGA action would be litigated in court. *Id.* However, per the severability clause, if any portion of the waiver remained valid, it would be enforced in arbitration. *Id.* Moriana filed a PAGA complaint against Viking in court which “contained a claim that Viking had failed to provide her with her final wages within 72 hours[.]” *Id.* Viking moved to compel arbitration of Moriana’s “individual” PAGA claim, namely, the claim that Viking had failed to provide her with her final wages within 72 hours, and sought to dismiss her other PAGA claims. *Id.* Ultimately, this Court reasoned, *based on the severability provision*, “Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana’s individual PAGA claim.” *Id.* at 1925.

Contrary to Petitioners’ assertion, this matter is not on all fours with *Viking River*. Foremost, the arbitration agreement here is not governed by the FAA as the arbitration agreement makes no mention of the FAA whatsoever. *But see, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442-43 (holding the arbitration agreement was governed by the FAA where a provision expressly designated such). Petitioners have entirely failed to establish that the arbitration agreement is governed by the FAA. Petitioners have made no mention of how the agreement at issue involves interstate commerce, as required for the governance of the FAA. *See* 9 U.S.C. § 2. Thus, it appears the arbitration agreement is governed under the California

Arbitration Act (“CAA”), especially in light of the fact that the arbitration agreement here includes a choice-of-law provision, mandating that arbitration shall be pursuant to the laws of the State of California. *See, e.g., Garrido v. Air Liquide Industrial U.S. LP*, 241 Cal.App.4th 833, 841-42 (review den. Feb. 3, 2016) (cert. den. Oct. 3, 2016) (if the FAA does not apply to an arbitration agreement, the CAA applies). Therefore, *Viking River* is distinguishable as this Court in *Viking River* decided the narrow issue of “whether the [FAA] preempts . . . California law that invalidates contractual waivers of the right to assert representative claims under” the PAGA. *Id.* at 1913. On this basis alone, Petitioners’ Petition must be denied.

Assuming arguendo the arbitration agreement is governed by the FAA, Petitioners’ Petition must still be denied. As the Court of Appeal correctly recognized, Petitioners’ arbitration agreement runs afoul the *Iskanian* rule prohibiting a “wholesale waiver” of representative PAGA claims. This proposition was affirmed by this Court in *Viking River*. The arbitration agreement reads, “[e]ach party may pursue arbitration solely in an individual capacity, and not as a representative . . . in any purported . . . representative proceeding.” App. 4. The arbitration agreement contains no severability provision.

To reiterate, this Court in *Viking River* did not preempt *Iskanian*’s rule rendering PAGA representative waivers unenforceable. Thus, because the arbitration agreement lacks a severability provision, the representative waiver here remains unenforceable

under both *Iskanian* and *Viking River*. See *Viking River*, 14 S. Ct. at 1912 (“[n]othing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principles”). Indeed, such a waiver frustrates the purpose of PAGA’s objectives and undermines the legislative intent in enacting the PAGA. On this basis alone, because the arbitration agreement forecloses Respondent from pursuing a representative PAGA action, it cannot be enforced to mandate the arbitration of Respondent’s individual PAGA claim when there is no recourse for his representative PAGA claim. A representative PAGA waiver renders the arbitration provision under the arbitration agreement entirely unenforceable.

Further, Respondent brought this action entirely on a representative basis. Respondent has not sought to litigate any individual claims, as clarified by Respondent eliminating individual damages when filing his FAC. Bringing a PAGA action entirely on a representative basis is feasible and has been recognized by the California Supreme Court. See *Kim v. Reins Int’l California, Inc.*, 9 Cal.5th 73, 91 (2020) (a PAGA plaintiff need not allege a “separate, unresolved claim” or have an “unredressed injury” to bring a PAGA action). Again, Respondent seeks only civil penalties pursuant to PAGA. See *Kim v. Reins*, 9 Cal.5th at 86 (emphasis added) (“civil penalties recovered on the state’s behalf are intended to remediate present violations and deter future ones, **not to redress employees’ injuries**”). Thus, because Respondent has not alleged an

individual PAGA claim – as he is not seeking individual damages – Respondent cannot be compelled to arbitration under *Viking River*.

B. Assuming *Arguendo* Respondent Alleged an Individual PAGA Claim Which Must be Compelled to Arbitration, Petitioners’ Position that Respondent’s Representative Claim Must be Dismissed Is Improper.

Assuming this Court finds Respondent alleged an individual PAGA claim, and assuming his individual PAGA must be compelled to arbitration under the arbitration agreement, the proper course of action is not to dismiss Respondent’s representative PAGA claim.

Foremost, this Court in *Viking River* did not decide the issue of whether a plaintiff retains standing to assert representative claims under PAGA once he has arbitrated his individual PAGA claims. Specifically, the portion in *Viking River*’s opinion finding “PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding,” remains dicta. *Id.* at 1925. Justice Sotomayor drafted a concurring opinion, finding that the issue of whether a PAGA plaintiff “lacks ‘statutory standing under PAGA to litigate her “non-individual claims” separately in state court” remains an unsettled issue for California courts to decide. *Viking River*, 14 S. Ct. 1906 (Sotomayor, J., concurring) at 1925-26. Further, Justice Barrett drafted a concurring opinion, joined by Justice

Kavanaugh and Chief Justice Roberts, refusing to join with Parts II and IV of this Court’s opinion regarding the same, finding “it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case.” *Id.* at 1926 (Barrett, J., concurring). Moreover, Justice Thomas drafted a dissenting opinion, entirely refusing to join the opinion drafted by Justice Alito. *Id.* (Thomas, J., dissenting).

Indeed, such a holding that a plaintiff can maintain a representative PAGA claim in an action only by virtue of also maintaining an individual claim in that action, has been explicitly discredited by the California Supreme Court in *Kim v. Reins Int’l California, Inc.*, 9 Cal.5th 73 (2020). This Court’s opinion in *Viking River* has not overturned *Kim v. Reins*, even in part. In fact, this Court relied on *Kim v. Reins* when discussing how to proceed with Moriana’s representative claim – “PAGA’s standing requirement was meant to be a departure from the “general public” . . . standing originally allowed’ under other California statutes.” *Viking River*, 14 S. Ct. 1906 at 1925 (citing *Kim v. Reins*, 9 Cal.5th at 90). The Court in *Kim v. Reins* held, “[s]ettlement of individual claims does not strip an aggrieved employee of standing, as the state’s authorized representative, to pursue PAGA remedies.” 9 Cal.5th at 80. Thus, a PAGA plaintiff does not lose standing to maintain a representative PAGA action by virtue of settling and/or dismissing an individual PAGA claim under *Kim v. Reins*.

More importantly, to reiterate, the arbitration agreement here includes a choice-of-law provision,

mandating that arbitration shall be pursuant to the laws of the State of California. App. 4. Thus, even if this Court finds the arbitration agreement is governed by the FAA and an agreement to arbitrate the controversy exists, given the choice-of-law provision, California Code of Civil Procedure section 1281.2 applies. *See Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 458, 477 (even where the FAA is “applicable in state-court proceedings, [the FAA] do[es] not prevent application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law”).

California Code of Civil Procedure section 1281.2, subdivision (c) reads, in relevant part:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: . . . (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction . . . and there is a possibility of conflicting rulings on a common issue of law or fact.

This Court in *Viking River* did not overturn the notion that a PAGA plaintiff is bringing, at least in part, a representative action on behalf of the State of

California, which cannot be waived by way of an arbitration agreement. Petitioners do not dispute this contention. See Petition for Writ of Certiorari at p. 13 (internal quotations and citations omitted) (“PAGA actions are representative in that they are brought by employees acting as representatives – that is, as agents or proxies – of the State[,]” and this Court held “*Iskanian*’s principal rule prohibits waivers of representative PAGA claims in th[is] [] sense”). Therefore, clearly, there is a third party at issue here – the State of California. Further, it is undisputed that both the individual and representative PAGA claims here arise out of the same transaction or occurrence. Thus, California Code of Civil Procedure section 1281.2 applies to the arbitration provision at issue, as it is governed under California law.

Pursuant to this Court’s precedent, application of California Code of Civil Procedure section 1281.2(c) to stay arbitration here is proper and not preempted by the FAA. See *Volt Info. Scis.*, 489 U.S. at 477-78, 479 (where “the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward”). Thus, Respondent requests this Court refuse to stay the judicial proceedings and stay the arbitration under California Code of Civil Procedure section 1281.2(c) because a third party is involved – the State of California – who is not bound by the

arbitration agreement, and there is a possibility of conflicting rulings on the common issues of law and fact.

Alternatively, if this Court is inclined to grant Petitioners' GVR Petition and compel Respondent's individual PAGA claim to arbitration, Respondent respectfully requests this Court remand with instructions to stay Respondent's representative PAGA claim, pending the outcome of his individual PAGA claim in arbitration.

◆

CONCLUSION

For the reasons stated herein, Respondent Brandon Ahlmann respectfully requests the Petition for Writ of Certiorari be denied.

Dated: November 3, 2022

Respectfully submitted,

DOUGLAS HAN

Counsel of Record

SHUNT TATAVOS-GHARAJEH

TALIA LUX

JUSTICE LAW CORPORATION

751 N. Fair Oaks Avenue,

Suite 101

Pasadena, California 91103

Telephone: (818) 230-7502

Facsimile: (818) 230-7259

Email: dhan@justicelawcorp.com

Counsel for Respondent

Brandon Ahlmann