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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

Respondent Brandon Ahlmann sued ForwardLine Financial, LLC, and ForwardLine Payment Services, LLC (collectively "ForwardLine") for violations of California's Private Attorneys General Act of 2004 ("PAGA") based on Labor Code violations allegedly committed against him, as well as similar harms allegedly committed unnamed others. ForwardLine and Ahlmann had mutually agreed to arbitrate "any and all claims" arising from their employment relationship. The outcome of this case is therefore governed by *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 596 U.S. ___, 142 S. Ct. 1906 (2022), which holds that bilateral agreements to arbitrate an employee's PAGA claims arising from alleged Labor Code violations committed against the employee personally are enforceable. To the extent California law holds otherwise, it is pre-empted by the Federal Arbitration Act, 9 U.S.C. § 2. Ahlmann's brief in opposition misreads *Viking River Cruises*, attempts to evade FAA preemption, and invites the Court to weigh in on a number of state-law matters that are not properly before it. Ahlmann has an individual PAGA claim that the parties agreed to arbitrate, and, per *Viking*, that agreement must be enforced. The Court should grant the petition, vacate the Court of Appeal's order denying ForwardLine's motion to compel arbitration, and remand this matter to the state court for reconsideration consistent with *Viking*.

I. *Viking River Cruises* Is Controlling

This case parallels *Viking* in all salient respects and accordingly *Viking* controls the outcome. Here and in *Viking*, a California employer and employee 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. *Viking*, 142 S. Ct. at 1916; App. 4. Here, as in *Viking*, an aggrieved now-former 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 predispute agreement. *Viking*, 142 S. Ct at 1916; App. 4, 21-34. And here, as in *Viking*, the California Court of Appeal misread *Iskanian* to prevent enforcement of individual agreements to arbitrate all claims arising from the employment relationship. 142 S. Ct at 1916-17; App. 5-20. *Viking* rejects that reading of *Iskanian*, and holds the FAA "preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Viking*, 142 S. Ct. at 1924.

Ahlmann's brief in opposition attempts to distinguish *Viking* on the bases that (1) Ahlmann is not seeking compensatory damages; (2) the parties' arbitration agreement does not contain an explicit severability clause; and (3) the Federal Arbitration Act does not

apply. These are unavailing, for the reasons discussed below.

A. Ahlmann has an individual, victim-specific PAGA claim

It is not disputed that Ahlmann has pleaded Labor Code violations that were allegedly suffered by him personally, as well as "other current and former employees." This claim is not rendered "representative" by virtue of Ahlmann's decision to seek only civil penalties; indeed, the plaintiff-respondent in *Viking* sought only civil penalties herself. *Viking River Cruises, Inc. v. Angie Moriana*, No. 20-1573, Joint Appendix at 39-41 (filed Jan. 31, 2022). *Viking* discusses two senses in which a PAGA action is "representative" – that in which the plaintiff acts as an agent of the state, and that in which the plaintiff acts as an agent of one or more absent third parties. 142 S. Ct. at 1916. *Viking* does not distinguish these claims based on the types of damages sought, but rather on whether the Labor Code violations in question were allegedly suffered by the plaintiff. *Id*. Thus, Ahlmann has an "individual PAGA claim" as that term was defined in *Viking*. *See* 142 S. Ct. at 1916.

B. Ahlmann's individual PAGA claim is severable from his non-individual claims

The absence of an express severability clause in the parties' arbitration agreement does not take this case outside the purview of *Viking* because principles

of contract law allow such a provision to be read into the agreement, and to decline to sever Ahlmann's individual PAGA claim would be inconsistent with this Court's holding in *Viking*.

1. Severability is implied even in the absence of an express contractual provision

California Civil Code § 1643 provides that "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civ. Code § 1643. Similarly, California Civil Code § 1599 provides, "[w]here 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. "The overarching inquiry is whether interests of justice would be furthered by severance." *Shopoff & Cavallo LLP v. Hyon*, 167 Cal.App.4th 1489, 1523 (2008) (quoting *Templeton Development Corp. v. Superior Court*, 144 Cal.App.4th 1073, 1084 (2006)) (citations and internal alterations omitted) (severing invalid portion of attorney contingent fee agreement so as to render remaining portions of contract enforceable). The FAA similarly has a "rule of severability," even when an arbitration agreement does not expressly include a severability clause. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (arbitration provision

of agreement was severable from allegedly void remainder of contract for purposes of FAA enforcement).

2. Ahlmann's individual PAGA claim should be severed

To read the arbitration agreement in the manner suggested by Ahlmann is to render it completely unenforceable as to any PAGA claim and possibly unenforceable altogether. That reading is not only contrary to the intention of the parties and the California Civil Code, but it runs afoul of this Court's reasoning in *Viking* and creates a sizeable exception to the FAA that Congress surely did not intend. The FAA was enacted in response to judicial hostility to arbitration. *Viking*, 142 S. Ct. at 1917. Section 2 of the FAA has two components: (1) an enforcement mandate, which "renders agreements to arbitrate enforceable as a matter of federal law," and (2) a saving clause, which "permits invalidation of arbitration clauses on grounds applicable to 'any contract.'" *Id*. (citations omitted). Together, the clauses jointly establish "an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id*. (quoting *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 251 (2017)).

PAGA has already created a boon for California plaintiffs' lawyers wishing to evade arbitration. *Viking*

put an important check on that practice by distinguishing between individual and non-individual PAGA claims and finding bilateral arbitration agreements enforceable as to the former. This is particularly important for disputes brought by plaintiffs like Ahlmann, whose PAGA claim arises entirely from species of alleged Code violations he claims to have personally suffered. To permit him to avoid the effect of the arbitration agreement provides an incentive to plaintiffs like him to restyle their individual grievances as "PAGA claims." This undermines the *Viking* decision – and the long line of case law upon which it relied – mere months after it was issued. The intention of the parties and the interests of justice are both served by severance, and the FAA and California law readily provide the mechanism for doing so. Ahlmann's individual PAGA claims are severable from his representative claims on behalf of absent third parties, and should be severed just as the plaintiff-respondent's was in *Viking*.

C. The FAA Applies to the Parties' Arbitration Agreement

The FAA applies to the parties' arbitration agreement insofar as it pre-empts contrary California law that would otherwise preclude arbitration of Ahlmann's individual PAGA claim. It has not been (and cannot be) seriously disputed that ForwardLine's business has the requisite nexus with interstate commerce. App. 28 ("ForwardLine is a nationwide lender that receives applications for loans online and transfers funds

to small businesses throughout the country."); *cf*. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, (2003) (even company that performed purely intrastate debt-restructuring transactions had requisite connection with interstate commerce to be covered by FAA).

The parties' agreement does not mention the FAA or the California Arbitration Act. It does not contain a specific choice-of-law provision. The relevant language in the agreement is as follows:

> 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.

Ahlmann misconstrues this language as a choice-of-law provision reflecting a conscious decision by the parties to contract around FAA preemption. (Opp. at 7.) First, that reading is not supported by the plain text of the clause, which expressly designates arbitration as

the sole available forum to resolve employment disputes, and waives class-action claims or representative claims on behalf of absent other employees. Contracts are to be read to effectuate the intent of the parties. *See* Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.") The parties' clear mutual intent is to arbitrate all claims arising from their employment relationship, and to do so on an individual basis.

Second, *Garrido v. Air Liquide Indus. U.S. LP*, 241 Cal.App.4th 833, 840 (2015), cited by Ahlmann, is not on point. The plaintiff in *Garrido* was a truck driver who was employed by defendant to drive its products across state lines. *Id*. at 8. He had nevertheless entered into an agreement to arbitrate employment disputes with the defendant, which agreement purported to be governed by the FAA. *Id*. at 839. Section 1 of the FAA exempts from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As the *Garrido* court observed, "The most obvious case where a plaintiff falls under the FAA exemption is where the plaintiff directly transports goods in interstate, such as [an] interstate truck driver whose primary function is to deliver mailing packages from one state into another." *Garrido*, 241 Cal.App.4th at 840. Accordingly, the FAA could not apply to the plaintiff in *Garrido*. Here, Ahlmann has never claimed to fall under any FAA exemption, and none is obvious to ForwardLine.

Finally, to the extent that the above-quoted provision reflects a general choice to apply California law to proceedings in California involving a California (former) employee, California courts have found that the FAA still preempts state law "when the particular provision of state law in question is one that reflects a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome." *Mount Diablo Med. Ctr. v. Health Net of Cal.*, 101 Cal.App. 4th 711, 724, (2002) "If so, the choice-of-law clause should not be construed to incorporate such a provision, at least in the absence of unambiguous language in the contract making the intention to do so unmistakably clear." *Id*.

Here, the requisite unmistakable clarity is absent, as discussed above. Further, the provisions of California law which Ahlmann invokes – Code of Civil Procedure § 1281.2(c) and the pre-*Viking* reading of *Iskanian* prohibiting splitting of PAGA actions into individual and representative claims – reflect exactly the type of hostility to arbitration that the FAA was enacted to prevent. *Viking*, 142 S. Ct. at 1916, 1924-25.[1] The generic language of the arbitration provision does not reflect a conscious and mutual intention to waive the protections of the FAA in favor of the CAA. *Viking*

[1] Ahlmann also argues that § 1281.2(c) precludes arbitration of his individual PAGA claim because the state and unnamed other employees are absent third parties. (Opp. at 12.) To the extent § 1281.2(c) conflicts with this Court's decision in *Viking*, *Viking* is controlling and the solution is to enforce the arbitration agreement as to Ahlmann's individual PAGA claim and dismiss Ahlmann's non-individual PAGA claims.

controls and demands that the petition be granted and the matter vacated and returned to the California Court of Appeal for reconsideration.

II. Ahlmann's Non-Individual PAGA Claims Should Be Dismissed, or in the Alternative Addressed in California State Court on Remand

ForwardLine agrees with the *Viking* majority that Ahlmann's remaining non-individual PAGA claims must be dismissed, as California provides no mechanism for maintaining them once his individual PAGA claim is sent to arbitration. *Viking*, 142 S. Ct. at 1925.

In the alternative, as noted in the concurrences of Justices Barrett and Sotomayor in *Viking*, 142 S. Ct. at 1925-26, the disposition of Ahlmann's non-individual claims is an unsettled matter of state law that is not before this Court. Ahlmann cites to *Kim v. Reins International California, Inc.*, 9 Cal.5th 73 (2020) for the proposition that a PAGA plaintiff maintains standing to sue even after his or her individual PAGA claim has been settled. (Opp. at 10). The effect of the *Viking* decision on *Kim* and its progeny is a matter for California state courts to decide, and the question is premature as to Ahlmann because he has not settled or otherwise dismissed his individual PAGA claim. In any event, the fate of Ahlmann's non-individual PAGA claims is not a reason to deny ForwardLine's petition.

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. As the Court held in *Viking*, 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 the petition, vacate the California Court of Appeal's decision, and remand the matter for reconsideration consistent with *Viking*.

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. Moriana*, 596 U.S. ___, 142 S.Ct. 1906 (2022).

Respectfully submitted,

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