No. 23-1130

In the
Supreme Court of the United States

UBER TECHNOLOGIES, INC., *ET AL.*,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae California Employment Law Council (CELC) files this brief in support of Petitioners Uber Technologies, Inc., et al.[1] CELC is a voluntary, non-profit organization that promotes the common interests of employers and the public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes roughly 80 private-sector employers in California who collectively employ more than a half-million Californians. CELC has participated as an *amicus* in many of California's leading employment cases[2] and several cases in this Court.[3]

Many members of *amicus* have arbitration agreements with some or all of their employees. They therefore have a significant stake in the outcome of this case. *Amicus'* experience with and expertise in the practical aspects of employment matters allow it to assist this Court in evaluating the issues here.

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[1] In accordance with Supreme Court Rule 37.6, *amicus* declares that no party or counsel in the pending appeal either authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of the accompanying brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief other than *amicus* or its members.

[2] *See, e.g., Donahue v. AMN Servs., LLC*, 11 Cal. 5th 58 (2021); *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021); *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (2020); *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018); *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018).

[3] *See, e.g., Bisonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (U.S. 2023); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022).

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements according to their terms. 9 U.S.C. § 2. The FAA respects private choices to arbitrate, and it preempts state efforts to undermine those choices. *See* U.S. Const. art. VI, cl. 2. That principle has been made clear through the repeated decisions of this Court. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649 (2022); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). *Cf. Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018). And yet, state lawmakers and administrative officials have continued to attack arbitration through ever more creative legal tactics. *See, e.g.*, *Chamber of Com. of the United States of Am. v. Bonta*, 62 F.4th 473, 478 & n.1 (9th Cir. 2023) (considering California law that imposed civil and criminal penalties on arbitration agreements in employment contracts); *Olde Disc. Corp. v. Tupman*, 1 F.3d 202, 211 (3d Cir. 1993) (considering Delaware statutory rescission remedy that rendered private arbitration meaningless).

This case involves one such tactic. In recent years, state officials have increasingly sought to erode arbitration through their enforcement powers. Through superficially "public" lawsuits, they have sued to recover amounts owed to individual parties under private contracts. *See, e.g.*, *Healey v. Uber Techs.*, No. 2084CV01519-BLS1 (Mass. Super. Mar. 25, 2021) (lawsuit by Massachusetts attorney general to establish driver-partners' entitlement to wages and benefits under state law); *People v. DoorDash*, No. CGC-20-584789 (Cal. Sup. Ct. June 16, 2020) (action

by San Francisco city attorney to recover amounts allegedly owed to delivery workers); *District of Columbia v. Maplebear, Inc.*, No. 2020 CA 00377 B (D.C. Sup. Ct. Aug. 27, 2020) (suit by DC attorney general to recover gratuities allegedly owed to delivery workers). These suits have often been brought on behalf of parties who agreed to otherwise enforceable arbitration agreements. *See, e.g.*, *Rent-A-Center, Inc. v. Iowa Civ. Rts. Comm'n*, 843 N.W.2d 727, 741 (Iowa 2014) (state agency could sue to recover individual relief allegedly owed to employee who signed arbitration agreement); *Crestwood Behav. Health, Inc. v. Lacy*, 70 Cal. App. 5th 560, 588 (2021) (holding that state labor commissioner seeking relief for individual employee was not bound by employee's arbitration agreement). No one disputes that had these same parties filed their own claims, they would have been required to arbitrate. *See Lacy*, 70 Cal. App. 5th at 588 (noting that employee had already been ordered to arbitrate). But because states have sued on the parties' behalf, courts have allowed the lawsuits to proceed despite the agreements. *See, e.g.*, *People v. Maplebear Inc.*, 81 Cal. App. 5th 923, 935 (2022) (affirming denial of motion to compel arbitration because state was not a party to the arbitration agreement); *People ex rel. Cuomo v. Coventry First LLC*, 915 N.E.2d 616, 618 (N.Y. 2009) (denying motion to compel attorney general to arbitration in suit filed on behalf of certain brokers because the attorney general "did not enter any contracts with defendants").

This tactic has been most pronounced in California. California officials have filed lawsuit after lawsuit designed to circumvent arbitration. *See, e.g.*, *Dep't of Fair Emp. & Hous. v. Cisco Sys., Inc.*, 82 Cal.

App. 5th 93, 103 (2022);[4] *Maplebear*, 81 Cal. App. 5th at 935; *DoorDash*, No. CGC-20-584789; *People v. Handy*, No. CGC-21-0590442, slip op. at 6-7 (Cal. Sup. Ct. Sept. 28, 2022). Among these lawsuits have been several filed against Petitioner Uber Technologies. These suits have sought to recover contractual damages on behalf of certain independent driver-partners. Because the drivers agreed to arbitrate their claims, Petitioner moved to compel the suits to arbitration. But in this case, a California court of appeals denied that motion. *See In re Uber Techs. Wage & Hour Cases*, 95 Cal. App. 5th 1297, 1304, 1312 (2023), *review denied* (Jan. 17, 2024). The court reasoned that the nominal plaintiff in the suits was not the drivers, but the state. *Id.* So the lawsuits could proceed despite the otherwise valid agreements. *Id.* (holding that the "People and the Labor Commissioner . . . are not barred from seeking judicial relief by arbitration agreements they did not enter").

In the process, the California court signaled that state officials are free to sidestep arbitration. *See id.* at 1312. State officials can file superficially "public" suits and collect damages on behalf of individual contracting parties. *See id.* In effect, the court declared open season on arbitration: from now on, states will be able to nullify arbitration agreements by filing contractual claims themselves. *See id.*

That decision will reverberate across statehouses and the economy at large. It will encourage states to reassign contractual claims from private parties to

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[4] Available online: https://www.uschamber.com/assets/documents/Order20re20Demurrer20Motion20to20Strike20and20Motion20to20Stay20-20California20v.20DoorDash2C20Inc.2028Superior20Court20of20California29.pdf.

government officials. And those officials will be free to trample on arbitral rights. Through a legal shell game, states will be free to shuffle claims out of arbitration and into state courts. *See id.* (reasoning that state cannot be required to arbitrate claims for individual relief when it did not join the agreement as a party). And indeed, they have already started to do so. States and cities are increasingly delegating contractual claims to public officials with an eye toward nullifying arbitration agreements. And if that trend continues, arbitration may soon be an afterthought—a technicality that state officials can eliminate with a few statutory tweaks. *See, e.g.*, S.B. 5026, Reg. Sess. (N.Y. 2023-24) (authorizing state agency to take certain freelancers' contractual claims "in trust" and sue on those claims to recover amounts owed under the contract); S.B. 988, Reg. Sess. (Cal. 2023-24) (authorizing state officials to sue on behalf of freelancers to recover "the contracted compensation").

This outcome is not inevitable. It can be prevented. But it can be prevented only by this Court. The Court should grant the petition, reverse the court of appeal, and reaffirm the FAA's clear federal policy of enforcing arbitration agreements according to their terms.

ARGUMENT

This case arose from a group of lawsuits by California officials against Petitioner, Uber Technologies, Inc. The lawsuits each focused on the status of drivers who use Petitioner's app-based platform to provide rideshare services to consumers. To use the platform, the drivers must agree to Petitioners' terms of service, which include an

agreement to arbitrate all disputes. *See Platform Access Agreement*, Uber (2022).[5] The terms of service also specify that, with respect to their relationship with Petitioner, the drivers are not employees, but independent contractors. *Id.*

In 2020, California passed a sweeping worker-classification bill, AB 5, that changed the rules for classifying many workers. *See* A.B. 5 Reg. Sess. (Cal. 2019). *See also* Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 Wm. & Mary Bus. L. Rev. 733, 761–62 (2020) (describing leadup to passage of AB 5). A group of state officials then filed overlapping lawsuits under AB 5 and the state's Unfair Competition Law against Petitioner. These lawsuits asserted that the drivers were not contractors, but employees. And they sought multiple forms of relief, including driver-specific relief, such as allegedly unpaid compensation and expense reimbursements. *See Uber Techs.*, 95 Cal. App. 5th at 1302–03 (describing procedural history).

In response, Petitioner moved to compel arbitration of the driver-specific portions of these claims. *Id.* at 1303. A California Superior Court denied Petitioner's motion, and a California appellate court affirmed. *Id.* at 1304. The appellate court purported to apply California precedent and this Court's decision in *EEOC v. Waffle House*, 534 U.S.

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[5] Available online: https://tb-static.uber.com/prod/reddog/country/UnitedStates/licensed/f5f1f4a9-4e6d-4810-8aa3-21b663290294.pdf.

279 (2002).[6] Under those precedents, the court concluded that California officials could not be compelled to arbitration because they had signed no agreement with Petitioner. *Id.* at 1312. Though the officials sought relief for individual drivers, who had agreed to arbitrate, they were not bound by those drivers' agreements. *Id.*

As explained in the petition for certiorari, the appellate court's decision distorted this Court's precedent and contradicted the strong federal policy of enforcing arbitration agreements. *See* Pet. at 20–27. But the decision did more than just misconstrue precedent and undermine federal policy. It also threatened to open a new path for states to subvert private arbitration, a path many states were already pursuing. And that trend will only accelerate if the decision stands. States and cities will be able to effectively nullify private arbitration for large swaths of the American workforce—unless they are stopped by this Court.

I. The panel's decision will open a new avenue for states to undermine private arbitration agreements.

The appellate panel effectively nullified the drivers' arbitration agreements. It held that the agreements did not bind state officials, even when the officials were suing to recover amounts allegedly owed to drivers who had agreed to arbitrate. *Uber Techs.*, 95 Cal. App. 5th at 1304, 1312. The panel acknowledged that the drivers could have sought to

[6] The panel also relied on *Cisco*, 82 Cal. App. 5th at 99, and *Maplebear*, 81 Cal. Ap. 5th at 931-32, each of which reached a similar conclusion on a similar rationale.

recover the same remedies themselves. *See id.* at 1313. And if they had, they would have been bound by their arbitration agreements. *See id.* But because the state was the nominal plaintiff, the agreements were irrelevant. State officials could sidestep the agreements and recover the same relief for the drivers in court. And these officials could do so on what was effectively a class-wide basis—even though the drivers themselves would have had to arbitrate their claims individually. *See id.* (rejecting argument that state officials "must arbitrate their statutory claims when they have not agreed to do so and have no preexisting relationship with the parties to the arbitration agreement").

The implications of that rationale are staggering. If upheld, the decision will leave states free to undermine arbitration at will. For example, nothing would stop a state from assigning any private contractual claims to a state agency. The agency could then pursue the claim in any forum it chose, regardless of the contract's terms. *See id.* (holding that state could not be compelled to arbitrate even when aggrieved contracting parties agreed to binding arbitration). And if the agency prevailed on its claim (or extracted a settlement), it could remit any amounts recovered to the individual contracting parties, just as if those parties had brought the claims on their own. *Cf.* Press Release, District Attorney Brooke Jenkins Announces a $6 million Settlement and Permanent Injunction in Worker Protection Lawsuit (May 18, 2023) [hereinafter San Francisco Handy Press Release][7] (announcing settlement in

[7] Available online: https://www.sfdistrictattorney.org/press-release/district-attorney-brooke-jenkins-announces-a-6-million-

district attorneys' lawsuit against platform company Handy for $6 million, $4.8 million of which would be remitted to workers otherwise subject to arbitration agreements). In effect, the agency could bypass arbitration and litigate otherwise arbitral claims in any forum designed by state law. *Cf. Moriana*, 596 U.S. at 646-47 (describing California Private Attorney General Act, which allows private parties to sue in the state's name to recover statutory remedies arising out of an employment contract). *Cf. also Tupman*, 1 F.3d at 211 (holding that a similar scheme under Delaware law was preempted under the FAA).

Worse, there would be nothing stopping this agency from further delegating contractual claims. For example, the agency could hire a private class-action law firm to pursue the claims on its behalf. *See City of Chicago v. DoorDash, Inc., and Caviar, LLC*, No. 1:21-cv-05162 (N.D. Ill. May 25, 2023) (denying motion to compel in ostensibly public action filed against platform company using private counsel); Compl., *People of the State of California v. Grubhub Inc. and Grubhub Holdings Inc.*, No. 24STCV04326 (L.A. Super. 2024) (stating claims on behalf of city against platform company in action filed by private class-action law firm).[8] *See also City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-CV-00149-GEB-DA, 2007 WL 4166238, at *1 (E.D. Cal. Nov. 20, 2007) (rejecting motion to disqualify private counsel hired to represent city in *parens patriae* lawsuit); Martin H. Redish, *Private Contingent Fee Lawyers and Public*

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settlement-and-permanent-injunction-in-worker-protection-lawsuit/.

[8] Available online: https://file.lacounty.gov/SDSInter/lac/1156290_LACountyGrubhubComplaint-Redacted.pdf.

Power: Constitutional and Political Implications, 18 Sup. Ct. Econ. Rev. 77, 79 (2010) (describing the "modern trend towards governmental use of private contingency fee-based attorneys to enforce state law and seek either civil damage awards or civil penalties against private actors"). Or it could simply deputize a private party, such as a labor union, to pursue the claims in the agency's name. *See* A.B. A5876A Reg. Sess. (N.Y. 2021-22)[9] (proposing to authorize relator actions under New York Labor Law by "representative organizations," including labor unions). In fact, it could even deputize the same contracting party—effectively redelegating a private claim back to the claim's owner. *See* H.B. 2205, Reg. Sess. (Or. 2021)[10] (proposing to authorize an aggrieved person to bring actions to recover unpaid compensation in "public enforcement" action and providing that such action "may not be impaired by contract"). The state could essentially launder contractual claims through a superficially "public" enforcement process. *See id.* And it could wash arbitration entirely out of the system. *Cf. Cisco*, 82 Cal. App. 5th at 101 (refusing to compel arbitration even when statute authorized agency to sue "on behalf of" employee subject to arbitration agreement and specified that employee was the "real party in interest").

In effect, the panel's decision allows states to do exactly what this Court has said a state may not do—subvert arbitration through procedural slight-of-

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[9] Available online: https://www.nysenate.gov/legislation/bills/2021/A5876.

[10] Available online: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2205/Introduced.

hand. *See Keating*, 465 U.S. at 16 (holding that California could not abrogate arbitration agreements by requiring administrative forum for franchise disputes). *See also Epic Sys.*, 584 U.S. at 509 (warning courts to be vigilant for "new devices and formulas" to undermine arbitration).

II. State officials are already using "public" enforcement to undermine arbitration.

These fears are not hypothetical. Even before the appellate court's decision, states and cities were already moving in that direction. This trend has only accelerated in recent years, and it will doubtless be hyper-charged by the court's rationale.

For evidence, the Court need look no further than litigation in Petitioner's own industry. Across the country, public officials have piled lawsuit after lawsuit on app-based platform companies. *See* Julien Chaisse & Nilanjan Banik, *The Gig Workers Facing the Regulator: The Good, the Bad, and the Future*, 31 Transnat'l L. & Contemp. Probs. 1, 8 (2021) (observing that the so-called gig economy was "becoming a hotbed of litigation, particularly over the issue of worker classification"). In California alone, the Labor Commissioner, the Attorney General, and local district attorneys have sued platform companies such as Uber, Lyft, DoorDash, Instacart, and Handy. *See Uber Techs.*, 95 Cal. App. 5th at 1302–03; *DoorDash*, No. CGC-20-584789, slip op. at 2; *Maplebear*, 81 Cal. App. 5th at 926; *Handy*, No. CGC-21-0590442, slip op. at 6–7. Each of these lawsuits has sought to recover allegedly unpaid compensation and benefits for individual workers. And each has sought to circumvent otherwise enforceable arbitration agreements. *See, e.g.*, *Handy*, No. CGC-

21-0590442, slip op. at 6–7 (denying motion to arbitrate under workers' individual agreements); *Maplebear*, 81 Cal. App. 5th at 926 (same); *Uber Techs.*, 95 Cal. App. 5th at 1304 (same). They have extracted millions in "restitution," which they have remitted to the allegedly aggrieved workers. *See* San Francisco Handy Press Release, *supra* (announcing that company would pay $4.8 million in "restitution" to workers); Press Release, Instacart Shoppers Should Expect Lawsuit Payments, Says San Diego Coty Attorney Mara W. Elliot (Set. 2023)[11] (announcing $46.5 million in "restitution" payments for workers). And they have done so even though the workers themselves would have been bound to arbitrate. *See Maplebear*, 81 Cal. App. 5th at 927 (observing that workers had signed arbitration agreements covering all disputes arising out of their relationship with the company); *Handy*, CGC-21-0590442, slip op. at 3 (same).

This activity has not been limited to California. Attorneys general in Massachusetts, Minnesota, and Washington, D.C. have filed similar suits, all seeking to recover worker-specific relief. *See Healey v. Uber Techs.*, No. 2084CV01519-BLS1 (Mass. Super. Mar. 25, 2021); Compl., *District of Columbia v. Shipt*, 2022-CA-004909-B (D.C. Sup. Ct. Oct. 27, 2022); Compl., *Minnesota v. Shipt*, 27-CV-15991 (Minn. D. Ct. Oct. 27, 2022). And often, these officials have been transparent about their reasons. For example, in justifying a recent lawsuit against the platform company Shipt, Minnesota Attorney General Keith Ellison cited the workers' arbitration agreements as a

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[11] Available online: https://www.sandiego.gov/sites/default/files/nr230922a.pdf.

reason for the suit. *See* Press Release, Attorney General Ellison Sues Shipt for Misclassifying "Shoppers" as Independent Contractors Instead of Employees (Oct. 24, 2022) [hereinafter Ellison Press Release].[12] He said that the workers' agreements made it "impossible" for them to "band together" and file a class-action lawsuit. *Id.* So he sued the company himself to get class-wide relief on their behalf. *Id.* In other words, he was using an ostensibly public enforcement process to reverse-engineer a class action *See id.* (citing company's "form contract" which included a "binding arbitration agreement" as justification for filing a public enforcement action).

Ellison is hardly unique in his views about arbitration and class procedures. Other public officials have also objected to arbitration on policy grounds. *See, e.g.*, Senate Floor Analysis, AB 51, Reg. Sess. (Cal. 2019-20) (quoting bill author Lorena Gonzalez) ("Forced arbitration is among the most harmful practices that have enabled widespread abuse to go undetected for decades.").[13] They have argued that workers should be free to sue in court on a class-wide basis, regardless of the terms of their contracts. *See id.* So they have leveraged a perceived loophole in the FAA to reinstitute class procedures and subvert otherwise enforceable arbitration agreements. *See* Ellison Press Release, *supra* (citing the existence of arbitration agreements and lack of

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[12] Available online: https://www.ag.state.mn.us/Office/Communications/2022/10/27_Shipt.asp#:~:text=October%2024%2C%202022%20(SAINT%20PAUL,as%20independent%20contractors%20to%20avoid.

[13] Available online: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51.

class procedures to justify "public" enforcement action). *See also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 660 (2012) (arguing that "state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through the expanded use of *parens patriae* powers that are currently on the books in most states").

Nor is that view limited to enforcement officials. State legislatures and city councils have also moved to expand public enforcement and pry open the perceived loophole. For example, a growing collection of cities and states has adopted "freelancer protection" laws.[14] These laws are based on a model first developed in New York City. *See* N.Y.C. Admin. Code §§ 20-927 to 20-935. Passed in 2016, the New York City law requires a "hiring entity" to reduce any contract with a freelancer to writing. *Id.* § 20-928. It also requires the hiring entity to pay the freelancer on a particular schedule (usually thirty days). *Id.* § 20-929. And to enforce those requirements, the law deputizes a public official to sue on freelancers' behalf. *Id.* § 20-934. This official can recover amounts owed under the contracts and remit them back to the freelancers. *Id. See also* Compl., *City of New Yok v. L'Officiel USA Inc.*, No. 453762/2021 (N.Y. Sup. Ct.

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[14] *See* Alex Suarez, *Using the "Freelance Isn't Free Law" Blueprint to Protect Philadelphia's Freelance Workforce*, Temple Univ. Law & Public Policy Blog (Jan. 29, 2024), https://www2.law.temple.edu/lppp/using-the-freelance-isnt-free-law-blueprint-to-protect-philadelphias-freelance-workforce/#:~:text=This%20commitment%20to%20punctual%20remuneration,more%20in%20a%20calendar%20year (tracking progress of bills in multiple jurisdictions).

Nov. 29, 2021) (action by city officials seeking to recover amounts owed to writers, photographers, and others under contracts with publisher); Press Release, Mayor Adams Announces Settlement with Media Company L'Officiel USA Over Violations of Freelance Isn't Free Act (July 12, 2023)[15] (announcing that company agreed to pay $275,000 allegedly owed under contracts and to pay future claims for alleged underpayment). And under the panel's rationale, this official can do so even when the freelancers have agreed to otherwise valid arbitration agreements. *See Uber Techs.*, 95 Cal. App. 5th at 1312 ("The People and the Labor Commissioner . . . are not barred from seeking judicial relief by arbitration agreements they did not enter.").

This approach is expanding rapidly. Even before the panel's decision, more than a half-dozen states and cities had adopted New York City's model. *See, e.g.*, Freelance Worker Protections, Minneapolis Code Ord. §§ 40.700 to 40.850;[16] Seattle Independent Contractor Protections Ordinance, Seattle Mun. Code 14.34.010 to 14.34.250;[17] California Freelance Workers Protection Act, S.B. 988, Reg. Sess. (Cal. 2023-24);[18] Illinois Freelance Worker Protection Act,

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[15] Available online: https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH40WORE_ARTVIFRWOPR_40.790EN.

[16] Available online: https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT2AD_CH40WORE_ARTVIFRWOPR_40.790EN.

[17] Available online: https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.34INCOPR_14.34.010SHTI.

[18] Available online: https://legiscan.com/CA/text/SB988/id/2908610.

820 ILCS 193/1 to 193/99 (2023).[19] And over time, they have expanded it to more closely track class-wide litigation. A particularly aggressive version appeared in 2023, when New York elevated the city's model to the entire state. *See* S.B. 5026 Reg. Sess. (N.Y. 2023-24). The state-wide version not only authorized the New York Labor Commissioner to sue on behalf of freelancers, but also authorized the Commissioner to take freelancers' claims in "trust." *Id.* And once the Commissioner took those claims, it could aggregate them into a single, class-wide action. *Id.* (stating that the commissioner "may sue hiring parties on wage claims thus assigned" and "may join in a single action any number of wage claims against the hiring party"). The Commissioner could then remit any amounts it recovered to freelancers—the real parties in interest. *See id.* (stating that commissioner takes assigned claims "in trust for such freelance workers or for the benefit of various funds for such freelance workers").

Naturally, the state anticipated legal challenges. Parties would doubtless try to enforce their existing arbitration agreements. So the state caveated the Commissioner's enforcement authority as being subject to "the provisions of existing law applying to actions by freelance workers for collection of wages." *Id.* But of course, the "provisions of existing law" are open to interpretation. And under the California panel's rationale, the FAA would do nothing to stop the Commissioner from suing on behalf of freelancers who had agreed to arbitration. The Commissioner could effectively serve as class counsel; it could sue to recover contractual damage in court on a class-wide

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[19] Available online: https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4441&ChapterID=68.

basis, arbitration agreements notwithstanding. *See id.* (authorizing commissioner to aggregate and sue on "any number of wage claims against the hiring party"); *Uber Techs.*, 95 Cal. App. 5th at 1312 (licensing lawsuits by public officials regardless of underlying arbitration agreements).

In other words, the New York law carries the panel's decision to its logical conclusion. It reassigns purely contractual claims from private parties to public officials. *See* S.B. 5026. It then allows those officials to sue on the parties' behalf and recover amounts owed under the contracts. *See id.* And it does so regardless of whether those parties agreed to arbitrate their claims. It is a transparent mechanism for undermining arbitration, and it previews exactly where the panel's decision will lead. *See* Gilles & Friedman, *supra*, at 660 (urging states to use their *parens patriae* powers to override individual arbitration agreements and reinstitute class-wide litigation in court); Ellison Press Release, *supra* (justifying action against company on behalf of individual workers by arguing that private arbitration agreements prevented the workers from suing as a class).

Nor is the New York law the only example. Volumes could be filled with the novel mechanisms states have crafted—and are continuing to craft—to undermine arbitration through "public" enforcement. *See, e.g.*, Press Release, Attorney General James Joins New York City Uber and Lyft Drivers to Celebrate Historic $328 Million Settlement (Jan. 18,

2024)[20] (announcing that state attorney general had extracted $328 million in restitution for individual drivers through investigation under general fraud-prevention powers); Press Release, AG Racine Announces Instacart Must Pay $2.54 million for Misrepresenting that Consumer Tips Would go to Workers & Failing to Pay Sales Taxes (Aug. 19, 2022)[21] (announcing that D.C. attorney general extracted $1.8 million in restitution for individual delivery contractors under consumer-protection statute). Cities and states across the country are licensing public officials to sue and recover contract-style damages on behalf of private parties. *See, e.g.*, NYC Admin. Code 20-1510 (authorizing city corporation counsel to sue to recover compensation owed to third-party delivery contractors); Seattle Mun. Code §§ 1423.075, 14.23.095 (authorizing Seattle Office of Labor Standards to recover unpaid wages on behalf of certain domestic workers and remit amounts to those workers); San Francisco Worker Protection Ordinance, S.F. Police Code § 3300M.14 (authorizing city agency to recover amounts owed to certain delivery workers for cleaning time and costs of sanitation materials). And lower courts have given them no reason to stop. *See, e.g.*, *Uber Techs.*, 95 Cal. App. 5th at 1312; *Cuomo*, 915 N.E.2d at 618. So unless this perceived loophole is closed, they will continue unabated. "Public" enforcement will become the norm, and arbitration

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[20] Available online: https://ag.ny.gov/press-release/2024/attorney-general-james-joins-new-york-city-uber-and-lyft-drivers-celebrate.

[21] Available online: https://oag.dc.gov/release/ag-racine-announces-instacart-must-pay-254-million.

will be an afterthought. The FAA will have become a dead letter.

III. Only this Court can close the loophole.

That outcome can be prevented only by this Court. This Court has consistently protected Congress's pro-arbitration policy. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–26 (1991). It has applied the FAA to preempt a variety of state-level schemes to undermine arbitration. *See Concepcion*, 563 U.S. at 339–42; *Keating*, 465 U.S. at 7. It has also consistently warned courts to remain vigilant for new, creative mechanisms crafted to erode the nation's preference for private dispute resolution. *Epic Sys.*, 584 U.S. at 509. Yet even so, state officials have continued to display hostility to arbitration as a forum. They have continued to search for workarounds, and state courts have failed to stop them. Lower federal courts rarely have the chance to weigh in. The only backstop, therefore, is this Court. *See Waffle House*, 534 U.S. at 314 (Thomas, J., dissenting) (noting that in "the last 20 years, this Court has expanded the reach and scope of the FAA, holding, for instance, that the statute applies even to state-law claims in state court and preempts all contrary state statutes").

CONCLUSION

The Court should grant the petition for certiorari, reverse the appellate court, and declare that federal law continues to protect the right to private arbitration.

Respectfully submitted.

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