No. 23-645

In the
Supreme Court of the United States

UBER TECHNOLOGIES, INC., ET AL.,
Petitioner,

v.

JOHNATHON GREGG,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Civil Justice Association of California ("CJAC") is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some causes harm to others – more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern the scope and application of the Federal Arbitration Act ("FAA").

CJAC's members collectively employ many thousands of people in California and hundreds of thousands nationally to provide various products and services. Most of CJAC's members have elected, as have many employers throughout the country, to resolve disputes with their employees over employment matters through binding arbitration. CJAC supports the FAA's protective umbrella for voluntary, binding arbitration and believes that arbitration is preferable to litigation for maintenance of a viable economy.

The current state of the law regarding the enforcement of agreements to arbitrate that implicate claims under California's Labor Code Private

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[1] Counsel of record for the parties received timely notice of the intent to file this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *amicus* made a monetary contribution to the preparation or submission of this brief.

Attorneys General Act of 2004 (PAGA) is uncertain. As businesses with thousands of employees in California, CJAC's members are concerned that the arbitration agreements they have with their employees will be subject to differing enforcement standards by the lower courts until this Court grants review to provide the clarity and certainty on this issue that is needed to assure uniformity of decision.

SUMMARY OF THE ARGUMENT

In *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1912 (2022), this Court ruled that California's prohibition on contractual division of PAGA claims into individual and representative claims violated the Federal Arbitration Act (FAA)'s fundamental principle that "arbitration is a matter of consent." Once an employee's own claim for a California Labor Code violation has been severed away from her lawsuit and sent to arbitration, there is no mechanism to allow a court to adjudicate the non-individual PAGA claims (that is, those brought on behalf of the Labor and Workforce Development Agency for violations involving other employees). According to the Court, because the employee whose individual claim has been ordered to arbitration lacks standing to maintain those claims, the correct course was to dismiss that plaintiff's remaining claims. *Id.* at 1925.

The California Court of Appeal in this case, and the California Supreme Court in *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (2023) disagree. According to those decisions, California law permits an employee whose individual PAGA claim has been sent to arbitration to somehow remain in court and

seek penalties and attorney's fees from her employer based on violations involving other employees.

This Court should grant review to make clear that this new California rule interferes with the freedom of the parties to an arbitration agreement to determine without coercion "the issues subject to arbitration" and "the rules by which they will arbitrate." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1416 (2019).

ARGUMENT

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). To further that policy, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Ibid.* The FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987)

PAGA authorizes any employee who claims to have been a victim of a California Labor Code violation to file an action as an agent of the State of California to obtain civil penalties for all violations the employer is alleged to have committed, including violations involving other employees. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). A prevailing plaintiff in such an action may also recover attorney's fees. Cal. Lab. Code § 2699(g). As this Court has recognized, "[i]ndividually, these

penalties are modest; but given PAGA's additive dimension, low-value claims may easily be welded together into high-value suits." *Viking River*, 142 S.Ct. at 1915.

In *Viking River*, this Court held that California could not enforce a rule that compelled parties to an arbitration agreement "to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether." 142 S.Ct. at 1924. The California rule at issue there had that effect because it barred employees from splitting their individual PAGA claims from the representative ones.

But the revised rule that the California courts have now adopted to avoid the result directed in *Viking River* would have the same effect. Although the new rule would permit an employer to resolve an employee's individual PAGA claim in arbitration, the stakes riding on the arbitration of that claim would be just as high as they were before *Viking River* was decided. If the employee wins the arbitration, the employer will face hundreds of thousands, if not millions, of dollars of penalties and attorney fees when the employee pursues the representative claims in court. That prospect is what led this Court to rule in *Viking River* that the *Iskanian* rule was incompatible with the FAA.

> But as we have said, "[a]rbitration is poorly suited to the higher stakes" of massive-scale disputes of this kind. *Concepcion*, 563 U.S. at 350. The absence of "multilayered review" in arbitral proceedings "makes it more likely that

> errors will go uncorrected." *Ibid*. And suits featuring a vast number of claims entail the same "risk of 'in terrorem' settlements that class actions entail." *Ibid*. As a result, Iskanian's indivisibility rule effectively coerces parties to opt for a judicial forum rather than "forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." *Stolt-Nielsen*, 559 U.S. at 685; see also *Concepcion*, 563 U.S. at 350-351. This result is incompatible with the FAA.

Because California's new rule for the treatment of PAGA claims in an arbitration context is based on the same hostility toward arbitration as the *Iskanian* rule, the Court should grant certiorari to strike it down.

CONCLUSION

Because they employ thousands of employees in California, CJAC's members have a strong interest in making sure that California courts adhere to the principles of the FAA. As this Court is aware, California courts have shown an inclination to evade those principles.[2] The Court should grant certiorari to

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[2] *See Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984) (statute that purported to invalidate certain arbitration agreements violated the Supremacy Clause); *Perry v. Thomas*, *supra* (FAA preempted a provision that actions for collection of wages could be maintained without regard to the existence of an arbitration agreement); *Preston v. Ferrer*, 552 U.S. 346 (2008) (statute requiring some wage and hour disputes to be determined by a state administrative agency conflicted with the FAA); *AT&T*

overturn the rule that California courts have adopted to try to get around this Court's *Viking River* decision.

Respectfully submitted,

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Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (California rule that a contractual arbitration provision was unconscionable because it disallowed class wide proceedings); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) (California courts could not use a contractual choice of California law to overcome this Court's invalidation of a California rule that was hostile to arbitration).