No. 23-645

In the
Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND RAISER-CA, LLC,
Petitioners,

v.

JOHNATHON GREGG,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF THE CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The California Business & Industrial Alliance ("CABIA") is a trade group focused exclusively on fixing the abuses of the California Private Attorneys General Act ("PAGA"). CABIA pursues this mission through promoting original research and engaging in public advocacy and litigation. CABIA published a groundbreaking study authored by former senior California labor officials showing how PAGA's promotion of court action over agency adjudication serves the plaintiffs' bar over everyone else: PAGA litigation delays recoveries and results in aggrieved workers getting less and employers paying more as compared to state administrative proceedings.

CABIA submits this *amicus* brief to highlight just how harmful PAGA has been to employers and employees alike. And to explain how the California Supreme Court's rule that individual and non-individual PAGA claims can remain part of the same action in order to circumvent statutory standing limitations defies *Viking River* and imposes significant and unlawful burdens on the decision to arbitrate.

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[1] The parties have consented in writing to the filing of this brief. *Amicus curiae* timely provided notice of intent to file this brief to all parties. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

The California Supreme Court has apparently taken up the Judge Reinhardt strategy for defying the Federal Arbitration Act: hoping that this Court "can't catch 'em all."[2] This tiresome exercise has been going on for many years. *See* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419 (2014); *see also Perry v. Thomas*, 482 U.S. 483 (1987); *Preston v. Ferrer*, 552 U.S. 346 (2008); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022) (all holding that a California rule was preempted under the FAA).

California is at it again, this time in defiance of this Court's recent holding in *Viking River Cruises, Inc. v. Moriana* that state law cannot force employers to choose between (1) forgoing arbitration entirely; or (2) having to proceed in arbitration on both the plaintiff's "individual" claims *and* all the claims that the plaintiff (really, the plaintiff's lawyer) seeks to bring in a "non-individual" capacity to vindicate harms done to others. The reason was obvious: when parties agree to arbitration, the FAA requires that the "individual" claim be arbitrated; additional pleas for damages based on harms to other employees ("non-individual claims") are separate claims that thus must be "pared away." 596 U.S. at 654 & n.6, 663. PAGA only

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[2] Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. Times (April 12, 2018) (quoting Judge Reinhardt).

permits suits when the plaintiff has standing as an "aggrieved employee" who suffered one of the violations. Cal. Lab. Code § 2699(c). So, once the PAGA action is split, this Court continued, the plaintiff will surely lack statutory standing for the non-individual claims, once they stand alone from the individual claim.

Under the guise that it was reinterpreting state law on statutory standing, the California Supreme Court defied *Viking River*'s clear holding on a matter of *federal* law—whether an agreement to arbitrate the individual claim must result in splitting up the PAGA action—in *Adolph v. Uber Techs, Inc.*, 14 Cal. 5th 1104 (2023). *Adolph* held that, even when the employer and employee agreed to arbitrate their disputes, the individual and non-individual claims can still proceed as "a *single PAGA action* on behalf of themselves and other current or former employees." *Id.* at 1126 (emphasis added) (cleaned up). Because the individual and non-individual claims still move forward as one action, under *Adolph*'s rule, plaintiffs *retain* statutory standing to litigate the non-individual claims, as they can still rely on the actual injury to the plaintiff that spurred the individual claim. *See id.* at 1124–26.

The FAA preempts *Adolph*'s attempted gerrymandered rule. Just like the California rule preempted in *Viking River*, the *Adolph* decision deprives employers and employees of the ability to make agreements that specify which claims get arbitrated. Where *Viking River* separates the claims that must be arbitrated from the litigated claims, *Adolph* rejoins them. And by

making the outcome of informal arbitration so important to an endless number of other claims in litigation, *Adolph* unlawfully discourages arbitration.

Moreover, review by this Court is exceptionally important. *Adolph* leaves the door open to a system where an arbitration on the individual claim and litigation on the non-individual claim occur simultaneously, putting the employer in an impossible position. And if this Court gives the California Supreme Court an inch on the FAA, it will take a mile. Review is necessary to avoid sending the message that this Court permits defiance of its precedents.

STATEMENT

A. How PAGA Works.

The California legislature enacted PAGA in 2004. It sought to supplement the state's administrative enforcement actions of California's Labor Code and allow "aggrieved" employees to recover through the courts.

PAGA provides that, whenever the California Labor Code creates a civil penalty that may be assessed and collected by California's Labor and Workforce Development Agency, those penalties "may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a). Through this process, a single employee can bring non-individual claims on behalf of hundreds or even thousands of other "aggrieved employees" while avoiding the hurdles of class certification, which is not required under the statute.

To have statutory standing to pursue a PAGA action, the plaintiff must be an "aggrieved employee." An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Cal. Lab. Code § 2699(c).

Before bringing a PAGA action, the employee must provide notice to both LWDA and the employer. *Id.* § 2699.3. This pre-filing notice gives LWDA an opportunity to investigate the claim and issue a citation (which would foreclose a private action), and for some violations allows the employer an opportunity to cure the violation. After notification, LWDA has 65 days (expanded from 33 days in 2016 by SB 836) to notify parties of its intent to investigate violations. *Id.* § 2699.3(a)(2).

When the LWDA declines to take a case—as it does nearly all the time, retaining only 31 cases out around 9,000 notices filed between FY2017 and FY2018—the aggrieved employee is then free to bring a civil suit against their employer. While the government has a residual interest in the outcome—seventy-five percent of the civil penalties recovered go to LWDA; twenty-five percent go to the aggrieved employee, *id.* § 2699(i)—the aggrieved employee is in the driver's seat. After filing, the LWDA cannot direct the litigation or seek to dismiss the action and any settlement is subject only to the court's approval. *Id.* § 2699(l).

B. PAGA's Harmful Effects on California's Employers and Employees

PAGA has been a boon—not for employees or employers—but for the plaintiffs' bar. Like class

actions, PAGA cases create potential large-scale exposure and expense for employers because the representative mechanism raises total award amounts and potential attorneys' fees (which on average make up 33% of the payment made by employers). Christine Baker & Len Welsh, *California Private Attorney General Act of 2004: Outcomes and Recommendations*, CABIA (Oct. 2021), https://bit.ly/3gmwJ06. With nearly 7,000 PAGA notices filed last year and an average total settlement of $1.1M for PAGA suits, PAGA is lucrative for the attorneys—who receive an average of $372,000 in attorney fees per lawsuit. *Ibid.*

Unfortunately, what is profitable for plaintiffs' lawyers has not been nearly as beneficial to the employees they represent. Available data show that the average payment a worker receives from the rare PAGA dispute decided administratively and in house by the LWDA is 4.5 times greater than for a PAGA case filed with a court—$5,700 from an LWDA case, versus $1,300 from a court case. Baker & Welsh, *supra*. And those who litigate get this money slower: workers wait on average twelve months for their awards from LWDA cases, and twenty-three months for their awards from court cases. *Ibid.*; *see also PAGA Cases in California by County*, CABIA (Dec. 1, 2021), https://cabiafoundation.org/paga-cases-in-californiaby-county/ (PAGA suits take on average 183 days longer than LWDA-resolved disputes). At the same time, employers are hurt. Despite workers receiving higher awards from LWDA cases, employers pay out 29% less per award, on average $790,000 per LWDA case and $1.1 million per PAGA court case. *Ibid.*

C. Viking River

In 2014, the California Supreme Court imposed two contract rules that limited arbitration of PAGA claims. First, the California courts held that a pre-dispute agreement waiving the employee's right to bring "non-individual" PAGA claims is invalid as a matter of public policy. *Viking River*, 596 U.S. at 648 (citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014)). Second, the California courts ruled invalid pre-dispute agreements "to separately arbitrate or litigate individual PAGA claims" for the harm that the employee actually suffered from the non-individual claims. *Viking River*, 596 U.S. at 649 (quoting *Iskanian*, 59 Cal. 4th at 383) (cleaned up).

Viking River considered whether the Federal Arbitration Act—which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2—preempted these two rules. It concluded that the first California rule—categorical waivers of non-individual PAGA claims are invalid—does not run afoul of the FAA. 596 U.S. at 657–58.

Conversely, *Viking River* held that the FAA did preempt the second California rule, which prohibited the "contractual division of PAGA actions into constituent claims." *Id.* at 659. Because the FAA does not permit parties to "be coerced into arbitrating a claim" unless "the party *agreed* to do so," California law cannot force upon the employer a "claim joinder" rule that permits plaintiffs to bring their non-individual claims into the arbitration too. *Id.* at 660 (cleaned up). Under a rule like that, employers "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." *Id.* at 661. Especially when this permits "plaintiffs to unite a massive number of claims in a single-package lawsuit" which is "poorly suited" to arbitration, the rule preventing claim "division" violates the FAA. *Id.* at 661–62 (cleaned up).

Viking River then addressed "what the lower courts should have done with [the] non-individual claims" once the individual claims went to arbitration. *Id.* at 662. Under a fair reading of PAGA, this Court noted, "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." *Id.* at 663. Once "an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." *Id.*

D. *Adolph* Responds to *Viking River*.

Adolph started where *Viking River* ended. In *Adolph*, the California Supreme Court concluded that courts *should* continue to allow non-individual claims to go forward in litigation on their own, even after the individual claim has gone to arbitration. On its contrary view of PAGA, the plaintiff became an aggrieved employee when it suffered a violation, and nothing in PAGA deprives the employee of that status just because that individual claim was sent to arbitration. 14 Cal. 5th at 1121.

Adolph explained how this would work. A trial court "*may* exercise its discretion to stay the non-individual claims pending the outcome of arbitration."

Id. at 1123 (emphasis added). And if it turns out that the arbitrator concluded that the plaintiff was an aggrieved employee *for purposes of the individual claim*, then the court will accept that answer for the representative claims and the plaintiff will have statutory standing to press them. *Id.* at 1123–24.

In response to arguments that none of this explains how a plaintiff has standing for a non-individual claim on its own, *Adolph* held that "the arbitration of some issues does not sever those issues from the remainder of the lawsuit." *Id.* at 1125. Instead, "the individual PAGA claims in arbitration remain part of the same lawsuit as the representative claims remaining in court. Thus, plaintiffs are pursuing a single PAGA action on behalf of [themselves] and other current or former employees, albeit across two fora." *Id.* at 1126 (cleaned up).

Adolph seemingly agreed with *Viking River* about the basics of how PAGA standing works. *Adolph* disclaimed any suggestion that it was recreating "general public standing," which no longer exists for labor violations in California. *Id.* at 1127. Instead, it explained that "an aggrieved employee is an individual who worked for the alleged violator and personally sustained at least one" of the violations. *Id.*

Adolph also made clear that the California Supreme Court had adopted the same reasoning that the California Court of Appeal applied in this case. *See Gregg v. Uber Techns., Inc.*, 89 Cal. App. 5th 786 (Cal. Ct. App. 2023). Indeed, *Adolph* embraced *Gregg*, citing it multiple times. *Adolph*, 14 Cal. 5th at 1118, 1122.

REASONS FOR GRANTING THE PETITION

I. The FAA Preempts the Interpretation of PAGA Adopted by the California Supreme Court in *Adolph*.

A. *Adolph*'s state statutory standing analysis ignores *Viking River*'s holding on federal law.

The opinion below in this case has been made the law of California by *Adolph*. *Adolph* says that it accepts *Viking River* and merely reaches a different conclusion on what PAGA's standing requirements entail as a matter of state law. Not so. *Adolph* only holds together if it ignores *Viking River*'s holding that the individual and non-individual claim must separate.

Viking River held that that the individual PAGA claim and the non-individual ones are *separate claims*: "a PAGA action asserting multiple code violations affecting a range of different employees does not constitute a single claim in even the broadest possible sense, because the violations asserted need not even arise from a common transaction or nucleus of operative facts." 596 U.S. at 654 (cleaned up). And, crucially, where one PAGA claim ends and another begins is a question of *federal* law. This Court is "not required to take the labels affixed by state courts at face value in determining whether state law creates a scheme at odds with federal law." *Id.* at 654 n.6. Once the individual claims go to arbitration, *Viking River* holds that the non-individual claim stands alone in a different action. The "employee's own dispute is pared away from a PAGA action," *id.* at 663, a formal and

binding "*division*" required by the FAA. *Id.* at 662 (emphasis added).

Indeed, if the claims did not need to be severed, Part IV of the Court's opinion wouldn't make much sense. *See Viking River*, 596 U.S. at 662–63. The Court's statement that plaintiffs would lack statutory standing for non-individual claims necessarily presumes that the individual claim has left the scene. Only then would the employee stop being an "aggrieved employee" for the purposes of the litigation since the "one or more of the alleged violation[s]" that was committed "against" him, Cal. Lab. Code § 2699(c), cannot be litigated, but must proceed in arbitration.

Turn to *Adolph*. How can there be statutory standing for the non-individual claims, contrary to this Court's well-informed prediction? Notably, the California Supreme Court declined to discard the "aggrieved employee" requirement or to create a general standing rule for PAGA plaintiffs. And it couldn't possibly say that a PAGA plaintiff asserting only non-individual claims has standing as a person "against whom one or more of the alleged violations was committed." Cal. Labor Code § 2699(c). Nor could the California Supreme Court have said that a PAGA plaintiff bringing only non-individual claims was pursuing an action "on behalf of *himself* …and other current or former employees." *Id.* § 2699(a) (emphasis added).

Instead, *Adolph* rejoined what this Court separated. It held that statutory standing in the non-individual claims can still be *borrowed* from the individual claim as if the two kinds of claims still were part of one action, even after that individual claim

goes to arbitration. On *Adolph*'s view, when a plaintiff files a complaint with both individual and non-individual claims, he had standing for both sets as an aggrieved employee at the outset. 14 Cal. 5th at 1126. If an arbitration agreement compels the individual claim to arbitration, *Adolph* holds that there is no need to "sever[] the two components into separate and distinct actions." *Id.* at 1124. As a result, the plaintiff will retain a kind of zombie standing for the non-individual claim based on the individual claim even after the individual claim disappears. According to *Adolph* both claims "remain part of the same lawsuit as the representative claims remaining in court." *Id.* at 1126.

But this logical progression falls apart at the second step. *Viking River* makes clear that, as a matter of federal law, the FAA requires that individual claim go to arbitration and be "pared away" from the representative claim.

B. The *Adolph* decision recreates the same problem that doomed the claim-joinder rule in *Viking River*.

The FAA preempts any state law that "unduly circumscribes the freedom of parties to determine the issues subject to arbitration." *Viking River*, 596 U.S. at 659 (cleaned up). This covers state laws that coerce parties "into arbitrating a claim, issue, or dispute absent an affirmative contractual basis for concluding that the party agreed to do so." *Id.* at 660 (cleaned up).

California's claim-joinder rule rejected in *Viking River* violated the FAA because it did not permit the parties to agree to break the claims apart, leaving parties powerless to write contracts that would

"restrict the scope of an arbitration to disputes arising out of" specific claims. *Id.* at 661 (cleaned up).

Adolph recreates the same FAA problem. The parties here entered into an agreement restricting the scope of the arbitration to certain issues, namely any individual claims. But contrary to that agreement, California law requires that the arbitration decide a *different* issue, and one of much higher stakes: whether statutory standing lies for all the non-individual claims that threaten significant liability. Under *Adolph*, if the arbitrator concludes that the plaintiff is an aggrieved employee for purpose of bringing his individual claim, that determination, "would be binding on the court, and [the plaintiff] would continue to have standing to litigate his nonindividual claims." 14 Cal. 5th at 1123–24.

It is no answer to say that its rule merely takes the arbitration's judgment on an issue (statutory standing) and applies it in the representative litigation through collateral estoppel. *See Adolph*, 14 Cal. 5th at 1124 (citing Cal. Code Civ. Proc. § 1287.4, which provides arbitration awards with res judicata effect). Collateral estoppel only applies when, among other requirements, the issue precluded from relitigation is identical to that decided in a former proceeding. *Lucido v. Superior Ct.*, 51 Cal. 3d 335, 341 (1990). This requirement turns on "whether identical factual allegations are at stake." *Id.* at 342 (cleaned up).

That rules out the *Adolph* approach. After the claims are split, whether the plaintiff had standing to litigate his individual claim and whether he has standing to litigate the non-individual claim cannot be called "identical issues." There are decidedly *not*

"identical factual allegations" at stake as to the plaintiff's standing in the two proceedings—in one, the plaintiff can allege that he suffered harm from one of the violations (as PAGA requires), and in the other he cannot. The only way that the question of statutory standing can be identical in both proceedings is to assume that they truly remain part of one action. But *Viking River* already closed that door.

Without the collateral-estoppel sleight of hand, all that remains of *Adolph* is this: It transforms a mutually agreed to arbitration of specific issues into something completely different. What should be an informal adjudication of a specific claim between employer and employee becomes the preliminary round of high-stakes litigation concerning a limitless number of claims. That is particularly concerning when arbitration lacks the "procedural rigor and appellate review" that are needed for such high-stakes decisions. *Viking River*, 596 U.S at 662 (cleaned up).

Because *Adolph* makes the parties powerless "to restrict the scope of an arbitration to disputes arising out of a particular transaction or common nucleus of facts," it must be preempted by the FAA. *Id.* at 661 (cleaned up).

C. *Adolph* imposes excessive burdens on the decision to arbitrate.

The FAA preempts state laws that impose excessive penalties on parties that freely choose arbitration. The FAA "establishes a liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (cleaned up). It directs courts to treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2.

It only permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

The FAA preempts state laws that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Not only are state laws that "target arbitration" preempted, but so are state laws that merely "interfere[] with fundamental attributes of arbitration." *Epic*, 138 S. Ct. at 1622 (cleaned up). Nothing in the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343.

Adolph interferes with a fundamental aspect of arbitration. It creates a system where an informal arbitration decides the question of statutory standing for a host of other claims that remain in litigation. *See* 14 Cal. 5th at 1123–24. That rule interferes with arbitration because it "greatly increases risks to defendants," pressuring them "into settling questionable claims." *Concepcion*, 563 U.S. at 350. Deciding the statutory standing for both actions in a PAGA suit—the individual claims and non-individual claims—is a massive question for which "the risk of an error" in an informal arbitration proceeding would "become unacceptable." *Id.*

The *Adolph* decision will unlawfully push employers and employees *away* from arbitration. Just as *Viking River* forbids, *Adolph* "compels parties to either go along with an arbitration in which the range of issues" adjudicated, and the collateral effect of those adjudications for a vast number of other claims, are "determined by coercion rather than consent, or

else forgo arbitration altogether." *Viking River*, 596 U.S. at 661.

II. Review by This Court is Exceptionally Important.

A. *Adolph* threatens to create an unfair system of simultaneous arbitration and litigation.

Uber has consistently emphasized that no matter the answer to whether non-individual claims are viable, it cannot live in a world where the arbitration of individual claims and the litigation of non-individual claims goes on simultaneously. Brief for Appellant at 40, *Adolph*, 14 Cal. 5th 1104; Reply Br. at 38, *Adolph*, 14 Cal. 5th 1104.

This makes perfect sense. The parties agreed to a stay of litigation while arbitration proceeds. *See* Brief for Appellant at 40, *Adolph*, 14 Cal. 5th 1104. When the arbitration is poised to resolve such important issues in the litigation, the parties should be able to focus on one at a time. And practically, forcing employers to defend both claims simultaneously will just force employers into more settlements—already a significant part of how PAGA hamstrings California businesses. *See* Baker & Welsh, *supra*, at 8–9.

Moreover, if California courts do not stay the litigation, it creates an independent FAA problem. The FAA requires the state courts to enforce the parties' arbitration agreement, and that agreement mandates a stay. Denying a stay also creates a situation where the PAGA action, which must be split, is still effectively one action as both components get adjudicated alongside each other (albeit in different

forums). *See Viking River*, 596 U.S. at 662–63. And if California courts declined to issue stays, it would further discourage arbitration agreements, as arbitration would become just one small part of a much larger PAGA defense. *See Concepcion*, 563 U.S. at 346–47.

Yet, *Adolph* leaves the door open to requiring employers to defend themselves in both forums simultaneously. It explained that "when an action includes arbitrable and nonarbitrable components … the court *may* stay the trail of the action until such arbitration has been had in accordance with the terms of the agreement." 14 Cal. 5th at 1125 (cleaned up) (emphasis added). Far from giving employers certainty, this holding sets up employers to be forced to run the gauntlet of defending itself in both actions at the same time at the whim of California state court trial judges.

B. California will continue its defiance of the FAA and this Court's precedents without review here.

Unless corrected in the clearest terms, California's attempts to avoid the FAA will continue to take on new and ever more creative forms, causing continued harm to employers and employees in the state in addition to the serious negative consequences they have already sustained.

Over the last few decades, California has made clear the lengths to which its courts and legislature will go to fight its crusade in favor of class-action style employment litigation. Despite the requirements of the FAA, California rarely lets a mutual agreement between the parties to arbitrate their disputes stand

in the way of their push for more representative litigation.

The Court should therefore grant review to send the message that it will permit no further attempts to avoid the plain terms of the FAA and the clear rulings of this Court.

CONCLUSION

The petition for certiorari should be granted.

January 16, 2024 Respectfully submitted,

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