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 Writ of Certiorari to the Supreme Court of California**

## AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER IN SUPPORT OF PETITIONER UBER TECHNOLOGIES, INC. AND RASIER-CA, LLC


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## I. AMICUS CURIAE'S REQUEST AND STATEMENT OF INTEREST[1]

Amicus Curiae Restaurant Law Center ("Law Center" or "Amicus") respectfully submits this Amicus Curiae Brief in support of Petitioners Uber Technologies, Inc. and Raiser-CA, LLC ("Petitioners"). The Law Center is the only public policy organization created specifically to represent the interests of the foodservice industry in the courts. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing over 15 million people across the Nation – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the Nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the Nation, with 47 percent of the industry's employees being minorities, compared to 36 percent across the rest of the economy. Further, 40 percent of restaurant businesses are owned primarily by minorities, compared to 29 percent of businesses across the rest of the U.S.

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket received timely notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

economy. Supporting these businesses is Amicus's primary purpose.

The Law Center has participated as *amicus curiae* in precedent-setting decisions shaping the issue disputed here, and others. *See*, *e.g. Viking River Cruises, Inc. v. Angie Moriana,* 142 S. Ct. 1906 (2022); *Robyn Morgan v. Sundance, Inc.*, 142 S. Ct 1708 (2022); *Adolph v. Uber Technologies, Inc.*, 14 Cal.5th 1104 (2023).

The Law Center is familiar with the issues before the Court and the scope of the parties' presentation in their briefing. The Law Center seeks to bring to the Court's attention the injury that will be suffered by the restauranteurs, the Californians they employ, and the public at large because decisions preventing parties from enforcing bi-lateral arbitration agreements of claims pursuant to the California Private Attorneys General Act of 2004, Labor Code sections 2698, et seq. ("PAGA") also threaten to undermine this Court's and the United States Supreme Court's precedents in *AT&T Mobility, LLC v. Concepcion,* 563 U.S. 333 (2011), *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *Viking River Cruises, Inc. v. Angie Moriana,* 142 S. Ct 1906 (2022), and subvert PAGA's clear statutory text.

Amicus's members have learned through experience that even small issues that commonly arise in day-to-day interactions with the workforce are

exploited by some employees through a PAGA action, even when many of those same employees have agreed to arbitrate their claims. Even unfounded accusations threaten these businesses with, at worst, their very survival, and at best, tens or hundreds of thousands of dollars in legal fees. Hence, Amicus and their members have a vital interest in these proceedings.

## II. SUMMARY OF ARGUMENT

Following the Court's clear decision in *Viking River Cruises*, the California Supreme Court used a case called *Adolph* to act as a super legislature and create a workaround to the Court's decision. The California Supreme Court seeks to aid California's attack on the Federal Arbitration Act ("FAA") and this Court's precedential decisions, permitting individuals with bilateral arbitration agreements to remain in court, suing the other party to the arbitration agreement on behalf of all other current and former employees employed during the statutory period.

In 2003 the California Legislature created the California Private Attorneys General Act ("PAGA"), ostensibly to give employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California. The Legislature's goal was to encourage compliance with the state's labor code. In 2014, after the Court's decision in *Concepcion* and before the Court's decision in *Epic Systems*, the California Supreme Court issued its decision in

*Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). This decision held that despite the FAA and the strong national public policy in favor of arbitration, that bi-lateral arbitration agreements were unenforceable when applied to PAGA claims. *Iskanian* created an open back door as a workaround to the central holdings in *Concepcion* and *Epic Systems*. Since that time, PAGA has been abused to avoid bi-lateral arbitration agreements that were agreed to by the very "representative plaintiffs" that are suing under PAGA.

Some employers and employees have long agreed to private arbitration to resolve their disputes. Employers and employees will decide to enter into these agreements for diverse reasons, including costs, risks, and delay associated with class action procedures. This Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) recognized and enhanced those agreements. *Concepcion* and *Epic Systems* were concerned that courts, a non-party to the private agreement between an employer and employee, may disregard or attempt to reshape bilateral arbitration agreements without the parties' consent. *Epic*, 138 S. Ct. at 1623. Therefore, the Court specifically prohibited others from doing so. Notwithstanding, the California Supreme Court created a back door into court to preclude private arbitration in support of the fiction PAGA matters have become: seemingly laudatory actions by a statutorily created state actor, despite being litigated

by the same people who are parties to an arbitration agreement and yet seek to enforce the Labor Code through their individual actions.

Consistent with its decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 138 S. Ct.1612 (2018), the U.S. Supreme Court affirmed in *Viking River Cruises, Inc. v. Angie Moriana*, 142 S. Ct. 1906 (2022) that pursuant to the FAA, courts must enforce individual arbitration agreements according to their terms. This includes actions under PAGA, to the extent the arbitration agreements require arbitration of an employee's individual PAGA claim, *i.e.*, a claim alleging a violation the employee personally suffered. In so holding, the U.S. Supreme Court closed the door on the ability for employees to evade their contractual agreements to arbitrate by asserting a claim under PAGA—a back door opened by the California Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348 (2014). Instead, employees are now required to arbitrate their individual PAGA claims in accordance with their contractual obligations. Relying on this Court's decision in *Kim v. Reins International California, Inc.,* 9 Cal.5th 73 (2020), the U.S. Supreme Court further held that when an employee's individual claim is relegated to a separate proceeding, he has no standing under PAGA to continue adjudicating non-individual

claims (those asserted on behalf of others only) in court and those claims must be dismissed.

In *Adolph v. Uber Technologies*, the California Supreme Court once again sought to prop open a back door work around this Court's *Viking River* decision. There, the California Supreme Court sought to judicially rewrite PAGA to evade arbitration agreements and provide standing for a plaintiff to pursue non-individual PAGA claims when his individual PAGA claim must be arbitrated. However, such a result is directly foreclosed by PAGA's clear statutory text, runs afoul of the Legislative intent to further facilitate existing abuses of PAGA, and erodes established United States Supreme Court precedent regarding the FAA.

The decisions in *Iskanian* and *Adolph* have resulted in PAGA being used thousands of times to avoid arbitration agreements and generate fees for the plaintiffs' bar. The decision in *Adolph* merely permits this practice to continue with little more than a wink and a nod to this Court's decision in *Viking River Cruises*. This scheme undermines the purpose of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). At its core, *Adolph* ignores the idea that you find a plaintiff as they are, *i.e.* a party to a private agreement to arbitrate their claims. To this point, where a PAGA plaintiff is fictionally deputized by the state to pursue penalties, their credibility, past criminal history involving truthfulness, performance on the witness

stand, and poor memory all follow the PAGA plaintiff through the door and into the courtroom. We find them as they are and the "state's" interest rises or falls with them. However, the *Adolph* rule, selectively applies this basic truth, holding that the only thing that does not follow the plaintiff into the courtroom is their private agreement to utilize arbitration rather than court to seek enforcement of the labor code so long as they say the magical word "representative." In developing this scheme, the state and the plaintiff's attorneys should find the plaintiff as they are. After all, they are being deputized by the state to pursue a PAGA action after they have already entered into an arbitration agreement. Simply put, if they entered into a bilateral arbitration agreement, then the matter should go to binding arbitration. If they did not enter into such an agreement, the PAGA matter would proceed in court. *Adolph* offers a thinly and hastily fashioned key to open the back door work around this Court's rulings in *Viking River Cruises* and *Epic Systems*. It was precisely the hostility of state courts that *Viking River Cruises* and *Epic Systems* sought to end. This Court must change the locks for good, upholding the purpose of the FAA and the holdings in its precedential decisions.

This issue is of utmost importance to restaurants and other foodservice employers in California. These employers employ approximately 10% of the nation's workforce and are entitled to

enforce the benefit of their bargains with employees who enter into valid contractual agreements to arbitrate their individual claims under PAGA. This Court should preclude the ability for these employees to reopen the door foreclosed by *Viking River* so that arbitration agreements remain enforceable to the fullest extent under the law of the land and PAGA retains its standing requirement as written and intended by the Legislature.

## III. ARGUMENT

### A. The History of the Federal Arbitration Act Shows It was Enacted Specifically to Combat Legislatures and Courts Such as Those Found in California

In 1925, Congress enacted the FAA to address "widespread judicial hostility to arbitration," *Concepcion*, 563 U.S. at 339, by implementing a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Prior to the enactment of the FAA, common law courts consistently declined to enforce arbitration agreements. *Epic,* 138 S. Ct. at 1621. However, Congress recognized arbitration offered "quicker, more informal, and often cheaper resolutions for everyone involved." *Id.* As a result, Congress instructed the courts to abandon their

indisposition and instead recognize arbitration agreements as "valid, irrevocable, and enforceable." *Id.*; 9 U.S.C.A. § 2 (West).

This Court has recognized that Congress' principal purpose in enacting the FAA was to ensure the enforcement of private arbitration agreements according to their terms, and as such, has held that the FAA preempts state laws that "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

Throughout the entirety of the FAA, Congress explicitly directed courts to respect and enforce both arbitration agreements and the parties' chosen arbitration procedures. *Epic*, 138 S. Ct. at 1621. Section 3 of the FAA provides for a stay of litigation pending arbitration "in accordance with the terms of the agreement." *Id.* Section 4 of the FAA provides for "an order directing that ... arbitration proceed in the manner provided for in such agreement." *Id.* The FAA requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Id.*

Additionally, this Court has honored "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). In honoring the FAA's congressional purpose, this Court has held the saving clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," but the clause "offers no refuge for defenses 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. This Court has interpreted that language to mean that the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Epic*, 138 S. Ct. at 1622. "The FAA thus preempts any state rule that discriminates on its face against arbitration—for example, a law prohibit[ing] outright the arbitration of a particular type of claim." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017). The FAA further preempts any state rule that even covertly discriminates against arbitration by disfavoring contracts that contain the defining attributes of arbitration agreements. *Id.*

Thus, this Court, alongside Congress, has made clear the FAA establishes "a liberal federal policy favoring arbitration agreements" free from delay and obstruction in the courts. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In *Epic*, this Court made clear that arbitration agreements may not be undone merely because they prevent class relief. 138 S. Ct. at 1622. Accordingly, the history of the FAA and this Court's precedents demand *Adolph* be overturned.

In *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), this Court reiterated that arbitration agreements are a matter of consent and must be enforced in accordance with the agreed upon terms of the parties. Specifically, in addressing the enforceability of class action waivers, the *Concepcion* Court held that states may not use state contract law principles as a means to impose limitations or requirements that "stand as an obstacle" to the unfettered use of arbitration agreements. *Id.* at 334. As a result, the Court concluded that the California Supreme Court's ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which held that any party to an arbitration agreement could demand class wide, as opposed to individual, arbitration, was an obstacle to the strong public policy in favor of unfettered use of arbitration and the speedy resolution of disputes. *Concepcion*, 563 U.S. at 348-49. Consequently, this Court disallowed *Discover Bank's*

rule authorizing class arbitration in lieu of individual arbitration calling it an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 352.

Similarly, this Court held that class action waivers in employment arbitration agreements are enforceable under the FAA. See *Epic*, 138 S. Ct. at 1616 ("Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise"); see also *Iskanian*, 59 Cal.4th 348 at 367. This Court emphasized that "Congress has instructed that arbitration agreements like those before us must be enforced as written." *Epic*, 138 S. Ct. at 1632.

Congress, when enacting the FAA, and this Court, when issuing its decisions in *Conception* and *Epic Systems*, foreshadowed California's hostility toward arbitration agreements. This Court should ensure California and other states are not shown a roadmap to circumvent the clear intent of the FAA and the Court's prior decisions.

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### B. California's Recent Decisions Eviscerate the Benefits of Arbitration

The recent rulings from the recalcitrant California courts threaten the very essence of arbitration, specifically designed for "efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344. In its traditional, bilateral form, arbitration "afford[s] parties discretion in designing arbitration processes" to "forego the procedural rigor and appellate review of the courts" for the benefits of "lower costs" and "greater efficiency and speed." *Id.* at 344, 348. Pursuant to *Adolph*, even when an employee's individual PAGA claim is compelled to arbitration, the representative claim is allowed to remain in court and be litigated.

Even though this Court reversed *Iskanian*'s "indivisibility rule" on the grounds that it "coerces parties to opt for a judicial forum" instead of proceeding with arbitration as expressly agreed upon in a valid and enforceable arbitration agreement, California's decision in *Adolph* has the exact same effect. *Viking River*, 142 S. Ct. at 1912.

This Court's long-standing precedent holds that arbitration must be "protected from undue state interference by the FAA." Yet California is doing just that. Absent a check on California's perpetual creation

of backdoors to avoid the FAA, the Congressional intent behind the FAA and this Court's previous decisions will be undermined and other states will follow the path toward exercising their hostility toward bilateral arbitration agreements. The U.S. Supreme Court's holding in *Viking River* abrogating *Iskanian*'s indivisibility rule and closed the backdoor for employees to avoid their valid arbitration agreements simply by asserting a representative PAGA claim. Pursuant to *Viking River*, an employee's agreement to arbitrate his or her individual claims under PAGA is enforceable. Rather than accept the U.S. Supreme Court's decision, *Adolph* created a work around the ruling to re-open the door to bring a PAGA action in court despite there being a valid agreement to arbitrate it. As *Adolph* would have it, an employee's non-individual claims could proceed in court despite the employee's inability to meet the critical standing requirements in that action—that he or she is "aggrieved" and brings the action on behalf of himself or herself and others—because the employee's individual PAGA claim must be arbitrated.

Permitting dual actions, one in arbitration and the other in court, would only result in the same abuses PAGA has seen to date. Plaintiffs' attorneys will continue to file PAGA actions in court on behalf of their clients, even when their clients have agreed to arbitrate their individual PAGA claims, knowing the individual claim would simply be ordered to

arbitration while the non-individual claim could proceed in court. Plaintiffs' attorneys will thus be encouraged to "'act as vigilantes' pursuing frivolous violations on behalf of different employees" thus defying the compulsory joinder rule preempted by the FAA under *Viking River*. (Assem. Floor Analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) as amended July 16, 2003, p. 3.) Consequently, PAGA's abuses will remain and inevitably worsen as if the ruling in *Viking River* never existed. PAGA actions will continue to flood California courts without any recourse to temper the fee-motivated lawsuits in direct contravention of Legislative intent.

### C. Adolph's Position Could Eviscerate the Central Holding of *Viking River*.

*Viking River*'s central holding is undisputed—parties can arbitrate an employee's individual PAGA claim. 142 S. Ct. at 1925. Thus, even if this Court finds for Adolph, the result may be less impactful than expected. When an employee's individual claim is ordered to arbitration, and if the employee is permitted to continue pursuing the non-individual claims in court, other potential "aggrieved employees" on whose behalf the non-individual claims are brought may also have enforceable arbitration agreements requiring them to submit their individual PAGA claims to arbitration. As a result, only those employees who have not previously executed

arbitration agreements would be part of any remaining action in court. Therefore, the potential "representative group" of aggrieved employees would be limited to individuals who did not sign arbitration agreements and as a result are still eligible to participate in representative actions. In the case of an employer where the entire workforce executes arbitration agreements, then, no representative action may remain because everyone will have agreed to arbitrate their own individual PAGA penalties.

We see this situation clearly illustrated in the class action context. The U.S. Supreme Court has made clear that courts must enforce a valid arbitration agreement in accordance with the agreed upon terms contained in the agreement and cannot impose class-wide arbitration unless agreed to by the parties. The Supreme Court explained that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684-85 (2010), emphasis in original.

Subsequently, in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), the U.S. Supreme Court reiterated that arbitration agreements are a matter of consent and must be enforced in accordance with the agreed upon terms of the parties. Specifically, in addressing the enforceability of class

action waivers, the *Concepcion* Court held that states may not use state contract law principles as a means to impose limitations or requirements that "stand as an obstacle" to the unfettered use of arbitration agreements. *Id.* at 334. As a result, the Court concluded that this Court's ruling in *Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005), which held that any party to an arbitration agreement could demand class wide, as opposed to individual, arbitration, was an obstacle to the strong public policy in favor of unfettered use of arbitration and the speedy resolution of disputes. *Concepcion*, 563 U.S. at 348-49. Consequently, the Court disallowed *Discover Bank's* rule authorizing class arbitration in lieu of individual arbitration calling it an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 352.

Similarly, the U.S. Supreme Court held that class action waivers in employment arbitration agreements are enforceable under the FAA. See *Epic*, 138 S. Ct. at 1616 ("Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise"); see also *Iskanian*, 59 Cal.4th at 367. The U.S. Supreme Court emphasized that "Congress has instructed that arbitration agreements like those before us must be enforced as written." *Epic*, 138 S. Ct. at 1632.

When applying the foregoing U.S. Supreme Court precedent, this Court and California's appellate courts have consistently held that, when a binding arbitration agreement exists and does not permit class arbitration, the court must compel individual arbitration. See *Concepcion*, 563 U.S. at 352; *Iskanian*, 59 Cal.4th at 384; *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1130-31 (2012) (holding class arbitration cannot be compelled when the plain language of an arbitration agreement reflects a "two-party intention" and provides no contractual basis for authorizing class arbitration).

As a result, when a plaintiff brings class action claims on behalf of himself and others similarly situated, provided the plaintiff does not have their own arbitration agreement requiring individualized arbitration of the claims, courts have authority to exclude from any proposed class of similarly aggrieved employees those employees who signed arbitration agreements. See *Sherman v. CLP Resources, Inc.* No. CV 12-8080-GW (PLAX), 2015 WL 13542759, at * 2 (C.D. Cal. Mar. 19, 2015) ("While the Court [agrees] with Defendants that any class must be defined . . . to exclude employees who signed enforceable arbitration agreements, Defendants' suggestion that the mere existence of some agreements precludes class certification oversteps the mark"), quoting court's prior order on class certification in same action; *Balasanyan v. Nordstrom, Inc.*, 294 F.R.D 550, 573-

574 (S.D. Cal. 2013) ("new employees who signed the [arbitration agreement] upon becoming employed . . . may be properly excluded from the class").

Take for example an employee who brings an action against his former employer, a single location restaurant, for class claims on behalf of himself and all current and former non-exempt employees for minimum wage and overtime violations under the Labor Code, covering a time period of three years. The employee did not execute an arbitration agreement during his employment. For the single location restaurant, the potential class of similarly situated persons may include 100 people. However, the employer and its workforce executed arbitration agreements with class action waivers upon hire throughout the relevant three-year time period covered by the claims, but not before that time. Thus, any new employees hired during that three-year time period would have executed arbitration agreements requiring individual arbitration of any potential claims arising from their employment at the restaurant. Consequently, those employees would be excluded as part of the class of persons on whose behalf the plaintiff brings the claims. Only those employees who were hired before that time period, but worked during that time period, and did not sign an arbitration agreement with a class action waiver would be included in the putative class. See *Concepcion*, 563 U.S. at 352; *Sherman v. CLP*

*Resources, Inc.* No. CV 12-8080-GW (PLAX), 2015 WL 13542759, at * 2 (C.D. Cal. Mar. 19, 2015); *Balasanyan v. Nordstrom, Inc.*, 294 F.R.D 550, 573-574 (S.D. Cal. 2013).

With the U.S. Supreme Court's holding in *Viking River*, representative action wavers in employment arbitration agreements requiring an employee to arbitrate individual claims under PAGA, joining class action waivers as enforceable under the FAA. 142 S. Ct. at 1913, 1925. Similar to class actions where an employee brings claims on behalf of himself and other employees, a plaintiff may bring an action for civil penalties under PAGA for Labor Code violations committed against the plaintiff personally and also for Labor Code violations committed against other coworkers with that same employer. Cal. Lab. Code § 2699(a) (West); *Huff v. Securitas Sec. Servs. USA, Inc.,* 23 Cal. App. 5th 745, 750-51 (2018).

If a plaintiff brings an action in court for civil penalties under PAGA on behalf of himself and other aggrieved employees, but has an arbitration agreement requiring his individual PAGA claim subject to binding arbitration, if *Adolph* prevails here, the plaintiff could continue his non-individual claims in court. However, just as in class actions, the class of potential aggrieved employees on whose behalf those non-individual claims continue to be pursued, would be limited to those who themselves do not have

arbitration agreements requiring them to arbitrate their personal claim for civil penalties under PAGA. *Viking River*'s central holding requires such a result.

However, *Adolph* appears to advance the opposite conclusion. Allowing a plaintiff who has a valid, enforceable arbitration agreement requiring arbitration of his individual PAGA claim to continue pursuing non-individual PAGA claims in court on behalf of others, who themselves have their own arbitration agreement covering their individual PAGA penalties, would eviscerate the central holding of *Viking River* by creating another backdoor around the FAA. This Court must reject *Adolph*'s attempt to create another backdoor to avoid bilateral agreements to arbitrate individual PAGA claims pursuant to the FAA and the U.S. Supreme Court's holding in *Viking River*.

### D. Permitting the Back Door to Court to Remain Open for PAGA-Like Matters Will Further Undermine the FAA, *Concepcion*, and *Epic Systems*

*Adolph*'s faulty holding and the back door it created to evade contractual obligations of private parties and undermining *Concepcion, Epic Systems, and Viking River* may no longer be California's problem alone. With the spread of PAGA-like legislation to other states, including Connecticut, Illinois, Maine, Massachusetts, New Jersey, New

York, Oregon, Vermont, and Washington, the Court's precedent and irrefutable federal policy favoring arbitration is threatened beyond the previous geographical confines of California. Jamie Gross, *PAGA Pains Soon Might Not Just Be for California Employers*, FISHER PHILLIPS (Sept. 8, 2021), https://www.fisherphillips.com/news-insights/paga-pains-california-employers.html.

While the proposed legislation in those states maintained PAGA's basic framework of allowing aggrieved employees to bring representative lawsuits for civil penalties on behalf of themselves and others, several states made alterations broadening the California model in varied respects. For example, Maine's bill titled "An Act of Enhanced Enforcement of Employment Law," which was passed but then vetoed by the Governor, expanded who would have standing to bring private enforcement actions in the name of the state and the types of laws those actions applied to. Maine, as well as the legislation in New York and Vermont, purported to allow employees and unions or advocacy groups to bring these representative actions. *Id.* In addition to deputizing a larger class of persons, legislation in Maine, Vermont, and Washington all proposed the application of PAGA-like procedures to include violations of their anti-discrimination and wage and hour labor laws. *Id.*

Certainly, if such legislation was passed and survived veto, the courts of those states would

inevitably apply authority from California courts to argue that waivers of those representative claims in arbitration agreements were unenforceable and against public policy. Because discrimination claims are nearly always subject to mandatory arbitration pursuant to a pre-dispute agreement between the employee and the employer, such a result could entirely erode the use of arbitration in employment disputes in at least 40% of employers in certain states and 60.1 million workers nationwide. *See*, Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

Further still, proposed legislation in these states also seeks to adjust the penalty formula in its representative actions to provide, in some cases, 40% of the penalties recovered to remit to individuals and organizations. Jon Janes, *et al.*, *PAGA Claims: A Growing Threat for Employers*, WOODRUFF SAWYER (Oct. 6, 2021), https://woodruffsawyer.com/do-notebook/paga-claims-growing-employer-threat/#:~:text=Maine%3A%20On%20June%2018th%2C%202021,it%20vetoed%20by%20the%20governor. While not only serving a devastating blow to employers by denying the benefit of their bargains, the potential results of these proposals in other states would nullify this Court's and Congress' intent to

insulate bilateral arbitration from third party interference and protect contractual rights of private parties absolutely.

## IV. CONCLUSION

The issue before the Court is specifically meant to address the incorrect decision in *Adolph* in light of *Concepcion, Epic Systems, and Viking River Cruises*. However, we urge the Court to act definitively and broadly to prevent more states from seeking to interfere or reshape traditional bi-lateral arbitration agreements.

Respectfully submitted,

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