No. 23-645

IN THE

Supreme Court of the United States

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

v.

JOHNATHON GREGG,
Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

REPLY BRIEF FOR PETITIONERS

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California employers, restaurants, trade groups, and businesses all agree that this Court's review is urgently needed because the California courts have swiftly repudiated the core holding of *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639 (2022). Even though *Viking River* made clear that the "built-in mechanism of claim joinder" under the California Labor Code Private Attorneys General Act (PAGA) conflicted with the Federal Arbitration Act (FAA) (*id.* at 659), the California courts have held that an individual PAGA claim—even after sent to arbitration—remains part of a broader unitary action that stretches across arbitration and court.

That holding, as Judge Lee recently warned, threatens to "undermine the benefits of arbitration for

everyone" by transforming a "low-stakes" arbitration over an individual PAGA claim into a "high-stakes" contest over standing to bring "non-individual PAGA claim[s] in … court." *Johnson* v. *Lowe's Home Centers, LLC*, — F.4th —, 2024 WL 542830, at *5 (9th Cir. Feb. 12, 2024) (concurring opinion). The result has been the de facto return of the regime that prevailed before *Viking River*: one where "parties are coerced into giving up a right they enjoy under the FAA" because of the inability to submit only the individual PAGA claim to arbitration. 596 U.S. at 661.

Respondent ignores amici's concerns and gives only abbreviated treatment to the California courts' refusal to apply *Viking River*'s preemption holding. For the most part, respondent insists that the petition presents only a question of California law, while ignoring that the California Court of Appeal below and the California Supreme Court in a parallel decision both analyzed whether the FAA preempts their new rule. Pet. App. 24a-25a; *Adolph* v. *Uber Technologies, Inc.*, 532 P.3d 682, 692-693 (Cal. 2023). Respondent also argues that Uber did not preserve the issue of FAA preemption, even though Uber expressly argued preemption in its briefing below and the Court of Appeal reached that issue.

Viking River was not an idle gesture or an advisory opinion. And the California courts cannot interpret state law in a manner that circumvents the preemption of PAGA's anti-severability rule. By insisting that an individual PAGA claim still cannot be fully cleaved from a non-individual PAGA claim, the California courts have done precisely that. This Court should reverse the decision below either summarily or after plenary review.

I. The Decision Below Conflicts with the Core Federal Holding of *Viking River*.

Viking River's central federal holding was that the FAA requires an individual PAGA claim to be "pared away" and "committed to a separate proceeding" when parties have agreed to arbitrate only individualized issues. 596 U.S. at 663. Not according to the California courts, though. The Court of Appeal in this case denied that *Viking River* held that respondent's "individual claim must be 'severed' from his nonindividual claims." Pet. App. 24a-25a. And the California Supreme Court has since held that, even after an individual PAGA claim is nominally compelled to arbitration, the plaintiff retains statutory standing on the theory that the individual claim remains part of "a single action" with the non-individual claims in court. *Adolph*, 532 P.3d at 694-695.

Respondent tries (Opp. 14-16) to paint this disagreement as a dispute over the effect of bifurcated proceedings under California law. But the California courts did not take issue with this Court's understanding that "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." *Viking River*, 596 U.S. at 663. To the contrary, they agreed that a PAGA plaintiff must seek "penalties for the violations he or she suffered in addition to penalties for violations suffered by other employees." Pet. App. 23a; *accord Adolph*, 532 P.3d at 695. They reached a different bottom-line conclusion, however, only by disregarding this Court's holding that the FAA requires an individual PAGA claim to be "committed to a separate proceeding." *Viking River*, 596 U.S. at 663. In other words, the California courts reached that result only by assuming away *Viking River*'s preemption holding.

Pet. 26-27. Respondent tellingly does not address, much less defend, the California courts' transformation of the separate proceedings required under *Viking River* back into a "single action." *Adolph*, 532 P.3d at 694-695.

Respondent's embrace of the potential for a stay of the PAGA action in court (Opp. 20) confirms the underlying preemption problem. If the California courts had fully compelled the individual PAGA claim to arbitration, then a stay of the non-individual claims pending arbitration would not have been necessary. Pet. 24; Employers Br. 9. The California Supreme Court also entrusted the stay decision to trial courts, thereby leaving open the possibility that parties would need to *simultaneously* litigate the same issue committed to arbitration in both court and arbitration. *Adolph*, 532 P.3d at 692-693. California courts since *Adolph* have reiterated that trial courts have ample discretion in deciding whether to enter a stay or not. *E.g.*, *Barrera* v. *Apple American Group LLC*, 95 Cal. App. 5th 63, 95 (2023). And respondent even admits that California courts "might someday use" this "docket-management authority to interfere with arbitration." Opp. 20. Federal rights should not be left to the docket-management whims of state trial courts. Pet. 24-25; CABIA Br. 16-17.

In treating a stay as a panacea, respondent also glosses over how the California courts' preclusion rule distorts the scope and stakes of the arbitration to which the parties agreed. Respondent euphemistically acknowledges that "resolution of various issues in arbitration … could impact the subsequent litigation." Opp. 21. What respondent means—but cannot bring himself to say—is that California courts will use arbitral findings when deciding standing for the non-

individual PAGA claims that the parties did not agree to arbitrate. *Adolph*, 532 P.3d at 692-693; *see* Pet. 25. This rule, which hitches non-arbitrable issues to the fate of arbitrable issues, "raises the stakes of individual arbitration far beyond what parties contemplate." Employers Br. 9; *see* CJAC Br. 4.

This preclusion rule is compulsory joinder by another name. Expanding an arbitration's scope to resolve non-arbitrable issues "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration.'" *Viking River*, 596 U.S. at 659. Making the individual and non-individual claims a package deal—whether through joinder at the front end or preclusion at the back end—undermines the important federal interest in ensuring that parties can agree to arbitrate low-stakes individual claims separate and apart from "massive-scale disputes of this kind." *Id.* at 661-662; *see* CABIA Br. 13-14. Because the California courts have reunited the individual and non-individual claims into a "single action" (*Adolph*, 532 P.3d at 694-695), PAGA again "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'" (*Viking River*, 596 U.S. at 662).

Since Uber filed its petition, the need for this Court's review has become even more urgent. The Ninth Circuit recently joined ranks with the California courts in upholding the interpretation of state law in *Adolph* against an FAA preemption challenge. *Johnson*, 2024 WL 542830, at *4. In a concurrence, Judge Lee warned that *Adolph*'s holding "that the arbitration decision of a low-stakes individual PAGA claim could have preclusive effect … on the high-stakes non-individual PAGA claim in federal court …

could tilt the stakes of arbitration for defendants and undermine the benefits of arbitration for everyone." *Id.* at *5. The California courts, by creating the risk that "legal conclusions or factual findings from an individual PAGA arbitration could be binding in a non-individual PAGA court action," has left defendants "little choice but to bring in the legal cavalry and devote substantial resources at that individual arbitration." *Ibid.* Judge Lee refrained from acting on these concerns, however, because he believed that Article III might limit the preemption question's importance in federal court and that preclusion (despite *Adolph*) *might* not apply if the defendant lacked "'an adequate opportunity or incentive'" to fully litigate the issue in arbitration. *Id.* at *6 (emphasis omitted).

The distortion of the arbitration proceedings should be fixed now because the harms cannot be undone after the fact. The California courts have again put parties to a choice: "either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent" (now via preclusion rather than joinder), "or else forgo arbitration altogether." *Viking River*, 596 U.S. at 661. Forcing defendants to wait and see whether the arbitration morphs into a far-ranging dispute over the non-individual claims *before* raising an FAA preemption defense would be inconsistent with this Court's unwillingness to force defendants to "'bet the farm'" in other contexts. *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490-491 (2010). And if defendants must "bring in the legal cavalry" during arbitration to guard against the possibility of expansive preclusion (*Johnson*, 2024 WL 542830, at *5 (Lee, J., concurring)), then the benefits of a streamlined individualized arbitration will "be irretrievably

lost" (*Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 743 (2023)).

This case illustrates the upfront coercion of the California courts' unwillingness to fully sever the individual and non-individual PAGA claims. Brandishing this risk that Uber must effectively tie the non-individual (and non-arbitrable) claims to the outcome of the individual (and arbitrable) claim, respondent has demanded that the parties barrel ahead with arbitration here without knowing whether it will be the low-stakes and informal proceeding to which they agreed (*Viking River*, 596 U.S. at 661-662) or instead a "high stakes" proxy war over the non-individual claims (Opp. 21). Uber faces yet another "mechanism" designed "to coerce parties into withholding PAGA claims from arbitration." *Viking River*, 596 U.S. at 661. That is to say that we are back where we started before *Viking River*.

II. The Question Presented Is Exceptionally Important.

The issue in this case will recur whenever parties have agreed to arbitrate a PAGA claim on an individual basis. Before *Adolph*, this issue had already resulted in five published decisions from the California Court of Appeal. 532 P.3d at 688-689 (collecting cases). And many of the estimated 7,000 PAGA notices last year (Pet. 29) will implicate arbitration agreements and now be governed by *Adolph* and *Johnson* rather than by *Viking River*.

There is also no reason to delay resolution of the question presented. The California Supreme Court and the Ninth Circuit have both addressed the preemption question, squelching the potential for further percolation. *Adolph*, 532 P.3d at 692-694; *John-*

son, 2024 WL 5422830, at *4. And parties will be discouraged from invoking their rights under the FAA until they can once and for all "par[e] away" the individual dispute and commit it "to a separate proceeding." *Viking River*, 596 U.S. at 663; *see supra*, at 5-7. Review is necessary to prevent resurrecting PAGA's compulsory joinder rule and to restore the preemption holding of *Viking River*.

Respondent suggests (Opp. 25) that the California courts should get a free pass in defying *Viking River* because other States have not yet adopted laws with "PAGA's unique features" (*Viking River*, 596 U.S. at 648). But this Court granted review in *Viking River* based on the same configuration of decisions from the California Supreme Court and the Ninth Circuit that had initially rejected FAA challenges to PAGA. *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 149-153 (Cal. 2014); *Sakkab* v. *Luxottica Retain North America, Inc.*, 803 F.3d 425, 437-438 (9th Cir. 2015). Many other FAA preemption decisions have concerned California-specific attempts to undermine arbitration in the largest economy of any State in the country. *See AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011); Pet. 7 (collecting five more examples). In fact, this Court has not hesitated to intervene even when a state supreme court defies a decision that affects only a couple of smaller States. *Shafer* v. *South Carolina*, 532 U.S. 36, 48 & n.4 (2001).

Respondent conspicuously makes no effort to address the amici who highlight that this Court's review is necessary to stem the tide of abusive litigation that *Adolph* has unleashed with redoubled fervor. Now that plaintiffs once again have free reign to disregard their binding arbitration agreements, PAGA litigation has proliferated with more than 4,000 notices being

filed in the six months since *Adolph*—"a nearly 30 percent increase over the same period the year before." Employers Br. 16. The California courts' resurrection of the compulsory joinder rule in preclusion's garb "allows plaintiffs to unite a massive number of claims in a single-package suit," which supercharges the "risk of 'in terrorem' settlements." *Viking River*, 596 U.S. at 661. In practical terms, strength in numbers can matter more than strength in merit, threatening "businesses with, at worst, their very survival, and at best, tens or hundreds of thousands of dollars in legal fees." Restaurants Br. 3.

Small business owners are most susceptible to an interpretation of PAGA that undermines arbitration agreements after the fact. Given their limited resources, small businesses depend on arbitration's "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 505 (2018). They also are ill equipped to respond even to frivolous litigation brought by workers who skirt such agreements. Restaurants Br. 2-3; CJAC Br. 2-3. One California business, for example, had no choice but to settle after it faced $30 million in potential liability for providing paychecks listing the date the checks were issued, rather than the dates the checks covered. Employers Br. 13-14. Absent this Court's intervention, the plaintiffs' bar will take advantage of the California courts' defiance of *Viking River* to press vexatious litigation over minor, technical violations against "small and mid-size companies." *Id.* at 13 n.3; *see also* Restaurants Br. 14-15.

These shakedown suits serve neither employees nor the State, but only plaintiffs' lawyers. PAGA liti-

gation takes nearly twice as long and results in recoveries that are four times less than what workers receive in state administrative proceedings—even though employers pay more. CABIA Br. 1, 6. It impinges on not only the parties' arbitration agreements, but also those of other workers who have agreed to resolve their PAGA claims through individualized arbitration. *See* Restaurants Br. 15-21. And it does not even benefit the State: As amici explain, the plaintiffs' bar routinely pockets the bulk of any settlements, while allocating a mere pittance of the total recovery to the PAGA claims. Employers Br. 15-17. This case thus cries out for this Court's review to put a stop to an artful interpretation of PAGA that flouts the FAA, defies *Viking River*, and harms employers and employees alike.

Review is also important to clarify that the FAA mandates severance of arbitral claims from non-arbitral claims. As respondent acknowledges, suits often "contain arbitrable and non-arbitrable elements." Opp. 19. But respondent argues that *Viking River* does not "opin[e] on what FAA-mandated 'severance' would look like." Opp. 17. That is wrong: This Court's decisions establish that the FAA requires severance in a manner that protects the parties' right to determine the issues subject to arbitration. Pet. 19-21. And there is no other way to make sense of how the preemption holding drove the result in *Viking River*. If this Court did not mean what it said—that the FAA requires the individual PAGA claim to be "committed to a *separate* proceeding"—then its conclusion would not follow: that a plaintiff "lacks statutory standing" to maintain non-individual claims in court because a plaintiff may do so "only by virtue of also maintaining an individual claim in *that action*." *Viking River*, 596 U.S. at 663 (emphases added). But even if respondent

were right that *Viking River* left this question unsettled, that would be all the more reason for this Court to provide helpful clarity inside and outside the context of PAGA—particularly at a time when hostility to arbitration is mounting nationwide. *See* Restaurants Br. 20-21.

III. This Petition Is an Ideal Vehicle.

This case cleanly presents the *Viking River* comeback issue. The Court of Appeal correctly recognized that the arbitration agreement here, as there, provides that any portion of the PAGA waiver that is found unenforceable shall be severed and any remaining portion of the claim must be litigated in court. Pet. App. 13a-18a; *see Viking River*, 596 U.S. at 647. That determination leaves only the question whether respondent can nevertheless keep the individual claim in court for purposes of establishing standing for his non-individual claims. Although respondent contends (Opp. 25-27) that Uber waived the preemption issue, he misunderstands basic principles of preservation.

Uber argued in the Court of Appeal that allowing respondent to keep the individual PAGA claim in court, even if only to prove standing for the non-individual claims, would "transgress the FAA as interpreted in *Viking River*." Reply App. 25a. That is why the Court of Appeal addressed Uber's argument that "'[t]he FAA demands that [respondent's] individual PAGA claim be severed.'" Pet. App. 24a. In seeking review in the California Supreme Court, Uber again argued that "[p]ermitting [respondent's] individual PAGA claim to remain part of this action even after it is sent to arbitration—as the Court of Appeal did—would resurrect *Iskanian*'s preempted anti-severability rule." Reply App. 13a-14a. Because a claim need be only

"'pressed'" *or* "'passed upon,'" Uber's preemption defense is preserved twice over. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

If respondent means to argue (Opp. 26) that Uber made slightly different preemption arguments, that contention is wrong and (more importantly) irrelevant. This Court has repeatedly held that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim" and is "not limited to the precise arguments [it] made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (citations omitted). Respondent never denies that the Court of Appeal squarely addressed whether the FAA preempts respondent's attempt to keep the individual claim in court for purposes of establishing statutory standing. Pet. App. 24a-25a.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 27, 2024