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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JONATHON GREGG,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants and Appellants.

PETITION FOR REVIEW

* * *

ISSUE PRESENTED FOR REVIEW

Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1916; see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River*, 142 S.Ct. at p. 1916) in court or in any other forum the parties agree is suitable.

INTRODUCTION

In *Viking River Cruises, Inc. v. Moriana*, the U.S. Supreme Court held that the Federal Arbitration Act requires the enforcement of agreements calling for the arbitration of individual claims brought under PAGA, and that after such claims are sent to arbitration, the remaining non-individual PAGA claims should be dismissed for lack of statutory standing. On remand from the U.S. Supreme Court following *Viking River*, however, the Court of Appeal disagreed with the High Court's thoughtful decision, and held that Jonathon Gregg could pursue non-individual PAGA claims even after his individual PAGA claim has been sent to arbitration. That ruling warrants review for two reasons.

First, this Court has already granted review of the precise question at issue here in another case brought by a driver against Uber. As the Court of Appeal noted (see Opn. at p. 17, fn. 5.), this Court will soon decide whether a plaintiff has standing to pursue civil penalties solely on behalf of others once his individual PAGA claim has been severed and sent to arbitration (see Issues Ordered Limited, *Adolph v. Uber Techs., Inc.* (Cal., Aug. 1, 2022, No. S27461)). Because this case presents the same question as *Adolph*, the Court should grant review and defer further action pending consideration of *Adolph*—as it has already done in three other related cases. (See *Wing v. Chico Healthcare & Wellness Centre* (Cal., Aug. 10, 2022, No. S274939) 296 Cal.Rptr.3d 648; Petition for Review Granted, *Sanchez v. MC Painting* (Cal., Aug. 10, 2022, No. S274780); Petition for Review Granted, *Silva v. Dolgen Cal., LLC* (Cal., Jan. 25, 2023, No. S277536).)

Second, if allowed to stand, the Court of Appeal's decision would put PAGA jurisprudence once again on a collision course with the FAA. The court concluded that Gregg satisfies PAGA's requirement that he "seek[] to recover civil penalties on behalf of himself and other[s]" in the same proceeding because the FAA does not require his "individual claim [to] be 'severed' from his nonindividual claims." (Opn. at pp. 20, 22.) In doing so, the court mischaracterized the key *federal* holding of *Viking River*—that the FAA preempts this rule precluding severance of PAGA claims established in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 389—as a nonbinding interpretation of "state law." (*Id.* at p. 22.)

Viking River squarely held that arbitration agreements that divide PAGA actions into individual and non-individual claims are enforceable under the FAA and that the effect of such severance is to "commit[]" the individual PAGA claim "to a *separate* proceeding." (*Viking River*, 142 S.Ct. at pp. 1924–1925, italics added.) Any attempt to yoke the individual and non-individual claims together in a single action would revive the preempted rule of *Iskanian*, in clear defiance of *Viking River*. Under the plain language of PAGA, the correct approach then is to dismiss because the statute "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Viking River*, 142 S.Ct. at p. 1925.)

This Court should therefore grant Uber's petition for review and hold this case pending its decision in *Adolph*.

STATEMENT OF THE CASE

I. Gregg Agrees to Arbitrate Claims Related to His Use of Uber's Rides App.

Uber is a technology company that has developed the smartphone application known as the "Rides App," which connects local merchants, consumers, and independent delivery drivers to facilitate the purchase and delivery of food and drink. (Opn. at p. 3.) Gregg is a driver who signed up to use the Rides App to generate leads for his independent delivery business in October 2016. (*Id.* at p. 4.) To do so, he accepted the Technology Services Agreement (the "Agreement"), which governed the relationship between Uber and drivers and contained an arbitration agreement (the "Arbitration Provision"). (*Id.* at p. 3.)

The Arbitration Provision stated that the parties agree to submit virtually all disputes to bilateral (i.e., individual) arbitration:

> **This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") … . [T]his Arbitration Provision applies to any dispute arising out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement terminates. …**
>
> [T]his Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration … . [T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator

> through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action. …
>
> **[T]his Arbitration Provision also applies to all disputes between you and the Company or Uber, … including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship.**

(2-CT-413, § 15.3(i).) The Arbitration Provision contained a waiver of PAGA claims to the fullest extent permissible under law, with an accompanying severability clause:

> [T]o the extent permitted by law, (1) **You and Company agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code § 2698 et seq., in any court or in arbitration,** and (2) for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and Company agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective

> proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law) ("PAGA Waiver"). … If any provision of the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Agreement; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative actions brought under the PAGA on behalf of others must be litigated in a civil court of competent jurisdiction and not in arbitration. To the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect to those claims, the Parties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration.

(2-CT-415–416, § 15.3(v).)

The Arbitration Provision afforded Gregg an unfettered right to opt out of arbitration for 30 days after accepting the Agreement simply by sending an email or letter to Uber. (Opn. at p. 4.) Although thousands of drivers nationwide have exercised their right to opt out of the Arbitration Provision in the Agreement, Gregg did not. (*Ibid.*)

II. Gregg Brings a PAGA Claim Predicated on His Use of the Rides App, the Trial Court Declines to Compel Arbitration, and the Court of Appeal Affirms.

Notwithstanding the Arbitration Provision, Gregg filed a PAGA action in August 2018, claiming that Uber willfully misclassified drivers as independent contractors and violated numerous wage-and-hour provisions. (Opn. at pp. 4–5.) Uber promptly moved to compel arbitration of Gregg's PAGA claim on an individual basis and to dismiss his non-individual claims. (*Id.* at p. 5.) In the alternative, Uber requested that the court order Gregg to arbitrate his individual status as an "aggrieved employee" and stay proceedings pending that arbitration. (*Ibid.*)

The trial court denied Uber's motion, concluding that Gregg could not be compelled to arbitration under the FAA because a PAGA claim "is brought on behalf of the State"—"not the individual"—and the State never consented to arbitration. (3-CT-614; 3-CT-618.) Additionally, the trial court held that a PAGA claim could not be "parse[d] out" into an arbitrable individual component and a non-arbitrable representative component. (3-CT-617–618.) It thus summarily denied Uber's alternative request to compel arbitration of Gregg's alleged status as an aggrieved employee. (3-CT-609; see also Opn. at p. 5.)

The Court of Appeal affirmed. It likewise determined that no portion of Gregg's PAGA claim could be compelled to arbitration because the claim was "indivisible and belong[ed] solely to the state," which (unlike Gregg) had not "agreed to arbitrate" with Uber. (*Gregg v. Uber Technologies, Inc.* (Cal. Ct. App.,

Apr. 21, 2021) 2021 WL 1561297, at *3–4 [nonpub. opn.], italics omitted.)

III. The U.S. Supreme Court Grants Certiorari, Vacates, and Remands in Light of *Viking River*, Which the Court of Appeal Refuses to Fully Follow.

In June 2022, the U.S. Supreme Court granted Uber's petition for writ of certiorari, vacated the Court of Appeal's judgment, and remanded the case for further consideration in light of *Viking River*. (*Uber Technologies, Inc. v. Gregg* (2022) 142 S.Ct. 2860.) On remand, the Court of Appeal requested supplemental briefing addressing the impact of *Viking River*. (Opn. at pp. 5–6.)

Uber explained that the trial court's decision should be reversed in the wake of *Viking River*, which held that the FAA requires arbitration of Gregg's individual PAGA claim and that PAGA provides no mechanism to adjudicate standalone non-individual claims. (Opn. at p. 16.) In response, Gregg contended that his individual PAGA claim was not subject to arbitration and—even if it were—his non-individual claims should be stayed, rather than dismissed for lack of statutory standing. (See *id.* at pp. 11, 16, 24.)

The Court of Appeal affirmed in part and reversed in part. It determined that Gregg's individual PAGA claim fell "squarely within the Arbitration Provision's scope" because it was "based on Uber's alleged misclassification of him as an independent contractor (i.e., a 'dispute[] arising out of or related to [Gregg's] relationship with Uber[]')." (Opn. at p. 15.) Although the Arbitration Provision purported to waive non-individual PAGA claims (*id.* at p. 9), it specified that the

waiver should be severed in the event of invalidity and that such severance "shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision" (*id.* at p. 15). The Court of Appeal thus concluded that "Gregg must resolve his individual PAGA claim in arbitration," while "his non-individual claims … must be litigated in court." (*Id.* at pp. 15–16.)

The Court of Appeal disagreed, however, with *Viking River*'s disposition of the remaining non-individual PAGA claims. The court recognized that "to recover civil penalties under PAGA on behalf of other employees, the plaintiff must: (1) have been employed by the defendant; (2) have suffered one or more of the Labor Code violations on which the PAGA claim is based; and (3) seek to recover penalties for the violations he or she suffered in addition to penalties for violations suffered by other employees." (Opn. at p. 21.) According to the court, Gregg "satisfie[d] these requirements" even though his individual PAGA claim must be sent to arbitration. (*Ibid.*) That did not matter, the court reasoned, because "the United States Supreme Court did not … hold that under the FAA, Gregg's individual claim must be 'severed' from his nonindividual claims." (*Id.* at p. 22.) Rather, the court maintained that *Viking River*'s decision rested entirely on its "understanding of state law," which the court was "not bound" to follow. (*Id.* at pp. 16, 22.) So, the court concluded, Gregg retained standing as he still sought "civil penalties on behalf of himself and other current and former Uber drivers"—albeit in two separate forums. (*Id.* at p. 20.) The court thus stayed

his non-individual PAGA claims pending arbitration of his individual claim. (*Id.* at pp. 24–25.)

ARGUMENT

I. This Court Should Grant Review and Defer Further Action Pending Consideration of *Adolph v. Uber Technologies, Inc.*

The Court should grant this petition because it presents the same issue currently under review in *Adolph*. There, the Court granted a petition presenting the question "[w]hether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are 'premised on Labor Code violations actually sustained by' the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __, __ [142 S.Ct. 1906, 1916] (*Viking River Cruises*); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable." (Issues Ordered Limited, *Adolph v. Uber Techs., Inc.* (Cal., Aug. 1, 2022, No. S27461.)

This case involves the exact same question. The U.S. Supreme Court vacated the Court of Appeal's earlier judgment affirming the denial of Uber's motion to compel arbitration and remanded the case for further consideration in light of *Viking River*. (Opn. at p. 5.) On remand, the Court of Appeal compelled Gregg's individual PAGA claim to arbitration in accordance with *Viking River*. (*Id.* at pp. 11–16.) It then proceeded to consider what to do with Gregg's non-individual PAGA claims (*id.* at pp. 16–24)—even while

acknowledging that this Court would soon decide that very question (*id.* at p. 17, fn. 5).

Where, as here, "several appeals present the same issue" meriting review, this Court commonly grants review in each case, "treats one as the 'lead case,'" and "holds the others until the lead case opinion becomes final." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2022) ¶ 13:125 ["This 'grant and hold' procedure … accounts for a significant number of cases granted review."].) In fact, this Court has already granted review and deferred further action pending consideration of *Adolph* in three other related cases. (See *Wing v. Chico Healthcare & Wellness Centre* (Cal., Aug. 10, 2022, No. S274939) 296 Cal.Rptr.3d 648; Petition for Review Granted, *Sanchez v. MC Painting* (Cal., Aug. 10, 2022, No. S274780); Petition for Review Granted, *Silva v. Dolgen Cal., LLC* (Cal., Jan. 25, 2023, No. S277536).) The Court should do the same here and grant and hold this case pending *Adolph*.

II. The Court of Appeal's Decision Misconstrues State Law and Violates Federal Law.

In choosing not to order the dismissal of Gregg's non-individual PAGA claims, the Court of Appeal failed to apply clear principles of statutory standing and ignored federal law requiring that Gregg's individual PAGA claim be severed from his non-individual claims. Review is thus necessary to correct the Court of Appeal's misapplication of state law and to ensure compliance with the FAA.

PAGA imposes two fundamental requirements for standing: To recover civil penalties, a plaintiff must bring the claim "on behalf of himself or herself" (Lab.

Code, § 2699, subd. (a)) and as an "aggrieved employee … against whom one or more of the alleged violations was committed" (*id.*, subd. (c)). Gregg's non-individual claims—the only claims that can potentially remain in court—satisfy neither requirement. They are brought only on behalf of other employees, not on behalf of himself. And they concern only violations allegedly committed against other employees, not one or more violations allegedly committed against him. As the U.S. Supreme Court correctly recognized, Gregg thus lacks standing to assert non-individual PAGA claims once his individual claim is severed and sent to arbitration. (See *Viking River*, 142 S.Ct. at p. 1925 ["[A] plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action."].)

The Court of Appeal likewise acknowledged that PAGA's standing provisions require a plaintiff to "(1) have been employed by the defendant; (2) have suffered one or more of the Labor Code violations on which the PAGA claim is based; and (3) seek to recover penalties for the violations he or she suffered in addition to penalties for violations suffered by other employees." (Opn. at p. 21.) But it held that Gregg still "satisfies these requirements" in a roundabout way. (*Ibid.*) As the court saw it, Gregg may *allege* an individual PAGA claim—even if he can't *litigate* it in court—and that allegation remains a part of the action even after the claim is compelled to arbitration. (*Id.* at pp. 19–20 ["His agreement to arbitrate his individual claim does not nullify these allegations."].) That is so, the court explained, because the "United States Supreme Court did not … hold that under the

FAA, Gregg's individual claim must be 'severed' from his nonindividual claims." (*Id.* at p. 22.)

But that was, in fact, the core *federal* holding of *Viking River*—not an interpretation of "state law" which the Court of Appeal was free to ignore. (Opn. at p. 22.) In *Viking River*, the U.S. Supreme Court reiterated that "arbitration is a matter of consent" and parties may freely "determine the issues subject to arbitration and the rules by which they will arbitrate." (142 S.Ct. at pp. 1922–1923, cleaned up.) *Iskanian* impinged on this freedom by freezing "efforts to split PAGA claims into individual and representative components" (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 88), thus forcing parties to choose between litigation or arbitration of "a massive number of claims in a single-package suit" (*Viking River*, 142 S.Ct. at p. 1924). Accordingly, the U.S. Supreme Court determined that the FAA preempts *Iskanian* "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Ibid.*)

The effect of that federal rule of severability is to "commit[]" the individual PAGA claim "to a *separate* proceeding"—namely, arbitration. (*Viking River*, 142 S.Ct. at p. 1925, italics added.) Where, as here, "a complaint contains both arbitrable and nonarbitrable claims," the FAA "requires courts to 'compel arbitration of [the] arbitrable claims,'" resulting in "*separate* proceedings in *different* forums." (*KPMG LLP v. Cocchi* (2011) 565 U.S. 18, 22 [per curiam], italics added.)

Permitting Gregg'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 and deny the parties the right to "determine the issues subject to arbitration." (*Viking River*, 142 S.Ct. at p. 1923, cleaned up.) As a result, Gregg's standalone non-individual PAGA claims should be dismissed because he can no longer seek penalties on his own behalf in the *same* proceeding for one or more violations he allegedly sustained. (See Lab. Code, § 2699, subds. (a), (c); *Viking River*, 142 S.Ct. at p. 1925 ["When 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."].)

The Court of Appeal failed to explain any other workable outcome that is faithful to PAGA's text and does not run afoul the FAA. After all, Gregg must prove he is an aggrieved employee—that is, someone who "was employed by" Uber and who "personally suffered at least one Labor Code violation." (*Kim*, 9 Cal.5th at p. 84.) But he cannot make that showing without litigating the "Labor Code violations [he] personally suffered," which is an issue the parties agreed to arbitrate. (*Viking River*, 142 S.Ct. at p. 1923.)

The Court of Appeal suggested that arbitration of Gregg's individual PAGA claim would be preclusive of his aggrieved employee status, and so the parties would not have to litigate this issue in court in violation of the Arbitration Provision and the FAA. (See Opn. at p. 24.) But as this Court has held, claim preclusion applies only in the context of a "second suit"—not "to claims within the *same lawsuit*." (*Kim*, 9 Cal.5th at p. 92; see also, e.g., *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 ["issue preclusion[] precludes relitigation of issues argued and

decided in *prior* proceedings"], cleaned up; italics added.) In other words, if the arbitrator's decision has preclusive effect in any subsequent litigation, that result would depend on the premise that the arbitration and litigation are "*separate* proceedings"—which, again, is exactly what the Supreme Court recognized in *Viking River*. (142 S.Ct. at p. 1925, italics added.) Even under the Court of Appeal's view, then, Gregg would not be bringing a claim "on behalf of himself … and others" in the same "civil action"—as PAGA's plain text requires. (Lab. Code, § 2699, subd. (a).)

Conversely, if arbitration of Gregg's individual PAGA claim is *not* preclusive, then the parties would have to relitigate whether he is an aggrieved employee—even though the Arbitration Provision clearly forbids him from doing so. (See Opn. at pp. 11–16; see also 2-CT-416, § 15.3(v) ["for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and Company agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law)"].) So the correct approach, as the U.S. Supreme Court has held, is to dismiss because there is "no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Viking River*, 142 S.Ct. at p. 1925.)

The Court of Appeal erred in holding otherwise, and this Court should grant review to correct that error.

CONCLUSION

The Court should grant review and defer further action pending consideration of *Adolph v. Uber Technologies, Inc.*

APPENDIX B

October 3, 2022

Daniel P. Potter, Clerk
California Court of Appeal
Second Appellate District
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Re: Defendants/Appellants' Supplemental Letter Brief in *Gregg v. Uber Technologies, Inc.*, No. B302925

Dear Presiding Justice and Associate Justices:

On June 27, 2022, the U.S. Supreme Court granted Uber Technologies, Inc. and Rasier-CA, LLC's petition for writ of certiorari, vacated the judgment of this Court affirming the denial of Uber's motion to compel arbitration, and remanded the case for further consideration in light of *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906.

No oral argument is needed to resolve this case: A straightforward application of *Viking River* requires that Jonathan Gregg's individual claim under the Labor Code Private Attorneys General Act be ordered to arbitration and that Gregg's non-individual PAGA

claims be dismissed for lack of standing.[1] Alternatively, Gregg's non-individual PAGA claims should be stayed pending arbitration of his individual PAGA claim in accordance with the parties' arbitration agreement, section 3 of the Federal Arbitration Act, and Code of Civil Procedure section 1281.4.

The *Viking River* Decision

Viking River reversed, in part, the rules articulated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 regarding PAGA and the enforcement of arbitration agreements. Under *Viking River*, Uber's motion to compel arbitration should have been granted.

To start, contrary to *Iskanian*, *Viking River* held that the FAA applies to PAGA claims because "disputes resolved in PAGA actions" satisfy the requirement in section 2 of the FAA that the dispute "'arise out of' the parties' contractual relationship." (142 S.Ct. at p. 1919, fn. 4.) That remains true, *Viking River* explained, "regardless of whether a PAGA action is in some sense also a dispute between an employer and the State" because "nothing in the FAA categorically exempts claims belonging to sovereigns." (*Ibid.*)

Next, *Viking River* held that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual

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[1] On July 20, 2022, the California Supreme Court granted review in *Adolph v. Uber Technologies, Inc.* (No. S274671) to address whether a plaintiff's non-individual PAGA claims must be dismissed for lack of standing once his individual PAGA claim has been sent to arbitration.

claims through an agreement to arbitrate." (142 S.Ct. at p. 1924.) By requiring the individual and non-individual components to be joined together and forbidding arbitration of both, *Iskanian* had the effect of "coerc[ing]" parties "into giving up a right they enjoy under the FAA"—the right to determine, by consent, "which claims are subject to arbitration." (*Ibid.*)

The preemption of this California-law joinder rule meant that, under the FAA, the defendant was "entitled to compel arbitration of [the] individual claim." (*Viking River*, 142 S.Ct. at p. 1925.) The defendant in *Viking River* moved to compel arbitration of the individual PAGA claim, and the Supreme Court held it must be arbitrated. (*Id.* at pp. 1924–1925.)

Finally, *Viking River* held that "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." (142 S.Ct. at p. 1925.) As the Court explained, "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Ibid.*) But "[w]hen 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." (*Ibid.*) Thus, a plaintiff without her *own* individual PAGA claim "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Ibid.*)

The Trial Court's Decision

After Gregg brought suit under PAGA, Uber moved to compel arbitration and dismiss this case.

(2-CT-422–426; 3-CT-427–446.) The trial court's denial of that motion conflicts with *Viking River* in multiple ways and should be reversed.

The trial court decided that Gregg could not be compelled to arbitration under the FAA because a PAGA claim "is brought on behalf of the State"—"not the individual"—and the State never consented to arbitration. (3-CT-614; 3-CT-618.) *Viking River* flatly rejected this reasoning, concluding that PAGA claims are subject to the FAA even if they are "in some sense also a dispute between an employer and the State." (142 S.Ct. at p. 1919, fn. 4.) Here, as in *Viking River*, the contractual relationship between the parties is the "but-for cause of any justiciable legal controversy." (*Ibid.*) Gregg had to accept the Technology Services Agreement before performing any work via the Uber App—work that now forms the basis of his attempt to impose PAGA penalties on Uber. (3-CT-571, ¶¶ 16–17; 3-CT-572, ¶ 20.) As a result, the trial court's contrary decision to exempt his PAGA claim from the FAA cannot stand.

Additionally, the trial court held that a PAGA claim could not be "parse[d] out" into an arbitrable individual component and a non-arbitrable representative component. (3-CT-617–618.) It thus summarily denied Uber's alternative request to compel arbitration of Gregg's individual status as an "aggrieved employee." (3-CT-609.) Once again, *Viking River* held the opposite, finding that the FAA required enforcement of the parties' agreement to arbitrate individual claims notwithstanding *Iskanian*'s joinder rule. (See 142 S.Ct. at pp. 1924–1925.)

Here, there is no doubt that the parties agreed to arbitrate any PAGA claim on an individual basis. The parties' arbitration provision encompasses "any disputes arising out of or related to this Agreement and disputes arising out of or related to [Gregg's] relationship with" Uber. (2-CT-413, § 15.3(i).) Determining whether Gregg is an independent contractor or an employee clearly relates to the Agreement and his relationship with Uber. And while the arbitration provision purports to waive PAGA claims "in any court or in arbitration," it also includes the proviso that severance of the unenforceable waiver "shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis." (2-CT-415–416, § 15.3(v), cleaned up; see also 2-CT-414, § 15.3(ii).) *Viking River* requires that this agreement be enforced as to Gregg's individual PAGA claim, including the question whether he was an employee. (See *Chacon v. Union Pacific Railroad* (2020) 56 Cal.App.5th 565, 575 ["In interpreting federal law, we are of course bound by decisions of the United States Supreme Court."].)

Viking River also establishes that Gregg's non-individual PAGA claims should be dismissed because "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." (142 S.Ct. at p. 1925.) California courts "do not depart lightly from clear United States Supreme Court rulings." (*People v. Houston* (1986) 42 Cal.3d 595, 609.) Rather, "in the absence of good cause for departure," this Court should "defer[]" to federal decisions even in matters of state law. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353; see also, e.g.,

People v. Superior Court (Sparks) (2010) 48 Cal.4th 1, 12.) Because there is no "persuasive reason[]" for departing from the U.S. Supreme Court's interpretation of PAGA's standing requirement (*People v. Teresinski* (1982) 30 Cal.3d 822, 836), this Court should follow *Viking River* and instruct the trial court to compel Gregg's individual PAGA claim to arbitration and dismiss his non-individual PAGA claims.

The U.S. Supreme Court got PAGA's standing requirements exactly right. The statute plainly specifies that a PAGA claim may be brought only by an "'aggrieved employee' … against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subds. (a), (c).) And the aggrieved employee may file suit only "'on behalf of himself or herself *and* other current or former employees,' not on behalf of himself *or* other employees." (*Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141, quoting Lab. Code, § 2699, subd. (a).)

As the California Supreme Court recognized in *Iskanian*, "*every* PAGA action" must therefore pursue "penalties for Labor Code violations" for at least "one aggrieved employee—the plaintiff bringing the action." (59 Cal.4th at p. 387.) While a PAGA plaintiff may seek to represent "other employees *as well*" (*ibid.*, italics added), he cannot recover penalties based only on violations to others (see *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 678 [PAGA plaintiff may "su[e] solely on behalf of himself or herself or *also* on behalf of other employees"], italics added). A plaintiff thus "can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Viking River*, 142 S.Ct. at p. 1925; see also, e.g., *Quevedo*, 798

F.Supp.2d at p. 1141 [same]; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418, at pp. *9–10 [same].)

PAGA's express limitation on standing reflects the legislative concern that the statute "would be vulnerable to … shakedown suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury"—as had originally occurred under the Unfair Competition Law's "general public" standing provision. (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 90, cleaned up.) Seeking to curb such "private plaintiff abuse" (*Iskanian*, 59 Cal.4th at p. 387, citation omitted), the legislature permitted PAGA actions to "be brought only by an employee or former employee of the alleged violator against whom the alleged violation was committed" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6). And while such suits may "*also* include fellow employees *also* harmed by the alleged violation" (*ibid.*, italics added), a PAGA action cannot proceed solely based on alleged Labor Code violations that others experienced.

The FAA mandates that Gregg's individual claim be compelled to arbitration, and under state law, Gregg lacks standing to bring non-individual PAGA claims concerning alleged violations suffered only by *other* alleged employees. (See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1004 [dismissing claims of two labor unions for lack of standing because they did not "bring an action on behalf of [themselves]," but solely "on behalf of [their] members"].) To rule otherwise would require a complete rewriting of the statute's text and

would contravene the legislature's purpose that PAGA "be a departure from the 'general public' standing originally allowed under the UCL." (*Kim*, 9 Cal.5th at p. 90, citation omitted.)

Kim v. Reins is not to the contrary. There, the California Supreme Court merely held that a plaintiff's settlement of damages claims under the Labor Code did not strip him of standing to pursue a PAGA claim for penalties. (*Kim*, 9 Cal.5th at p. 80.) Critically, the plaintiff did *not* settle his individual PAGA claim—he was still seeking civil penalties for personally suffered violations. (See *id.* at pp. 82–83, 92, fn. 7 [noting that "the parties had specifically carved [the PAGA claim] out of the settlement"], italics omitted.) Because he was still seeking penalties for "one or more of the alleged violations" against himself, he retained PAGA standing even after settlement of his separate damages claims. (Lab. Code, § 2699, subd. (c).) Here, by contrast, Gregg cannot assert any individual claim under PAGA in court. (See *Robinson v. Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476, 484–485 [concluding that "*Kim* does not support [plaintiff's] argument that he has standing to pursue claims based solely on violations" to others].)

That Gregg may still assert an individual PAGA claim in arbitration does not give him standing to bring non-individual PAGA claims separately in court. The FAA demands that his individual PAGA claim be severed from his non-individual claims (*Viking River*, 142 S.Ct. at p. 1925), and thus what was once "a single action" must now proceed as "two … separate and distinct actions with consequent separate [j]udgments" (*Bodine v. Superior Court in and for Santa Barbara County* (1962) 209 Cal.App.2d 354,

361; see also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 738, fn. 7 ["severance of an action" results in "two or more separate actions"]). And nothing in PAGA suggests that a plaintiff can point to a separate proceeding in a different forum to establish standing in court. Now that his "own dispute [has been] pared away from [the] PAGA action," Gregg "is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River*, 142 S.Ct. at p. 1925.) His non-individual PAGA claims should therefore be dismissed.

Any other outcome would be unworkable. After all, if a plaintiff does not prove his "aggrieved employee" status in court because he agreed that dispute must be addressed in arbitration only, then the court cannot determine whether the plaintiff actually has standing to bring a PAGA claim as a proxy of the State. (See *Kim*, 9 Cal.5th at pp. 83–84; *Amalgamated Transit Union*, 46 Cal.4th at pp. 1004–1005.) But under *Viking River*, agreements to arbitrate an individual PAGA claim—which necessarily includes the question whether the plaintiff is an "aggrieved employee" who personally suffered "one or more of the alleged violations" (Lab. Code, § 2699, subd. (c))—are enforceable (*Viking River*, 142 S.Ct. at p. 1925). If a plaintiff who is bound by such an agreement is nonetheless permitted to litigate his "aggrieved employee" status in court (so as to prove that he has standing to pursue non-individual PAGA claims), that would violate the parties' enforceable agreement and transgress the FAA as interpreted in *Viking River*. The correct approach then, as the U.S. Supreme Court has already recognized, is to dismiss because there is "no mechanism" that would "enable a court to adjudicate

non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (142 S.Ct. at p. 1925.)

In the alternative, this Court should stay Gregg's non-individual PAGA claims pending arbitration of his individual claim. The parties' arbitration agreement dictates this outcome: "To the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect to those claims, the Parties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration." (2-CT-416, § 15.3(v).)

Moreover, both section 3 of the FAA and Code of Civil Procedure section 1281.4 would call for a stay in any event. (See *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1122 [parties may designate that arbitration "should move forward under the FAA's procedural provisions rather than under state procedural law"], quoting *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394; see also 2-CT-410, § 15.3(i).) The overlap between the individual and non-individual claims justifies a stay "to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues that are subject to arbitration." (*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966; see also, e.g., *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966 [same rule for severance of request for public injunctive relief].)

* * *

Viking River makes clear that the parties' arbitration agreement is valid and enforceable under the FAA. This Court should reverse the judgment below and direct the trial court to compel Gregg's individual PAGA claim to arbitration and dismiss the non-individual PAGA claims.