No. 23–_____

In The
Supreme Court of the United States

LYFT, INC.,

Petitioner,

v.

MILLION SEIFU,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

HORVITZ & LEVY LLP
PEDER K. BATALDEN
Counsel of Record
FELIX SHAFIR
3601 WEST OLIVE AVENUE
8TH FLOOR
BURBANK, CALIFORNIA
91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

KEKER, VAN NEST & PETERS LLP
RACHAEL E. MENY
R. JAMES SLAUGHTER
ERIN E. MEYER
633 BATTERY STREET
SAN FRANCISCO, CALIFORNIA
94111-1809
(415) 391-5400

Counsel for Petitioner Lyft, Inc.

QUESTION PRESENTED

This case involves the preemptive effect of the Federal Arbitration Act (FAA) on state-law employment claims brought under California's Private Attorneys General Act (PAGA). Two Terms ago, applying the FAA, this Court divided PAGA claims subject to an arbitration agreement into two new categories of claims: "individual" claims and "non-individual" claims. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022). The Court directed the arbitration of individual claims and the dismissal of non-individual claims. *Id.* at 663.

The Court's holding that non-individual claims are to be dismissed quickly became a dead letter in California. In *Adolph v. Uber Techs., Inc.*, the California Supreme Court held that non-individual claims should be stayed or litigated in court, not dismissed. 532 P.3d 682, 685–86 (Cal. 2023). Lower courts in California have followed this approach (including here in Lyft's case) and have bypassed this Court's disposition and reasoning in *Viking River*. But some federal district courts have applied *Viking River* and dismissed non-individual claims.

The question here is whether—in deviating from this Court's direction to dismiss non-individual claims—California courts have violated the FAA and this Court's application of the FAA in *Viking River*.

(The question here embraces the question presented in *Uber Techs., Inc. v. Gregg*, No. 23–645 (U.S. filed Dec. 12, 2023).)

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Lyft, Inc., petitioner on review, was the defendant below. Million Seifu, respondent on review, was the plaintiff below.

Other plaintiffs were also involved in this case—Stephen McFadyen, Seth Blackham, and Monica Garcia. But they settled with court approval and are no longer parties in this case.

Pursuant to Supreme Court Rule 29.6, petitioner Lyft, Inc., states that it is a publicly held corporation with no parent corporation, and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Superior Court of California, County of Los Angeles, the California Court of Appeal, the California Supreme Court, and this Court:

Seifu v. Lyft, Inc., No. BC712959 (Cal. Super. Ct), order issued October 23, 2019 (denying Lyft's petition to compel arbitration).

Seifu v. Lyft, Inc., No. BC712959 (Cal. Super. Ct.), order issued November 6, 2019 (granting ex parte application to enforce automatic appellate stay).

Seifu v. Superior Court, No. B303049, (Cal. Ct. App.), order issued January 23, 2020 (denying Seifu's petition for writ of mandate challenging the stay).

Seifu v. Lyft, Inc., No. B301774 (Cal. Ct. App.), opinion issued June 1, 2021 (affirming denial of Lyft's petition to compel arbitration).

Seifu v. Lyft, Inc., No. S269800 (Cal.), petition for review denied August 18, 2021 (declining to review the June 2021 appellate opinion).

Lyft, Inc. v. Seifu, No. 21–742 (U.S.), judgment issued July 29, 2022 (granting certiorari, vacating the California Court of Appeal's judgment, and remanding for further proceedings).

Seifu v. Lyft, Inc., No. B301774 (Cal. Ct. App.), opinion issued March 30, 2023 (on remand from this

Court, affirming in part and reversing in part the denial of Lyft's petition to compel arbitration).

Seifu v. Lyft, Inc., No. S279932 (Cal.), petition for review granted June 14, 2023 (granting review of the March 2023 appellate opinion, and deferring briefing pending the disposition of a related issue in another case).

Seifu v. Lyft, Inc., No. S279932 (Cal.), September 13, 2023 (dismissing review of the March 2023 appellate opinion).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

Lyft petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The California Supreme Court's order dismissing review is available at 534 P.3d 923 (Cal. 2023), and is reproduced in the appendix at App. 1–2. The California Court of Appeal's opinion is published at 306 Cal.Rptr.3d 651 (Ct. App. 2023), and is reproduced in the appendix at App. 3–21. A prior opinion of the California Court of Appeal is available at 2021 WL 2200878, and is reproduced in the appendix at App. 22–31. The order and judgment of the Superior Court of California, County of Los Angeles, denying Lyft's petition to compel arbitration, is reproduced in the appendix at App. 32–38.

JURISDICTION

The California Supreme Court dismissed review on September 13, 2023. App. 1–2. On November 20, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 11, 2024. No. 23A451. This Court has jurisdiction under 28 U.S.C. § 1257(a).

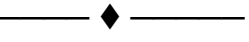
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in relevant part: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ."

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, is reproduced in the appendix at App. 40–41.

Section 2699 of the California Labor Code is reproduced in the appendix at App. 41–46.



INTRODUCTION

For more than a quarter of a century, California's Legislature and courts have invented laws and contrived rules that thwart the enforcement of arbitration agreements. *See, e.g., AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011); *Chamber of Com. of the U.S. v. Bonta*, 62 F.4th 473, 478 & n.1 (9th Cir. 2023) (collecting examples).

Again and again, in a line of decisions stretching back decades, this Court has applied the Federal Arbitration Act (FAA) to rebuff California's serial efforts to interfere with arbitration contracts. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Concepcion*, 563 U.S. 333; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987).

Undeterred, California courts continue to resist this Court's federal arbitration precedent. Their most recent efforts involve California's Private Attorneys General Act (PAGA).

PAGA authorizes an "aggrieved employee" to pursue civil penalties "on behalf of himself or herself and other current or former employees" for statutory violations of wage-and-hour laws. Cal. Lab. Code § 2699(a) (West 2020). PAGA allows named plaintiffs to lump together in one action alleged code violations *they* suffered with code violations purportedly sustained by *co-workers*.

Until recently, PAGA was an FAA-free zone. California courts decreed that PAGA claims were not arbitrable. This Court sought to end that regime in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). *Viking River* squarely held the FAA applies to PAGA claims. But before the ink was fully dry on *Viking River*, the California Supreme Court devised a workaround in *Adolph v. Uber Techs., Inc.*, 532 P.3d 682 (Cal. 2023), that largely failed to enforce arbitration provisions. The California workaround is unfaithful to *Viking River* and violates the FAA, as we explain below. And it has not been followed by all lower federal courts, creating legal tension and the opportunity for forum-shopping, meriting this Court's attention.

We begin by emphasizing three aspects of *Viking River*: (1) PAGA actions are divisible into *individual claims* (premised on code violations suffered by the named plaintiff) and *non-individual claims* (predicated on code violations suffered by co-workers); (2) individual PAGA claims must be arbitrated where the worker and employer had agreed to do so; and (3) the remaining, now-headless, non-individual PAGA claims must be dismissed. This Court applied *Viking River* to this very case (among others), granting certiorari and remanding for further consideration. *Lyft, Inc. v. Seifu*, 142 S.Ct. 2860 (2022).

Refusing to yield on remand, the California Court of Appeal here disregarded *Viking River*'s directive to dismiss non-individual PAGA claims. The Court of Appeal insisted that *Viking River*'s dismissal rule was a mistaken, non-binding interpretation of

California law. The Court of Appeal therefore brushed aside the dismissal rule and instead held that respondent Million Seifu's non-individual PAGA claim could proceed in court. Every California appellate court has adopted the same approach. *E.g., Gregg v. Uber Techs., Inc.*, 306 Cal.Rptr.3d 332, 342–346 (Ct. App. 2023), *petition for cert. filed* (U.S. Dec. 12, 2023) (No. 23–645). The California Supreme Court followed suit in *Adolph*, 532 P.3d 682.

As a result, only two Terms after *Viking River*, this Court's dismissal rule is now a dead letter in California. Some California courts have even pretended not to understand *Viking River*, for example by insisting that individual PAGA claims are actually non-PAGA claims instead. *See Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 29 Cal.Rptr.3d 34, 41 (Ct. App. 2022) ("What the Supreme Court called, as shorthand, an 'individual PAGA claim' is not actually a PAGA claim at all. It would exist even if PAGA had never been enacted. It is what we are calling, more accurately, an individual Labor Code claim."); *Silva v. Dolgen Cal., LLC*, No. E078185, 2022 WL 12366505, at *4 (Cal. Ct. App. Oct. 21, 2022) (following *Gavriiloglou* to compel the arbitration of "individual Labor Code claims" rather than individual PAGA claims). This Court's intervention is needed—both to safeguard its decision in *Viking River*, and to end California courts' latest round of interference with arbitration contracts via PAGA claims.

The approach adopted by California courts offends *Viking River* and the FAA in several ways.

This Court granted certiorari in *Viking River* solely to address a federal issue—FAA preemption—and the Court's direction to dismiss non-individual claims is a federal rule of decision implementing the FAA. Under the Supremacy Clause, California courts are bound by this federal rule. They lack discretion to chart a different course under state law.

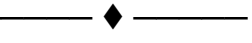
But the California approach would be erroneous and incompatible with the FAA even if *Viking River*'s dismissal rule had been based exclusively on this Court's understanding of statutory standing under state law. First, allowing non-individual PAGA claims to be litigated in court (instead of being dismissed) interferes with a company's contractual right to individually arbitrate disputes with workers *other* than the named plaintiffs. Litigation (resulting in a judgment) will have adverse res judicata consequences for the company and for other workers alike (depending on who prevails), all of which would be avoided if the dispute were arbitrated.

Second, California's do-not-dismiss approach is a rule uniquely hostile to arbitration. The rule does not apply to any contract other than an agreement to arbitrate PAGA claims. In *Adolph*, the California Supreme Court thought that dismissing non-individual claims was unnecessary if those claims remained tethered together with individual claims. But tethering does not work because (even under the California approach) the claims will be adjudicated in different fora. And in all events, *Viking River* construed the FAA to require the complete severance of individual and non-individual claims. By refusing

to conclusively sever the claims, *Adolph* disfavored arbitration rights, running afoul of the FAA.

Third, *Adolph* reiterates a rule of California public policy—that arbitration provisions waiving representative PAGA claims may not be enforced. But public policy grounds are insufficient to prevent enforcement of an otherwise enforceable arbitration contract. *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring) (citing 9 U.S.C. § 2); *see id.* at 351 (majority opinion) (holding that States cannot impose rules that are inconsistent with the FAA, even if they are desirable for reasons of state public policy).

Whether to take *Viking River* at its word—and dismiss non-individual PAGA claims—is an important and recurring issue. Businesses face a tsunami of PAGA litigation. The number of PAGA actions filed in California has grown dramatically. Plaintiffs evade arbitration obligations by filing PAGA claims alongside class claims or, increasingly, filing PAGA-only claims in lieu of class claims (as Seifu has done here). The tide of PAGA actions has increased as California courts disregard *Viking River*. Although penalties associated with individual PAGA claims are generally modest, the "additive dimension" of non-individual PAGA claims allow "plaintiffs to unite a massive number of claims in a single-package suit" with an inordinately high value. *Viking River*, 596 U.S. at 647, 661. This Court should grant certiorari to confirm *Viking River*'s dismissal rule and to require California courts to honor arbitration contracts governed by the FAA.



STATEMENT

A. Overview of competing laws

1. Nearly a century ago, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). To secure the speedy resolution of disputes through "bilateral arbitration," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013), the FAA "envisioned" a "traditional" form of "individualized" arbitration, *Lamps Plus*, 139 S.Ct. at 1412 (citation omitted). Congress therefore "directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable,'" establishing "a liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (citations omitted).

The FAA "foreclose[s]" attempts by state courts "to undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). "State courts rather than federal courts are most frequently called upon to apply" the FAA. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012) (per curiam). "It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Id.* at 17–18. State law "is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus*, 139 S.Ct. at 1415 (citation omitted).

The FAA "limits the grounds for denying enforcement of 'written provision[s] in . . . contract[s]' providing for arbitration, thereby preempting state laws that would otherwise interfere with such contracts." *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 98 (2017) (alterations in original; citation omitted). Thus, "courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 529 (2019).

2. PAGA authorizes a worker who has suffered Labor Code violations to file an action on behalf of himself or herself seeking civil penalties that belong to the State. *Williams v. Superior Ct.*, 398 P.3d 69, 74 (Cal. 2017). That aggrieved worker may also aggregate other workers' Labor Code violations with his or her own violations in what this Court has labeled "a rule of claim joinder." *Viking River*, 596 U.S. at 646. In other words, as a plaintiff, an aggrieved worker "may 'seek any civil penalties the [S]tate can, including penalties for violations involving employees other than the PAGA litigant herself.'" *Id.* at 646–47 (citation omitted). A single violation suffered by a single plaintiff becomes "a gateway to assert a potentially limitless number of other violations as predicates for liability." *Id.* at 647.

A PAGA plaintiff shares recovered penalties with other affected workers and the State, with the State receiving 75 percent. *Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 378 n.5 (Cal. 2017). "Individually, these penalties are modest," but using PAGA's claim-joinder mechanism, "low-value claims may easily be

welded together into high-value suits." *Viking River*, 596 U.S. at 647.

The California Supreme Court has insisted that PAGA actions are indivisible representative actions. *See Viking River*, 596 U.S. at 648, 659. But California courts "use the word 'representative' in two distinct ways." *Id.* at 647. In one (vertical) sense, PAGA actions are representative because workers initiate them as agents of the State, to whom the actions belong. *Id.* at 648. In a second (horizontal) sense, PAGA actions are representative because they seek to prove violations suffered by co-workers. *Id.* at 648–49.

In using the word "representative" in the second way, courts should distinguish *individual* PAGA claims (premised on Labor Code violations actually sustained by the plaintiff) from *non-individual* PAGA claims, which are claims arising out of events involving other workers. *Id.* at 662.

3. In *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court first addressed the relationship between the FAA and PAGA. There, an employee had agreed to individually arbitrate his claims against his employer, foregoing the right to litigate class and representative claims in court. *Id.* at 133. The employee nonetheless filed a lawsuit asserting class and PAGA claims. *Id.* at 133–34.

The California Supreme Court allowed the employee's PAGA claims to proceed notwithstanding the terms of his arbitration agreement. The court

adopted several rules grounded in California "public policy." *Id.* at 133.

"*Iskanian*'s principal rule prohibits waivers of 'representative' PAGA claims in the first sense. That is, it prevents parties from waiving *representative* standing to bring PAGA claims in a judicial or arbitral forum." *Viking River*, 596 U.S. at 649.

"But *Iskanian* also adopted a secondary rule" that "prohibit[ed] parties from contracting around" PAGA's "[claim] joinder device" by "invalid[ating] agreements to arbitrate only 'individual PAGA claims for Labor Code violations that an employee suffered.'" *Viking River*, 596 U.S. at 649, 659 (citation omitted). The California Supreme Court maintained that this ostensibly anti-arbitration rule did not offend the FAA because "a PAGA action lies outside the FAA's coverage entirely . . . ." *Id.* at 652 n.4. This was so, according to the California Supreme Court, because a PAGA claim involves a public dispute between "an employer and the *state*," rather than a private dispute "between an employer and an employee." *Iskanian*, 327 P.3d at 150–51 (alteration in original). California courts therefore deemed PAGA claims "nonarbitrable." *Brooks v. AmeriHome Mortg. Co.*, 260 Cal.Rptr.3d 428, 432 (Ct. App. 2020).

4. This Court granted certiorari in *Viking River* to decide whether the FAA preempts *Iskanian*'s rules. 596 U.S. at 643.

Viking River held that the FAA applies to PAGA claims, rejecting *Iskanian*'s contrary view. This Court explained that, "regardless of whether a

PAGA action is in some sense also a dispute between an employer and the State, nothing in the FAA categorically exempts claims belonging to sovereigns from the scope" of the FAA. *Viking River*, 596 U.S. at 652 n.4. This Court then turned to the representative-action waiver provision included in the employee's arbitration agreement. This Court said the FAA does not require California courts to enforce contractual provisions that waive a plaintiff's standing to assert PAGA claims on behalf of the State. *Id.* at 657–59. But the FAA *does* preempt *Iskanian*'s indivisibility rule that mandates a plaintiff join his or her own violations with those affecting other workers. *Viking River*, 596 U.S. at 659–62. As this Court stated, by prohibiting the "division of PAGA actions into individual and non-individual claims through an agreement to arbitrate," *Iskanian*'s indivisibility rule "invalidates agreements to arbitrate only 'individual PAGA claims for Labor Code violations that an employee suffered.'" *Viking River*, 596 U.S. at 659, 662 (citation omitted).

Applying these principles, *Viking River* held that courts must enforce agreements to arbitrate individual claims—those arising from violations "personally suffered" by the named plaintiff. *Id.* at 659, 662. Once those individual claims are "pared away from a PAGA action" to proceed in arbitration, a plaintiff cannot "maintain [the] non-individual claims in court, and the correct course is to dismiss [the] remaining claims." *Id.* at 663.

B. Factual background

Lyft's smartphone application enables drivers to connect with riders seeking transportation services. App. 6. A driver must agree to Terms of Service that include an arbitration provision requiring the driver—unless he or she opts out—to resolve any disputes he or she may have with Lyft (with limited exceptions) in "binding and final arbitration on an individual basis, not as a plaintiff or class member in any class, group, representative action, or proceeding." App. 6 (citation omitted).

This arbitration provision "is governed by the Federal Arbitration Act." App. 6 (citation omitted). The driver and Lyft agree that the driver may not "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." App. 7 (citation omitted).

Respondent Seifu agreed to the Terms of Service without opting out of the arbitration provision. App. 7. But Seifu later filed this PAGA action, alleging that Lyft misclassified drivers as independent contractors in violation of California law. App. 7–8. Lyft petitioned to compel arbitration, arguing that, notwithstanding *Iskanian*, the arbitration provision's PAGA representative-action waiver was enforceable under the FAA. App. 8, 26.

The trial court applied *Iskanian* and denied Lyft's petition. App. 8. After the California Court of Appeal affirmed, App. 23, 27–31, and the California Supreme Court denied review, this Court granted

certiorari, vacated the judgment, and remanded for further consideration in light of *Viking River*. App. 4.

On remand, the California Court of Appeal held Seifu must arbitrate his individual claim. App. 5, 13–14. But the Court of Appeal declined to dismiss his non-individual claim. App. 5, 14–20. The California Supreme Court initially granted review and held Lyft's case pending its resolution of *Adolph*, 532 P.3d 682. App. 1. But the California Supreme Court ultimately dismissed review after issuing its decision in *Adolph*. App. 1–2.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's FAA precedent.

A. This Court construed the FAA to require the dismissal of non-individual claims as a matter of federal law. But California courts refuse to apply that construction.

Parts II and III of this Court's decision in *Viking River* explained how the FAA applies to PAGA claims when a valid arbitration agreement exists. 596 U.S. at 649–62. Part IV then implemented those principles and announced the Court's holding and disposition. *Id.* at 662–63.

Part IV began by summarizing the Court's rule of decision: "We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA

actions into individual and non-individual claims through an agreement to arbitrate." *Id.* at 662. The Court then applied its rule separately to the individual claim and to the non-individual claims. *Id.* at 662–63. To clarify that its application flowed from its FAA-based rule, the Court repeated the same locution ("Under our holding") in introducing each disposition. *Id.* First, the Court committed the individual claim to arbitration because, "[u]nder our holding," *Iskanian*'s rule against individualized arbitration is preempted. *Viking River*, 596 U.S. at 662. That left the question of "what the lower courts should have done with [the] non-individual claims." *Id.* Once more, the Court invoked its FAA-based rule—"Under our holding in this case," *id.* at 662–63—and concluded that "the correct course is to dismiss [the] remaining claims," *id.* at 663.

These passages confirm that *Viking River*'s dismissal rule was an outgrowth of applying the FAA to PAGA actions. The Court's disposition (of dismissal) implemented federal-law principles designed to give meaning to the FAA against the backdrop of PAGA's state-law standing requirement. This dismissal rule was, in other words, a federal rule of decision.

It should come as no surprise that *Viking River*'s mandate is federal in character. Until *Viking River*, "individual" and "non-individual" claims were unknown to California appellate courts, which had long insisted that PAGA claims may not be divided in this way. *See id.* at 649 ("California law prohibits division of a PAGA action into constituent claims."); *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1131 (Cal.

2020) (holding "[t]here is no individual component to a PAGA action"). Since California law denied the existence of "non-individual" claims, this Court could hardly have been applying California law in discussing the proper method of disposing of those claims.

The Court's holding and disposition in *Viking River* was a garden-variety example of creating a federal rule to protect federal rights. *See, e.g.*, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) ("It is not uncommon for federal courts to fashion federal law where federal rights are concerned."); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (imposing "a federal rule" designed to preserve First Amendment rights in state-law defamation claims against public officials). And that process may include—as here—borrowing from or incorporating *state* law as the *federal* rule of decision when applying a federal statute. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

Since *Viking River* enunciated and applied a federal rule, California courts were required to apply it. They had no discretion to rewrite this Court's federal holding under the FAA so as *not* to dismiss non-individual claims. "The Federal Arbitration Act is a law of the United States," and *Viking River*'s application of the FAA to individual and non-individual claims is "an authoritative interpretation of that Act." *DIRECTV*, 577 U.S. at 54. "Consequently, the judges of every State must follow it," in accordance with the Supremacy Clause. *Id.* (citing U.S. Const. art. VI, cl. 2).

Here, however, the California Court of Appeal failed to apply *Viking River* by failing to dismiss Seifu's non-individual claims. In doing so, the Court of Appeal split from this Court's rule and reasoning in *Viking River*. The Court of Appeal disagreed that it was bound by *Viking River*'s disposition of dismissal. App. 14–16. As the Court of Appeal saw it, this Court misapplied California law in requiring the dismissal of non-individual claims. App. 15–16. The Court of Appeal drew that impression from Justice Sotomayor's concurrence in *Viking River*, from the *Viking River* majority's citation of state law, and from the Court of Appeal's view that *Viking River* did not implicate federal constitutional provisions. App. 14–16.

That reasoning is without merit.

First, concurrences by individual Justices do not bind this Court. *See Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997). Here, the concurring opinion's view that *Viking River* decided a question of state law would be incongruous, since this Court lacks jurisdiction to resolve state-law questions and does not grant certiorari to do so. *See, e.g.*, *Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163, 177 (2009); *Mansell v. Mansell*, 490 U.S. 581, 586 n.5 (1989); *Butner v. United States*, 440 U.S. 48, 51–52 (1979).

Second, a preemption decision like *Viking River* must necessarily cite state authority (as well as federal) in order "to compare federal and state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 611 (2011). So *Viking River*'s citation to state law does not mean *Viking River* applied state law. When courts apply the

FAA, they "must apply federal substantive law;" state law simply "provide[s] a helpful reference in formulating the federal rule of decision." *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 373 (8th Cir. 1983).

Finally, *Viking River*'s preemption holding—like any federal preemption holding—follows from the Supremacy Clause. *See Perry*, 482 U.S. at 490–91 & n.8; *DIRECTV*, 577 U.S. at 53. The California Court of Appeal therefore erred here in claiming that *Viking River* did not implicate a constitutional provision.

Nevertheless, other California courts, including the California Supreme Court, have accepted the Court of Appeal's mode of reasoning. *E.g.*, *Adolph*, 532 P.3d at 689–91; *Gregg*, 306 Cal.Rptr.3d at 342–46. California courts' refusal to follow *Viking River* mirrors their intransigence on arbitration issues leading up to this Court's reversals in *Viking River*, *Lamps Plus*, *DIRECTV*, *Concepcion*, and similar cases. Indeed, even the defendant who prevailed in *Viking River* was unable to secure the dismissal mandated by this Court. On remand, the California Court of Appeal decided that non-individual claims need not be dismissed; the trial court was invited either to stay proceedings or allow them to proceed in court. *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2023 WL 3266802, at *5 (Cal. Ct. App. May 4, 2023).

All of this has led to confusion and divided rulings in the lower *federal* courts in the wake of *Viking River*. Unlike California's appellate courts, several federal courts have implemented *Viking*

River's mandate to correctly dismiss non-individual PAGA claims—the very course *Viking River* specified. *See, e.g.*, *Huell v. Bevmo Holdings, LLC*, No. 22-cv-01394, 2023 WL 1823611, at *1 (E.D. Cal. Feb. 8, 2023) (dismissing non-individual claims after compelling individual claims to arbitration); *Thistlewaite v. United Parcel Serv., Inc.*, No. CV 22-01753, 2022 WL 17578868, at *3 (C.D. Cal. Dec. 7, 2022) (same); *Rivas v. Coverall N. Am., Inc.*, No. SACV 18-1007, 2022 WL 17960776, at *4 (C.D. Cal. Nov. 28, 2022) (same), *appeal filed*, No. 22-56192 (9th Cir. Dec. 20, 2022). But other federal courts have not—they have instead followed California's appellate courts by treating *Viking River*'s dismissal rule as an erroneous interpretation of state law that should be disregarded, rather than the direct result of the Court's FAA-based holding. *See, e.g.*, *Quintero de Vazquez v. Tommy Bahama R&R Holdings, Inc.*, No. 22-cv-01881, 2023 WL 8264554, at *7–8 (S.D. Cal. Nov. 29, 2023); *Rubio v. Marriott Resorts Hosp. Corp.*, No. 23-cv-00773, 2023 WL 8153535, at *3–4 (C.D. Cal. Oct. 17, 2023); *Merhi v. Lowe's Home Ctr., LLC*, No. 22-cv-545, 2023 WL 6798500, at *6–8 (S.D. Cal. Oct. 13, 2023).

This confusing state of affairs is intolerable, as is the lower courts' refusal to adhere to this Court's precedent. This Court should grant certiorari to confirm that, under the FAA, non-individual claims must be dismissed and that all lower courts must follow this federal rule.

B. Contrary to California law, the FAA requires the dismissal of non-individual PAGA claims for three reasons.

1. *Allowing non-individual PAGA claims to proceed in court interferes with a defendant's arbitration contracts with other workers*. Under the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express*, 570 U.S. at 233 (citation omitted). "Parties may . . . specify[] with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus,* 139 S.Ct. at 1416. A court's only task is "to give effect to the intent of the parties." *Id.* (citation omitted).

Companies and workers often agree to individually arbitrate their disputes—including disputes over alleged Labor Code violations that could serve as predicates for PAGA claims. *See, e.g.*, *Viking River*, 596 U.S. at 647; *Adolph*, 532 P.3d at 686; *see also* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 Minn. L. Rev. 877, 919 (2021) (explaining that businesses and workers have, for decades, commonly agreed to arbitrate disputes on an individual basis).

Lyft is one such company; it routinely agrees with drivers to individually arbitrate disputes arising under wage-and-hour laws, including PAGA. *See, e.g.*, App. 6–7, 13; *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 247 (1st Cir. 2021); *Olson v. Lyft, Inc.*, 270 Cal.Rptr.3d 739, 741–42 (Ct. App. 2020); *Osvatics v. Lyft, Inc.*, 535

F.Supp.3d 1, 5 (D.D.C. 2021) (Jackson, J.); *Hinson v. Lyft, Inc.*, 522 F.Supp.3d 1254, 1256 (N.D. Ga. 2021). Lyft and a driver agree that "all disputes and claims" between them—including disputes under PAGA—"shall be *exclusively* resolved by binding arbitration *solely* between" the driver and Lyft "on an individual basis"; both parties waive their "respective rights to resolution of disputes in a court of law by a judge or jury" in order to "resolve any dispute by arbitration." App. 6–7 (emphasis added; citation omitted).

Vindicating these arbitration rights becomes impossible if non-individual PAGA claims may be litigated in court. Court litigation, and the resulting judgment disposing of a non-individual claim, will resolve core issues that companies and workers have committed to arbitration.

First, if the non-individual claim succeeds, then other workers could rely on the resulting judgment in their own *non-PAGA* actions to establish—via offensive non-mutual collateral estoppel—the same Labor Code violations. *See, e.g., Z.B., N.A. v. Superior Ct.*, 448 P.3d 239, 252 (Cal. 2019) (holding that a defendant company will be "bound by" the resulting judgment and therefore nonparty workers whose violations were adjudicated in the course of the PAGA action could invoke collateral estoppel to use the PAGA judgment to establish the same violations for their own non-PAGA action); *Arias v. Superior Ct.*, 209 P.3d 923, 934 (Cal. 2009) (same); *see also Kim*, 459 P.3d at 1130–32 (distinguishing PAGA claims from individual non-PAGA claims); *Wesson v. Staples the Office Superstore, LLC*, 283 Cal.Rptr.3d 846, 862 (Ct. App.

2021) (holding that adjudication of a PAGA claim requires a determination of whether a company committed Labor Code violations against *each and every* worker).

Second, if the non-individual claim fails—or even if the claim succeeds but results in paltry penalties—other workers asserting their own PAGA claims will be saddled with the named plaintiff's outcome. *See, e.g.*, *Williams*, 398 P.3d at 80; *Estrada v. Royalty Carpet Mills, Inc.*, 292 Cal.Rptr.3d 1, 22 & n.8 (Ct. App. 2022), *review granted*, 511 P.3d 191 (Cal. June 22, 2022) (No. S274340); *Woodworth v. Loma Linda Univ. Med. Ctr.*, 311 Cal.Rptr.3d 486, 514 (Ct. App. 2023), *review granted*, 537 P.3d 338 (Cal. Nov. 1, 2023) (No. S281717). "[T]here is no mechanism for opting out of the judgment entered on [a] PAGA claim." *Robinson v. S. Cntys. Oil Co.*, 267 Cal.Rptr.3d 633, 637–38 (Ct. App. 2020).

Yet all of these disputes with other, nonparty workers were committed to individual arbitration in those workers' arbitration agreements. Both nonparty workers and companies alike lose the opportunity to resolve these disputes in the format to which everyone agreed—individualized arbitration.

In this way, court adjudication of non-individual PAGA claims would nullify the terms agreed to in arbitration contracts, in violation of the FAA. *See, e.g.*, *Viking River*, 596 U.S. at 659 (holding that state courts may not "unduly circumscribe[] the freedom of parties to determine 'the issues subject to arbitration'" (citation omitted)); *Lamps Plus*, 139 S.Ct. at 1415 ("The FAA requires courts to 'enforce

arbitration agreements according to their terms.'" (citation omitted)); *Concepcion*, 563 U.S. at 351–52 (holding that wholesale invalidation of workplace arbitration agreements covering individual claims would violate the FAA by standing as an obstacle to the FAA's full purposes and objectives); *Epic Sys.*, 138 S.Ct. at 1622 ("target[ing] arbitration" through "more subtle methods" violates the FAA).

By contrast, applying the FAA and dismissing non-individual PAGA claims infringes no substantive rights. After all, PAGA "does not create any private rights or private claims for relief." *Viking River*, 596 U.S. at 646. PAGA is "simply a procedural statute" allowing workers to recover penalties "that otherwise would be sought by labor law enforcement agencies." *Wesson*, 283 Cal.Rptr.3d at 860 n.14 (citation omitted). And those agencies have shown no lack of appetite for filing their own actions. *See, e.g.*, *People v. Uber Techs., Inc.*, 270 Cal.Rptr.3d 290, 302 (Ct. App. 2020); Complaint, *Garcia-Brower v. Uber Techs., Inc.*, No. RG20070281 (Cal. Super. Ct. Aug. 5, 2020), 2020 WL 4729151.

2. *Dismissing non-individual PAGA claims is the only way to honor the severance rule.* *Viking River* held that the FAA requires a PAGA action to be "divided" into two separate claims that are severed. 596 U.S. at 662. An individual claim is "pared away" from the non-individual claim and "committed to a separate proceeding." *Id.* at 663. To effectuate that severance, this Court instructed that a non-individual claim should be dismissed. *Id.* The headless non-individual claim could not proceed after its connection to the plaintiff was severed. *Id.*

The California Supreme Court balked at this approach in *Adolph* and declined to sever the individual claim from the non-individual claim. Instead, *Adolph* insisted on tethering the two claims together, describing them as "remaining part[s] of the same action," even after the individual claim is pared away for arbitration. 532 P.3d at 693. The California Supreme Court did so to avoid the necessary consequence of severance—the creation of a non-individual claim no longer connected to its plaintiff. That was the circumstance that led to dismissal, as explained in *Viking River*.

But connecting the individual and non-individual claims meant disregarding *Viking River*'s application of the FAA, which requires complete severance, not linkage, of the individual and non-individual claims when the individual claims are sent to arbitration. The California Supreme Court lacked authority to accept one part of *Viking River* (compelling arbitration of individual claims) while ignoring another part: the severance rule. By picking and choosing the portions of this Court's FAA decision to adopt, the California Supreme Court wound up mandating its own unique rule hostile to arbitration rights—an approach the FAA forbids. *See Epic Sys.*, 138 S.Ct. at 1622.

It follows that *Adolph*'s rule of connecting, or tethering, individual and non-individual claims violates the FAA and may not be enforced. Once that state-law barrier erected by *Adolph* is dismantled, this Court's disposition in *Viking River* must be honored—non-individual claims are to be dismissed. There is no logical or legal reason to do otherwise.

3. *The FAA requires enforcement of representative-action waivers notwithstanding California's public policy against such waivers.* The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But these grounds for revocation do "not include all defenses applicable to any contract but rather" only a "subset of those defenses." *Concepcion*, 563 U.S. at 354–55 (Thomas, J., concurring).

Section 2 does not itself define the grounds for refusing to enforce arbitration agreements. The Court therefore utilizes ordinary rules of statutory construction to interpret Section 2 in the context of the FAA as a whole. *Id.* at 354 (Thomas, J., concurring).

"Examining the broader statutory scheme," Section 4 of the FAA "clarif[ies] the scope of § 2's exception to the enforcement of arbitration agreements." *Id.* at 354–55. "When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,' the court must order arbitration 'in accordance with the terms of the agreement.'" *Id.* at 355 (citation omitted).

"Reading §§ 2 and 4 harmoniously," the grounds for revoking an arbitration provision "preserved in § 2" refer solely to "grounds related to *the making* of the agreement." *Id.* at 355 (emphasis added; citation omitted). Thus, the only viable

defenses to the enforcement of an arbitration agreement's terms are those "concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake." *Id.*

Critically, this excludes state-law policy-based defenses to enforcement. *Id*. A State's "public-policy reasons" for refusing to enforce the terms of an arbitration provision do "not concern whether the contract was properly made." *Epic Sys.*, 138 S. Ct at 1633 (Thomas, J., concurring) (citation omitted); *accord*, *e.g.*, *Am. Express*, 570 U.S. at 239 (Thomas, J., concurring); *Nitro-Lift*, 568 U.S. at 18–22 (holding that the FAA preempted Oklahoma Supreme Court case law predicated on state public policy that required a court rather than an arbitrator to decide enforceability of covenants not to compete); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533–34 (2012) (per curiam) (vacating West Virginia high court's determination of unconscionability influenced by state public policy).

Arbitration agreements—including Seifu's agreement here—often stipulate the parties will pursue individual claims only and may not bring representative actions (including PAGA actions). *E.g.*, *Viking River*, 596 U.S. at 647; App. 7. When such provisions were enforceable under California law prior to *Iskanian*, they barred plaintiffs who had agreed to these provisions from pursuing PAGA claims. *E.g.*, *Teimouri v. Macy's, Inc.*, No. D060696, 2013 WL 2006815, at *18 (Cal. Ct. App. May 14, 2013); *Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1141–43 (C.D. Cal. 2011).

Iskanian halted this line of cases by deeming PAGA representative-action waivers to be unenforceable because they contravened California "public policy." 327 P.3d at 133. *Adolph* reiterated this rule, insisting these waivers violate state public policy. 532 P.3d at 688.

But Section 2 of the FAA forbids courts from refusing to enforce the terms of an arbitration provision based on public policy grounds. Thus, for example, *Viking River* held that the FAA preempted *Iskanian*'s claim joinder rule prohibiting the division of PAGA actions into individual and non-individual PAGA claims, 596 U.S. at 659–62, even though *Iskanian* grounded the rule in California public policy, 327 P.3d at 149. Consequently, the FAA likewise preempts the California Supreme Court's public policy prohibition on enforcing PAGA representative-action waivers. Non-individual claims are representative claims, *Viking River*, 596 U.S. at 648–49, thus it follows that they must be dismissed as part of enforcing those waivers, s*ee id.* at 663 (Barrett, J., concurring) ("PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement.").

Viking River is not to the contrary. This Court considered whether California's prohibition created an *implied* conflict with the FAA. *Id.* at 649–59. The Section 2 argument described here, which is based on the FAA's plain language, *expressly* overrides California's rule against enforcing representative action waivers. *Cf., e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (differentiating between express and conflict preemption); *accord*

English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (describing different types of federal preemption). *Viking River* never considered this distinct issue arising from California's problematic invocation of state public policy, and cases are not authority for propositions not considered. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

II. Certiorari is warranted because the question of whether the FAA requires the dismissal of non-individual PAGA claims is a recurring issue of vital importance.

"[J]udicial hostility towards arbitration agreements is evident in California." Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 Fordham L. Rev. 2035, 2055 (2011). In response, this Court has repeatedly "struck down a number of California laws or judge-made rules relating to arbitration as preempted by the FAA." *Chamber of Com*, 62 F.4th at 478.

"PAGA is the new frontier in which California attempts to subvert the FAA." Max Birmingham, *Kalifornia: Exploring the Crossroads of the Federal Arbitration Act and the California Private Attorney General Act*, 29 Willamette J. Int'l L. & Disp. Resol. 268, 269 (2022). Nowhere is this more evident than in *Adolph* and the decision below, both of which chose not to dismiss non-individual claims shortly after this Court told California courts to do so in *Viking River*. California courts have restored the pre-*Viking River* landscape in which they relied on PAGA to thwart the enforcement of arbitration provisions.

PAGA claims have long been seen as "a means for employees and others to avoid arbitration." Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103, 127–28 (2015). "The result has been an explosion of PAGA claims." Jathan Janove, *More California Employers Are Getting Hit with PAGA Claims*, Soc'y for Hum. Res. Mgmt. (Mar. 26, 2019), http://tinyurl.com/shrmjanove.

Since 2004, PAGA actions have increased by more than 1000%. Ashley Hoffman, *Private Attorneys General Act*, Cal-Chamber Advocacy (Jan. 2023), http://tinyurl.com/calchmbradvoc. This pace shows no signs of slowing, particularly now that California courts disregard *Viking River*'s dismissal rule. In 2023 alone, California expected to receive an all-time high of over 7,000 PAGA notices (the necessary precursors for initiating PAGA lawsuits). Anthony Zaller, *The High Stakes and Risks of California's Private Attorneys General Act (PAGA)*, California Employment Law Report (May 26, 2023), http://tinyurl.com/calemp. It is therefore unsurprising that, in recent years, the State has received hundreds of millions of dollars from PAGA lawsuits. *See Rose v. Hobby Lobby Stores, Inc.*, No. RG17-862127, 2023 WL 9111213, at *5 (Cal. Super. Ct. Dec. 28, 2023).

In short, PAGA actions are legion and often seek millions—even billions—of dollars in penalties. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 451 (2018) ("Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries"); *Turrieta v.*

Lyft, Inc., 284 Cal.Rptr.3d 767, 775 n.7 (Ct. App. 2021), *review granted*, 502 P.3d 3 (Cal. Jan. 5, 2022) (No. S271721) (explaining that plaintiffs, including Seifu, claimed Lyft's PAGA liability could exceed $12 *billion*), Dorothy Atkins, *Google's $27M PAGA Deal Ok'd After Rare Calif. Agency Nod*, Law360 (Dec. 4, 2023), http://tinyurl.com/law360atkins.

These claims allow plaintiffs to extract high-value settlements from companies—including small businesses—from which plaintiff's lawyers receive hefty financial benefits, even as each worker receives a fraction of the penalties (most of which are routed to the State). *See, e.g.*, Ken Monroe, *Op-Ed: Frivolous PAGA lawsuits are making some lawyers rich, but they aren't helping workers or employees*, L.A. Times (Dec. 6, 2018), http://tinyurl.com/latimesmonroe; Hoffman, *supra*; *see also CA Lawyer Flaunts "MR PAGA" License Plate*, CABIA In the News (Jan. 27, 2020), http://tinyurl.com/cabiaitn.

This form of employment litigation is not a small problem, since California has the largest workforce of any State. *See Economic News Release*, U.S. Bureau of Lab. Stats. (Jan. 5, 2024) http://tinyurl.com/usbls2024. And several States are considering bills that would enact PAGA analogues. *See* Charles Thompson et al., *Employers Must Brace For PAGA-Like Bills Across US*, Law360 (June 18, 2021), http://tinyurl.com/law360thompson.

Given the profound stakes involved, California businesses spent years pressing FAA preemption challenges to pre-*Viking River* California precedent. *Viking River* uprooted California courts' unending

hostility to arbitration provisions by applying the FAA to require the arbitration of individual claims and the dismissal of non-individual claims. But California courts swiftly circumvented this course correction by uniformly refusing to follow this Court's dismissal directive. *See Adolph*, 532 P.3d at 691. This Court should refuse to countenance California's continued resistance to federal law. *See DIRECTV*, 577 U.S. at 53 ("[T]he Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." (citation omitted)).

Lyft and others have once again turned to this Court for intervention. *See, e.g.*, Pet. for Writ of Cert., *Uber Techs., Inc. v. Gregg* (U.S. Dec. 12, 2023) (No. 23-645), 2023 WL 8690999.[1] Unless this Court steps in, *Viking River*'s dismissal directive and the FAA's mandate requiring the dismissal of non-individual claims will be a dead letter in California even as the number of these claims skyrockets. This Court's intervention is necessary to put an end to California courts' efforts to evade *Viking River* and the FAA. As it did once before in this very case, the Court should grant certiorari and overturn the Court of Appeal's opinion here.

[1] The question presented by Lyft's petition embraces the question in *Uber Techs., Inc. v. Gregg*, No. 20–645 (U.S. filed Dec. 12, 2023).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

HORVITZ & LEVY LLP
PEDER K. BATALDEN
Counsel of Record
FELIX SHAFIR
3601 West Olive Avenue
8th Floor
Burbank, California 91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

KEKER, VAN NEST & PETERS LLP
RACHAEL E. MENY
R. JAMES SLAUGHTER
ERIN E. MEYER
633 Battery Street
San Francisco, California 94111-1809
(415) 391-5400

Counsel for Petitioner Lyft, Inc.

January 11, 2024