No. 24-

IN THE

Supreme Court of the United States

THE SERVICEMASTER COMPANY, LLC, *et al.*,

Petitioners,

v.

TYRON COOLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Viking River Cruises v. Moriana,* 596 U.S. 638 (2022), this Court held that the Federal Arbitration Act ("FAA") requires the enforcement of agreements to arbitrate individual claims brought under California's Private Attorneys General Act codified in Labor Code section 2698, *et seq.* ("PAGA"). *Id.* In so doing, this Court abrogated California's "indivisibility" rule, which previously held that actions under the PAGA "cannot be divided into individual and non-individual claims." *Id.* at 660-62; *see Iskanian v. CLS Transp. Los Angeles, LLC,* 327 P.3d 129 (Cal. 2014). Instead, this Court held that the arbitrable individual PAGA claim must be "pared away" from the non-individual claim and be "committed to a separate proceeding." *Id.*

Despite this Court's holding, in *Adolph v. Uber Technologies, Inc.,* 532 P.3d 682 (2023), the California Supreme Court held that PAGA claims constitute "a single action" such that the individual claim compelled to arbitration is not "pared away" but remains linked to the non-individual claim pending in the court for standing purposes. *Id.* at 1124. Relying on *Adolph,* both the Ninth Circuit and California courts continue to refuse to sever the arbitrable individual claim from the non-individual claim.

The question presented is: Does the Federal Arbitration Act require the complete severance of arbitrable individual PAGA claims from non-individual PAGA claims, with the individual PAGA claims committed to a separate proceeding?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners The Servicemaster Company, LLC, Terminix International, Inc., and The Terminix International Company Limited Partnership ("Petitioners") were the Defendants-Appellees in the courts below.

Respondent Tyron Cooley ("Cooley") was the Plaintiff-Appellant in the courts below.

Petitioners identify the following entities as parent corporations and/or publicly held corporations owning 10% or more of their stock:

The Terminix International Company Limited Partnership is a limited partnership formed under the law of the State of Delaware and has its principal place of business in the State of Tennessee. Its general partner is TMX Holdco, Inc. (f/k/a SMCS Holdco II, Inc.).[1] Its limited partners are The Terminix Company LLC and TMX Holdco II, Inc. (f/k/a SMCS Holdco II, Inc.). TMX Holdco, Inc. (f/k/a SMCS Holdco II, Inc.) is a corporation formed under the laws of the State of Delaware and has its principal place of business in the State of Tennessee and is wholly owned by The Terminix Company LLC. The Terminix Company LLC is a limited liability company formed under the laws of the State of Delaware and has its principal place of business in the State of Tennessee, and

1. Terminix International Inc. merged into SMCS Holdco II, Inc. as of December 20, 2020. SMCS Holdco II, Inc. named changed to TMX Holdco, Inc. effective December 30, 2020.

is wholly owned by CDRSVM Holding, LLC. CDRSVM Holding, LLC is a limited liability company formed under the law of the State of Delaware and has its principal place of business in the State of Tennessee, and is wholly owned by CDRSVM Investment Holding, LLC. CDRSVM Investment Holding, LLC is a limited liability company formed under the law of the State of Delaware and has its principal place of business in the State of Tennessee, and is wholly owned by Terminix Holdings, LLC. Terminix Holdings, LLC is a limited liability company formed under the law of the State of Delaware and has its principal place of business in the State of Tennessee, and is wholly owned by Rentokil Initial US Holdings, Inc. Rentokil Initial US Holdings, Inc. is a corporation formed under the law of the Commonwealth of Pennsylvania and has its principal place of business in the Commonwealth of Pennsylvania, and is wholly owned by Rentokil Initial plc. Rentokil Initial plc is a corporation formed under the law of the United Kingdom and is publicly traded on the London and NY Stock Exchanges (RTO).

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit:

- *Cooley v. The Servicemaster Company LLC, et al.,* Eastern District of California, District Court Case No. 2:20-cv-01382-MCE-DB, order and judgment entered April 13, 2023;

- *Cooley v. The Servicemaster Company LLC, et al.,* Ninth Circuit Case No. 23-15643, memorandum issued February 29, 2024;

- *Cooley v. The Servicemaster Company, LLC, et al.,* Ninth Circuit Case No. 23-15643, order denying petition for rehearing and rehearing *en banc* entered April 23, 2024.

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

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PETITION FOR WRIT OF CERTIORARI

In *Viking River Cruises, Inc. v. Moriana,* 596 U.S. 638 (2022) ("*Viking River*"), this Court held that the FAA preempts California law "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Id.* at 660-62. Instead, this Court held that the arbitrable individual PAGA claim must be "pared away" from the non-individual claim and be "committed to a separate proceeding." *Id.* In so doing, this Court correctly observed 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." *Id.* at 1925. As a result, this Court held that once an individual PAGA claim is ordered to arbitration, that individual lacks standing to bring a representative action, and the non-individual PAGA claim must be dismissed. *Id.* at 663.

Both the Ninth Circuit and California courts continue to ignore this Court's precedent in favor of the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (2023) ("*Adolph*") which holds in contravention to *Viking River* that "an order compelling arbitration of the individual [PAGA] claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA." *Id.* Contrary to this Court's *Viking River* decision, *Adolph* holds that the individual and non-individual claims "remain[n] part of the same action" even after the individual PAGA claim is sent to arbitration. *Id.* at 693.

Given the conflict between this Court's *Viking River* decision and the California Supreme Court's *Adolph* decision, adopted by the 9th Circuit here, and the confusion

it has caused in the lower courts, this Court's intervention is warranted. This court should grant review to end the repudiation of *Viking River's* severability holding and to curtail California's continued interference with the fundamental purpose of the FAA. Indeed, under *Adolph* as currently interpreted, the individual PAGA claim is not fully committed to a separate arbitral proceeding in violation of *Viking River,* the FAA, and the scope of the agreed-upon individual arbitration. Instead, the individual PAGA claim remains part of the non-individual PAGA claim pending in the court after the individual PAGA claim has been compelled to arbitration, effectively invalidating not only the agreed-upon arbitration agreement, but those of the many employees purportedly represented by the non-individual PAGA claim who agreed to individual arbitration. Such a rule circumvents and effectively nullifies those employees' agreements to arbitrate their PAGA claims. The result is a wholesale invalidation of parties' individual arbitration agreements that frustrates the purpose of, and therefore violates, the FAA, which requires courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys. Corp. v. Lewis,* 138 S.Ct. 1612, 1619 (2018).

This case is an ideal vehicle to review and reject *Adolph* and the cases which are relying on it to reject enforcement of agreed-upon individual arbitration agreements governed by the FAA when PAGA is alleged. The California Supreme Court had the opportunity to consider this Court's *Viking River* decision but failed to recognize its precedent as to the application of the FAA – a federal law. This Court's review is necessary to safeguard the federal policy favoring arbitration as explained in *Concepcion* and *Epic.*

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's unpublished memorandum is available at *Cooley v. Servicemaster Company, LLC, et al.,* 2024 WL 866123 (Feb. 29, 2024) and reproduced in the Appendix ("App.") at App. B 2a-6a. The judgment and order of the United States District Court for the Eastern District of California are unpublished and reproduced at App. C 7a and App. D 8a-10a.

JURISDICTION

The Ninth Circuit issued its memorandum on February 29, 2024. App B 2a-6a. The Ninth Circuit issued an order denying Petitioners' Petition for Rehearing and Rehearing *En Banc* on April 23, 2024. App A 1a. This Court has jurisdiction pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides: "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."

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The FAA and California's Continued Attempt to Create New Devices and Formulas to Undermine It.

The FAA declares a liberal policy favoring the enforcement of arbitration clauses: "A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … *shall be 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, emphasis added; see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The party opposing arbitration bears the burden of proving that Congress intended to preclude arbitration of the claims asserted. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24 (1983). In this regard, any doubts are resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24-25.

In enacting the FAA, Congress sought to overcome widespread judicial hostility to the enforcement of arbitration agreements. *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). As this Court explained, the FAA permits private parties to "trade the procedures … of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer,* 500 U.S. at 31 citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, the FAA's "principal purpose … is to ensure that private arbitration agreements are enforced *according to their terms*." *Concepcion*, 563 U.S. at 344, emphasis added.

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. The FAA amounts to a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Perry v. Thomas,* 482 U.S. 483, 489 (1987) quoting *Moses H. Cone,* 460 U.S. at 24. "By its terms, the [FAA] leaves no place for the exercise of discretion by a … court, but instead mandates that … courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc., v. Byrd,* 470 U.S. 213, 218 (1985) citing 9 U.S.C. §§ 3, 4.

This Court has consistently rejected invitations to curtail Section 2's sweeping text. According to *Concepcion,* the FAA preempts state-law rules that interfere with the parties' ability to choose bilateral arbitration. California's "*Discover Bank* rule," prohibited class-action waivers

included in consumer contracts in both litigation and arbitration as "unconscionable." 563 U.S. at 340. This Court held that the FAA preempted the *Discover Bank* rule and the *Discover Bank* rule "sacrific[ed] the principal advantage of arbitration - its informality - and ma[de] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 347, 348. Because it stood "as an obstacle to the accomplishment of the FAA's objectives," the *Discover Bank* rule was preempted. *Id.* at 343.

Epic reaffirmed that *Concepcion's* holding as to class-action waivers was just as applicable to collective-action waivers. 138 S.Ct. at 1612. In enacting the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms - including terms providing for individualized proceedings." *Id.* at 1619. And *Epic* reinforced *Concepcion*'s "essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures," and by cautioning that "we must be alert to new devices and formulas" that aim to interfere with the fundamental purpose of arbitration. *Id.* at 1623.

California's Legislature and courts have been particularly inventive in creating new devices and formulas that undermine arbitration agreements, many of which this Court has rejected. Among other decisions discussed here, this Court has held that the FAA preempts California statutes requiring a judicial forum for franchise claims (*Southland Corporation v. Keating,* 465 U.S. 1, 10 (1984)) and wage disputes (*Perry,* 482 U.S. at 491); a California statute granting a state agency primary jurisdiction over talent agents (*Preston v. Ferrer,*

552 U.S. 346, 359 (2008); a California judge-made rule requiring the availability of class procedures in arbitration (*Concepcion,* 563 U.S. at 344); and the use of California's canon construing contract language against the drafter to undercut arbitration (*DIRECTV, Inc. v. Imburgia,* 577 U.S. 47, 58 (2015)) or to impose class procedures in arbitration on unwilling parties (*Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1417, 1422 (2019)).

B. California's Private Attorneys General Act

PAGA allows an aggrieved employee to seek monetary penalties individually and on a representative basis on behalf of other past or present employees of the same employer. PAGA confers no substantive rights. *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). There is no such thing as a "violation of PAGA." Rather, PAGA is "a procedural statute" that permits aggrieved employees to pursue relief for violations of substantive sections of the Labor Code. *Id.* Specifically, PAGA authorizes an "aggrieved employee" to recover civil penalties for violations of California's Labor Code when a state enforcement official could have—but chose not to—bring such a claim. Cal. Lab. Code §2699(a). An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* §2699(c). An employee bringing a PAGA claim may seek monetary penalties not only for Labor Code violations committed against themself, but also on a representative basis for similar infractions against other employees. *See* Cal. Lab. Code §2699(a); *see also id.* §2699(g)(1).[1]

1. On July 1, 2024, new PAGA reforms were signed into law which took immediate effect. *See id.* These changes, however, have

Before filing a PAGA suit, the employee must give written notice of the alleged Labor Code violation to the State's Labor and Workforce Development Agency. *Id.* §2699.3(a)(1)(A). If the agency either notifies the employee that it does not intend to investigate or simply fails to respond within the prescribed period, the employee can commence a civil action. *Id.* §2699.3(a)(2)(A). Likewise, an employee can commence a civil action if the agency expresses an intent to investigate but "determines that no citation will be issued" or takes no action within the prescribed time period. *Id.* §2699.3(a)(2)(B). Once the action is commenced, the private plaintiff controls the litigation in its entirety; neither the agency nor any other state component can direct or seek to dismiss the employee's action.

C. *Viking River* Abrogates *Iskanian*

In *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014) ("*Iskanian*"), the California Supreme Court held that a pre-dispute agreement in which an employee agrees to arbitrate all claims individually and to forgo his right to pursue a representative PAGA action is unenforceable as against public policy. The California Supreme Court (1) barred enforcement of private arbitration agreements governed by the FAA that are otherwise valid, binding, and enforceable, and (2) prohibited enforcement of representative PAGA waivers in such FAA-governed private arbitration agreements. *Id.*

In so doing, the California Supreme Court declined

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no impact on the instant appeal or underlying action as PAGA's interaction with private arbitration agreements and the FAA is not impacted by any changes in the law.

to permit the arbitration of "individual PAGA claims for Labor Code violations that an employee suffered" out of concern that "'a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.'" *Id.* at 149 (citation omitted). The California Supreme Court then upheld both the anti-waiver and the anti-severability rules under the FAA on the theory that PAGA "lies outside the FAA's coverage" because it creates "a type of *qui tam* action" where the employee litigates on behalf of the State. *Id.* at 148-151.

This Court granted review in *Viking River* to consider whether the FAA preempted PAGA as interpreted in *Iskanian*. In so doing, this Court held that a PAGA action does not lie outside the coverage of the FAA. *Viking River,* 142 S. Ct. at 1919 n.4. As explained, the contractual relationship between the parties is a but-for cause of any justiciable legal controversy between the parties under PAGA. *Id.* 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. *Id.* citing 9 U.S.C.A. § 2; Cal. Lab. Code § 2698 et seq. Under *Iskanian*, "California precedent holds that a PAGA suit is a 'representative action' 'in which the employee plaintiff sues as an 'agent or proxy' of the State." *Id.* at 1910 citing *Iskanian,* 59 Cal.4th at 380, This Court held "[w]e reject this argument[,]" explaining that a PAGA action is not between the employer and the State but between the employer and the employee. *Id.* at 1919. Section 2 of the FAA therefore controls. *Id.*

Viking River next determined that the FAA did not preempt California's anti-waiver rule. In this Court's view, representative arbitration is not necessarily inconsistent with the FAA "as a categorical rule." 142 S. Ct. at 1922. At least under some circumstances, "representative actions in which a single agent litigates on behalf of a single principal" do not violate an agreement requiring bilateral arbitration. *Id.* at 1922-1923. Consistent with the FAA, then, California law could continue to prohibit the wholesale waiver of PAGA claims. *Id.* at 1924-1925.

But this Court held 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." 142 S. Ct. 10 at 1924. In *Viking River,* this Court acknowledged that all PAGA actions are "representative" in the sense that they may only be brought by an employee acting as a proxy for the state. *Id.* at 1916. Until *Viking River*, California law had held that the representative nature of PAGA meant that a plaintiff's PAGA claims could not be compelled to individual arbitration because PAGA claims were indivisible in that their individual and non-individual components could not be separated. (*Iskanian,* 59 Cal.4th at 383; *Kim v. Reins,* 9 Cal.5th 73, 88 (2020) [noting that California courts have uniformly "rejected efforts to split PAGA claims into individual and representative components"]; *see also Id,* at 1916.

This Court abrogated this prior precedent, finding by requiring an employer to choose between arbitrating all the alleged aggrieved employees' claims or none of them, California's "indivisibility" rule was coercive and preempted by the FAA. *Id.*, at 1923-1924. In other words, this Court found that the *Iskanian* rule flouted the FAA by

mandating joinder of a massive number of claims similar to class claims, for which arbitration is poorly suited and to which the parties never agreed. *Id.* at 1924.

Instead, this Court held that PAGA's nature as a representative action did not preclude the division of PAGA actions into a plaintiff's "individual" PAGA claims – those claims for civil penalties based on Labor Code violations he alleges he personally suffered – and "non-individual" PAGA claims – those claims for civil penalties based on Labor Code violations alleged suffered by other "aggrieved employees." *Id.* Thus, while this Court did not disturb California law that precludes enforcement of a categorical waiver of the right to bring a PAGA action at all, where a PAGA plaintiff is bound by an agreement to arbitrate his individual claims, he must prosecute his individual claims in arbitration. *Id.* at 1923-1924.

Relevant to the issue on appeal, in Part IV of this Court's *Viking River* decision, Justices Alito, Breyer, Kagan, Sotomayor, and Gorsuch then crafted a federal rule of decision to implement its mandate that the FAA applies to PAGA claims when a valid arbitration agreement exists:

> [A]s we see it, 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 … As a result, [a PAGA plaintiff] lacks statutory standing to continue to maintain [their] non-individual claims in court, and the correct course is to dismiss [the] remaining claims.

Id. at 1924-25.

Justice Sotomayor in her concurrence opined that "the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits." *Id.* at 1925-1926. But this guidance has no bearing on this Court's determination that "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." *Id.* at 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." *Id.*

D. In *Adolph*, The California Supreme Court Defies *Viking River*

In *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (2023), the California Supreme Court held that PAGA claims constitute "a single action" such that the individual claim compelled to arbitration is not "pared away" but remains linked to the non-individual claim pending in the court for standing purposes. *Id.* In so doing, in direct contravention to *Viking River*, the California Supreme Court held that the individual and non-individual PAGA claims "remain[] part of the same action" even after the individual PAGA claim has been sent to arbitration. *Id.* at 693.

The California Supreme Court accepted the premise that a PAGA plaintiff must bring an action "on behalf of himself and herself *and* other current or former employees.'" *Id.* at 694 quoting Cal. Lab. Code § 2699(a), emphasis added. In this regard, the California Supreme Court recognized that PAGA actions are necessarily "comprised of individual and non-individual claims." *Id.*

at 692. Still, the California Supreme Court held that "an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court" on the theory that the initial filing of the complaint with the individual claim "suffice[d] to confer standing to bring a PAGA action." *Id.* at 691-692. In reaching this conclusion, the California Supreme Court held a plaintiff could satisfy the PAGA standing requirement by aggregating claims "'across two fora'." *Id.* at 694.

Per *Viking River*, this interpretation of California law is preempted by the FAA as it would preclude "severing the two components" of a PAGA action "into separate and distinct actions." *Id.* at 693; *see Viking River,* 142 S. Ct. at 1925. The California Supreme Court, however, saw no conflict with *Viking River,* reasoning that "[w]hen a case includes arbitrable and nonarbitrable issues, the issues may be adjudicated in different forums while remaining part of the same action." *Id.* at 693. In so doing, the California Supreme Court found that *Viking River* did not affect a severance when the individual PAGA claims are arbitrated. *Id.* at 693-94. Instead, it held that a trial court can comply with the FAA by "exercis[ing] its discretion to stay the non-individual claims pending the outcome of the arbitration" of the individual claim and then using the outcome of the arbitration to determine PAGA standing in court for the non-individual claims. *Id.* at 692-693. This determination not only directly contradicts *Viking River*, but it also violates the mandatory stay provision included in Section 3 of the FAA.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. It is Undisputed That Cooley Agreed to Arbitrate His Individual Employment-Related Claims Under the *We Listen* Plan.

Cooley was employed with Terminix from November 18, 2014, until April 3, 2019. Supplemental Excerpts of Record, p. 197 ("SER-197") ¶¶ 1, 5. On May 8, 2020, Cooley filed a Class Action and Individual Complaint in the Sacramento Superior Court against Petitioners asserting these claims: (1) Failure to Pay Wages When Due, Including Termination: Violation of Cal. Lab. Code §§ 201-204; (2) Meal Break Violations: Cal. Lab. Code §§ 226.7, 512 & Applicable Industrial Welfare Commission Wage Orders; (3) Rest Break Violations: Cal. Lab. Code § 226.7 & Industrial Welfare Commission Wage Orders; (4) Failure to Pay Overtime And Wages: Violation of Cal. Lab. Code §§ 510 & 1194; (5) Wage Statement Violations: Cal. Lab. Code § 226; (6) Reimbursement Violations: Cal. Lab. Code § 2802; (7) Unlawful, Unfair And Fraudulent Business Practices: Business & Professions Code § 17200, et seq. and (8) Labor Code Private Attorneys General Act of 2004 (the "PAGA"): Cal. Lab. Code § 2698, et seq. ER-25-49. On July 1, 2020, Petitioners filed their Answer (ER-59-78) and on July 8, 2020, they filed their Notice of Removal to Federal Court Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. ER-6-86. Cooley's motion to remand was denied by the District Court. ER-87-98.

Since 2009, Terminix has required all employees and new hires to agree to utilize its comprehensive dispute resolution program know as *We Listen*. SER-197 ¶6. On August 19, 2020, Terminix moved to enforce the *We*

Listen Dispute Resolution Plan ("*We Listen* Plan" or the "Plan"), sought an order compelling Cooley to arbitrate his individual claims and, consistent with California law at the time, staying the PAGA claims remaining in the District Court pending individual arbitration. SER-166-298. Terminix demonstrated that the *We Listen* Plan is governed by the FAA, and Cooley agreed to be bound by it at least three times. SER-95-98; SER-198 ¶10, 201 ¶19, 215-218, 226-230. Terminix also demonstrated that the *We Listen* Plan covers all the claims asserted by Cooley, and Cooley expressly waived the right to participate in a class action. ER-95-98; SER-198 ¶10, 201 ¶19, 215-218, 226-230.

The District Court granted Terminix's motion to compel arbitration. Excerpts of Record, pp. 95-98 ("ER-95-98"). The District Court found that the *We Listen* Plan was enforceable under the FAA. ER-06 n. 7 ("This Court finds that, given Defendants' nationwide operations, the interstate commerce element of the FAA is satisfied."). The District Court stayed Cooley's PAGA claims pending resolution of Cooley's individual claims in arbitration, noting that under California law at the time, they were "not arbitrable." ER-98, 95 n. 6 ("Defendants seek to stay Plaintiff's PAGA claims, which are not arbitrable …").

B. The *We Listen* Plan Requires Cooley to Arbitrate His PAGA Claims on an Individual Basis.

Cooley did not dispute on appeal that the *We Listen* Plan requires him to arbitrate his PAGA claims on an individual basis. (AOB 7.) *We Listen* Plan expressly covers all disputes arising from Cooley's employment and specifically includes compensation-related claims. SER-

201 ¶19, 226 §3, emphasis added; see also 198 ¶10, 215 §3.

And the *We Listen* Plan expressly requires individual arbitration, including an action brought under any private attorney general act:

> **7. CLASS, COLLECTIVE AND REPRESENTATIVE ACTION WAIVER**
>
> ...
>
> (b) ***I hereby waive any right for any Covered Dispute to be brought, heard, decided or arbitrated as a representative action under any private attorney general act or similar statute.*** Without waiving either party's right to appeal, if this representative action waiver is deemed unenforceable, then the representative action shall be severed from my individual claims. The court shall retain jurisdiction over the representative action and the representative action shall be stayed until final resolution of my individual claims, which shall be resolved through this dispute resolution process.

SER-201 ¶19, 228-229 §7(a)-(b), emphasis added; see also 198 ¶10, 217 §10.

Thus, the *We Listen* Plan requires arbitration of employment-related claims but limits the scope of the arbitration to individual claims between the parties. SER-201 ¶19, 226 §3, 228-229 §7(a)-(b), emphasis added; see also 198 ¶10, 215 §3, 217 §10.

C. The District Court Correctly Dismissed Cooley's Representative PAGA Claims.

After this Court's *Viking River* decision, on October 14, 2022, Petitioners filed a Motion to Lift the Stay and to Compel Arbitration of Cooley's Individual PAGA Claims and to Dismiss All Non-Individual PAGA Claims (SER-16-50), which Cooley opposed (ER-99-247), and which on April 13, 2023, the District Court correctly granted, (ER-4-6), and held:

> Arbitration may be compelled as to the individual PAGA claims, which strips plaintiffs of statutory standing to pursue representative PAGA claims in court. This is because '[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.'

ER-5:7-14 quoting *Viking River,* footnote omitted.

The District Court lifted the stay, ordered that Cooley's individual PAGA claims must be pursued, if at all, in binding arbitration, and dismissed Cooley's representative PAGA claims. ER-5:16-21. That same day, judgment was entered in accordance with the District Court's Order. ER-254. On April 27, 2023, Cooley filed a Notice of Appeal. ER-248-254.

D. The Ninth Circuit's Memorandum Misapplies Both *Viking River* And FAA Preemption.

On February 29, 2024, the Panel filed its Memorandum Disposition vacating the District Court's order of dismissal and remanded for further proceedings consistent with the memorandum disposition. Without any discussion of FAA preemption, the Memorandum erroneously "hold[s] that Cooley has statutory standing to bring his representative PAGA claims." App. B 5a. On April 23, 2024, Petitioners' Petition for Rehearing and Rehearing *En Banc* was summarily denied. App. A 1a.

REASONS FOR GRANTING THE PETITION

The decision below confirms that the time is right for this Court to address *Adolph's* incompatibility with the FAA. Indeed, the critical issues raised through this Petition impact whether plaintiffs may continue to utilize the PAGA to circumvent their arbitration agreements in light of the FAA's mandate that arbitration agreements must be enforced as written and the reiteration in both *Concepcion* and *Epic* that FAA preemption must be rigorously enforced to eliminate "new devices and formulas" aimed at curtailing individualized arbitration.

Without this Court's intervention, California and the Ninth Circuit will continue to apply *Adolph* in direct contravention to both *Viking River* and the FAA to deny California employers the benefit of their bargain. The time is right for this Court to put an end to this defiance of this Court's *Viking River* decision.

I. CALIFORNIA COURTS AND THE NINTH CIRCUIT CONTINUE TO DEFY *VIKING RIVER'S* INTERPRETATION OF THE FAA.

By applying the California Supreme Court's opinion in *Adolph,* 532 P.3d 682, both the Ninth Circuit and California courts continue to prevent the enforcement of valid individual arbitration agreements in contravention to both the FAA and this Court's opinion in *Viking River.* As a result, this Court should grant review through this Petition to address this issue of exceptional importance.

Viking River is the latest case in a long line of precedent holding that the FAA requires that arbitration agreements must be enforced as written, including an agreement for bilateral arbitration. *Epic Sys. Corp.,* 138 S. Ct. at 1632; *see Concepcion*, 563 U.S. at 343. *Viking River* abrogated California's "indivisibility" rule, which had meant that employers like Petitioners that wanted to offer their employees the choice to pursue individual claims in arbitration were forced to choose between arbitrating all the representative claims of all aggrieved employees or exempting the representative claims from the agreement to arbitrate. *Id.* at 660-62; *see Iskanian,* 327 P.3d 129. Thus, PAGA plaintiffs, like Cooley, who have agreed to arbitrate all their individual claims must do so, and the individual PAGA claims must be "committed to a separate proceeding" for arbitration. *Id.* at 663.

Despite this clear guidance, the California Supreme Court, in *Adolph*, accepted Justice Sotomayor's invitation in her concurrence, joined by no other justices, to reassess statutory standing under PAGA. Though *Adolph* affirmed that plaintiffs must arbitrate their individual PAGA

claims, rather than severing the individual PAGA claims to another proceeding, it did the opposite. Under the guise that PAGA is a state law, it held that the individual PAGA claims remain linked to the representative PAGA claims pending in court for standing purposes. *Adolph*, 532 P.3d at 692-93. Doubling down, the California Supreme Court also held that the arbitrator's decision could be "binding on the court" regarding whether the plaintiff had standing to pursue the representative PAGA claims. *Id.*

This is not an issue of state law. The Ninth Circuit and California courts continued application of *Adolph* directly conflicts with the FAA and *Viking River*. First, *Adolph* ensures that parties are still unable to submit only their individual PAGA claims to arbitration. Instead, the individual and representative PAGA claims are tied together by preclusion, nullifying *Viking River*'s ruling that the individual PAGA claims must be severed and arbitrated separately. Second, by continuing to allow PAGA plaintiffs to litigate the representative PAGA claims in court, both the Ninth Circuit and California courts are also practically preventing enforcement of any other alleged aggrieved employees' arbitration agreements. In fact, the record here demonstrates that every single alleged aggrieved employee is bound to arbitrate his or her individual PAGA claims. SER-197 ¶6. Yet the Ninth Circuit's adoption and application of *Adolph* invalidates those agreements in violation of the FAA.

Because *Viking River* decided that a plaintiff bound to arbitrate his individual PAGA claims did not have standing to represent non-individual PAGA claims in court, it did not need to address whether the FAA would preempt pursuit of a PAGA representative action

following an order compelling the individual PAGA claims to arbitration. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (acknowledging "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (citations omitted); *Clinton v. Jones*, 520 U.S. 681, 690 (1997).

But when the California Supreme Court decided the state statutory standing issue differently than the U.S. Supreme Court, it was then required to address the issue in the context of the FAA preemption holding. It did not do so, and *Adolph* cannot be reconciled with *Viking River*. *See Viking River*, 142 S. Ct. at 1923. As Justice Barrett explained in her concurring opinion, Part III of the *Viking River* opinion regarding preemption mandated reversal "because PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement. […] I would say nothing more than that." *Id.* at 1926.

Therefore, this Court should grant this Petition to resolve the conflict with *Adolph* and make clear that *Viking River* and the FAA require individual PAGA claims to be severed and arbitrated in a separate proceeding.

A. California Law Conflicts With *Viking River*'s Guidance on Preemption.

Congress passed the FAA as "a response to hostility of American courts to the enforcement of arbitration

agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). It preempts all conflicting state laws that frustrate the purpose of the FAA. *DIRECTV, Inc.*, 577 U.S. at 58-59; *Concepcion*, 563 U.S. at 343. The FAA also "displaces any rule that covertly accomplishes the … objective" of undermining parties' arbitration agreements, (*Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 250 (2017)), or that "target[s] arbitration" through "more subtle methods" (*Epic Sys.*, 138 S. Ct. at 1622). *Viking River* reiterates that the FAA protects "the freedom of parties to determine 'the issues subject to arbitration[.]'" *Viking River*, 596 U.S. at 659 quoting *Lamps Plus, Inc.*, 139 S.Ct. at 1416.

In *Viking River*, this Court squarely held that *Iskanian*'s indivisibility rule is preempted by the FAA. This is because California cannot impose a "compulsory . . . joinder rule" that forces an employer to choose between arbitrating *all* the alleged aggrieved employees' PAGA claims or *none* of them. *Id.* at 661. This indivisibility rule "circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate" by imposing on them an all-or-nothing choice: arbitrate both individual and nonindividual claims or forego arbitration entirely." *Id.* at 659 (citations omitted). This Court also observed that non-individual PAGA claims (as distinguished from individual PAGA claims) are "poorly suited" for arbitration given the "higher stakes of [such] massivescale disputes" and the "absence of multilayered review in arbitral proceedings." *Id.* at 661-62 (internal quotations and citations omitted).

Seven justices agreed that "state law cannot condition the enforceability of an arbitration agreement

on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." *Viking River*, 596 U.S. at 641. Noting that "[m]odern civil procedure dispenses with the formalities of the common-law approach to claim joinder in favor of almost-unqualified joinder," those same seven justices explained that "the FAA licenses contracting parties to depart from standard rules 'in favor of individualized arbitration procedures of their own design,' so parties to an arbitration agreement are not required to follow the same approach." *Id.* citing *Epic Sys.,* 138 S.Ct. at 1626.

In *Viking River,* Justice Barrett wrote separately in a concurrence, joined by the Chief Justice and Justice Kavanaugh to explain that "reversal is required under our precedent because PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement." *Id.* at 664. Justice Barrett then cited several examples of the Supreme Court's opinions which hold that the FAA preempted the imposition of the aggregation of claims in arbitration. (*See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."); *Concepcion*, 563 U.S. 333, 352 (2011) (FAA preempted California law that held that class action waivers were unconscionable); *Epic Sys.*, 138 S.Ct. at 1619 (FAA requires enforcement of arbitration agreements "including terms for individualized proceedings"); *Lamps Plus*, 139 S.Ct. at 1418-19 (FAA precludes parties from being ordered to class arbitration without a "contractual basis for concluding the parties agreed to class action") (citations omitted).

Justice Barrett then finished her concurrence by emphatically affirming the majority's take on preemption alone:

> I would say nothing more than that. The discussion in Parts II and IV of the Court's opinion is unnecessary to the result, and much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case.

Id.

Put simply, Justice Barrett correctly noted that the court's assessment of the state law standing question was superfluous because preemption alone was sufficient to carry the day and hold that individual PAGA claims are subject to individual arbitration. The California Supreme Court's reasoning in *Adolph* ignores *Viking River*'s directives. Rather than paring away the individual PAGA claims to a separate proceeding, *Adolph* specifically held that the arbitrable individual PAGA claims and the non-arbitrable representative claims "are not severed from one another." *Adolph,* 532 P.3d at 693-94. This flouts *Viking River*'s core holding that the FAA preempts California law that precludes division of PAGA claims into individual and non-individual claims. *Viking River*, 596 U.S. at 662.

The California Supreme Court further emphasized the connection between the individual and non-individual claims by suggesting that a trial court could avoid re-litigation by exercising "its discretion to stay the non-individual claims pending the outcome of the arbitration" and then treat the arbitrator's ruling as "binding on the

court." *Adolph,* 532 P.3d at 692. But this is the same compulsory joinder that *Viking River* held the FAA forbids. It effectively expands an arbitration's scope to resolve non-arbitrable issues "unduly circumscribe[ing] the freedom of parties to determine 'the issues subject to arbitration.'" *Viking River*, 596 U.S. at 659.

Combining the individual and non-individual claims, whether through joinder before arbitration or preclusion after arbitration, undermines the very purpose of low-stakes arbitration of individual claims, rather than "massive-scale disputes" like a representative PAGA action. *Id.* at 661-62. By effectively combining the two claims into a "single action," PAGA again "effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution'" *Viking River*, 596 U.S. at 662.)

In *Johnson v. Lowe's Home Centers, LLC,* 93 F.4th 459 (9th Cir. 2024), Judge Lee's concurrence emphasized these dangers writing that *Adolph*'s holding "that the arbitration decision of a low-stakes individual PAGA claim could have preclusive effect … on the highstakes non-individual PAGA claim in federal court … and could tilt the stakes of arbitration for defendants and undermine the benefits of arbitration for everyone." *Id.* at 466 (Lee, J., concurring). These harms cannot be undone after the fact. *Adolph* has ensured that parties are returned to the choice before *Viking River*: "either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent" (now via preclusion rather than joinder), "or else forgo arbitration altogether." *Viking River*, 596 U.S. at 661.

Both the Ninth Circuit's and California court's application of *Adolph* conflicts with *Viking River*. Under the Supremacy Clause, this Court is the final arbiter of what is federal law. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). While the California Supreme Court has the final say on the interpretation of PAGA, the federal courts have an independent obligation to decide whether the FAA preempts California law. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (per curiam). Here, it does. This Court should grant review to resolve California's continued attempt to circumvent the FAA.

B. California Law Conflicts With This Court's Precedent By Effectively Invalidating the Arbitration Agreements of Other Employees.

If this Court continues to allow California's rule permitting non-individual PAGA claims to proceed in court after a plaintiff's individual PAGA claim has been compelled to arbitration, it will effectively invalidate the arbitration agreements of other alleged aggrieved employees. The FAA requires courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys.*, 138 S.Ct. at 1619. For each of Petitioners' employees who entered into the same arbitration agreement, *Viking River* requires that the employee's individual claims be subject to arbitration. Allowing litigation of those claims in court through a non-individual, representative PAGA claim of another employee like Cooley prevents the resolution of those employees' claims in accordance with the agreed-upon terms of their arbitration agreements. This preemptively excludes from arbitration the individual PAGA claims of all other employees who are party to arbitration agreements

by which they agreed to individual arbitration. That result unlawfully "prohibits outright the arbitration of a particular type of claim." *Concepcion*, 563 U.S. at 341. This would deny those employees the very benefits of arbitration that the FAA is meant to protect.

Because, as discussed above, the FAA bars states from infringing that freedom by expanding the arbitrable issues beyond "those issues it specifically has agreed to submit to arbitration," then the foreclosure of the arbitration agreed to by many employees through a non-individual PAGA action in the trial court would also be unlawful under the FAA. *Viking River,* 596 U.S. at 660. This is especially well illustrated here, where the record establishes that every alleged aggrieved employee in the PAGA cohort is bound to arbitrate their individual claims. SER-197 ¶6. Under the Ninth Circuit's application of *Adolph*, the agreements of the alleged "aggrieved employees" would be nullified. This is contrary to the FAA. This Court should grant review to resolve California law's conflict with both the FAA and *Viking River.*

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW IN THIS CASE.

This Court's intervention is necessary to reaffirm the FAA's policy in favor of bilateral arbitration of all actions (whether individual, class, collective, or representative) regardless of the underlying claims. The California Supreme Court's decision in *Iskanian* opened the floodgates for PAGA litigation, with plaintiffs pivoting away from class and collective actions to which their binding and enforceable arbitration agreements apply. This Court tried to resolve California law's conflict

with the FAA through *Viking River*. But the California Supreme Court simply crafted a new device to circumvent FAA preemption through *Adolph*.

Indeed, the continued proliferation of PAGA claims brought by private plaintiffs in California despite this Court's *Viking River* decision underscores that *Adolph* is merely a device to thwart enforcement of private FAA-governed arbitration agreements. PAGA claims have a national impact given both California's population size and its impact on the world economy. This impact will also grow and expand as more states, such as New York, Massachusetts, Vermont, Washington, Maine, and Connecticut, consider and adopt their own private attorney general statutes. Baisden & Primm, States Seeking to Expand Availability of Private Attorney General Laws to Combat Arbitration Agreements (Feb. 25, 2020) <https://www.jdsupra.com/legalnews/states-seeking-to-expand-availability-24619/> (as of November 14, 2020). Thus, *Adolph* has a pronounced *national* effect, and it may be exported to other states that will use the judicial device in order to flout the mandates of the FAA and this Court's binding precedent.

The California Supreme Court had an opportunity to acknowledge and follow—as it must—this Court's precedent and the impact of FAA preemption on the PAGA through its *Adolph* decision but chose to do the exact opposite. This Court has not hesitated to intervene when states so openly defy the FAA and when the stakes are as high as they are here. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), … [i]t is a matter of great importance … that state supreme courts adhere

to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.*, 568 U.S. at 17-18.

California has had abundant opportunities to bring coherence to its law and more than enough direction from this Court that it needs to do so. This Court should grant review and make clear that the FAA requires the complete severance of arbitrable individual PAGA claims from non-individual PAGA claims, with the individual PAGA claims committed to a separate proceeding.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A — Order, United States Court of Appeals for the Ninth Circuit, *Tyron Cooley v. Servicemaster Company, LLC; et al.*, No. 23-15643 (Apr. 23, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15643

D.C. No.
2:20-cv-01382-MCE-DB
Eastern District of California,
Sacramento

TYRON COOLEY,

Plaintiff-Appellant,

v.

SERVICEMASTER COMPANY, LLC; *et al.*,

Defendants-Appellees.

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. **Dkt. 40.** The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Appendix B — Memorandum, United States Court of Appeals for the Ninth Circuit, *Tyron Cooley v. Servicemaster Company, LLC; et al.*, No. 23-15643 (Feb. 29, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15643

D.C. No. 2:20-cv-01382-MCE-DB.

TYRON COOLEY,

Plaintiff-Appellant,

v.

SERVICEMASTER COMPANY, LLC; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding.

February 9, 2024, Argued and Submitted,
San Francisco, California;
February 29, 2024, Filed

Appendix B

MEMORANDUM*

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

The sole issue on appeal is whether Plaintiff Tyron Cooley (Cooley) has standing. The district court held that Cooley does not have statutory standing, dismissing his claims. "We review [the] district court's dismissal for lack of standing de novo." *Barke v. Banks*, 25 F.4th 714, 718 (9th Cir. 2022).

1. Cooley sued his former employer, ServiceMaster Company, LLC (Appellees), in state court. Cooley brought several individual and representative employment-related claims, including individual and representative claims under the California Private Attorneys General Act (PAGA). Appellees removed to federal court under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453.

Cooley's employment with Appellees was subject to mandatory arbitration. Appellees thus moved to compel arbitration and stay proceedings in the district court, arguing Cooley needed to individually arbitrate most of his claims. *Cooley v. ServiceMaster Co. LLC, et al.*, No. 2:20-cv-01382, 2021 U.S. Dist. LEXIS 155153, 2021 WL 3630489, at *1, *6 (E.D. Cal. Aug. 17, 2021). The district court agreed, granting Appellees' motion.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix B

The district court maintained jurisdiction over the representative PAGA claim and stayed the case "pending resolution of Plaintiff's individual claims before the arbitrator."

2. In 2022, the Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022). *Viking River* held that PAGA claims are divisible into arbitrable individual claims and non-arbitrable representative claims. *Id.* at 1924-25. *Viking River* suggested that, where a plaintiff's individual claims were arbitrated, they were stripped of statutory standing to pursue their representative PAGA claims. *Id.* Accordingly, Appellees moved to dismiss for lack of statutory standing.

The district court agreed. On April 12, 2023, it dismissed Cooley's representative PAGA claim, citing *Viking River*. The district court declined to stay the case until the California Supreme Court weighed in on statutory standing, an issue of state law.

3. Just three months later, the California Supreme Court issued *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, 310 Cal. Rptr. 3d 668, 532 P.3d 682 (Cal. 2023). There the court considered "whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are 'premised on Labor Code violations actually sustained by' the plaintiff maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees.'" *Adolph*, 532 P.3d at 686 (quoting *Viking River*, 142 S. Ct. at 1916). It held that a plaintiff does

maintain statutory standing regarding representative claims because "an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA." *Id.*

The interpretation of a state statute is an issue of state law. *See, e.g.*, *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017). And whether there is statutory standing is an issue of statutory interpretation. *See, e.g.*, *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 197, 137 S. Ct. 1296, 197 L. Ed. 2d 678 (2017). Here, the California Supreme Court has told us that a plaintiff such as Cooley has statutory standing to bring representative PAGA claims, even after his individual PAGA claims are compelled to arbitration. We are bound by the California Supreme Court's interpretation. *See, e.g.*, *Bass v. County of Butte*, 458 F.3d 978, 981 (9th Cir. 2006) ("[W]e must determine what meaning the state's highest court would give to the law.").

4. We hold that Cooley has statutory standing to bring his representative PAGA claims. *See Johnson v. Lowe's Home Ctrs., LLC*, No. 22-16486, 2024 U.S. App. LEXIS 3238, 2024 WL 542830 (9th Cir. Feb. 12, 2024) (holding same). Article III standing is a separate inquiry, however, and it is "a question of federal law, not state law." *Hollingsworth v. Perry*, 570 U.S. 693, 715, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). It is an open question whether Cooley has constitutional standing to bring his representative PAGA claims. *See Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 676-78 (9th Cir. 2021). Because

the district court did not consider Cooley's constitutional standing, we remand with instructions for the district court to consider this issue in the first instance. If the district court determines that Cooley does not have constitutional standing, then this case must be remanded back to state court, where Cooley does have standing, under 28 U.S.C. § 1447(c).

VACATED AND REMANDED for further proceedings consistent with this memorandum disposition.

Appendix C — Judgment, United States District Court for the Eastern District of California, *Tyron Cooley v. Servicemaster Company, LLC, et al.*, No. 2:20-CV-01382-MCE-DB (Apr. 13, 2023)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO: **2:20-CV-01382-MCE-DB**

TYRON COOLEY,

v.

SERVICEMASTER COMPANY, LLC, *et al.*,

JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 4/13/2023

Keith Holland
Clerk of Court

ENTERED: April 13, 2023

by: /s/ L. Mena- Sanchez
Deputy Clerk

Appendix D — Order, The United States District Court for the Eastern District of California, *Tyron Cooley, on behalf of himself and all others similarly situated v. The Servicemaster Company, LLC, Terminix International, Inc., The Terminix International Company Limited Partnership, and Does 1 through 50, inclusive*, No. 2:20-cv-01382-MCE-DB (Apr. 13, 2023)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:20-cv-01382-MCE-DB

TYRON COOLEY, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

THE SERVICEMASTER COMPANY, LLC, TERMINIX INTERNATIONAL, INC., THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, AND DOES 1 THROUGH 50, INCLUSIVE,

Defendants.

ORDER

Plaintiff Tyron Cooley, on behalf of himself and all others similarly situated, ("Plaintiff") sought relief from Defendants The ServiceMaster Company, LLC, Terminix International, Inc., The Terminix International Company Limited Partnership, and DOES 1 through 50, inclusive (collectively, "Defendants") for violation of

Cal. Lab. Code §§ 201-204; Cal. Lab. Code §§ 201-203, 226, 226.7, 510, 512, 1194, 2699 et seq., 2751, and 2802; applicable Industrial Welfare Commission Wage Orders; Cal. Bus. & Prof. Code § 17200, et seq .; and Labor Code Private Attorneys General Act of 2004 ("PAGA"). *See* Not. of Removal, Exhibit A, Jul. 8, 2020, ECF No. 1. The Court previously granted Defendants' Motion to Compel Arbitration and Stay Proceedings, requiring, under then-existing authority, that Plaintiff arbitrate all of his claims except his PAGA cause of action. ECF No. 18. The Court maintained jurisdiction over the PAGA claim and stayed this case pending finalization of the arbitration proceedings.

Presently before the Court is Defendants' Motion to Lift the Stay and to Compel Arbitration of Plaintiff's Individua PAGA Claims and to Dismiss all Non-Individual PAGA Claims, filed in response to the Supreme Court's intervening decision in *Viking River Cruises, Inc. v. Mariana*, __ U.S. __, 142 S. Ct. 1906 (2022). ECF No. 26.[1] In *Viking River*, the Supreme Court concluded that PAGA claims are divisible into arbitrable individual claims and non-arbitrable representative claims. *Id.* at 1924-25. Arbitration may be compelled as to the individual PAGA claims, which strips plaintiffs of statutory standing to pursue representative PAGA claims in court. This is because "[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

1. Because oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g).

such persons to maintain suit." *Id.* Under this authority, Defendants' Motion must thus be granted.[2]

Accordingly, it is hereby ordered that:

1. The Stay is lifted, and Defendants' Motion (ECF No. 26) is GRANTED;

2. Plaintiff's individual claims under California's Private Attorneys General Act ("PAGA) must be pursued, if at all, in binding arbitration;

3. Plaintiff's non-individual, representative PAGA claims are DISMISSED; and

4. As there are no remaining claims before the Court, the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

DATED: April 12, 2023

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2. The Court is not persuaded that it should continue the stay in this case until the California Supreme Court has itself weighed in on this standing issue, which turns on an interpretation of state law pending before it in *Adolph v. Uber Technologies. Inc.*, Case No. S274671. The Supreme Court was clear in its direction in *Viking River* and, "[a]bsent intervening California authority, the Court declines to question the Supreme Court's interpretation on this issue." *Johnson v. Lowe's Home Centers, LLC*, __ F. Supp. 3d __, 2022 WL 4387796 (E.D. Cal. Sep. 22, 2022).