No. 24-81

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

RESPONDENT'S BRIEF IN OPPOSITION

SUZANNE KLOTZ
ROBIN G. WORKMAN
WORKMAN LAW FIRM, PC
2325 Third Street
Suite 329
San Francisco, CA 94107
(415) 782-3660

NICOLAS SANSONE
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
nsansone@citizen.org

Attorneys for Respondent

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QUESTION PRESENTED

Under California state law, an employee's agreement to arbitrate certain claims under the state's Private Attorneys General Act (PAGA) does not strip the employee of statutory standing to seek judicial resolution of PAGA claims that the employee has not agreed to arbitrate. The question presented is whether the Ninth Circuit correctly held that the Federal Arbitration Act does not preempt this state-law rule.

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INTRODUCTION

California's Private Attorneys General Act of 2004 (PAGA) authorizes an "aggrieved employee" to raise claims on behalf of the state against his or her employer for violations of the state's Labor Code. Specifically, PAGA confers standing on an aggrieved employee to file an enforcement action seeking to recover civil penalties for the state in response to both "individual" Code violations (i.e., those that the employer committed against the plaintiff) and "non-individual" violations (i.e., those that the employer committed against other, similar employees).

In *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), this Court held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, does *not* preempt a state-law rule that bars courts from enforcing an employee's pre-dispute waiver of the right to pursue non-individual PAGA claims on the state's behalf. At the same time, the Court held that the FAA *does* require enforcement of an agreement to divide a plaintiff's individual PAGA claims from the plaintiff's non-individual PAGA claims and to submit the former to arbitration. Although the opinion in *Viking River* assumed that a plaintiff lacks statutory standing under California law to pursue non-individual claims in court once the plaintiff's individual claims have been submitted to arbitration, the California Supreme Court held in *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (Cal. 2023), that PAGA *does* confer statutory standing on such a plaintiff to continue litigating the non-individual claims.

Here, petitioners The Servicemaster Company, LLC; Terminix International, Inc.; and The Terminix International Company Limited Partnership (collect-

ively, Terminix) seek review of an unpublished Ninth Circuit opinion that applies *Viking River* and *Adolph* to affirm the district court's order compelling arbitration of respondent Tyron Cooley's individual PAGA claim and to reverse the district court's order dismissing Mr. Cooley's non-individual PAGA claims for lack of statutory standing. Although Terminix argued below that the FAA preempts the statutory standing principles established in *Adolph*, the court of appeals implicitly rejected this argument.

The Ninth Circuit's tacit rejection of Terminix's FAA preemption argument does not merit review. Terminix does not cite a single decision from any court that analyzes whether the FAA preempts *Adolph*'s state-law ruling on statutory standing, let alone any decision that holds that the FAA does so. Granting review to consider an issue that has generated no conflict, or even discussion, in the lower courts would be unwarranted.

Terminix contends that *Viking River* resolved the preemption question it poses here by holding that the FAA requires the "complete severance" of the non-individual PAGA claims of a plaintiff whose individual claims have been submitted to arbitration. Terminix did not present this argument to the district court or the Ninth Circuit panel, however, and this Court should not address it in the first instance.

In any event, the argument fails. After *Viking River* held that the FAA requires enforcement of an agreement to arbitrate a plaintiff's individual PAGA claims, it turned to *state* law, not the FAA, to determine the impact of such an agreement on the non-individual claims that remain in court. If anything, it is Terminix, and not the decision below,

that flouts *Viking River*: In arguing that the FAA strips an employee who has agreed to arbitrate individual PAGA claims of the right to pursue non-individual claims, Terminix ignores *Viking River*'s holding that the FAA does not demand the enforcement of unlawful waivers of substantive rights. And while Terminix briefly sketches out a handful of other arguments as to why it views the decision below as inconsistent with the FAA, none has merit.

Moreover, Terminix's petition does not present a matter of national concern that requires this Court's attention. Given the paucity of state enforcement schemes that resemble PAGA, it is unlikely that the question whether the FAA preempts state-law standing rules like the one applied below will recur. Even as to California, recent amendments to PAGA may diminish *Adolph*'s practical impact. In addition, the shifting nature of the arguments that Terminix has presented during the course of this litigation—as well as the presence of potential jurisdictional issues that were raised but not fully explored below—would make this case a poor vehicle for review in any event.

This Court should deny the petition.

STATEMENT

Legal Background

1. California's legislature enacted PAGA in 2004 to address concerns that the state's civil enforcement authorities lacked sufficient resources to adequately enforce the state's Labor Code. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 146 (Cal. 2014). Intended to fortify the state's enforcement efforts, PAGA authorizes "aggrieved employees, acting as private attorneys general, to recover civil penalties

for Labor Code violations" on the state's behalf. *Arias v. Super. Ct.*, 209 P.3d 923, 929 (Cal. 2009).

At the time this suit was filed, PAGA provided that any civil penalty that could be "assessed and collected" by California's Labor and Workforce Development Agency for a Code violation could, "as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a) (2004). The statute defined "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* § 2699(c). Accordingly, an employee who had "suffered a single violation" and so qualified as "aggrieved" could "use that violation as a gateway" to bring claims against the employer for additional violations the employer had committed against others. *Viking River*, 596 U.S. at 647.

Critically, a plaintiff who brings a PAGA action "does so as the proxy or agent of the state's labor law enforcement agencies" and "represents the same legal right and interest" as those agencies. *Arias*, 209 P.3d at 933. In a PAGA action, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest," *Iskanian*, 327 P.3d at 148, and "most of the proceeds of th[e] litigation go[] to the state," *id.* at 133; *see* Cal. Labor Code § 2699(m). A PAGA action is thus "legally and conceptually different from an employee's own suit for damages" because a PAGA action is brought on the state's behalf, chiefly in order "to benefit the general public, not the party bringing the action." *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1127 (Cal. 2020).

2. In its 2014 *Iskanian* decision, the California Supreme Court held that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum" is unenforceable. 327 P.3d at 133. Giving effect to the pre-dispute waiver of an employee's right to raise a PAGA claim that is based on violations suffered by other employees, the court reasoned, would "disable one of [California's] primary mechanisms for enforcing the Labor Code" and so would impermissibly violate public policy. *Id.* at 149.

Iskanian acknowledged that the FAA requires a court to treat an arbitration agreement as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 150 (quoting 9 U.S.C. § 2). But *Iskanian* held that the FAA does not preempt a state-law bar on enforcing pre-dispute contractual waivers of an employee's substantive right to bring a PAGA claim on the state's behalf. *Id.* at 149–53.

3. This Court later confirmed in *Viking River* that the FAA does not preempt California's bar on enforcing pre-dispute PAGA waivers. As the Court held, the FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." 596 U.S. at 653. Rather, the FAA preempts only those state-law rules that "tak[e] the individualized and informal *procedures* characteristic of traditional arbitration off the table." *Id.* at 656. And PAGA, the Court held, creates no "procedural mechanism at odds with arbitration's basic forum." *Id.* Unlike class-action proceedings, which require an adjudicator to resolve the individual claims of multiple parties (including absent parties) based on a representative plaintiff's claims, *see id.* at 654–55, PAGA actions—

in which the state has authorized a plaintiff to raise multiple claims on its behalf—are the sort of "single-agent, single-principal representative suits" that this Court has not found "inconsistent [with] the norm of bilateral arbitration," *id.* at 657.

Separately, this Court held that the FAA *does* preempt a state-law procedural rule that some California courts had adopted following *Iskanian*. Specifically, some courts had read *Iskanian* to bar parties from agreeing to divide a PAGA action between arbitral proceedings intended to resolve the case's "individual" PAGA claims (i.e., those based on Labor Code violations committed against the plaintiff) and judicial proceedings intended to resolve the case's "non-individual" PAGA claims (i.e., those based on violations committed against others). *See id.* at 646–47. The Court held that "[t]his prohibition on contractual division of PAGA actions into constituent claims unduly circumscribe[d] the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate.'" *Id.* at 659 (quoting *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019)). Under the FAA, parties must be able to "control which claims are subject to arbitration," even if "bifurcated proceedings are an inevitable result" of the parties' agreement. *Id.* at 660.

Viking River then turned to the specific arbitration agreement before it, which the state courts had refused to enforce after construing it to include "a wholesale waiver" of the plaintiff employee's right to bring PAGA claims in any forum. *Id.* at 662. The Court held that the agreement "remain[ed] invalid" under *Iskanian*'s non-preempted bar on PAGA waivers. *Id.* A severability clause in the agreement, however, gave instructions on how to proceed "if the

waiver provision [was] invalid," and this Court read those instructions to require that the individual PAGA claim be resolved in arbitration. *Id.* Because the Court had just held that the FAA demands enforcement of a contractual agreement to divide a PAGA action into "individual and non-individual claims" and to arbitrate the former, the Court reversed the denial of the employer's motion to compel arbitration of the individual PAGA claim. *Id.*

Finally, the Court addressed the "remaining question" of what to do with the non-individual claims. *Id.* Given the Court's holding that the FAA does not preempt *Iskanian*'s state-law bar on PAGA waivers, the Court recognized that the non-individual claims could "not be dismissed simply because they [were] 'representative.'" *Id.* at 662–63. But as the Court construed "PAGA's standing requirement" and California case law interpreting the statute, "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 663. Based on that understanding of California law, the Court held that "the correct course" on remand would be to dismiss the non-individual claims for lack of "statutory standing." *Id.*

Justice Sotomayor concurred but emphasized that "if this Court's understanding of state law" regarding PAGA standing "[was] wrong, California courts, in an appropriate case, [would] have the last word." *Id.* at 664 (Sotomayor, J., concurring). Meanwhile, Justices Barrett and Kavanaugh and Chief Justice Roberts concurred in the judgment but declined to join the majority's discussion of PAGA standing because it "addresse[d] disputed state-law questions." *Id.* (Barrett, J., concurring in the judgment).

4. The California Supreme Court has since held that *Viking River*'s understanding of statutory standing under PAGA was mistaken. In *Adolph*, California's high court held that "an aggrieved employee who ha[d] been compelled to arbitrate claims under PAGA that [were] 'premised on Labor Code violations actually sustained by' the plaintiff maintain[ed] statutory standing to pursue 'PAGA claims arising out of events involving other employees' in court." 532 P.3d at 686 (citations omitted; quoting *Viking River*, 596 U.S. at 648–49). Looking first to the statutory text, the court noted that PAGA set out "only two requirements for … standing": that the plaintiff had been "employed by the alleged violator" and that "one or more of the alleged violations [had been] committed" against the plaintiff. *Id.* at 690 (quoting *Kim*, 459 P.3d at 1128–29). The court explained that "[a]rbitrating a PAGA plaintiff's individual claim d[id] not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee" who met PAGA's requirements. *Id.* at 691.

The state supreme court found further support for its holding in prior state-court opinions that "declined to impose additional [standing] requirements not found in the statute." *Id.* at 690. First, the court pointed to its holding in *Kim* that a plaintiff who had settled his individual damages claims against his employer did not thereby lose statutory standing to pursue PAGA claims for civil penalties on the state's behalf. *Id.* Second, the Court approved a state appellate court's holding in *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924 (2021), that an employee had standing to bring a PAGA action even though her individual damages claim against her employer was time-barred. *Adolph*,

532 P.3d at 690–91. These cases "ma[de] clear," the California Supreme Court explained, that "a worker bec[ame] an 'aggrieved employee' with standing to litigate claims on behalf of fellow employees upon sustaining a Labor Code violation committed by his or her employer," *id.* at 691, and that "post-violation events" could not "strip an aggrieved employee of the ability to pursue a PAGA claim," *id.* at 690.

The California Supreme Court also rejected the argument that "bifurcating individual and nonindividual components of a PAGA claim into arbitration and court proceedings has the effect of severing the two components into separate and distinct actions," each of which "must independently satisfy PAGA's standing requirements." *Id.* at 693. As the court explained, "[n]othing in PAGA or any other relevant statute suggests that arbitrating individual claims effects [such] a severance." *Id.* And citing *Viking River*'s acknowledgment that "bifurcated proceedings" within a single action would be the "inevitable result" of submitting some (but not all) claims to arbitration, *id.* (quoting *Viking River*, 596 U.S. at 660), the court observed that "it is a regular and accepted feature of litigation governed by the FAA that the arbitration of some issues does not sever those issues from the remainder of the lawsuit," *id.* *See also id.* at 693–94 (recognizing that the FAA requires a court to "stay the trial of the action" pending the arbitration of a suit's arbitrable components (quoting 9 U.S.C. § 3)).

5. After both *Adolph* and this case were decided, the California legislature made comprehensive amendments to PAGA, including to the statute's definition of "aggrieved employee" and to the type of non-individual claims that an aggrieved employee

may bring. Whereas the prior version of PAGA provided that an employee was "aggrieved" if the employer had committed "one or more of the alleged [Labor Code] violations" against the employee, Cal. Labor Code § 2699(c) (2004), the amended version defines an "aggrieved" employee as one who has "personally suffered each of the violations," *id.* § 2699(c)(1) (2024). In addition, the amended statute, unlike the prior version, specifies that an aggrieved employee may bring non-individual claims only with respect to "current or former employees against whom a violation of the same provision was committed." *Id.* § 2699(a). In other words, rather than using a single Labor Code violation as a mechanism to challenge an employer's compliance with all other Code provisions, PAGA now limits an employee's assertion of non-individual claims to claims that arise from the same Code provisions as the employee's individual claims. This change substantially reduces the volume of non-individual claims that a PAGA plaintiff may assert.

Factual and Procedural Background

1. Mr. Cooley worked as a sales representative for Terminix from 2014 to 2019. *See* Excerpts of Record (ER) at 88 (9th Cir. No. 23-15643, filed June 22, 2023). Throughout this time, Terminix had in effect a 2013 dispute-resolution plan called *We Listen*, which was updated in 2018. *See* Supplemental Excerpts of Record (SER) at 215–18, 226–30 (9th Cir. No. 23-15643, filed Aug. 25, 2023). The plan provided that all employment-related disputes would be resolved through binding arbitration and purported to waive employees' right to bring any claim in a representative capacity. SER 215, 217; *accord* SER 226, 228–29. If a court determined that the representative-action

waiver was unenforceable "in any action brought under a private attorneys general law," however, the plan provided that the waiver was severable. SER 217; *see also* SER 228–29. The 2018 version of the plan further specified that, upon severance, "[t]he court shall retain jurisdiction over the representative action," which "shall be stayed until final resolution of [the] individual claims" in arbitration. SER 228.

2. On May 8, 2020, Mr. Cooley filed a lawsuit against Terminix in California state court, alleging that Terminix had violated several provisions of the California Labor Code. ER 48. Among other things, Mr. Cooley raised a PAGA claim based on Code violations that Terminix had committed against him and against other current and former employees. *Id.*

Terminix removed the case to federal district court, ER 6–23, and moved to compel arbitration of all of Mr. Cooley's claims "with the exception of [his] claim for civil penalties under [PAGA]," SER 176. That claim, Terminix explained, was not "covered by the parties' agreement to arbitrate." *Id.* Accordingly, Terminix argued, the court should apply the terms of the 2018 version of the *We Listen* plan and "stay [Mr. Cooley's] … claim for relief seeking civil penalties on behalf of the state under PAGA pending completion of [his] individual arbitration." *Id.*

The district court granted Terminix's motion to compel arbitration of Mr. Cooley's non-PAGA claims and to stay Mr. Cooley's PAGA claim pending resolution of his non-PAGA claims in arbitration. ER 98.

3. In October 2022, following this Court's decision in *Viking River*, Terminix moved for the district court to lift the stay, compel arbitration of Mr. Cooley's individual PAGA claims, and dismiss Mr. Cooley's

non-individual PAGA claims. SER 20. As for the individual claims, Terminix argued that *Viking River* held that the FAA preempts *Iskanian*'s prohibition on dividing PAGA claims into individual and non-individual claims, and Terminix noted that the *We Listen* plan contained a provision stating that, if its representative-action waiver was held to be unenforceable, "the representative action shall be severed from [any] individual claims" and the individual claims shall be arbitrated. SER 24–25. Because *Viking River* made clear that the FAA preempts the aspect of *Iskanian* that had previously prevented enforcement of this severance provision, Terminix argued, Mr. Cooley's individual PAGA claims must be sent to arbitration. SER 25.

As for the non-individual claims, Terminix argued that Mr. Cooley lacked "statutory standing" to keep pursuing them in court. SER 26 (quoting *Viking River*, 596 U.S. at 663). According to Terminix, "the [California] Legislature provided" in "the PAGA statutory scheme" that "an aggrieved employee must be pursuing civil penalties on his own behalf as well as on behalf of the other employees in the same civil action." SER 27. While Terminix noted that the California Supreme Court had granted review of the statutory standing issue in *Adolph*, it urged the court not to await the ruling in that case. *Id.*; *see* SER 14 (arguing that *Adolph* "could take years to decide").

The district court granted Terminix's motion to compel arbitration of the individual PAGA claim and to dismiss the non-individual PAGA claims. Pet. App. 10a. After holding that the *We Listen* plan required arbitration of Mr. Cooley's individual claim, the court held that Mr. Cooley lacked statutory standing to pursue the remaining, non-individual claims in court.

Id. at 9a–10a. In so holding, the court understood itself to be bound by *Viking River*'s analysis of PAGA standing "[a]bsent intervening California authority." *Id.* at 10a n.2 (alteration in original; citation omitted). The court observed that the California Supreme Court was poised in *Adolph* to "weigh[] in on this standing issue, which turns on an interpretation of state law," but it declined to await the state court's ruling. *Id.*

4. Mr. Cooley appealed to the Ninth Circuit. While briefing was ongoing, the California Supreme Court issued its decision in *Adolph* and rejected the view of PAGA standing embraced by the district court in this case. Terminix, though, argued that the Ninth Circuit should nonetheless affirm dismissal of Mr. Cooley's non-individual claims, based on two theories that it had not presented to the district court. First, it argued that *Viking River*'s holding on PAGA standing announced "a federal rule of decision" and not an interpretation of state law. Appellees' Br. at 23 (9th Cir. No. 23-15643, filed Aug. 25, 2023). Second, Terminix argued that the FAA preempts any state-law rule that permits a plaintiff to pursue non-individual PAGA claims in court after the plaintiff's individual PAGA claim has been submitted to arbitration because such a rule would "effectively invalidate[] the arbitration agreements of the many employees represented by th[e] [non-individual] PAGA claim[s] who agreed to individual arbitration." *Id.* at 25.

In a brief, unpublished memorandum opinion, the Ninth Circuit held that Mr. Cooley had statutory standing to pursue his non-individual PAGA claims and reversed the district court's dismissal of those claims. Pet. App. 3a–6a. The court explained that

"statutory standing is an issue of statutory interpretation," and that because "[t]he interpretation of a state statute is an issue of state law," the court was "bound by the California Supreme Court's interpretation" of PAGA's standing requirements in *Adolph*. *Id.* at 5a. Noting that the district court had not addressed the distinct issue of Article III standing, however, the court of appeals directed the district court to do so on remand. *Id.* at 5a–6a.

5. Terminix petitioned for panel rehearing and rehearing en banc. Among other things, Terminix argued that the case was moot as a result of a settlement that resolved Mr. Cooley's individual claims. *See* Appellees' Pet. for Panel Reh'g & Reh'g En Banc at 7–11 (9th Cir. No. 23-15643, filed Mar. 14, 2024). The Ninth Circuit denied the petition without requesting a response and without any judge calling for a vote. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

I. There is no split of authority on the question presented.

Terminix urges this Court to resolve whether the FAA preempts the state-law rule announced in *Adolph* and applied below: that a plaintiff whose individual PAGA claims have been submitted to arbitration retains statutory standing to pursue non-individual PAGA claims in court. Pet. i. Terminix, however, does not identify any judicial decision, state or federal, that has answered this preemption question in the affirmative. Indeed, Terminix does not identify a single decision—including the decision below—that has analyzed the question at all. Although Terminix disagrees with the Ninth Circuit's implicit rejection of its FAA preemption argument in

the decision below, there is no reason for this Court to grant review of an unpublished, nonprecedential decision's tacit resolution of a legal issue, particularly absent any disagreement in the lower courts.

II. The decision below is consistent with *Viking River* and the FAA.

Terminix's sole argument as to why review is warranted despite the absence of a split of authority among the lower courts is that the decision below supposedly "contraven[es] … both *Viking River* and the FAA." Pet. 18. Terminix is wrong on both counts.

A. The decision below is consistent with the holding in *Viking River*.

As an initial matter, Terminix appears to have abandoned its argument that *Viking River*'s discussion of PAGA standing announced a binding federal holding. *See* Pet. 21 (conceding that the relevant portion of *Viking River* involved a "state statutory standing issue" that the California Supreme Court later conclusively resolved in *Adolph*). Rightly so. Relying on the text of a state statute and on state-court opinions interpreting it, *Viking River* asked whether "*PAGA* provides [a] mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding" and (mistakenly) opined that "*PAGA* does not" do so. 596 U.S. at 663 (emphases added). As four Justices explicitly acknowledged, this portion of *Viking River* clearly "addresse[d] disputed state-law questions." *Id.* at 664 (Barrett, J., concurring in the judgment); *see also id.* (Sotomayor, J., concurring) (noting that "California courts, in an appropriate case, [would] have the last word" on the issue of PAGA standing).

Terminix also concedes that *Viking River* "did not need to address"—and so did not address—"whether the FAA would preempt pursuit of a PAGA representative action following an order compelling the individual PAGA claims to arbitration." Pet. 20–21. Terminix nonetheless argues that the decision below, which implicitly answers that unresolved question in the negative, "conflicts with *Viking River*'s guidance on preemption." *Id.* at 21 (capitalization and formatting omitted). To the extent that *Viking River* bears on the preemption issue presented here, however, it squarely supports the decision below.

1. According to Terminix, the decision below "flouts *Viking River*'s core holding that the FAA preempts California law that precludes division of PAGA claims into individual and non-individual claims." Pet. 24. The decision below flatly contradicts Terminix's assertion. The Ninth Circuit expressly referenced *Viking River*'s holding that, under FAA preemption principles, "PAGA claims are divisible into arbitrable individual claims and non-arbitrable representative claims." Pet. App. 4a. The court then applied that holding by affirming the district court's decision to bifurcate Mr. Cooley's PAGA claims by severing his individual claims from his non-individual claims and "compell[ing]" the former to arbitration. *Id.* at 5a.

In Terminix's view, the decision below does not go far enough. Terminix argues that, because the outcome of the arbitration of Mr. Cooley's individual claim could have preclusive effect in the subsequent litigation of the non-individual claims, dismissal of the non-individual claims is required to avoid "the same compulsory joinder that *Viking River* held the FAA forbids." Pet. 25.

To begin with, Terminix did not raise this theory before either the district court or the Ninth Circuit panel. *See supra* at 11–13. Accordingly, neither court considered or addressed it. This Court "[o]rdinarily … does not decide questions not raised or resolved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam), and Terminix offers no reason to depart from that customary practice here. The lack of adversarial presentation or judicial consideration below of the principal merits argument that Terminix seeks to advance before this Court counsels strongly in favor of denying review. *See, e.g.*, *Brownback v. King*, 592 U.S. 209, 215 n.4 (2021) (declining to address an argument not raised in the court of appeals because "we are a court of review, not of first view" (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))).

In any event, Terminix's new preemption theory is meritless. According to Terminix, *Viking River* establishes that the FAA requires "complete severance" of non-individual PAGA claims from arbitrable individual claims, such that the two sets of claims cannot remain part of the same lawsuit. *See* Pet. 29. But although *Viking River* holds that the FAA requires courts to honor contracting parties' agreement to "pare[] away" individual PAGA claims from non-individual claims and "commit[]" the claims to "separate proceeding[s]," *Viking River*, 596 U.S. at 663, it does *not* hold that the FAA requires dismissal of the non-individual claims in the case of such an agreement. To the contrary, *Viking River* suggests that, under the FAA, the "inevitable result" of an agreement to arbitrate some (but not all) of the claims in a lawsuit is "bifurcated proceedings," not separate actions. *Id.* at 660; *see Adolph*, 532 P.3d at

693 (emphasizing this aspect of *Viking River*). This suggestion follows from the FAA's text, which expressly contemplates that a single suit might contain both arbitrable and non-arbitrable elements, and that the latter should remain "stay[ed]" in court while the former are resolved in arbitration. 9 U.S.C. § 3. As Terminix concedes, *Viking River*'s conclusion that the non-individual claims in that case should be dismissed was based on "state statutory" law, not the FAA.[1] Pet. 21; *see Viking River*, 596 U.S. at 662–63 (consulting "PAGA's standing requirement" to resolve "[t]he remaining question" of what to do with non-individual claims that stay in court after individual claims are "pared away" and sent to arbitration).

Terminix emphasizes that individual PAGA claims that have been submitted to arbitration and non-individual PAGA claims that remain in court may yet be "tied together by preclusion." Pet. 20. Terminix, though, is wrong to equate the preclusion consequences that may follow from resolving a claim in arbitration with the "compulsory joinder" rule that

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[1] Contrary to Terminix's suggestion, *see* Pet. 21, Justice Barrett's concurrence in *Viking River* does not support its contention that *Viking River*'s federal preemption holding resolves the question whether non-individual PAGA claims must be dismissed after the individual claims are submitted to arbitration. Rather, the concurrence states that the Court should have "sa[id] nothing" at all about the issue because *Viking River*'s holding that the FAA requires enforcement of contracting parties' agreement to divide individual from non-individual PAGA claims and to arbitrate the former was sufficient to require reversal of the lower court's refusal to compel arbitration of the *Viking River* plaintiff's individual claim. *Viking River*, 596 U.S. at 664 (Barrett, J., concurring in the judgment).

Viking River held was preempted by the FAA. *Id.* at 25. Unlike the preempted joinder rule, which allowed a party to unilaterally bring "new claims" into an arbitration without the other party's consent, *Viking River*, 596 U.S. at 660, the statutory standing principles applied below leave parties free to "determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate,'" *id.* at 659 (quoting *Lamps Plus*, 587 U.S. at 184).

To be sure, the resolution of certain issues during the arbitration of an individual PAGA claim could impact the subsequent judicial resolution of non-individual claims. *But see Johnson v. Lowe's Home Ctrs., LLC*, 93 F.4th 459, 466–67 (9th Cir. 2024) (Lee, J., concurring) (identifying open questions about how preclusion principles might operate in this context). The fact that PAGA requires resolution of issues that are common to multiple claims, however, is a function of California's policy choice to allow an aggrieved employee to "represent a principal with a potentially vast number of claims." *Viking River*, 596 U.S. at 656. And *Viking River* holds that this policy choice is consistent with the FAA. *Id.* at 653–59; *see id.* at 662–63 (explaining that non-individual PAGA claims "may not be dismissed" pursuant to the FAA "simply because they are 'representative'"). *Viking River*, of course, also requires courts to enforce an agreement to resolve a given claim or issue using "the individualized and informal procedures characteristic of traditional arbitration." *Id.* at 656 (emphasis omitted). But *Viking River* nowhere suggests that the FAA insulates a defendant from the ordinary preclusion consequences of having that claim or issue decided at all. *See id.* (emphasizing that the FAA

does not "allow[] parties to contract out of *anything* that might amplify defense risks").

2. It is Terminix's argument, not the decision below, that conflicts with *Viking River*. As Terminix recognizes, *Viking River* stands for the proposition that, in general, "arbitration agreements must be enforced as written," Pet. 19, even if the agreement contemplates resolving individual and non-individual PAGA claims in separate forums. Here, the court of appeals honored this principle, enforcing Terminix's agreement according to its terms: The 2018 version of the *We Listen* plan, which Terminix urged the lower courts to apply, provides that if the plan's PAGA waiver is unenforceable—which, under *Iskanian*'s non-preempted rule, it is—"the representative action shall be severed from [the] individual claims" and "[t]he court shall retain jurisdiction over the representative action" pending "final resolution of [the] individual claims" in arbitration. SER 228. That course of action is exactly what the Ninth Circuit directed the parties to pursue here.

Nonetheless, Terminix argues that the court of appeals should have *departed* from the terms that Terminix drafted and should have dismissed the non-individual PAGA claims rather than "retain[ing] jurisdiction" over them. *Id.* This argument, which essentially seeks to revive the *We Listen* plan's unlawful waiver of non-individual PAGA claims, rests on the view that the FAA guarantees that an employer can avoid facing *non-individual* PAGA claims by requiring its employees to arbitrate *individual* PAGA claims. This Court could have adopted that position in *Viking River*. It did the opposite.

The employer in *Viking River*, like Terminix here, sought to "compel arbitration of [an employee's] 'individual' PAGA claim … and to dismiss her other PAGA claims" pursuant to an agreement that prohibited the employee from raising non-individual claims. 596 U.S. at 648. This Court, however, expressly held that the FAA does *not* require a court to enforce the waiver of non-individual claims, although the FAA *does* require a court to give effect to the parties' agreement as to the forum in which those claims will be resolved. *See id.* at 653 ("An arbitration agreement … does not alter or abridge substantive rights; it merely changes how those rights will be processed."). While the Court did state that the non-individual claims in *Viking River* should be dismissed, it based that holding—as Terminix concedes, Pet. 21—on its understanding of *state* law.

Embracing Terminix's argument that, under the FAA, an employee who agrees to arbitrate individual PAGA claims thereby loses the right to pursue non-individual PAGA claims would "nullify[] *Viking River*'s ruling" that the FAA does not preempt *Iskanian*'s bar on enforcing arbitration agreements that purport to waive non-individual PAGA claims. *Id.* at 20. The FAA allows Terminix the flexibility to decide whether to defend against its employees' non-individual claims in court or in arbitration, but *Viking River* established just two years ago that the FAA does not relieve Terminix of the duty to defend against those claims altogether. There is no reason for this Court to revisit that holding now.

B. Terminix's other arguments also lack merit.

Terminix briefly makes two additional arguments as to why, in its view, the FAA preempts the state-law standing principles applied below. These arguments also lack merit.

First, Terminix briefly asserts that the California Supreme Court's decision in *Adolph*, on which the decision below rests, is "merely a device to thwart enforcement of private FAA-governed arbitration agreements." Pet. 28. The statutory standing principles announced in *Adolph*, however, do not "apply only to arbitration or … derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). To the contrary, *Adolph* based its holding on a close reading of statutory text and prior California precedents addressing PAGA standing issues outside the arbitration context. *See Adolph*, 532 P.3d at 690–91. Prior to *Adolph*, moreover, multiple other California state courts had reached the same holding based on similar reasoning. *See id.* at 691 (citing cases). Terminix offers no basis for its tendentious claim that these courts all engaged in a bad-faith refusal to apply the proper legal principles.

Second, Terminix argues that the standing principles applied below violate the FAA by "effectively invalidat[ing] the arbitration agreements of *other* alleged aggrieved employees" who are not party to this lawsuit. Pet. 26 (emphasis added). Because "every alleged aggrieved employee in [Mr. Cooley's] PAGA cohort" has supposedly agreed to arbitrate his

or her claims, Terminix argues that applying state law to allow Mr. Cooley to litigate non-individual PAGA claims based on Labor Code violations that Terminix committed against those employees would impermissibly "nullif[y]" those agreements. *Id.* at 27.

Terminix's argument rests on a mischaracterization of how PAGA works. When an aggrieved employee files a PAGA claim—whether individual or non-individual—the employee "does so as the proxy or agent of the state's labor law enforcement agencies," *Arias*, 209 P.3d at 933, and "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest," *Iskanian*, 327 P.3d at 148. A judgment resolving a plaintiff's PAGA claims, then, resolves claims that belong to the *state* and that the plaintiff has asserted on the state's behalf. The judgment does not resolve the claims of *other employees* who have agreed to arbitration. *See Kim*, 459 P.3d at 1127 (explaining why a non-individual PAGA claim is "legally and conceptually different from an employee's own suit for damages").

Viking River makes this point clearly. As this Court explained, "PAGA judgments are binding only with respect to the State's claims, and are not binding on nonparty employees as to any individually held claims." *Viking River*, 596 U.S. at 655. Indeed, it is precisely because "PAGA actions do not adjudicate the individual claims of multiple absent third parties"—but rather the claims of "a single principal"—that PAGA actions "do not present the problems of notice, due process, and adequacy of representation that render class arbitration inconsistent with arbitration's traditionally individualized form." *Id.*; *see also id.* (explaining that "other affected employees" are not "parties" to an aggrieved employ-

ee's PAGA action and have nothing more than "an inchoate interest in litigation proceeds").

Here again, Terminix asks this Court to grant review to consider an argument that none of Terminix's cited authority has embraced and that conflicts with reasoning this Court provided just two years ago. Here again, this Court should decline to do so.

III. The question presented is insufficiently important to merit review.

Beyond its (meritless) argument that the decision below contravenes *Viking River* and the FAA, Terminix offers no reason why the decision below warrants review. Terminix does not contend, for example, that the decision conflicts with federal appellate or state high-court decisions applying FAA preemption principles in similar contexts. After all, PAGA creates a state-law enforcement mechanism with "unique features." *Viking River*, 596 U.S. at 648. This Court thoroughly considered how the FAA applies in the context of that specific statute just two years ago, and further exploration of that same topic, absent any conflict in the lower courts, would be a needless expenditure of this Court's resources.

Tellingly, the only support that Terminix offers for its contention that *Adolph* will have "a pronounced *national* effect" is a single pre-*Adolph* article from February 2020 describing proposed PAGA-style legislation in a handful of states. Pet. 28. Terminix does not identify any such legislation that has actually been enacted in the four years since. And even assuming that the proposals discussed in the 2020 article remain under consideration, it remains to be seen whether any of them will become law, whether the enacted version of any law will

resemble PAGA in any relevant respect, and whether any court will apply the FAA to an enacted law in a way that conflicts with the decision below. The mere possibility that all of these contingencies could arise in the future is no reason to grant review.

Although Terminix expresses concern over the "proliferation of PAGA claims," *id.*, the volume of litigation most likely arises as a function of California's permissible policy aim of achieving more reliable enforcement of its Labor Code. Even if the fact of robust enforcement were a cause for concern, moreover, California's legislature would be capable of addressing it without this Court's intervention. Indeed, California has recently adopted "major changes" to PAGA in a set of amendments that are "expected to curb the number of PAGA lawsuits." Daniel Wiessner, *California Legislature Clears Changes to "Private Attorney General" Law*, Reuters (June 27, 2024), https://tinyurl.com/mw34x5kr.

IV. This case is a poor vehicle for addressing the question presented.

For several reasons, this case is also a poor vehicle for addressing the question presented. For one thing, because the principal FAA preemption theory that Terminix advances in its petition was not presented to the district court or the Ninth Circuit panel, *see supra* at 11–13, the parties have not had the chance to refine their arguments as the case has progressed. Indeed, Terminix did not raise *any* FAA preemption theory in connection with Mr. Cooley's non-individual PAGA claims until it filed its answering brief in the court of appeals. *See supra* at 11–12. Given the substantial shifts that Terminix's position has undertaken over the four-plus years of

this litigation, the lower-court decisions have not fully ventilated Terminix's latest set of arguments in a way that tees them up properly for this Court.

Furthermore, this case presents threshold jurisdictional issues that could complicate this Court's review. First, the court of appeals raised the question of Mr. Cooley's Article III standing to proceed in federal court and directed the district court to consider that issue on remand. The parties have not briefed that issue, and neither the district court nor the court of appeals has addressed it. Second, Terminix argued in its rehearing petition that its settlement agreement with Mr. Cooley moots this case. Mr. Cooley disagrees that the case is moot, but the Court would have to consider Terminix's mootness argument to ensure itself of jurisdiction if review were granted. Each of these potential jurisdictional wrinkles provides further reason for this Court to deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SUZANNE KLOTZ
ROBIN G. WORKMAN
WORKMAN LAW FIRM, PC
2325 Third Street
Suite 329
San Francisco, CA 94107
(415) 782-3660

NICOLAS SANSONE
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
nsansone@citizen.org

Attorneys for Respondent

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