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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court's review is urgently needed to resolve whether the Federal Arbitration Act ("FAA") requires the complete severance of arbitrable individual claims brought under California's Private Attorneys General Act codified in Labor Code section 2698, *et seq.* ("PAGA") from non-individual PAGA claims, with the individual PAGA claims committed to a separate proceeding. Both the Ninth Circuit and California's courts have repudiated the core holding of this Court in *Viking River Cruises, Inc. v. Moriana,* 596 U.S. 639 (2022) ("*Viking River*"). In *Viking River*, 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.* at 660-62. In so doing, this Court found that the "built-in mechanism of claim joinder" under PAGA conflicts with the FAA. *Id.* at 659.

The Ninth Circuit and California's courts have unabashedly rejected this Court's *Viking River* decision and instead hold that even after it is sent to arbitration, an individual PAGA claim remains part of the broader unitary action that stretches across arbitration and court. Specifically, in *Adolph v. Uber Technologies, Inc.,* 532 P.3d 682 (2023) ("*Adolph*") the California Supreme Court held directly contrary 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.* Rejecting this Court's *Viking River* decision as to the conflicts between PAGA and the FAA, *Adolph* holds

that the individual and non-individual claims "remain part of the same action" even after the individual PAGA claim is sent to arbitration *Id.* at 693.

Respondent Tyron Cooley's ("Cooley") mischaracterization of both PAGA itself as solely a mechanism "on behalf of the state," and this Court's *Viking River* decision in an attempt to unilaterally rewrite the question presented for review is of no avail. Cooley ignores both the Ninth Circuit's and California courts' refusal to apply *Viking River's* preemption holding in arguing that there is no split of authority on the question presented. Instead, Cooley argues that the petition raises only a question of California law, while being oblivious to the critical question of FAA preemption that it raises. Cooley also argues that Petitioners The Servicemaster Company, LLC, Terminix International, Inc., and The Terminix International Company Limited Partnership ("Petitioners") did not preserve the issue of FAA preemption, even though it is the very first legal argument in Petitioners' Appellees' Answering Brief in the Ninth Circuit. (Answering Brief pp. 20-29.)

This Court should grant review to put an end to the repudiation of *Viking River's* severability holding and to curtail the Ninth Circuit and California courts' continued interference with the fundamental purpose of the FAA through the interpretation of state law in a manner that circumvents the preemption of PAGA's anti-severability rule. This Court should reverse the decision below.

I. BOTH THE DECISION BELOW AND THE CALIFORNIA SUPREME COURT'S *ADOLPH* DECISION CONFLICT WITH *VIKING RIVER* AND THE FAA.

Just as Cooley misstates both this Court's *Viking River* decision and the PAGA itself, he also misconstrues Petitioners' petition in arguing that "Terminix appears to have abandoned its argument that *Viking River's* discussion of PAGA standing announced a binding federal holding." (Opp 15.) Yet the petition itself plainly states that "[t]his is not an issue of state law." (Petition 20.) Instead, *Viking River* held as a matter of federal preemption that "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." (Petition 19 citing *Viking River,* 596 U.S. at 663.) In *Adolph,* the California Supreme Court rejected this argument, holding that the question was a state statutory standing issue. As Petitioners explain through the petition, when it did so, it was then required to address the issue in the context of FAA preemption, which it failed to do. (Petition 21.)

As explained in the Petition, as Justice Barrett – joined by the Chief Justice and Justice Kavanaugh – correctly noted in her concurrence in *Viking River,* Part III 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 …" *Viking River,* 596 U.S. at 664. Thus, the standing question (which Justice Barrett

noted was a disputed state-law question[]) is superfluous to the analysis because FAA preemption alone is sufficient to hold that individual PAGA claims are subject to individual arbitration. As Justice Barrett explained:

> 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. at 664.

A. *Adolph* Conflicts With *Viking River*'s FAA Preemption Holding.

The central holding in *Viking River* is that the FAA requires an individual PAGA claim to be "pared away" from the non-individual PAGA claim and "committed to a separate proceeding" when the parties agree to arbitrate only individualized issues. *Id.* at 663. In *Adolph,* the California Supreme Court held in contravention that, even after an individual PAGA claim is compelled to arbitration, the plaintiff retains statutory standing as to the non-individual PAGA claims remaining in the court because the individual claim remains part of "a single action[.]" *Adolph,* 532 P.3d at 684-695. Cooley argues review is unnecessary because *Viking River* and *Adolph* are consistent with each other, claiming "*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." (Opp. 17-18 citing *Viking River,* 596 U.S. at 660; *Adolph,* 532 P.3d at 693.)

In making this argument, Cooley misstates the plain holding in *Viking River* which mandates a "separate proceeding" not a "bifurcated action" for the individual PAGA claims compelled to arbitration. *Viking River,* 596 U.S. at 663. *Viking River* and *Adolph* are not consistent with each other, and Cooley's argument otherwise only highlights the need for review to correct California's blatant disregard for FAA preemption when PAGA claims are alleged. In *Adolph,* the California Supreme Court agreed with this Court that a PAGA "plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintain[ing] an individual claim in that action." *Viking River,* 596 U.S. at 663 accord *Adolph,* 532 P.3d at 695. Yet *Adolph* nevertheless disregards this Court's holding that the FAA requires an individual PAGA claim to be "committed to a separate proceeding." *Id.* at 663. Instead, the California Supreme Court held directly contrary to *Viking River* that the non-individual PAGA claim remaining in the court and the individual PAGA claim compelled to arbitration remain part of "a single action[.]" *Adolph,* 532 P.3d at 684-695.

Cooley supports his flawed "bifurcation" argument by solely relying on *Adolph's* complete disregard of *Viking River* and its preemption holding. In this regard, Cooley acknowledges that "[t]he California Supreme Court [] 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.'" (Opp. 9 citing *Viking River,* 596 U.S. at 693.) Indeed, the California Supreme Court defied this Court finding that "[n]othing in PAGA or any other relevant statute suggests that arbitrating individual claims effects a severance." *Adolph,* 532 P.3d at 693. In doing so, the California Supreme Court disregarded this Court's FAA preemption holding by finding 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.*

But the California Supreme Court's embrace of the potential for a stay of the non-individual PAGA claim remaining in court confirms the underlying preemption problem. *Id.* at 693-94 (recognizing that the FAA requires a court to "stay the trial of the action" pending arbitration). If the California Supreme Court had recognized that FAA preemption requires the individual PAGA claim to be "committed to a separate proceeding[,]" a stay would not be necessary. *Viking River,* 596 U.S. at 663. The California Supreme Court compounded its error when it left the stay decision to the discretion of trial courts. *Adolph,* 532 P.3d at 692-693. This decision, which violates Section 3 of the FAA, leaves open the possibility of simultaneous litigation in both arbitration and the court. *Id.* Since *Adolph,* California courts have relied on the discretionary authority granted to them. *Barrera v. Apple American Grp., LLC,* 95 Cal. App. 5th 63, 95 (2023).

California courts' and the Ninth Circuit's embrace of bifurcation rather than severing the two components into separate and distinct actions as required by *Viking River* distorts the terms of the arbitration to which the parties agreed. Under *Adolph,* courts are now using arbitral findings to decide standing for the non-individual PAGA claims the parties did not agree to arbitrate. *Adolph,* 532 P.3d at 692-693. Expanding arbitration's scope to non-arbitrable issues "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration.'" *Viking River,* 596 U.S. at 659. This result undermines the important federal interest in ensuring that parties can agree to arbitrate low-stakes individual claims separate and apart from "massive-scale disputes of this kind." *Id.* at 661-662. In direct contravention to *Viking River,* California courts and the Ninth Circuit have reunited the individual and non-individual PAGA claims into a "single action." *Adolph,* 532 P.3d at 694-695. In so doing, just as before *Viking River,* 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.

B. *Adolph* Conflicts With *Viking River* By Effectively Invalidating the Arbitration Agreements of Other Employees.

As detailed in the petition, 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. (Petition 26-27.) Cooley disputes this only through his misinterpretation of this Court's *Viking River* decision. (Opp. 23.) Specifically, Cooley posits that "[w]hen an aggrieved employee filed a PAGA claim … the employee 'does so as the proxy or agent of the state's labor law enforcement agencies.'" (Opp. 23 citing *Arias v. Superior Court,* 209 P.3d 923, 933 (2009).) But Cooley fails to acknowledge a critical holding in *Viking River* where this Court acknowledged that PAGA actions are *also* representative when they are predicated on violations purportedly sustained by other employees. (*Id.,* at 1916.) In that regard, it "makes sense to distinguish 'individual' PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from 'representative' (or perhaps quasi-representative) PAGA claims arising out of events involving other employees." (*Id.*)

Until *Viking River*, California law had held that the representative nature of PAGA meant that PAGA claims could not be compelled to individual arbitration because PAGA claims were indivisible in that their individual and nonindividual components could not be separated. (*Iskanian v. CLS Transp. Los Angeles, LLC,* 327 P.3d 129 (2014); *see also Id,* at 1916.) This Court abrogated the 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 ran afoul of 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.)

Adolph is simply another mechanism mandating joinder of the other "aggrieved employees" claims in arbitration, whether they agreed to individual arbitration or not. This Court should grant review to stop the California courts' creation of another new "mechanism" designed "to coerce parties into withholding PAGA claims from arbitration" which has been embraced by both the Ninth Circuit and lower courts and to correct the complete disregard for this Court's *Viking River* decision. *Viking River,* 596 U.S. at 661.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Cooley's contention that Petitioners offer no reason why this case warrants review beyond that the decision below contravenes *Viking River* and the FAA belies the plain contents of the petition. (Petition 27-29.) As Petitioners explained in the petition, through *Adolph* the California Supreme Court has crafted another new device to attempt to circumvent FAA preemption. This is evidenced by "the continued proliferation of PAGA claims brought by private plaintiffs in California despite this Court's *Viking River* decision …" (Petition 28.) Indeed, the issue in this case will continue to recur whenever parties agree to arbitrate a PAGA claim on an individual basis. Given California's population and its impact on the

world economy (Petition 28), as this Court recognized in *Viking River,* the question presented is of national importance.

Cooley's argument that no state other than California has enacted PAGA-style legislation does not negate the pronounced national impact of California's direct disregard for this Court's precedence as set forth in *Viking River*. In fact, this Court has not hesitated to intervene when a state supreme court defies its decisions. (See *Shafer v. S. Carolina,* 532 U.S. 36, 48, n. 4 (2001). This Court granted review in *Viking River* based on the same configuration of decisions from the California Supreme Court – namely as set forth in *Iskanian,* 237 P.3d 129 – and Ninth Circuit cases that relied on it. Many other FAA preemption decisions by this Court have concerned California-specific attempts to undermine the FAA. See *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344 (2011); *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018). As detailed in the petition, this Court has likewise 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 v. Thomas,* 482 U.S. 483, 491 (1987)); a California statute granting a state agency primary jurisdiction over talent agents (*Preston v. Ferrer,* 552 U.S. 346, 359 (2008)); 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, 1422(2019)). (Petition 6-7.)

There is no reason to delay resolution of the question presented any longer. The California Supreme Court and the Ninth Circuit have both addressed the preemption question, repudiating this Court's *Viking River* decision. *Adolph,* 532 P.3d at 692-694; *Johnson v. Lowe's Home Centers, LLC,* 93 F.4th 459 (9th Cir. 2024). Review is necessary to prevent *Adolph's* back-door resurrection of PAGA's compulsory joinder rule. Until individual PAGA claims are "pared away" and committed "to a separate proceeding" as FAA preemption requires, parties will be discouraged from invoking their rights under the FAA. *Viking Ricer,* 596 U.S. at 663.

III. THIS PETITION IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

This case is an ideal vehicle to review and reject *Adolph* and the Ninth Circuit and California courts that are relying on it to ignore FAA preemption over the enforcement of agreed-upon individual arbitration agreements when PAGA is alleged. Here, Cooley does not dispute that he agreed to arbitrate his PAGA claims on an individual basis only. (AOB 7; SER-198 ¶10, 215 §3, 201 ¶19, 226 §3.) Specifically, he expressly agreed that "if th[e] representative action waiver is deemed unenforceable, then the representative action *shall* be severed from my individual claims." (SER-198 ¶10, 217 §10, 201 ¶19, 228-229 §7(a)-(b), emphasis added.) Based on this, the District Court correctly applied this Court's *Viking River* holding to compel Cooley's individual PAGA

claim to arbitration and to dismiss his non-individual PAGA claim. (ER-4-6.)

Cooley's argument that this case is a poor vehicle for addressing FAA preemption ignores the simple fact that the District Court's dismissal of his non-individual PAGA claims resulted from its faithful application of this Court's precedent in *Viking River*. Then, in the Ninth Circuit, Petitioners argued that the FAA preempts any interpretation of PAGA that allows a plaintiff to pursue PAGA actions in court on behalf of other employees where plaintiff has no personal right of recovery and his individual claim has been severed. (Appellees' Brief 20-29.) Thus, the statutory standing holding in Section IV of *Viking River* does not render the preemption holding in Section III inapplicable and the California Supreme Court's and Ninth Circuit's complete disregard of that holding does not render this case a poor vehicle for addressing preemption. To the contrary, the Ninth Circuit's overruling of the District Court's decision demonstrates that clarity regarding preemption is required.

Cooley's contention that Petitioners' FAA preemption argument has "shifted" is not only unsupported by the briefing in the Ninth Circuit, but also is of no consequence. (Opp. 25-26.) This Court has repeatedly held that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim" and is "not limited to the precise arguments [it] made below." *Citizens United v. FEC,* 558 U.S. 310, 330-331 (2010) (citations omitted).

Moreover, Cooley's reference to the Ninth Circuit's question of Cooley's Article III standing to proceed is merely an attempt to distract this Court from the question presented. Whether Cooley has Article III standing is not a question answered by the Ninth Circuit below and it is not a question for review before this Court. In short, it has no bearing on whether 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 petition for writ of certiorari should be granted.

Respectfully submitted,

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