No.

IN THE

Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND RASIER-CA, LLC,
Petitioners,

v.

JOHNATHON GREGG,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906 (2022), this Court held that the Federal Arbitration Act preempts the California-law rule that actions under the California Labor Code Private Attorneys General Act (PAGA) "cannot be divided into individual and non-individual claims." *Id.* at 1925. This Court also instructed that the arbitrable individual PAGA claims must be "pared away" from the non-individual claims and "committed to a separate proceeding." *Ibid.*

The California courts have refused to follow this Court's guidance. In this case (as in several others), the California Court of Appeal refused to sever the arbitrable individual claim from the non-individual claims on the theory that this aspect of *Viking River* was grounded in California law rather than the Federal Arbitration Act. App., *infra*, 24a-25a. The California Supreme Court has since similarly held that PAGA claims constitute "a single action" in which the individual PAGA claim compelled to arbitration nonetheless remains in court for the purpose of allowing a plaintiff to establish statutory standing to pursue the non-individual claims. *Adolph* v. *Uber Technologies, Inc.*, 532 P.3d 682, 694-695 (2023).

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 PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. The caption contains the names of all the parties to the proceedings below.

2. Rasier-CA, LLC is a wholly owned subsidiary of Uber Technologies, Inc., which is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Uber Technologies, Inc., petitioners are unaware of any shareholder who beneficially owns more than 10% of Uber Technologies, Inc.'s outstanding stock.

RELATED PROCEEDINGS

Superior Court for the County of Los Angeles

Gregg v. *Uber Technologies, Inc.*
No. BC719085 (Dec. 5, 2019)
(denying motion to compel arbitration)

Superior Court for the County of San Francisco

In re: Uber Technologies Wage & Hour Cases
No. CJC-21-005179 (Feb. 14, 2022)
(consolidating cases)

California Court of Appeal

Gregg v. *Uber Technologies, Inc.*
No. B302925
(initial opinion) (Apr. 21, 2021)
(on remand from this Court) (Mar. 24, 2023)

California Supreme Court

Gregg v. *Uber Technologies, Inc.*
No. S269000 (June 30, 2021)
(denying petition for review)

Gregg v. *Uber Technologies, Inc.*
No. S279722
(granting petition for review) (June 14, 2023)
(dismissing review) (Sept. 13, 2023)

Supreme Court of the United States

Uber Technologies, Inc. v. *Gregg*
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Uber Technologies, Inc. and Rasier-CA, LLC (collectively, Uber) respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The California Supreme Court's order dismissing Uber's petition for review (App., *infra*, 1a) is not reported. The California Court of Appeal's opinion on remand from this Court (*id.* at 3a-28a) is reported at 89 Cal. App. 5th 786 (2023). A prior opinion of the California Court of Appeal (App., *infra*, 40a-51a) is not reported but is available at 2021 WL 1561297. The order of the Superior Court of Los Angeles County denying the motion to compel arbitration (App., *infra*, 52a-53a) is not reported.

JURISDICTION

The California Court of Appeal issued its opinion on March 24, 2023. The California Supreme Court granted Uber's timely petition for review on June 14, 2023, but later dismissed review on September 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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 in 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 (FAA) states: "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." 9 U.S.C. § 2.

The California Labor Code Private Attorneys General Act (PAGA) states in relevant part: "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be as-

sessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, 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 pursuant to the procedures specified in Section 2699.3. … For purposes of this part, 'aggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Cal. Lab. Code § 2699(a), (c).

INTRODUCTION

This is not the first time this case has appeared before this Court. Just last year, this Court granted Uber's petition for a writ of certiorari, vacated the California Court of Appeal's judgment, and remanded the case for further consideration in light of *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906 (2022). This Court held in *Viking River* 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 1924. In other words, federal law requires enforcement of an agreement between an employer and employee to arbitrate *only* whether that employee (and not a host of other employees) suffered a Labor Code violation giving rise to penalties under PAGA. This Court also implemented that holding by requiring that the individual PAGA claim be "committed to a separate proceeding" for arbitration. *Id.* at 1925.

The California courts did not faithfully apply *Viking River* on remand. The California Court of Appeal determined that the FAA does *not* require a plaintiff's

"individual claim [to] be 'severed' from his nonindividual claims." App., *infra*, 24a-25a. Rather, the Court of Appeal concluded that the individual PAGA claim, even after being compelled to arbitration, could remain in court for the purpose of establishing statutory standing to pursue the non-individual claims. The California Supreme Court later adopted this same reasoning in *Adolph* v. *Uber Technologies, Inc.*, 532 P.3d 682 (Cal. 2023), holding that the two claims "remai[n] part of the same action" even after the individual PAGA claim has been sent to arbitration. *Id.* at 693.

This repudiation of *Viking River*'s severability holding undermines the FAA in two important ways. First, the California Supreme Court suggested that trial courts have discretion under California law to stay the non-individual claims or else permit simultaneous litigation of the individual issues, which puts the parties' federal rights at the mercy of a trial judge's discretionary state-law determination. Second, notwithstanding the parties' right under the FAA to decide the issues subject to arbitration, the California courts have retroactively expanded the scope of the agreed-upon arbitration of the individual claim into a contest over statutory standing for the non-individual claims in court. The result is the individual PAGA claim in this case has *not* been *fully* committed to a separate arbitral proceeding even though that is exactly what this Court ordered in *Viking River*.

The California Court of Appeal reached this impermissible result by conflating this Court's severability holding under the FAA with its separate interpretation of PAGA under California law. As Justice Sotomayor explained in her *Viking River* concurrence, the California courts have the "last word" on how to

interpret PAGA. 142 S. Ct. at 1925. But this Court just as assuredly has the last word on the interpretation of federal law under the Supremacy Clause.

Because the Court of Appeal's holding is incompatible with the FAA, this Court should either grant review or summarily reverse to make clear that it meant what it said in *Viking River*: the individual claim must be committed to a separate proceeding.

STATEMENT

A. Legal Background.

1. Congress enacted the FAA "in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). That hostility harmed parties to both commercial and labor contracts, depriving them of arbitration's many benefits—"not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018).

Congress codified a "liberal federal policy favoring arbitration" to overcome the hostility that pervaded not only the federal judiciary, but state legislatures and courts as well. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). During hearings on the legislation that became the FAA, Senators canvassed "the widespread unwillingness of state courts to enforce arbitration agreements" and criticized "the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Southland Corp.* v. *Keating*, 465 U.S. 1, 13-14 (1984) (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration*, Hearing Before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 8

(1923)). The bill they ultimately adopted "foreclose[d] state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16.

In large part, Congress accomplished that objective through "Section 2, the 'primary substantive provision of the Act.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone*, 460 U.S. at 24). That provision mandates that arbitration agreements "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; *see also* § 4 (courts shall "direc[t] the parties to proceed to arbitration in accordance with the terms of the agreement"). The FAA thereby ensures that parties can make (and must adhere to) arbitration agreements by requiring courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (citations omitted). Equal footing means "'rigorou[s]'" adherence to the agreement, "'including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Systems*, 138 S. Ct. at 1621 (quoting *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)).

This Court has consistently rejected invitations to curtail Section 2's sweeping text. For example, this Court has confirmed that Section 2 covers *all* arbitration agreements contained in contracts involving commerce (except as carved out by Section 1), not only agreements to arbitrate commercial disputes. *See Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113-114 (2001). This Court has also made clear that agreements to arbitrate statutory claims are enforceable under the FAA. *See Gilmer* v. *Interstate/Johnson*

Lane Corp., 500 U.S. 20, 26 (1991). And this Court has overruled creative interpretations of federal statutes that would "effectively nullif[y] the [Federal] Arbitration Act." *Epic Systems*, 138 S. Ct. at 1620-1622. But hostility to arbitration—which has only increased in recent years—comes in many forms. For that reason, this Court has been ever "alert to new devices and formulas" that would expressly or implicitly "declar[e] arbitration against public policy." *Id.* at 1623.

The California Legislature and California courts have been especially inventive when it comes to new devices and formulas that undermine arbitration agreements. Many of those "California laws or judge-made rules" have come before this Court. *Chamber of Commerce of the United States of America* v. *Bonta*, 62 F.4th 473, 478 (9th Cir. 2023) (collecting examples). Among other decisions, this Court has held that the FAA preempts California statutes requiring a judicial forum for franchise claims (*Southland*, 465 U.S. at 10) 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)); 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)). *See also generally* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419 (2014).

2. The California Labor Code Private Attorneys General Act permits a plaintiff to seek civil penalties for violations of California wage-and-hour law "as the proxy or agent of the state's labor law enforcement agencies." *Arias* v. *Superior Court*, 209 P.3d 923, 933 (Cal. 2009). Under PAGA, a plaintiff must bring "a civil action … on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a). The plaintiff also must be an "'aggrieved employee' … against whom one or more of the alleged violations was committed." § 2699(c).

Of the civil penalties recovered in a PAGA action, 75 percent goes to the State, while the remaining 25 percent is distributed among the aggrieved employees. Cal. Lab. Code § 2699(i). PAGA sets default penalties of $100 per employee subjected to a violation per pay period for the first violation and ratchets the penalty up to $200 per employee per pay period for each subsequent violation. § 2699(f), (g)(1). This Court has observed that, "[i]ndividually, these penalties are modest; but given PAGA's additive dimension, low-value claims may easily be welded together into high-value suits." *Viking River*, 142 S. Ct. at 1915. When the action involves a thousand workers, the stakes increase a thousand-fold.

In *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), the California Supreme Court held that California's public policy prevents the enforcement of an arbitration agreement categorically waiving the right to bring a PAGA action in court. *Id.* at 148-149. It also declined 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.

3. This Court granted review in *Viking River* to consider whether the FAA preempted PAGA as interpreted in *Iskanian*. First, this Court held that the FAA applies to PAGA claims, no less than any other claims that "'arise out of' the parties' contractual relationship." 142 S. Ct. at 1919 n.4 (quoting 9 U.S.C. § 2). Section 2 therefore controls, "regardless of whether a PAGA action is in some sense also a dispute between an employer and the State," because "nothing in the FAA categorically exempts claims belonging to sovereigns." *Ibid.*

This Court next determined that the FAA did not preempt California's anti-waiver rule. In the 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.

at 1924. This "built-in mechanism of claim joinder," by "allow[ing] plaintiffs to unite a massive number of claims in a single-package suit," had improperly coerced parties to forgo arbitration or else relinquish their right under the FAA to decide "which claims are subject to arbitration." *Id.* at 1923-1924. Even if California law "allows plaintiffs to unite a massive number of claims in a single-package suit," the parties have a federal right to tailor the "'stakes'" as appropriate to an arbitration's typical lack of "'procedural rigor.'" *Id.* at 1924 (citations omitted). The upshot is that parties can agree to arbitrate only the "individual" PAGA claim seeking civil penalties for violations that the plaintiff himself allegedly suffered. *Id.* at 1925.

This Court made one last holding in *Viking River*—this one under California law. California Labor Code § 2699, as this Court "s[aw] it," "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." 142 S. Ct. at 1925. Instead, "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." *Ibid.* But "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." *Ibid.* This Court concluded that a plaintiff without her *own* individual PAGA claim "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." *Ibid.*

B. Procedural History.

1. Uber is a technology company that developed the smartphone application known as the "Uber App," which connects riders in need of transportation with drivers who can provide it. App., *infra*, 5a.

As of December 2015, drivers wishing to use the Uber App must first enter into the Technology Services Agreement. App., *infra*, 5a. The Agreement contains an arbitration provision. *Ibid.* Arbitration is not a mandatory condition of drivers' contractual relationship with Uber, as drivers may opt out of the arbitration provision by submitting an opt-out notice within 30 days of executing the Agreement. *Id.* at 6a.

Drivers who do not opt out agree to resolve virtually all disputes with Uber—including those "arising out of or related to [drivers'] relationship with [Uber]" or "regarding any … wage-hour law"—"through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." App., *infra*, 5a. The Agreement further states that any action "brought on a private attorney general basis" "shall be resolved in arbitration on an individual basis only" and "that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding." *Id.* at 6a. And it contains a severability clause providing that if any portion of the PAGA waiver "is found to be unenforceable," (1) "the unenforceable provision shall be severed," (2) the severance "shall have no impact whatsoever" on "attempt[s] to arbitrate any remaining claims on an individual basis," and (3) "any representative action[s] brought under PAGA on behalf of others must be litigated" in court. *Id.* at 13a.

Respondent Johnathon Gregg signed up to use the Uber App and accepted the Agreement in October 2016. App., *infra*, 6a. Gregg did not exercise his right to opt out of the arbitration provision. *Ibid.*

2. Despite agreeing to individual arbitration, Gregg filed a PAGA action in August 2018, seeking civil penalties on the theory that Uber allegedly misclassified him and other drivers as independent contractors. App., *infra*, 6a-7a. Uber moved to compel arbitration of Gregg's individual PAGA claim and to dismiss the non-individual claims brought on behalf of other drivers. *Id.* at 7a. In the alternative, Uber requested that the court order Gregg to arbitrate his individual status as an "aggrieved employee" and stay proceedings pending that arbitration. *Ibid.*

The Superior Court for Los Angeles County denied Uber's motion under *Iskanian*, concluding that the FAA did not apply to Gregg's claims because a PAGA claim "is brought on behalf of the State"—"not the individual"—and the State never consented to arbitration. App., *infra*, 58a, 62a. Additionally, the Superior Court held that a PAGA claim could not be "parse[d] out" into an arbitrable individual component and a non-arbitrable representative component. *Id.* at 62a. The Superior Court accordingly denied Uber's alternative request to compel arbitration of Gregg's alleged status as an aggrieved employee. *Id.* at 53a.

The California Court of Appeal affirmed. It likewise determined that no portion of Gregg's PAGA claim could be compelled to arbitration because the claim was "indivisible and belong[ed] solely to the state," which (unlike Gregg) had not "agreed to arbitrate" with Uber. App., *infra*, 47a, 49a (emphasis omitted).

The California Supreme Court denied Uber's petition for review. App., *infra*, 39a.

After Uber petitioned for a writ of certiorari, this Court decided *Viking River*, which invalidated the anti-severability rule applied by the Court of Appeal. *Supra*, at 9-10. This Court subsequently granted Uber's petition for a writ of certiorari, vacated the Court of Appeal's judgment, and remanded the case for further consideration in light of *Viking River*. 142 S. Ct. 2860 (2022) (App., *infra*, 29a).

3. In this and other cases presenting the same issue, the California courts reached the opposite conclusion of this Court in *Viking River*: that a PAGA plaintiff can proceed on non-individual claims in court even after the individual PAGA claim has been compelled to arbitration.

On remand from this Court, the Court of Appeal affirmed in part and reversed in part the denial of Uber's motion to compel arbitration. It held that Gregg's individual PAGA claim fell "squarely within the Arbitration Provision's scope" because it was "based on Uber's alleged misclassification of him as an independent contractor (i.e., a 'disput[e] arising out of or related to [Gregg's] relationship with [Uber]')." App., *infra*, 17a. As in *Viking River*, the Arbitration Provision purported to waive non-individual PAGA claims but also specified that the waiver should be severed in the event of invalidity and that such severance "shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision." *Id.* at 18a. The Court of Appeal therefore concluded that "Gregg must resolve his individual PAGA claim in arbitration," while

"his non-individual claims … must be litigated in court." *Ibid.*

The Court of Appeal also held that Gregg retained standing under PAGA to bring non-individual claims relating to other employees. It recognized that "to recover civil penalties under PAGA on behalf of other employees, the plaintiff must: (1) have been employed by the defendant; (2) have suffered one or more of the Labor Code violations on which the PAGA claim is based; and (3) seek to recover penalties for the violations he or she suffered in addition to penalties for violations suffered by other employees." App., *infra*, 23a. But according to the Court of Appeal, Gregg "satisfie[d] these requirements," even though he could no longer litigate on behalf of himself in court, because his standing could be aggregated across both forums. *Id.* at 24a.

The Court of Appeal recognized that this Court in *Viking River* had come to the opposite conclusion in dismissing the non-individual PAGA claims for lack of statutory standing. App., *infra*, 18a-19a. But, in its view, *Viking River* rested entirely on this Court's "understanding of state law," which the Court of Appeal was "'not bound'" to follow, and did not separately "hold that under the FAA, Gregg's individual claim must be 'severed' from his nonindividual claims." *Id.* at 24a-25a (citation omitted).

Rather than dismiss Gregg's non-individual PAGA claims, the Court of Appeal stayed them pending arbitration of his individual claim. App., *infra*, 27a.

Uber again sought review from the California Supreme Court, arguing that the Court of Appeal's refusal to sever Gregg's individual PAGA claim from the

non-individual claims impermissibly revived *Iskanian*'s preempted rule of compulsory claim joinder. The California Supreme Court granted Uber's petition and deferred further action pending its decision in *Adolph*, which presented the same question. App., *infra*, 2a.

In *Adolph*, the California Supreme Court granted review shortly after *Viking River* to decide whether "an aggrieved employee who has been compelled to arbitrate individual [PAGA] claims … maintains statutory standing to pursue non-individual PAGA claims … in court." 532 P.3d at 689 (quotation marks omitted). There, as here, a driver who had agreed to arbitrate disputes against Uber brought a PAGA action alleging misclassification. *Id.* at 686.

Uber contended that both California law and the FAA led to the same result that this Court reached in *Viking River*: A plaintiff who agrees to arbitrate his individual PAGA claim has no standing under California law and, more importantly, no way to prove his standing consistent with the FAA. The California Supreme Court disagreed, reaching the same conclusion as the Court of Appeal in this case for essentially the same reasons.

As to California law, Uber argued (i) that a PAGA plaintiff in a non-individual-only action lacks statutory standing because the non-individual claims in court are brought only on behalf of "other current or former employees" and not "on behalf of himself or herself" (Cal. Lab. Code § 2699(a)); and (ii) that a plaintiff whose individual claim has been compelled to arbitration has not suffered "one or more of the alleged violations" that are at issue in court (§ 2699(c)). The California Supreme Court accepted the premise that a PAGA plaintiff must bring an action "'on behalf

of himself or herself *and* other current or former employees.'" *Adolph*, 532 P.3d at 694 (emphasis added) (quoting Cal. Lab. Code § 2699(a)). It also acknowledged that PAGA actions are necessarily "comprised of individual and non-individual claims." *Id.* at 692. But 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 (in violation of the arbitration agreement) "suffice[d] to confer standing to bring a PAGA action." *Id.* at 691-692. In other words, the plaintiff could satisfy the PAGA standing requirement by aggregating claims "'across two fora'" (arbitration and litigation). *Id.* at 694 (citation omitted).

Uber warned that this interpretation of California law would be preempted by the FAA, as interpreted in *Viking River*, as it would preclude "severing the two components" of a PAGA action—the individual and the non-individual—"into separate and distinct actions." *Adolph*, 532 P.3d at 693; *see Viking River*, 142 S. Ct. at 1925 (holding that the FAA preempts "the rule that PAGA actions cannot be divided into individual and non-individual claims"). The California Supreme Court, however, saw no conflict with *Viking River*. It reasoned 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." 532 P.3d at 693. It also disagreed with Uber that *Viking River* held that "arbitrating individual claims effects a severance." *Id.* at 693-694. And it held that a trial court could comply with the FAA by "exercis[ing] its discretion to stay the non-individual claims pending the outcome of the arbitra-

tion" 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. As long as "no such relitigation" of the individual claim could occur, the California Supreme Court thought that this Court's dictates in *Viking River* would be satisfied. *Id.* at 693.

4. Following its decision in *Adolph*, the California Supreme Court dismissed review in this case, leaving the Court of Appeal's decision in place. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

The California courts have refused to faithfully apply *Viking River*. While this Court held that the FAA requires enforcement of severability provisions that pare away an individual PAGA claim from the non-individual ones, *Adolph* and the decision below have reunited the separate proceedings into a single multi-claim action and improperly kept a significant portion of the individual claim in court, notwithstanding the parties' agreement to arbitrate individualized issues.

Given the need to safeguard this Court's role under the Supremacy Clause as the final expositor of the meaning of federal law, review is appropriate whenever a lower court refuses to apply this Court's decisions. But this case also is exceptionally important on its own terms. PAGA has become a vehicle to undermine arbitration agreements. And the decision below is just the latest example of a long series of California legal rules that are hostile to arbitration. This Court should grant review and put a stop to the California courts' end-run of the FAA and *Viking River*.

I. The California Supreme Court and Court of Appeal Have Defied *Viking River*'s Interpretation of the FAA.

A. In *Viking River*, this Court held that where an agreement requires disputes to be resolved on an individual basis, the FAA requires an individual PAGA claim to be severed from any non-individual PAGA claims. This holding represented a significant change in existing law. Before *Viking River*, California courts had interpreted PAGA "to contain what is effectively a rule of claim joinder" that "allow[ed] a party to unite multiple claims against an opposing party in a single action." 142 S. Ct. at 1915. Because "California law prohibit[ed] division of a PAGA action into constituent claims," parties had to choose between arbitrating *all* of the PAGA action or *none* of it. *Id.* at 1917.

This Court held that the FAA preempts the California rule that "preclude[d] division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Viking River*, 142 S. Ct. at 1923-1924. As this Court explained, "[t]his prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate,' and does so in a way that violates the fundamental principle that 'arbitration is a matter of consent.'" *Id.* at 1923 (citations omitted). The Court put the dilemma this way: "If the parties agree to arbitrate 'individual' PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties."

Id. at 1924. This anti-severability rule thereby "compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether"—two outcomes that both violated rights the parties "enjoy under the FAA." *Ibid.*

In practice, "the effect" of California's anti-severability rule was "to coerce parties into withholding PAGA claims from arbitration" altogether. *Viking River*, 142 S. Ct. at 1924. That is because "[t]he absence of 'multilayered review' in arbitra[tion]" makes it "'poorly suited to the higher stakes' of massive-scale disputes of this kind." *Ibid.* (citations omitted). *Iskanian* thus nullified the benefits of arbitration's "quicker, more informal" procedures (*Epic Systems*, 138 S. Ct. at 1621), "effectively coerc[ing] parties to opt for a judicial forum" even though the FAA gave them the right to choose an arbitral one (*Viking River*, 142 S. Ct. at 1924).

This Court identified the proper remedy in *Viking River*. To prevent California law from distorting the issues submitted to arbitration, the FAA requires a PAGA action to be "divided" into two separate actions (a "pared away" individual claim and the other non-individual claims) when the parties have agreed to arbitrate disputes on an individualized basis. 142 S. Ct. at 1924-1925.

B. *Viking River* carried forward this Court's longstanding recognition that parties have the right to determine the issues subject to—and *not* subject to—arbitration and that the FAA mandates severance to implement this right.

In *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), this Court held that "a party can be forced to arbitrate only those issues it specifically has

agreed to submit to arbitration." *Id.* at 945. No less, but also no more: The use of state law to expand the scope of those issues violates the FAA. That was the situation in *Lamps Plus*, where this Court held that the positive right to decide "the issues subject to arbitration" also implied the negative right not to submit a claim or issue (there, class claims) to arbitration "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" 139 S. Ct. at 1416 (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 684 (2010)).

Viking River also was not the first time that this Court mandated severance under the FAA to implement a contractual agreement to arbitrate some issues but not others. On at least three prior occasions, this Court has held that the FAA requires severance when an action or claim contains both arbitrable and non-arbitrable issues.

In *Moses H. Cone*, this Court considered what to do when the FAA applies to only one of two related disputes. The party opposing arbitration argued that the motion to compel arbitration should be stayed pending state-court litigation of a non-arbitrable claim. 460 U.S. at 19-20. This Court acknowledged that an order compelling arbitration would force the party "to resolve these related disputes in different forums." *Id.* at 20. But the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Ibid.* If the parties agreed to arbitrate only one claim, this Court explained, the "two disputes will be *resolved separately*—one in arbitration, and the other (if at all) in state-court litigation." *Ibid.* (emphasis added).

This Court reaffirmed this rule in *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985). There, a

defendant moved to compel arbitration of state-law claims but not of related federal securities claims. *Id.* at 215. (This Court only later established that the FAA applies to such securities claims. *See Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 238 (1987).) The Ninth Circuit affirmed the district court's denial of "the motion to sever and compel arbitration of the pendent state claims." *Dean Witter*, 470 U.S. at 215-216. But this Court reversed, explaining that the FAA requires such severance "even where the result would be the possibly inefficient maintenance of *separate* proceedings in *different* forums." *Id.* at 217 (emphases added); *see id.* at 220-221 (holding that "this conclusion is compelled" by *Moses H. Cone*).

The story was much the same in *KPMG LLP* v. *Cocchi*, 565 U.S. 18 (2011) (per curiam), where the Florida courts denied a motion to compel arbitration because two of the plaintiffs' four claims were not arbitrable. *Id.* at 20. Applying *Dean Witter*, this Court reversed, remanded for the Florida courts to reconsider the motion to compel as to the arbitrable claims, and acknowledged that the FAA sometimes requires "'*separate* proceedings in *different* forums.'" *Id.* at 22 (emphases added) (quoting *Dean Witter*, 470 U.S. at 217).

C. The approach taken by the California courts is directly contrary to this unbroken line of precedent requiring the severance of arbitrable claims and non-arbitrable claims into separate actions under the FAA.

1. In the decision below, the California Court of Appeal rejected Uber's argument that the FAA requires the severance of the arbitrable portion of the PAGA action from the non-arbitrable portion in court. It asserted that this Court did not "hold that under the FAA, [the plaintiff's] individual claim must be

'severed' from his nonindividual claims." App., *infra*, 24a-25a. But that is exactly what this Court held: The FAA preempts "the rule that PAGA actions cannot be divided into individual and non-individual claims" and that the individual claims must be "pared away" and "committed to a separate proceeding." *Viking River*, 142 S. Ct. at 1925; *accord Dean Witter*, 470 U.S. at 217.

The Court of Appeal also nullified the parties' right to decide which issues are arbitrated and which issues are litigated. This Court held in *Viking River* that the parties' right to "determine 'the issues subject to arbitration'" cannot be circumvented by allowing the plaintiff to both arbitrate and litigate his claimed individual Labor Code violations. 142 S. Ct. at 1923 (citation omitted); *see also Laver* v. *Credit Suisse Securities (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020) (explaining that an arbitration agreement "'is a promise to have a dispute heard in some forum *other than a court*'") (quoting *Cohen* v. *UBS Financial Services, Inc.*, 799 F.3d 174, 179 (2d Cir. 2015)). Again, this Court implemented this right under the FAA by requiring that the individual claim be "committed to a separate proceeding." *Viking River*, 142 S. Ct. at 1925.

The decision below interferes with this federal right. The Court of Appeal held that the key questions the parties agreed to arbitrate—whether Gregg is an employee and whether he suffered a Labor Code violation—remain in court for the purpose of determining whether Gregg has statutory standing, even if not for the purpose of collecting a civil penalty for that violation. App., *infra*, 22a-23a. It did so despite recognizing that the arbitrator will determine whether

Gregg is an aggrieved employee. *Id.* at 26a. But instead of committing this individualized issue "to a separate proceeding" (*Viking River*, 142 S. Ct. at 1925), the Court of Appeal stitched the arbitration and judicial proceeding together (App., *infra*, 22a-23a).

2. In *Adolph*, the California Supreme Court adopted the same approach as the Court of Appeal in this case, holding that the individual PAGA claim in arbitration and non-individual claims in court "remai[n] part of the same action." 532 P.3d at 693; *see also*, *e.g.*, *Seifu* v. *Lyft, Inc.*, 89 Cal. App. 5th 1129, 1142 (2023) (rejecting argument that "sending the individual PAGA claim to arbitration 'amounts to a form of severance that yields two distinct actions in two distinct fora'"); *Piplack* v. *In-N-Out Burgers*, 88 Cal. App. 5th 1281, 1292 (2023) ("Even though *Viking* requires the trial court to bifurcate and order individual PAGA claims to arbitration … , the individual PAGA claims in arbitration remain part of the same lawsuit as the representative claims remaining in court."). The California Supreme Court even endorsed the opinion in this case. *See Adolph*, 532 P.3d at 691. *Adolph*—the decision currently binding on the California judiciary—therefore conflicts with *Viking River* for the same reasons as the decision below.

For the most part, the California Supreme Court framed the question as whether *California law* requires severance. It ruled that "[n]othing in *PAGA* … suggests that arbitrating individual claims effects a severance" and that a different state-law provision—California Code of Civil Procedure § 1281.4—"makes clear that the cause remains one action" despite the parties' arbitration agreement. 532 P.3d at 693 (emphasis added). But Uber argued that the *FAA itself* required severance consistent with the arbitration

agreement. As in *Iskanian*, the California Supreme Court has again elevated California law over the dictates of the FAA.

Unlike the Court of Appeal, the California Supreme Court did propose additional procedures that (it thought) would mitigate preemption concerns. It first suggested that "the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the [California] Code of Civil Procedure." 532 P.3d at 692. It then reasoned that "[i]f the arbitrator determines that [the plaintiff] is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment, would be binding on the court, and [the plaintiff] would continue to have standing to litigate his non-individual claims." *Ibid.* (citing Cal. Civ. Proc. Code § 1287.4). By the same token, "[i]f the arbitrator determines that [the plaintiff] is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and [the plaintiff] could no longer prosecute his non-individual claims due to lack of standing." *Id.* at 692-693.

This stay-and-preclusion mechanism *highlights*, rather than resolves, the underlying preemption violation because there would be no need for a stay if the California courts had fully compelled the individual claim to arbitration. The California Supreme Court recognized that the FAA forbids relitigation of arbitral issues but reasoned that a discretionary stay could eliminate that possibility with respect to the question whether a plaintiff is an aggrieved employee. 532 P.3d at 692-693. Even on its own terms, this proposal

leaves the parties' *federal* rights under the FAA at the mercy of the trial court's *discretion* under *California* statutes. *Id.* at 692. What was once a federal right under *Viking River* is now a docket-management suggestion under *Adolph*.

The California Supreme Court also overlooked that the FAA prevents not only relitigation of arbitrable claims in court but also state-law rules that distort the scope (and thus the stakes) of arbitration. *E.g.*, *Concepcion*, 563 U.S. at 350. *Adolph* violates this distinct strand of FAA preemption. In authorizing courts to use arbitral findings when deciding standing for the non-individual PAGA claims the parties did not agree to arbitrate, the California Supreme Court transformed the formerly individualized arbitration into a wide-ranging contest over all the claims (individual and non-individual)—even though "'[a]rbitration is poorly suited to the higher stakes' of massive-scale disputes of this kind," and even though the "absence of 'multilayered review' in arbitral proceedings 'makes it more likely that errors will go uncorrected.'" *Viking River*, 142 S. Ct. at 1924 (citation omitted). Under California law as it stood before *Viking River* and as it now stands after *Adolph*, the parties cannot agree to submit only their individualized dispute to arbitration and therefore are "effectively coerce[d]" into a "judicial forum." *Ibid.* "This result is"—and remains—"incompatible with the FAA." *Ibid.*

3. To be clear, Uber is not challenging the California courts' interpretation of PAGA. Both the Court of Appeal in this case and the California Supreme Court in *Adolph* held that they were not bound by this Court's interpretation of California Labor Code § 2699. App., *infra*, 19a; *Adolph*, 532 P.3d at 689-690. And that was correct, as far as it goes: "The highest

court of each State, of course, remains 'the final arbiter of what is state law.'" *Montana* v. *Wyoming*, 563 U.S. 368, 377 n.5 (2011) (citation omitted); *see also Viking River*, 142 S. Ct. at 1925 (Sotomayor, J., concurring) ("[I]f this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."). But the Supremacy Clause makes *this Court* the final arbiter of what is *federal* law. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). So while this Court did not have the final say on PAGA standing, the California courts certainly had a duty to follow the FAA holding in *Viking River*. *See*, *e.g.*, *Nitro-Lift Technologies, LLC* v. *Howard*, 568 U.S. 17, 21 (2012) (per curiam).

The California courts were stuck between California law and federal law. Without the California-law requirement that a plaintiff must seek penalties for at least one personally sustained violation in order to recover penalties on behalf of others, the non-individual claim could have proceeded despite the individual claim being compelled to arbitration. Yet the California courts understandably could not ignore the plain text of California Labor Code § 2699. *Viking River*, 142 S. Ct. at 1925. But they balked at following that standing requirement to its logical conclusion: 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." *Ibid.* So the California courts took the path of violating federal law, creating a workaround that effectively resurrected the anti-severability rule that *Viking River* held was preempted.

The California Supreme Court worried that severance under the FAA could "seriously impair the state's ability to collect and distribute civil penalties under

the provisions of [PAGA]." *Adolph*, 532 P.3d at 694. This is not the first time that California courts have defended arbitration-disfavoring rules on policy grounds. *E.g.*, *Concepcion*, 563 U.S. at 340. "But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351.

If the law compels an outcome that makes for bad policy, that is a problem for policymakers, not for courts. Congress of course can revisit the FAA at any time, and "the California Legislature" remains "free to modify the scope of statutory standing under PAGA within state and federal constitutional limits." *Viking River*, 142 S. Ct. at 1925-1926 (Sotomayor, J., concurring). But until such time, the California courts must follow *Viking River*.

II. The Question Presented Is Exceptionally Important.

A. This Court has not hesitated to intervene when state courts have not faithfully applied this Court's decisions or have devised paper-thin grounds to distinguish them. In *Concepcion*, for example, this Court held that the FAA preempts a California judge-made rule prohibiting class-action waivers in arbitration agreements. 563 U.S. at 344. Shortly thereafter, the California Court of Appeal refused to follow *Concepcion* on the theory that the parties had agreed to apply *invalid* California law governing class waivers. Even though the question presented affected only California, this Court again granted review and reaffirmed that "the California Court of Appeal must 'enforc[e]' the arbitration agreement" notwithstanding the presence of a class waiver. *DIRECTV*, 577 U.S. at 59 (citation omitted; alteration in original). This case

similarly involves a creative state-court interpretation of the law that seeks to reinstate a prior result despite this Court's intervening decision.

This Court also has often summarily dealt with state courts that have offered implausible grounds to bypass this Court's decisions, including in the context of the FAA. *E.g.*, *Nitro-Lift*, 568 U.S. at 21-22. When the Oklahoma Court of Criminal Appeals took it upon itself to declare that *Booth* v. *Maryland*, 482 U.S. 496 (1987), was no longer good law, this Court summarily vacated the judgment and ordered the court to apply *Booth* on remand. *Bosse* v. *Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam). And when the Montana Supreme Court held that *Citizens United* v. *FEC*, 558 U.S. 310 (2010), did not apply to Montana elections, this Court summarily reversed, finding "no serious doubt" that the state court must apply *Citizens United* under the Supremacy Clause. *American Tradition Partnership, Inc.* v. *Bullock*, 567 U.S. 516, 516-517 (2012) (per curiam). Summary reversal would be appropriate here given the California Court of Appeal's unwillingness to sever Gregg's individual claim and compel it to an separate arbitral proceeding that does not become a proxy war over the wide-ranging non-individual claims.

B. This Court's review is urgently needed in this particular context as well. For years, *Iskanian* deprived defendants in PAGA actions of their rights under the FAA. This Court rectified that situation in *Viking River*. But barely more than a year later, the California Supreme Court has already revived a version of the anti-severability rule and again coerced defendants to either forgo arbitration or submit to an ar-

bitration whose stakes vastly outstrip the individualized issues and procedures envisioned by the arbitration agreement.

The California courts' workaround to *Viking River* has real-world consequences. From 2004 to 2023, PAGA actions increased by more than 1,000%. *See* Ashley Hoffman, *Private Attorneys General Act*, CalChamber Advocacy (Jan. 2023), https://tinyurl.com/2teu2fu4. And that growth has continued apace. The California Labor Workforce Development Agency expects to receive an all-time high of over 7,000 filed notices this year. *See* Anthony Zaller, *The High Stakes and Risks of California's Private Attorneys General Act (PAGA)*, California Employment Law Report (May 26, 2023), https://tinyurl.com/3m42f6u4. Although proponents defended PAGA based on the agency's opportunity to screen claims, the agency in practice rarely investigates. *See* CABIA Foundation, *California Private Attorneys General Act of 2004: Outcomes and Recommendations* 12 (Mar. 2021), https://tinyurl.com/3pbjem9v.

When the agency fails to investigate (as is typical), the plaintiff automatically gains the ability to litigate on behalf of the State—and demand extortionate settlements from small businesses that benefit neither employees nor the State, but only plaintiffs' lawyers. *See*, *e.g.*, Ken Monroe, *Frivolous PAGA Lawsuits Are Making Some Lawyers Rich, But They Aren't Helping Workers or Employees*, L.A. Times (Dec. 6, 2018), https://tinyurl.com/ycysr6t6; Rich Peters, *SoCal Company Hit with PAGA Lawsuit: 'Purely a Shakedown on Businesses'*, Southern California Record (Feb. 18, 2020), https://tinyurl.com/2p9fmdtm. These suits include numerous claims for alleged technical errors in workers' pay stubs, such as shortening "Company" in

the employer's name to "Co." *See*, *e.g.*, *Mejia* v. *Farmland Mutual Insurance Co.*, 2018 WL 3198006, at *6 (E.D. Cal. June 26, 2018). If these suits ever reach trial, they become unwieldy for courts and parties given the huge number of workers at issue. *See*, *e.g.*, *Wesson* v. *Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746, 773 (2021) (PAGA action involving only 346 workers "would require a trial spanning several years with many hundreds of witnesses").

Arbitration is cheaper for the parties and reduces burdens on the judicial system. *See* U.S. Dep't of Justice, *Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria* (Nov. 12, 2020), https://tinyurl.com/2x3mz287. And studies show that arbitration provides consumers and employees with a better chance to win, higher awards, and quicker outcomes. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* 4-15 (Mar. 2022), https://tinyurl.com/2r2uer2b.

The decisions below and in *Adolph* not only deprive the parties and society of these benefits, but also create a roadmap to evade the FAA that could be reproduced in other States. Shortly before *Viking River*, nearly half a dozen state legislatures introduced bills to authorize actions similar in structure to PAGA. *See* Charles Thompson et al., *Employers Must Brace for PAGA-Like Bills Across US*, Law360 (June 18, 2021), https://tinyurl.com/3fntcmse. Left untouched, California's post-*Viking River* decisions provide a path for States to once again "coerc[e]" parties "into giving up a right they enjoy under the FAA." *Viking River*, 142 S. Ct. at 1924.

California has long been a hotbed for hostility to arbitration. This Court's FAA preemption decisions

are a roll call of since-invalidated California statutes and judge-made rules. *See*, *e.g.*, *Viking River*, 142 S. Ct. at 1923-1924; *Lamps Plus,* 139 S. Ct. at 1422; *DIRECTV*, 577 U.S. at 58; *Concepcion*, 563 U.S. at 340; *Preston*, 552 U.S. at 359; *Perry*, 482 U.S. at 491; *Southland*, 465 U.S. at 10. If the California courts are able to roll back *Viking River*, that may embolden further incursions on the FAA at a time when the resistance to enforcing arbitration agreements that motivated its enactment a century ago has come back with a vengeance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 12, 2023