No. 23-645

IN THE

Supreme Court of the United States

UBER TECHNOLOGIES, INC., ET AL.,

Petitioners,

v.

JOHNATHON GREGG,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Court of Appeal correctly held, as a matter of state law, that an employee who has standing under California's Private Attorneys General Act to raise both individual claims based on Labor Code violations he has suffered and non-individual claims based on Labor Code violations others have suffered retains standing to raise his non-individual claims after his individual claims are submitted to arbitration.

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INTRODUCTION

California's Private Attorneys General Act of 2004 (PAGA) authorizes a worker (an "aggrieved employee") to assert claims on the state's behalf, based on an employer's alleged violations of certain sections of the Labor Code. Specifically, PAGA confers standing on the employee to file an enforcement action that seeks to recover for the state civil penalties for both "individual" Code violations, *i.e.*, those that the employer has committed against the plaintiff, and "non-individual" violations, *i.e.*, those that the employer has 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, *et seq.*, does *not* preempt a state-law rule barring enforcement of a pre-dispute agreement that purports to waive an employee's right to pursue individual or non-individual PAGA claims on behalf of the state. At the same time, the Court held that the FAA *does* require enforcement of an agreement to arbitrate the employee's individual PAGA claims, even if "bifurcated proceedings" are needed to resolve both the individual claims in arbitration and the remaining non-individual claims in court. 596 U.S. at 660.

Here, petitioners Uber Technologies, Inc. and Rasier-CA, LLC (together, Uber) seek review of a California Court of Appeal decision that applies *Viking River*'s federal holdings and then answers a residual question of state law. The court first held that a PAGA waiver that Uber included in its employment contract with respondent Johnathon Gregg was unenforceable under the state-law rule

upheld in *Viking River*. Then, consistent with *Viking River*, the court enforced the parties' agreement that, in the event that the waiver could not lawfully be enforced, Gregg would submit his individual claim to arbitration and resolve his non-individual claims in court. Finally, the court addressed the state-law question whether PAGA confers standing on Gregg to pursue his non-individual claims in court even though his individual claim will be arbitrated. After examining PAGA's text and prior state-court decisions applying the statute in various contexts, the court held that Gregg retains statutory standing as a matter of state law.

The state court's holding on a state-law standing issue does not warrant review. Although Uber complains that *Viking River* reached a different conclusion on the issue, Uber also concedes that the state court was "not bound" by this aspect of *Viking River*. Pet. 25. Meanwhile, Uber's claim that the state court's holding on statutory standing somehow "repudiat[es]" the *federal* holdings from *Viking River* that the state court expressly applied is meritless. Pet. 4. *Viking River* does not hold that the FAA demands enforcement of a contract term that purports to "alter or abridge substantive rights"; rather, the FAA requires courts to enforce an arbitration agreement governing "how those rights will be processed." 596 U.S. at 653. The state court here did exactly what *Viking River* held the FAA requires by severing the unlawful PAGA waiver and then enforcing the terms of the arbitration agreement that Uber drafted. If anything, it is Uber, and not the state court, that flouts *Viking River*: In arguing that the FAA requires the enforcement of an agreement to waive an employee's non-individual

PAGA claims, Uber disregards *Viking River*'s holding that the FAA requires no such thing.

Moreover, Uber does not contend that the decision below creates a conflict with any other lower-court decisions applying the FAA or *Viking River*. Given the paucity of state enforcement schemes that resemble PAGA, it is unlikely that the issue whether the FAA preempts state-law standing rules like the one announced below will recur. And Uber has waived that issue in any event. Below, Uber argued that state law stripped Gregg of standing to pursue his non-individual claims in court; it did not argue that the *FAA* preempts an interpretation of state law that would permit Gregg to retain standing. The state court accordingly did not address preemption.

This Court should deny review.

STATEMENT

Legal Background

1. California's legislature enacted PAGA to address two issues that had contributed to under-enforcement of the state's Labor Code. First, many Code provisions were enforceable only under the criminal law, and companies that violated those provisions were rarely prosecuted, because district attorneys were reluctant to divert resources away from other priorities, such as violent crime. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 146 (Cal. 2014). Second, even when a Code provision allowed for a civil penalty, California's civil enforcement authorities lacked resources to pursue violations with sufficient regularity to promote maximum compliance with the state's labor laws. *Id.*

To address the first of these problems, the legislature created civil penalties for Code violations that had previously lacked them. *Id.*; *see* Cal. Labor Code § 2699(f). And to address the scarcity of enforcement resources, PAGA authorizes "aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations." *Arias v. Superior Ct.*, 209 P.3d 923, 929 (Cal. 2009). Specifically, PAGA provides that any civil penalty that can be "assessed and collected" by California's Labor and Workforce Development Agency (LWDA) for a Code violation "may, as an alternative, be recovered through a civil action brought by an aggrieved employee," Cal. Labor Code § 2699(a), defined 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). In a private-plaintiff PAGA suit, "[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(i).

Because a PAGA plaintiff "acts as 'the proxy or agent of the state's labor law enforcement agencies' and 'represents the same legal right and interest as' those agencies," the plaintiff has standing to seek "penalties for violations involving employees other than the PAGA litigant herself." *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243–44 (Cal. 2019) (quoting *Iskanian*, 327 P.3d at 147); *see* Cal. Labor Code § 2699(a) (authorizing an aggrieved employee to seek penalties for the state "on behalf of himself or herself and other current or former employees"). An employee who has "suffered a single violation" qualifies as "aggrieved" under PAGA and accordingly

can "use that violation as a gateway" to bring claims on the state's behalf against the employer for further violations the employer has committed against others. *Viking River*, 596 U.S. at 647.

2. About a decade after PAGA's enactment, the California Supreme Court held in *Iskanian* 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 contrary to public policy" and thus unenforceable. 327 P.3d at 133. Emphasizing that "the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency," the court concluded that "an agreement by employees to waive their right to bring a PAGA action" would impermissibly "serve[] to disable one of the primary mechanisms for enforcing the Labor Code." *Id.* at 149. Moreover, the court went on, even a limited waiver that reserves an employee's right to seek arbitration of "PAGA claims for Labor Code violations that [the] employee suffered" personally but that bars the employee from pursuing claims based on violations that the employer committed against others unlawfully "frustrates the PAGA's objectives." *Id.*

Iskanian acknowledged that, under the FAA, an arbitration agreement "shall be 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 an arbitration provision that purports to waive an employee's right to bring PAGA claims based on Labor Code violations suffered by others.

Id. at 149. *Iskanian* reasoned that nothing in the FAA can be read to "curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties for Labor Code violations traditionally prosecuted by the state." *Id.* at 152.

3. This Court subsequently confirmed in *Viking River* that the FAA does not preempt California's rule against 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. The Court acknowledged that PAGA "might amplify [an employer's] defense risks" by conferring "a potentially vast number of claims" on an aggrieved employee who is entitled under the law to seek civil penalties on behalf of the state for Labor Code violations the employer inflicted on others. *Id.* at 656. But although a PAGA plaintiff might be able to assert a large number of *substantive* claims against an employer, this Court emphasized that the FAA preempts only those state-law rules that "tak[e] the individualized and informal *procedures* characteristic of traditional arbitration off the table." *Id.* And PAGA, the Court recognized, creates no "procedural mechanism at odds with arbitration's basic forum." *Id.* Unlike class-action proceedings, which require an adjudicator to resolve the claims of multiple parties (including absent parties) based on a representative plaintiff's claims, *see id.* at 654–55, PAGA proceedings in which a plaintiff raises multiple claims on behalf of the state are the sort of "single-agent, single-principal representative suits" that this Court has never found "inconsistent [with] the norm of bilateral arbitration," *id.* at 657. Accordingly, the Court held

that California's rule against enforcing a contractual agreement to waive the right to initiate PAGA proceedings in any forum does not put the contracting parties to the "unacceptable choice between being compelled to arbitrate using procedures at odds with arbitration's traditional form and forgoing arbitration altogether." *Id.* at 651. The FAA thus does not preempt the rule. *Id.* at 656–57.

Separately, *Viking River* held that the FAA *does* preempt a state-law procedural rule that had arisen in the PAGA context following *Iskanian*. Prior to *Viking River*, some California courts read *Iskanian* to bar parties from agreeing to divide an employee's individual PAGA claims (*i.e.*, those arising from Labor Code violations experienced by that employee) from the employee's non-individual PAGA claims (*i.e.*, those arising from Labor Code violations experienced by others) and to arbitrate only the former. *See id.* at 646–47. This Court held, however, 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*, 139 S. Ct. 1407, 1416 (2019)). Under the FAA, this Court held, 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.

Turning to the specific arbitration agreement before it, *Viking River* held that it "remain[ed] invalid" under non-preempted state law because the state courts had construed it to include "a wholesale waiver of PAGA claims" in any forum. *Id.* at 662. The Court then construed a severability clause contained

in the agreement to require arbitration of individual PAGA claims and to foreclose arbitration of non-individual PAGA claims in the event that the waiver of PAGA claims altogether was unenforceable. *See id.* Because the Court had held that the FAA requires enforcement of such an agreement to separate individual and non-individual PAGA claims and to submit the former to arbitration, it concluded by considering the state-law consequences of such an agreement. *Id.* at 662–63. As the Court read California law, "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," such that employees who have agreed to arbitrate their individual claims lack statutory standing to pursue their non-individual claims in court. *Id.* at 663. Justice Sotomayor noted in concurrence, however, that "if this Court's understanding of state law [was] wrong, California courts, in an appropriate case, [would] have the last word." *Id.* at 664 (Sotomayor, J., concurring).

4. The California Supreme Court has since made clear that *Viking River*'s understanding of state law was not correct. In *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (Cal. 2023), the California Supreme Court held that "an aggrieved employee who has been compelled to arbitrate claims under PAGA that are 'premised on Labor Code violations actually sustained by' the plaintiff maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' in court." *Id.* at 686 (citations omitted; quoting *Viking River*, 596 U.S. at 648–49). Looking first to statutory text, the court noted that PAGA sets out "only two requirements for … standing": that the plaintiff has

been "employed by the alleged violator" and is someone "against whom one or more of the alleged violations was committed." *Id.* at 690 (quoting *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1128–29 (Cal. 2020)). The court explained that "[a]rbitrating a PAGA plaintiff's individual claim does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee" who meets PAGA's express standing 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 settled his individual claims against his employer did not thereby lose statutory standing to pursue PAGA claims. *Id.* Second, the Court approved a state court of appeal's holding in *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924 (2021), that an employee did not lose standing to assert PAGA claims where her individual 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 becomes 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" cannot "strip an aggrieved employee of the ability to pursue a PAGA claim," *id.* at 690.

In *Adolph*, the employer argued that allowing an employee to pursue non-individual PAGA claims in court when the employee had agreed to pursue individual PAGA claims in arbitration would permit an employee to "relitigate whether he is an aggrieved

employee in court to establish standing even if he has agreed to resolve that issue in arbitration as part of his individual PAGA claim." *Id.* at 692. The court, though, saw "no basis for [this] concern" because "*Viking River* makes clear that … no such relitigation may occur." *Id.* at 693. Instead, the court explained, the employee's non-individual claims could be stayed in court while arbitration proceeded on any individual claims; once the arbitrable claims reached final judgment, the Court went on, the arbitrator's findings would bind the court in resolving the remaining claims. *Id.* at 692–93.

Factual and Procedural Background

1. Johnathon Gregg signed up to work as a driver for Uber in October 2016. Pet. App. 6a. In the course of doing so, he assented to Uber's Technology Services Agreement. *Id.* With limited exceptions, the Agreement provided that any employment disputes between Gregg and Uber that "otherwise would [have] be[en] resolved in a court of law" would instead "be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not … by way of class, collective, or representative action." *Id.* at 5a (quoting the Agreement). The Agreement also required Gregg, "to the extent permitted by law," to agree that he would not "bring a representative action on behalf of others under [PAGA] in any court or in arbitration" and that any PAGA claims would "be resolved in arbitration on an individual basis only (i.e., to resolve whether [he] ha[d] personally been aggrieved or subject to any violations of law)." *Id.* at 6a (first alteration in original; quoting the Agreement). But "to the extent waiver" of a PAGA claim "brought on behalf of others … [was] deemed unenforceable by a

court of competent jurisdiction," the Agreement provided that the claim would "not be subject to arbitration." *Id.* at 13a (quoting the Agreement).

In 2018, Gregg filed a lawsuit against Uber in California state court, alleging that Uber misclassified him and his fellow drivers as independent contractors rather than employees and that numerous Labor Code violations resulted from this misclassification. *Id.* at 6a–7a. The sole form of relief requested in the operative complaint is the imposition of civil penalties on Uber pursuant to PAGA. *Id.* at 7a.

Uber moved to compel arbitration, arguing in relevant part that the Agreement required Gregg to submit his individual PAGA claim to arbitration and barred him from pursuing non-individual PAGA claims. *Id.* The trial court denied the motion, *id.* at 53a, and the court of appeal affirmed, relying on *Iskanian*'s rule against PAGA waivers and the then-prevailing rule among California courts that PAGA actions could not be split into arbitrable and non-arbitrable components, *id.* at 46a–51a. The California Supreme Court denied review, *id.* at 39a, and Uber filed a petition for certiorari in this Court. *See* U.S. No. 21-453. The Court held the petition pending its decision in *Viking River*. After issuing that decision, the Court granted Uber's petition, vacated the state court of appeal's decision, and remanded for further consideration. Pet. App. 29a.

2. On remand, the parties submitted briefing to the state court of appeal on *Viking River*'s effect on this case. In its brief, Uber took the view that "[t]he FAA mandates that Gregg's individual claim be compelled to arbitration, and *under state law*, Gregg

lacks standing to bring non-individual PAGA claims." Defs.' Supp. Letter Br. at 4 (Cal. Ct. App. Oct. 3, 2022) (hereafter, Uber Supp. Br.) (emphasis added). A contrary holding, Uber claimed, would contravene PAGA's statutory text and purpose. *Id.* Uber also stated that allowing Gregg to retain standing to pursue his non-individual claims in court would be "unworkable" because those claims shared certain common issues with his arbitrable individual claim and allowing Gregg to litigate those common issues in court would "transgress the FAA." *Id.* at 5.

The state court of appeal reversed in part and affirmed in part the trial court's denial of Uber's motion to compel arbitration. Pet. App. 4a–5a. To begin, the court observed that *Viking River* "upheld *Iskanian*'s rule 'prevent[ing] parties from waiving representative standing to bring PAGA claims in a judicial or arbitral forum'" and that the Agreement term that required Gregg to "completely forego his statutory right to seek civil penalties for Labor Code violations committed against other employees, whether in court or in arbitration," was therefore invalid under state law. *Id.* at 12a (alteration in original; quoting *Viking River*, 596 U.S. at 649); *see id.* at 12a n.3 (noting that Uber did "not argue or otherwise suggest" that this term was "valid and enforceable … post-*Viking River*"). And, the court went on, the Agreement expressly stated that Gregg's non-individual claims "must be litigated in a civil court of competent jurisdiction and not in arbitration" if, as was the case, his waiver of those claims was unenforceable. *Id.* at 13a (quoting the Agreement).

The court accepted Uber's argument that the contract term requiring judicial resolution of Gregg's

non-individual PAGA claims neither "exclude[d] Gregg's *individual* PAGA claim from the Arbitration Provision's scope, nor … mandate[d] its resolution in court." *Id.* at 14a (emphasis added). And the court recognized that "current law" after *Viking River* "permits a PAGA lawsuit to be split into arbitrable and non-arbitrable components, and does not require it to be treated as an indivisible unit." *Id.* at 15a–16a. Accordingly, the court held, "Gregg must resolve his individual PAGA claim in arbitration," while under the plain terms of the Agreement "his non-individual claims are not subject to arbitration and must be litigated in court." *Id.* at 18a.

Lastly, the court held that Gregg's non-individual claims should be stayed rather than dismissed. *Id.* at 27a. In an analysis similar to the one that the California Supreme Court would later conduct in *Adolph*, the court examined PAGA's text, along with the *Kim* and *Johnson* decisions, and held that PAGA plaintiffs who arbitrate their individual claims do not lose standing to litigate their non-individual claims in court. *Id.* at 20a–22a. The court acknowledged that *Viking River* had interpreted PAGA's standing requirement differently. *Id.* at 25a (citing *Viking River*, 596 U.S. at 663). But the court observed that a federal court's interpretation of state law does not bind state courts. *Id.* at 19a. The court also rejected Uber's argument that recognizing Gregg's standing to pursue his non-individual claims in court would undermine the FAA by permitting Gregg to litigate issues that he had agreed to resolve in arbitration. *See id.* at 26a–27a. Because Gregg's non-individual claims would be stayed in court while his individual claim proceeded in arbitration, Uber's concern that it might need to litigate identical issues "simultan-

eously in both forums" was "wholly unsupported by any explanation grounded in law or fact." *Id.* at 26a. Meanwhile, Uber's view that bifurcated proceedings could require it to "relitigate" certain issues in court following the arbitration was "premature at best, and incorrect at worst," given that principles of issue preclusion could well require the court to accept the arbitrator's findings. *Id.* The court of appeal accordingly remanded for the trial court to enter an order compelling Gregg to arbitrate his individual claim and staying his non-individual claims in the meantime. *Id.* at 27a.

3. Uber petitioned the California Supreme Court for review. The court granted the petition but deferred action pending its decision in *Adolph*. Pet. App. 2a. After issuing the *Adolph* decision, the California Supreme Court dismissed review in this case. *Id.* at 1a.

REASONS FOR DENYING THE WRIT

I. Uber seeks review of a state-law ruling.

Uber's question presented asks this Court to decide whether the FAA "require[s] the complete severance of arbitrable individual PAGA claims from non-individual PAGA claims, with the individual PAGA claims committed to a separate proceeding." Pet. i. Where the parties have agreed to arbitrate individual PAGA claims and to litigate non-individual PAGA claims in court, however, *Viking River* makes clear that the FAA requires courts to give effect to that agreement, "even if bifurcated proceedings are an inevitable result." 596 U.S. at 660.

The decision below is wholly consistent with *Viking River*'s holding on this issue. The decision echoes *Viking River*'s conclusion that the FAA

preempts a state-law rule that would require contracting parties to treat individual and non-individual PAGA claims as "indivisible" and incapable of being "split." Pet. App. 16a. Applying that holding, the decision enforces the terms of Uber's Agreement and commits Gregg's individual and non-individual PAGA claims to separate proceedings: the former to arbitration and the latter to subsequent litigation. *See id.* at 27a.

Uber nonetheless claims that the decision below "repudiat[es] … *Viking River*'s severability holding" by allowing Gregg's individual claims to "remain in court for the purpose of establishing statutory standing to pursue the non-individual claims." Pet. 4. Uber's description mischaracterizes the decision, which directs the trial court to "enter an order compelling Gregg to arbitrate his individual claim," Pet. App. 27a, such that no part of that claim "remain[s] in court" for judicial resolution, Pet. 4.

Uber's actual disagreement, then, is over the state court of appeal's holding that PAGA confers statutory standing on an aggrieved employee to pursue non-individual claims in court after the employee's individual claims no longer remain in court. That holding, which the state court based on PAGA's text and state-law precedent interpreting PAGA outside the arbitration context, resolves an issue of *state* law.

This Court has long held that state courts are the ultimate arbiters of state-law issues, including issues of statutory interpretation. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 167 (1977); *Green v. Neal's Lessee*, 31 U.S. 291, 298 (1832). Out of "[r]espect for the independence of state courts" and to avoid "rendering

advisory opinions," the Court has thus "refus[ed] to decide cases" where state law provides the basis for the outcome below. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Here, the state court interpreted a state statute and arrived at a holding on statutory standing that rested entirely on state law. *Cf. Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 196–97 (2017) (explaining that the issue whether a plaintiff has statutory standing to raise a cause of action is resolved by interpreting the statute that creates the cause of action). Moreover, the California Supreme Court's *Adolph* decision has definitively pronounced the state-law holding below to be correct. *See Adolph*, 532 P.3d at 691 (citing the Court of Appeal's decision in this case with approval). The views of California's high court "with respect to state law are binding on the federal courts," including on this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam). Indeed, review may well exceed this Court's jurisdiction. *See Mo. Pac. Ry. Co. v. McGrew Coal Co.*, 256 U.S. 134, 135 (1921) (mem.) (noting that this Court has "no jurisdiction to review" state-law issues that "raise[] no substantial federal question").

To be sure, *Viking River* stated an interpretation of "PAGA's standing requirement" that differs from the interpretation adopted by the state court of appeal below and by the California Supreme Court in *Adolph*. *See Viking River*, 596 U.S. at 663. California's courts, however, are entitled to "have the last word" on California law. *Id.* at 664 (Sotomayor, J., concurring). Indeed, even Uber admits that the state court was "correct" that it was "not bound" by *Viking River*'s discussion of PAGA standing, Pet. 25, which Uber concedes is an issue "under California law," *id.* at 10.

II. The FAA does not preempt the state court's state-law holding.

A. The decision below complies with *Viking River* and this Court's other FAA rulings.

Disclaiming any intent to "challeng[e] the California courts' interpretation of PAGA," Uber claims that the state court of appeal's state-law holding presents a federal question that merits review because the holding supposedly conflicts with *Viking River*'s pronouncements on "*federal* law." Pet. 25–26. Specifically, Uber claims that *Viking River* held that the FAA "requir[es] the severance of arbitrable claims and non-arbitrable claims *into separate actions*" and that the decision below flouted this requirement. *Id.* at 21 (emphasis added). Nothing in *Viking River* or any other decision of this Court, however, recognizes such a requirement.

Although Uber refers repeatedly to *Viking River*'s "severance" requirement, *see, e.g.*, *id.* at 19, *Viking River* neither uses that term nor opines on what FAA-mandated "severance" would look like. Rather, in holding that the FAA preempts a state-law "prohibition on contractual division of PAGA actions into constituent claims," *Viking River* emphasizes "the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate.'" 596 U.S. at 659 (quoting *Lamps Plus*, 139 S. Ct. at 1416). In other words, it recognizes that the FAA ensures that parties can elect to structure their dispute-resolution processes as they wish, including by resort to "bifurcated proceedings." *Id.* at 660. *Viking River* did *not*, however, hold that the FAA requires any particular substantive legal

consequences to flow from the parties' decision to bifurcate their claims. To the contrary, as Uber concedes, *Viking River* looked to "California law," not the FAA, to discern those consequences. Pet. 10; *see Viking River*, 596 U.S. at 663 (consulting "PAGA's standing requirement" to determine how a court should handle non-individual claims remaining after individual claims have been sent to arbitration).

As explained above, *supra* at 14–15, the state court followed *Viking River* by enforcing the Agreement's demand that Gregg's individual claim be arbitrated and that his non-individual claims be resolved in court. Uber makes much of the state court's statement that *Viking River* did not hold that, "under the FAA, [Gregg's] individual claim must be 'severed' from his nonindividual claims." Pet. 21–22 (quoting Pet. App. 24a–25a). But the court made this statement in response to Uber's contention that the form of "severance" required by *Viking River* would render Gregg's arbitrable individual PAGA claims a legal nullity under state law for purposes of assessing his statutory standing to pursue his non-individual PAGA claims. Pet. App. 24a. Neither *Viking River* nor the other cases on which Uber relies, *see* Pet. 19–21, support Uber's contention. *See Lamps Plus*, 139 S. Ct. at 1416 (explaining that "the task for courts" under the FAA is "to give effect to the intent of the parties" (citation omitted)); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (stating that the FAA requires a court to divide "arbitrable" from "nonarbitrable claims" and compel arbitration of the former notwithstanding the possibility of "separate proceedings in different forums" (citation omitted)); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (reiterating "the principle that a

party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that courts must "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (recognizing that courts must "give effect to an arbitration agreement," even if it means that "two [related] disputes will be resolved separately").

Indeed, far from requiring arbitrable claims and non-arbitrable claims to be consigned to entirely "separate actions," Pet. 21, the FAA expressly contemplates that a single suit filed in court might contain arbitrable and non-arbitrable elements. *See* 9 U.S.C. § 3. A court complies with the FAA by compelling arbitration of a suit's arbitrable issues and staying resolution of other issues, *see id.*, exactly as the state court did here. *See also Viking River*, 596 U.S. at 665 (Thomas, J., dissenting) ("continu[ing] to adhere to the view that the [FAA] does not apply to proceedings in state courts" in the first place).

B. The decision below poses no obstacle to the FAA's objectives.

Unable to point to anything in this Court's FAA precedents that conflicts with the state court's state-law holding, Uber suggests that the holding below is preempted by the FAA because it "nullifie[s]" contracting parties' "right to decide which issues are arbitrated and which issues are litigated." Pet. 22; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011) (holding that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," which

include "ensur[ing] that private arbitration agreements are enforced according to their terms" (citation omitted)). That suggestion is belied by the fact that the state court *did* enforce Uber's Agreement, which specifies that individual claims will be arbitrated and that non-individual claims will be litigated. *See* Pet. App. 5a–6a. Nothing in the decision suggests that the state court would have refused to enforce a different arrangement had the parties agreed to one.

Nonetheless, Uber contends that the bifurcated proceedings required by the Agreement that it drafted will "interfere[]" with arbitration because certain "key questions" are common to both the arbitrable individual claim and the non-individual claims that will be heard in court. Pet. 22. The state court, though, addressed the risk of "simultaneous[]" proceedings by granting the parties' request to stay Gregg's non-individual claims while his individual claims are being arbitrated. Pet. App. 26a–27a. Uber views this solution as insufficient because a stay is discretionary. Pet. 24–25. But Uber concedes that the California Supreme Court has "recognized that the FAA forbids relitigation of arbitral issues" in court. *Id.* at 24; *see Adolph*, 532 P.3d at 693 (reading *Viking River* to "make[] clear" that, under the FAA, "no such relitigation may occur"); *Johnson v. Lowe's Home Ctrs., LLC*, — F.4th —, 2024 WL 542830, at *4 (9th Cir. Feb. 12, 2024) ("There is nothing in *Adolph* that is inconsistent with the federal law articulated in *Viking River*."). The remote possibility that a different California court, unlike the court in this case, might someday use its docket-management authority to interfere with arbitration in direct contravention of the California Supreme Court's admonitions is not a reason to grant review.

Uber also claims that the Court of Appeal's state-law holding impermissibly "distort[s] the scope (and thus the stakes) of arbitration" because some of the issues decided in arbitration while resolving Gregg's individual claim could have preclusive effect and so influence the subsequent resolution of Gregg's non-individual claims in court. Pet. 25. In Uber's view, this possibility means that parties to a PAGA action "cannot agree to submit only their individualized dispute to arbitration and … are 'effectively coerce[d]' into a 'judicial forum.'" *Id.* (alteration in original; quoting *Viking River*, 596 U.S. at 662).

Uber's argument is misguided. Unlike the "joinder rule" that this Court held to be preempted in *Viking River*, the standing rule announced below does not "defeat the ability of parties to control which claims are subject to arbitration" by letting a party unilaterally "superadd new claims" to the arbitration without the other party's consent. *Viking River*, 596 U.S. at 660–61. Again, the court below enforced Uber's Agreement according to its terms: After severing the unlawful PAGA waiver, it ordered that Gregg's non-individual claims be "litigated in a civil court of competent jurisdiction and not in arbitration." Pet. App. 13a (quoting the Agreement). Although the resolution of various issues in arbitration under the Agreement could impact the subsequent litigation, Pet. 25, *Viking River* "do[es] not hold that the FAA allows parties to contract out of *anything* that might amplify defense risks." *Viking River*, 596 U.S. at 656. And that PAGA requires resolution of issues with potentially high stakes is a function of California's policy decision to allow an aggrieved employee to "represent a principal with a potentially vast number of claims." *Id. Viking River*

held that this policy decision is consistent with the FAA. *Id.* at 649–59; *see id.* at 662–63 (explaining that "[u]nder [*Viking River*'s FAA] holding," non-individual PAGA claims "may not be dismissed simply because they are 'representative'"). And the decision below likewise honors the FAA by preserving parties' ability to decide for themselves which issues, of whatever stakes, are best resolved using "the individualized and informal *procedures* characteristic of traditional arbitration." *Id.* at 656.

Finally, Uber's assertions that the decision below reflects "hostility to arbitration," Pet. 30, and is an attempt to chart a "workaround to *Viking River*," *id.* at 29, are baseless. The state court's holding on statutory standing does not "apply only to arbitration or … derive [its] 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 *Concepcion*, 563 U.S. at 339). To the contrary, the state court based its holding on a close reading of statutory text and prior California precedents addressing PAGA standing issues outside the arbitration context. Uber offers no reason to believe that the state court below—and the other state courts, including the California Supreme Court, that have reached the same holding on statutory standing following similar analyses—did not apply the proper legal principles in good faith.

C. Uber's position is inconsistent with *Viking River*.

Reduced to its essence, Uber's position is that the FAA guarantees that an employer can avoid facing *non-individual* PAGA claims by requiring its employees to agree to arbitrate *individual* PAGA

claims. This Court had the opportunity to hold as much in *Viking River*. Instead, it did the opposite.

The employer in *Viking River*, like Uber 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 rule that the non-individual claims in *Viking River* should be dismissed, it based that holding—as Uber concedes, Pet. 10—on its understanding of *state* law.

Moreover, Uber's argument disregards *Viking River*'s recognition that, although "PAGA plaintiffs represent a principal with a potentially vast number of claims at its disposal," resolution of those claims is not "inconsistent with arbitration's traditionally individualized form." 596 U.S. at 655–56. Indeed, Uber contends that *Viking River* impliedly accepted the opposite proposition: that a PAGA plaintiff's ability to assert non-individual claims transforms a PAGA action into a "massive-scale dispute[]" that cannot be reconciled with contracting parties' right under the FAA to choose arbitration. Pet. 25 (quoting *Viking River*, 596 U.S. at 662). But *Viking River* explained that an enforcement scheme that "might amplify defense risks" by authorizing a plaintiff to "represent[] a single principal … that has a

multitude of claims" does not conflict with the FAA unless it "tak[es] the individualized and informal *procedures* characteristic of traditional arbitration off the table." 596 U.S. at 655–56. The Court further stated that "[r]equiring parties to decide whether to arbitrate or litigate a single-agent, single-principal action" like a PAGA action does not impermissibly coerce parties into abandoning arbitral proceedings. *Id.* at 657. Indeed, this Court's discussion of why it believed that *California* law barred the *Viking River* plaintiff from pursuing non-individual claims in court after her individual claims had gone to arbitration, *id.* at 662–63, would have been extraneous had this Court's *federal* holding resolved the issue.

At bottom, Uber's gripe with the state court's decision is not that the decision strips Uber of the choice whether to defend against Gregg's non-individual PAGA claims in court or in arbitration. Uber's gripe is that the decision does not relieve Uber of the obligation to defend against those claims altogether. *See* Pet. 29–30 (making policy arguments against PAGA litigation generally). Two years ago, *Viking River* held that the FAA does not entitle Uber to the relief it seeks, and Uber offers no compelling reason for this Court to revisit that holding now.

III. The FAA preemption issue on which Uber seeks review has not split the lower courts, is unlikely to recur, and was waived below.

Other than its (meritless) argument that the state court "refused to faithfully apply *Viking River*," Pet. 17, Uber offers no reason why the decision below warrants review. Uber does not contend that the decision conflicts with federal appellate or state high-court decisions applying FAA preemption principles

in a similar context. And Uber does not claim that the decision below articulated an incorrect legal standard. Rather, its argument rests on the notion that the state court misapplied properly stated rules of law to the circumstances of this case. This Court "rarely grant[s]" certiorari to address asserted errors of this sort. S. Ct. R. 10.

Uber's inability to identify decisions that conflict with the decision below underscores that the state court's decision analyzes "unique features" of a specific state-law statutory enforcement mechanism. *Viking River*, 596 U.S. at 648. Uber has identified no other statutory regimes that are similar to PAGA and that are likely to present similar questions about the interplay between the FAA and statutory standing. At most, Uber claims that "nearly half a dozen state legislatures" (*i.e.*, fewer than six) have "introduced bills to authorize actions similar in structure to PAGA." Pet. 30. But it remains to be seen whether any of those bills will become law, whether the enacted version of any law will resemble PAGA in how it provides standing to aggrieved individuals or in any other relevant respect, and whether any court will apply the FAA to an enacted law in a way that diverges from the state court's approach here. The mere possibility that all of these contingencies could arise in the future is no reason to grant review.

Finally, but importantly, Uber failed to argue below that the FAA preempts a state-law rule that recognizes a party's standing to raise non-individual PAGA claims in court despite having agreed to arbitrate individual PAGA claims. Rather, Uber argued that Gregg lacked standing "under state law" to pursue his non-individual claims—without

arguing that *federal* law would preempt a holding to the contrary. Uber Supp. Br. 4. Uber's sole suggestion of such an argument was one sentence in the portion of its brief contending that recognizing Gregg's standing under state law would be "unworkable," in which Uber asserted that it would "transgress the FAA" if Gregg were "permitted to litigate … in court" certain issues that are common to both his individual and non-individual claims. *Id.* at 5. The state court "express[ed] no opinion on the matter" and found no "need [to] address it" because, under the court's ruling, Gregg's non-individual claims would be stayed pending the arbitration of his individual claims, and it would remain open to Uber to argue that issue preclusion barred Gregg from relitigating common issues in court following the arbitration. Pet. App. 26a–27a; *see Adolph*, 532 P.3d at 693 (holding that *Viking River* bars relitigation of common issues). And rather than making an argument under the FAA, Uber argued that because the FAA requires Gregg's individual claim to be "severed from his non-individual claims" and (as all now agree) resolved in "a separate proceeding in a different forum," *PAGA* requires dismissal of his non-individual claims. Uber Supp. Br. 5. Uber nowhere suggested that the *FAA* would preempt the recognition of Gregg's standing for reasons independent of Uber's workability argument.

Under California's procedural rules, Uber has waived its federal preemption argument by failing to present it to the state court of appeal. *See Inter-insurance Exchange of the Auto. Club of S. Cal. v. Collins*, 30 Cal. App. 4th 1445, 1448 (1994). And to the extent that Uber raised a version of such an argument in its petition for review in the California

Supreme Court, any such belated effort was insufficient to preserve the issue. *Lopez v. Ledesma*, 505 P.3d 212, 223 (Cal. 2022) ("As a matter of policy, we normally do not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal." (citation omitted)). Uber's failure to make its FAA argument below provides yet another reason to deny review.

CONCLUSION

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

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