No. S274671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERICK ADOLPH,

Petitioner-Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant-Appellant.

On Appeal from the Court of Appeal,
Fourth Appellate District, Division Three,
Case Nos. G059860, G060198

Orange County Superior Court
Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLANT

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable Chief Justice of the California Supreme Court:

Pursuant to Rule 8.520(f) of the California Rules of Court, the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") respectfully applies for leave to file an *amicus curiae* in support of Defendant-Appellant Uber Technologies, Inc.[1]

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small business association representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents approximately 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employees 10 people and reports gross sales of about $500,000 a year. NFIB's membership reflects American small business.

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[1] The proposed brief was authored in whole by counsel for NFIB Legal Center. No other counsel or party made a monetary contribution intended to fund the briefs preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact the small business community. NFIB Legal Center files in this case because it raises an important issue for small business owners. The proposed amicus curiae brief makes two key points:

First, the rationale of the court of appeal decision fundamentally conflicts with the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) and must be clarified.

Second, arbitration is beneficial to employees, employers, and the courts, and therefore in determining whether a person whose individual claim is subject to arbitration maintains standing in court for representative PAGA claims, the court should adopt a broad and liberal approach to arbitration for all PAGA claims.

Accordingly, NFIB Legal Center respectfully urges this Court to grant this application and file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: December 8, 2022

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AMICUS CURIAE BRIEF

INTEREST OF AMICUS CURIAE

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

SUMMARY OF ARGUMENT

This case presents a watershed moment for the California court system. After the Supreme Court's decision last term in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), striking down the PAGA indivisibility rule of *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), this Court must clarify the application of representative PAGA claims where valid arbitration agreements usher individual claims to arbitration. Specifically, it must determine whether an "aggrieved employee" maintains standing to pursue a representative PAGA claim in litigation while their individual claim proceeds through arbitration.

Amicus represents thousands of small businesses in California and submits this brief to assist and provide context for the Court in answering that question.

First, the court of appeal's analysis below fundamentally conflicts with the Supreme Court's decision in *Viking River Cruises* by relying on the PAGA indivisibility rule that the Supreme Court held was preempted by the Federal Arbitration Act (FAA). To bring either an individual or representative PAGA claim, an individual must be an "aggrieved employee." By the statute's own words, this is an individualized analysis. In both individual and representative claims, therefore the threshold standing analysis is subject to arbitration after *Viking River Cruises*.

Second, in charting the path forward for PAGA claims, this Court should adopt a broad and liberal approach to arbitration. Contrary to what the noise may suggest, arbitration benefits all parties involved—employees, employers, and the courts. Compared to litigation, arbitration provides employees with a better chance to win their case, higher awards on average, and a speedier resolution of their claim. Arbitration is good for small businesses because it is generally less expensive than litigation, not draining their cash on hand and tying them up in long-term disputes. California's anti-arbitration environment has led to businesses fleeing for friendlier jurisdictions, as the state is consistently rated as bad for business, which threatens the State's long-term economic health. The court system benefits from arbitration by reducing caseloads and allowing for quicker claim resolution.

Considering these reasons, this Court should reverse the court of appeal and clarify the application of PAGA.

ARGUMENT

I. The Court Of Appeal's Decision Conflicts with *Viking River Cruises* And Therefore Must Be Resolved.

The Court of Appeal held, "[u]nless and until the United States Supreme Court or the California Supreme Court directly overrules it, the courts of this state must follow the rule of *Iskanian*[.]" *Adolph v. Uber Technologies, Inc.*, Nos. G059860, G060198, 2022 WL 1073583, *5 (Cal. Ct. App. April 11, 2022). That rule, the court interpreted, was that PAGA claims lie "*outside the FAA's coverage*" because a PAGA suit represents "a dispute between an employer and the *state*," with "aggrieved employees" acting as state agents. *Id.* at *2 (quoting *Iskanian*, 59 Cal. 4th at 386–87) (first emphasis added). Relying on this rule, the court of appeal cited to other post-*Iskanian* court decisions for the proposition that only courts may decide whether a PAGA plaintiff is an "aggrieved employee" and these threshold issues "*cannot be split* into individual arbitrable and representative nonarbitrable components." *Adolph*, 2022 WL 1073583, at *3 (emphasis added). With this background, the lower court held that "the initial issue of whether Adolph can pursue a PAGA claim as an aggrieved employee must be decided by the trial court." *Id.* at *5.

But just two months later, in *Viking River Cruises, Inc.*, the United States Supreme Court overwhelmingly rejected the legal rationale relied on by the court of appeal. Make no mistake, eight of the nine justices agreed that the FAA preempted the exact interpretation of *Iskanian* that the court of appeal adopted. In Part III of the majority opinion—the only one joined by eight justices—the Court made clear that "*Iskanian*'s *indivisibility rule* effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution[,]'" a result "incompatible with the FAA." *Viking*

River Cruises, Inc., 142 S. Ct. at 1924 (emphasis added). The Court later said: "[T]he 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." *Id.*; *see also id.* at 1925 (Sotomayor, J., concurring) (approvingly quoting this statement from the Court). Thus, "Viking was entitled to enforce the agreement" to mandate "arbitration of Moriana's individual PAGA claim." *Id.* at 1925.

Simply put, there are two takeaways from *Viking River Cruises* that this Court must follow. First, the FAA does not impose a "categorical rule" mandating enforcement of standing waivers for *representative* PAGA claims. *Id.* at 1922. Second, *Iskanian* cannot prohibit the division of PAGA claims into individual and representative claims, and *individual* PAGA claims are subject to arbitration. *Id.* at 1924–25; *but see Adolph*, 2022 WL 1073583, at *3 (PAGA issues "cannot be split into individual arbitrable and representative nonarbitrable components." (quoting *Provost v. YourMechanic, Inc.*, 55 Cal. App. 5th 982, 996 (2020)).

Whether an individual is an "aggrieved employee" with standing to bring a PAGA claim is clearly an individual inquiry subject to arbitration. Under PAGA, only an "aggrieved employee" can sue an employer on behalf of themselves and other or former employees. Lab. Code § 2699(a). PAGA expressly defines "aggrieved employee" as "any *person who was employed* by the alleged violator and *against whom* one or more of the *alleged violations was committed*." Lab. Code § 2699(c) (emphasis added). By its own terms PAGA contemplates that determining the standing of a current or former employee to bring suit is an individualized analysis. This analysis requires looking into whether the alleged wrongdoer employed the specific person bringing the suit and whether the alleged wrongful act was specifically committed against the

person alleging the wrongful activity. In both representative and individual claims, this individualized inquiry must happen at the outset to determine whether the person alleging the wrongful activity is an "aggrieved employee."

The court of appeal's determination that the "aggrieved employee" analysis is not subject to arbitration, and therefore must be decided by courts, also conflicts with the point of arbitration laid out by the United States Supreme Court. Preventing division of PAGA claims for arbitration "unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate[.]'" *Viking River Cruises*, 142 S. Ct. at 1923 (quoting *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1407, 1416 (2019)). It does so by violating "the fundamental principle that 'arbitration is a matter of consent'" and the corollary that "'a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.'" *Id.* (citations omitted).

PAGA, and the court of appeal's interpretation of its line of precedents, does exactly that. Through liberal rules of joinder, individuals bringing PAGA claims are allowed to "expand the scope of the arbitration by introducing claims that [businesses and employers] did not jointly agree to arbitrate." *Viking River Cruises*, 142 S. Ct. at 1923. This "defeat[s] the ability of [businesses] to control which claims are subject to arbitration" and allows, ex-post, individuals to "add new claims . . . regardless of whether the agreement committed those claims to arbitration." *Id.* at 1924. In effect, employers are "coerced" into giving up their right under the FAA by either agreeing to arbitrate all claims or no claims. *Id.* "*Iskanian* allows the aggrieved employee to abrogate [the agreement to arbitrate individual claims based on personally sustained violations] after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope intended by the parties." *Id.* To ensure that

neither party can coerce the other into a resolution which was not within the scope of the original agreement, this court must follow the Supreme Court's lead in permitting arbitration for individual PAGA claims and individual PAGA analyses.

II. In Determining Whether A PAGA-Plaintiff Subject To Arbitration For Individual Claims Maintains Standing For Non-Individual Claims In Court, This Court Should Render A Decision That Allows For Broad And Liberal Arbitration, Which Benefits Employers, Employees, And The Judicial System.

This Court must overrule the court of appeal and ensure that *Iskanian* and its precedents align with the United States Supreme Court's decision in *Viking River Cruises*. But beyond the obligation to conform with Supreme Court precedent regarding the interaction between PAGA and the FAA, there are sound reasons why this Court should go further and enshrine in California law a broad and friendly attitude toward arbitration for PAGA claims.

First, let's consider the employees that PAGA seeks to protect from employment abuses. While the results may seem counterintuitive, a recent study comparing litigation with arbitration found that consumers and employees fare far better in arbitration than in litigation. Published in March of this year, the study compared over 67,000 consumer and employment arbitration outcomes with over 260,000 consumer and employment lawsuits between 2014 and 2021. Nam D. Pham & Mary Donovan, FAIRER, FASTER, BETTER III: AN EMPIRICAL ASSESSMENT OF CONSUMER AND EMPLOYMENT ARBITRATION 4 (2022), https://bit.ly/3TdwKod. In sum, arbitration provided consumers and employees with a better chance to win, higher awards, and quicker outcomes. *Id.*

Consumers prevailed in 41.7% of arbitrations, while doing so in only 29.3% of litigations. *Id.* at 11. For employees, the contrast was even more stark:

employees won 37.7% of arbitrations against employers but only 10.8% of litigations. *Id.* at 12. And when they did win, consumers and employees received significantly higher awards in arbitration than in litigation. *Id.* at 13–14. For employees specifically, their median award in arbitration was $142,332 compared to only $68,956 in litigation. *Id.* at 14. Additionally, both the mean and top 10 percent of awards for employees were at least $30,000 more in arbitration than in litigation. *Id.* If it is true that justice delayed is justice denied, then arbitration is superior to litigation at providing justice. The average time for consumers to prevail in arbitration was over 120 days faster than litigation; in the top 10 percent of outcomes, arbitration provided for a resolution more than a whole year before litigation. *Id.* at 15. Employees experienced similar arbitration benefits. Their average win in arbitration came 56 days quicker than in litigation and the top 10 percent of cases produced employee-favorable outcomes in arbitration almost *500 days faster* than litigation. *Id.* at 15.

In addition to being good for employees, arbitration benefits businesses, including small businesses. Small businesses operate on very thin margins. One study of over 600,000 small businesses found that the median small business has an average daily cash balance of less than $13,000. Diana Farrell & Chris Wheat, CASH IS KING: FLOWS, BALANCES, AND BUFFER DAYS 5 (Sept. 2016), https://bit.ly/3FXu0Im. But a survey commissioned by the Small Business Administration found that small businesses spent between $3,000 and $150,000 on litigation, with two-thirds having spent over $10,000. Klemm Analysis Group, IMPACT OF LITIGATION ON SMALL BUSINESS 12 (2005), https://bit.ly/3NMQbTJ. Thus, for many small businesses, settling disputes in court would drain them of their typical cash balances.

Every four years, the NFIB Research Center surveys America's small businesses to identify those obstacles hindering their success. In 2020, small businesses ranked the cost of outside business services, such as lawyers for litigation, as a top 30 problem facing their business. NFIB Research Ctr., *Small Business Problems & Priorities* 10 (2020), https://bit.ly/3NwwO0T. While arbitration itself is an expense, small businesses would prefer arbitration to litigation because arbitration tends to cost less when one takes into account the costs of discovery, time before resolution, prolonged attorneys' fees, and the appeals process. *See generally* Thomson Reuters, *Arbitration vs. litigation: the differences* (Oct. 4, 2022), https://tmsnrt.rs/3Uzu8BS (explaining that arbitration saves money compared to litigation).

When deciding the standing question, this court should do so in the manner most friendly to small businesses. To thrive, small businesses need a business-friendly environment; California's economy, to succeed, needs a strong business community.

California's own Hoover Institution recently concluded that companies are "leaving California in unprecedented numbers." Joseph Vranich & Lee E. Ohanian, WHY COMPANY HEADQUARTERS ARE LEAVING CALIFORNIA IN UNPRECEDENTED NUMBERS (Hoover Inst. 2022). The number of California businesses leaving the State doubled in 2021 compared to 2020. *Id.* at 3. One reason cited for the exodus of California businesses? Litigation abuse from PAGA. *Id.* at 12–13. And employees are not the beneficiaries of this abuse; the report outlines one recent PAGA settlement where $675,000 went to Lawyers for Justice, while only $10,000 went to the "aggrieved employee" and a mere $33 dollars to each other employee. *Id.* at 13. So much for helping employees. PAGA is not good for businesses, either. According to the most recent estimates

available, they are spending $40 million dollars per year due to PAGA, compared to just $4.5 million when PAGA was introduced in 2004. *Id.* at 13.

Hoover is not alone. A 2022 survey of U.S. CEOs, presidents, and business owners revealed that California was the worst state in America for businesses. Dale Buss, *Texas Tops 2022 Best & Worst States for Business Survey of CEOs* CHIEF EXECUTIVE, https://bit.ly/3htnC1q (last visited Nov. 10, 2022). Likewise, and in part because of PAGA lawsuit abuse targeting small business, the American Tort Reform Foundation's annual "Judicial Hellholes" list ranked California at the top. American Tort Reform Foundation, *Judicial Hellholes: California,* https://bit.ly/3UIVCFf (last visited Nov. 10, 2022). The Small Business & Entrepreneurship Council's 2019 Policy Index State Rankings placed California as the second-most hostile state for small businesses and entrepreneurs, behind only New Jersey. Raymond J. Keating, SMALL BUSINESS POLICY INDEX 2019: RANKING THE STATES ON POLICY MEASURES AND COSTS IMPACTING SMALL BUSINESS AND ENTREPRENEURSHIP 7 (May 2019), https://bit.ly/3TFDATL. Business-friendly is not a synonym for Republican, or anti-worker. Left-leaning or pro-worker states like Washington, Colorado, and Michigan all ranked in the top 15 best states for small businesses and entrepreneurs. *Id.* Meanwhile, typically right-leaning states like Iowa, Arkansas, and Nebraska ranked in the bottom 15. *Id.* Thus, this Court need not mark itself as pro-worker or pro-business. It can be both—and this case is a good vehicle for it to chart that course.

Finally, this Court should recognize that increased arbitration is advantageous for the California court system. Alternative dispute resolution proceedings, like mediation and arbitration, allow courts to reduce their caseload and focus more on complex, precedential, or criminal matters. *See* Brian Osgood, *Hundreds wait in jail for trials as San Francisco backlog*

balloons, GUARDIAN (Apr. 14, 2022), https://bit.ly/3WTOVSI (discussing the current San Francisco leading to delayed trial deadlines).

Arbitration is good for all parties—employees, employers, and the courts. In encouraging the use of arbitration, the Department of Justice has recognized the benefits:

> "ADR techniques have the potential to eliminate unnecessary civil litigation, shorten the time that it takes to resolve civil disputes, and achieve better case resolutions with the expenditure of fewer taxpayer resources. Often ADR will accelerate settlements, avoid trials, and provide enhanced resolution of disputes that litigation cannot provide."

U.S. Dep't of Justice, UPDATED GUIDANCE REGARDING THE USE OF ARBITRATION AND CASE SELECTION CRITERIA, Guidance Document (Nov. 12, 2020), https://bit.ly/3hucz8c.

CONCLUSION

In light of the Supreme Court's decision in *Viking River Cruises*, this court must reverse the court of appeals' decision and clarify the application of *Iskanian* and PAGA standing for representative claims. In doing so, it should allow for broad arbitration.

Respectfully submitted,

Dated: December 8, 2022

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Century Schoolbook font and contains 2,698 words as counted by the Microsoft Word software program used to prepare this brief.

Dated: December 8, 2022

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