No. S274671

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ERIK ADOLPH

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

OPENING BRIEF ON THE MERITS

After a Decision by 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

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ISSUE PRESENTED FOR REVIEW

Whether an aggrieved employee who has been compelled to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1916; see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River*, 142 S.Ct. at p. 1916) in court or in any other forum the parties agree is suitable.

INTRODUCTION

In *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, the U.S. Supreme Court held that the Federal Arbitration Act requires the enforcement of agreements calling for the arbitration of individual claims brought under the Labor Code Private Attorneys General Act, Lab. Code, § 2698 et seq., and that after such claims are sent to arbitration, the remaining non-individual PAGA claims should be dismissed for lack of statutory standing. This case presents the same issues as *Viking River*, and this Court should reach the same result.

PAGA actions may be novel in some ways, but after *Viking River*, it is clear they follow the ordinary rules respecting arbitration. For a time, however, California courts placed PAGA claims outside the normal operation of the FAA. *Viking River* did away with this special treatment of PAGA claims. In doing so, *Viking River* made clear that the FAA preempts the California-law joinder rule forbidding the division of PAGA claims into

individual claims and non-individual claims. After *Viking River*, parties can agree to arbitrate the individual aspects of PAGA claims (and can agree *not* to arbitrate non-individual violations that concern only other employees), and those agreements must be enforced. While California law formerly prohibited such claim-splitting under PAGA, the FAA—as interpreted in *Viking River*—overrides that rule as applied to arbitration.

The Supreme Court also addressed what happens after an individual PAGA claim has been severed and compelled to arbitration. A majority comprised of Justices Alito, Breyer, Kagan, Sotomayor, and Gorsuch concluded that, in this circumstance, a plaintiff cannot maintain non-individual PAGA claims in court after his individual PAGA claim has been sent to arbitration. As the Court explained, "[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." (142 S.Ct. at p. 1925.) This, in turn, means that the plaintiff "lacks statutory standing to continue to maintain [the] non-individual claims in court, and the correct course is to dismiss [the] remaining claims." (*Ibid.*)

The Supreme Court's decision on statutory standing applied the plain language of the PAGA statute and this Court's precedent interpreting PAGA's standing requirement, and its interpretation deserves substantial deference. Both text and precedent support the Supreme Court's holding that a plaintiff like Erik Adolph lacks statutory standing to maintain non-

individual PAGA claims in court once his individual PAGA claim is compelled to arbitration.

PAGA makes a cause of action available to only a subset of people meeting particular conditions. To seek civil penalties on behalf of the State, the plaintiff must be "an aggrieved employee" who sues "*on behalf of himself or herself and* other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) This means that the action must concern, at least in part, a Labor Code violation allegedly suffered by the plaintiff. PAGA drives this point home by defining an "aggrieved employee" as "any person who was employed by the alleged violator and *against whom one or more of the alleged violations was committed*." (*Id.*, subd. (c), italics added.)

The Legislature intentionally made "aggrieved employee" status the touchstone of PAGA's statutory standing requirement. In enacting PAGA, the Legislature sought specifically to avoid the many problems created by "general public" standing under a separate statute, the pre-Proposition 64 version of the Unfair Competition Law. Under the prior version of the UCL, anyone could sue anyone else about almost any violation of California law. The Legislature understood that such broad statutory standing had led to abusive litigation that the voters eventually rejected. So when authorizing private attorney general lawsuits to seek civil penalties for Labor Code violations, it made a conscious decision to turn the page on the failed experiment of "general public" standing. PAGA's standing requirement was drafted with this aim in mind—to ensure that a plaintiff is an

aggrieved employee with a stake in the outcome. PAGA thus precludes a plaintiff who cannot assert an individual PAGA claim in court from pursuing non-individual PAGA claims on behalf of other employees.

In short, the U.S. Supreme Court correctly interpreted PAGA's statutory-standing requirement in *Viking River*. Adolph's contrary rule not only misreads the statutory text and this Court's precedent, but also would undermine the overriding purpose of PAGA standing, which is to ensure that the State's representative has a stake in the outcome when seeking penalties on behalf of other employees. This Court should reverse and remand with instructions for the trial court to compel Adolph's individual PAGA claim to arbitration and to dismiss the non-individual PAGA claims for lack of standing.

STATEMENT OF APPEALABILITY

The trial court's preliminary injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6), and its denial of Uber's petition to compel arbitration is appealable under section 1294, subdivision (a).

STATEMENT OF THE CASE

I. Adolph Agrees to Arbitrate Claims Related to His Use of Uber's Eats App.

Uber is a technology company that has developed the smartphone application known as the "Eats App," which connects local merchants, consumers, and independent delivery drivers to facilitate the purchase and delivery of food and drink. (6-CT-1545, ¶¶ 4–5.) Adolph is a driver who has used the Eats

App to generate leads for his independent delivery business since March 2019. To do so, he accepted the Technology Services Agreement (the "Agreement"), which governs the relationship between Uber and drivers. (6-CT-1546–1547, ¶¶ 8, 12.)

The first page of the Agreement advised Adolph in bold, capitalized letters that it contained an arbitration agreement (the "Arbitration Provision"):

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW IN SECTION 15.3 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION … . IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

(6-CT-1555.) The Arbitration Provision stated that the parties agree to submit virtually all disputes to bilateral (i.e., individual) arbitration:

> **This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") … . [T]his Arbitration Provision applies to any dispute, past, present or future, arising out of or related to this Agreement or formation or termination of the Agreement and survives after the Agreement terminates … .**
>
> [T]his Arbitration Provision is intended to apply to

> the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration … . [T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator 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.
>
> **[T]his Arbitration Provision also applies to all disputes between you and the Company or Uber, as well as all disputes between You and the Company's or Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company or Uber, including the formation or termination of the relationship.**

(6-CT-1571–1572, § 15.3(i).) The Arbitration Provision contained a waiver of PAGA claims to the fullest extent permissible under law, with an accompanying severability clause:

> To the extent permitted by law, you and Company agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004, California Labor Code § 2698 et seq. ("PAGA"), in any court or in arbitration … .
>
> If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any

> representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction … . If the PAGA Waiver is found to be unenforceable or unlawful for any reason, the Parties agree that the litigation of any representative PAGA claims in a civil court of competent jurisdiction shall be stayed, pending the outcome of any individual claims in arbitration.

(6-CT-1574, § 15.3(v).)

The Arbitration Provision afforded Adolph an unfettered right to opt out of arbitration for 30 days after accepting the Agreement simply by sending an email or letter to Uber. (6-CT-1575, § 15.3(viii).) Although thousands of drivers nationwide have exercised their right to opt out of the Arbitration Provision in the Agreement, Adolph did not. (6-CT-1547–1548, ¶¶ 12, 14.)

II. Adolph Initiates Litigation Against Uber on Claims Arising out of His Use of the Eats App.

Notwithstanding the Arbitration Provision, Adolph filed a putative class action in October 2019, claiming that Uber misclassified delivery drivers as independent contractors and failed to reimburse their business expenses. (1-CT-47; 1-CT-52–54.) For this alleged misconduct, Adolph sought damages under Labor Code section 2802 and restitution under the UCL. (1-CT-54–55.) Uber promptly filed a petition to compel arbitration of Adolph's claims on an individual basis and to strike his class allegations pursuant to the Arbitration Provision's class action waiver. (1-CT-67–79.)

In response, Adolph amended his complaint to add a claim for civil penalties under PAGA for Uber's alleged failure to

reimburse business expenses, timely pay all wages due during and upon termination of employment, guarantee overtime wage, provide accurate itemized wage statements, and maintain accurate payroll records. (1-CT-213–214.) Uber renewed its petition to compel arbitration of Adolph's claims on an individual basis. (1-CT-250–264.)

III. The Trial Court Declines to Compel Any Aspect of the PAGA Claim to Arbitration and Enjoins Uber's Arbitration of Adolph's Individual Claims.

The trial court granted Uber's petition to compel the Labor Code and UCL claims to individualized arbitration. For those claims, Adolph did "not dispute agreeing to arbitration" or that the class action waiver was "enforceable under the FAA." (2-CT-431–432.) But "[t]he PAGA waiver [wa]s a different question," the court concluded, because a PAGA claim "belongs to the government" and thus "[a]n employee has no right to waive" it. (2-CT-432.) The court therefore compelled arbitration of Adolph's individual claims for damages and restitution and stayed the PAGA claim pending arbitration. (*Ibid.*)

Rather than proceed to arbitration, however, Adolph asked Uber to stipulate to the waiver of his individual claims under the Labor Code and UCL, so that he could litigate his PAGA claim in court straightaway. (3-CT-611, ¶ 4; 3-CT-616–617.) Uber declined to do so. (*Ibid.*) Uber submitted a demand for arbitration with JAMS in accordance with the trial court's order and the terms of the Arbitration Provision. (3-CT-611, ¶ 5; 3-CT-640–647; see also 6-CT-1573, § 15.3(iv).)

In response, Adolph moved for leave to file a second amended complaint alleging a single cause of action under PAGA and to dismiss his individual claims without prejudice to reviving them later. (2-CT-451–455.) He also sought a preliminary injunction to halt the pending arbitration that the court had just ordered. (2-CT-475–482.)

The trial court granted both motions, dismissing Adolph's individual claims without prejudice and preliminarily enjoining the pending arbitration. (5-CT-1466–1469.) Although arbitration of the original claims for damages and restitution "was permitted," the court found that the suit had since "been converted into a pure PAGA action," which "[wa]s not arbitrable." (5-CT-1469.) The court therefore concluded that Adolph was likely to "prevail[] on the issue of whether his claim is arbitrable" and that he would suffer interim harm absent injunctive relief "as arbitration of a nonarbitrable claim would be futile." (5-CT-1468–1469, cleaned up.) Uber timely appealed the order granting the preliminary injunction. (5-CT-1494.)

Meanwhile, Uber moved to compel arbitration of Adolph's alleged status as an "aggrieved employee" with standing to pursue a PAGA claim. (6-CT-1513–1669.) Uber disputed that Adolph could satisfy either the "aggrieved" or the "employee" component of the requirement. But the trial court denied Uber's motion on the grounds that the State never "consented to the arbitration of [Plaintiff's] PAGA claim," which could "[]not be split in individual arbitrable and representative nonarbitrable components." (6-CT-1734, citation omitted.) Uber again filed a

timely notice of appeal, and this appeal was consolidated with its earlier challenge to the preliminary injunction order. (6-CT-1744.)

IV. The Court of Appeal Affirms.

The Court of Appeal affirmed both orders. While noting that the forthcoming decision in *Viking River* could affect the outcome of the appeal, the court felt bound to "follow the rule of" *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 "[u]nless and until the United States Supreme Court or the California Supreme Court directly overrule[d] it." (Opn., at p. 9.) The court thus held that "despite the FAA's broad terms," Adolph's PAGA claim was "not subject to arbitration" because it "[wa]s brought on behalf of the state, which [wa]s not a signatory to the" Agreement. (*Id.* at pp. 2, 4–5.) And because a PAGA "action cannot be split into individual arbitrable and representative nonarbitrable components," the court concluded that Uber could not compel the "[t]hreshold issue[] involving whether [P]laintiff is an 'aggrieved employee'" to arbitration. (*Id.* at p. 6, citation omitted.)

V. This Court Grants Review.

Uber timely filed a petition for review, urging the Court to consider whether PAGA claims are subject to the FAA and whether the parties may agree to arbitrate Adolph's individual status as an aggrieved employee. (Pet. for Review, at p. 10.) Following the U.S. Supreme Court's ruling in *Viking River*, this Court granted Uber's request to submit supplemental briefing addressing that decision. Uber explained that the Court of

Appeal's decision should be reversed in the wake of *Viking River*, which held that the FAA requires arbitration of Adolph's individual PAGA claim and that PAGA provides no mechanism to adjudicate standalone non-individual claims. (Uber Supp. Letter Br., at p. 1.)

In response, Adolph contended that "the *Viking River* majority misread this Court's unanimous decision in *Kim*, and therefore got its standing analysis exactly backwards." (Adolph Supp. Letter Br., at p. 2.) In his view, a PAGA plaintiff "is *not* stripped of statutory standing upon being forced to adjudicate a portion of her claim in arbitration rather than in court." (*Ibid.*) Adolph thus urged the Court to grant review to correct five Justices of the U.S. Supreme Court in their "mistaken assumption about how state law would operate." (*Id.* at p. 4.)

This Court granted review on the question whether a plaintiff's non-individual PAGA claims must be dismissed for lack of standing once his individual PAGA claim has been compelled to arbitration.

STANDARD OF REVIEW

While the decision to grant a preliminary injunction is ordinarily committed to the trial court's discretion, "the standard of review is de novo" when the decision "involves purely a question of law or statutory interpretation." (*Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 808; accord *In re Butler* (2018) 4 Cal.5th 728, 739 [de novo review for legal conclusions underpinning decision whether to modify or vacate injunction].) Where, as here, the existence of a binding

arbitration agreement is undisputed, this Court likewise "review[s] the trial court's denial of arbitration de novo." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

ARGUMENT

In *Viking River*, the Supreme Court overruled this Court's precedent forbidding enforcement of agreements calling for the arbitration of individual PAGA claims, ordered the plaintiff's individual PAGA claim to arbitration, and held that the remaining non-individual PAGA claims should be dismissed for lack of statutory standing. The same result is warranted here.

Like the agreement in *Viking River*, the agreement here calls for arbitration of any PAGA claim on an individual basis. Under *Viking River*, that agreement must be enforced. After the individual PAGA claim is compelled to arbitration, all that will remain in court are non-individual PAGA claims seeking civil penalties for alleged violations that occurred only to others.

Adolph lacks statutory standing under PAGA to bring such non-individual claims. As a matter of this Court's longstanding practice, the U.S. Supreme Court's decision on this issue warrants substantial deference. *Viking River* also reached the correct result, as PAGA authorizes a private-plaintiff suit for civil penalties only when "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) A plaintiff is an aggrieved employee only when "*one or more* of the alleged violations was committed" against him. (§ 2699, subd. (c), italics

added.) After Adolph's claim is sent to arbitration, he will not be seeking in court any PAGA penalties for alleged Labor Code violations that he purportedly experienced. He simply "is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River*, 142 S.Ct. at p. 1925.)

I. *Viking River* Requires Adolph to Arbitrate His Individual PAGA Claim.

The U.S. Supreme Court held in *Viking River* that the FAA (i) applies to PAGA claims, (ii) preempts the California-law rule against severing individual PAGA claims, and (iii) requires that such claims be sent to arbitration when the parties have so agreed. The judgment below conflicts with the FAA in all three respects. (Opn., at pp. 2, 5–7.)

To begin with, the FAA applies to Adolph's PAGA claim under *Viking River*. The contractual relationship between the parties is the "but-for cause of any justiciable legal controversy." (*Viking River*, 142 S.Ct. at p. 1919, fn. 4.) Adolph necessarily accepted the Agreement before performing any work via the Eats App—work that now forms the basis of his attempt to exact PAGA penalties from Uber. (6-CT-1546–1547, ¶¶ 8, 12.) And although he could have opted out of arbitration, he chose not to.

The Court of Appeal's decision conflicts with *Viking River* because it turned on the now-abrogated rule that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship," but rather "a dispute between the

employer and the *state*" that delegates its claim to the plaintiff. (*Iskanian*, 59 Cal.4th at pp. 386–387; see Opn., at pp. 4–5, 7.)

The Court of Appeal also denied Uber's petition to compel arbitration based on the state-law compulsory joinder rule for PAGA claims invalidated by *Viking River*. *Iskanian* had interpreted PAGA claims as constituting an indivisible whole, such that parties cannot agree to arbitrate only the "individual … Labor Code violations that an employee suffered." (*Iskanian*, 59 Cal.4th at pp. 383–384.) This rule froze "efforts to split PAGA claims into individual and representative components." (*Kim v. Reins Internat. Cal., Inc.* (2020) 9 Cal.5th 73, 88.) The Court of Appeal applied this anti-severability "rule of *Iskanian*" in refusing to enforce the parties' agreement to arbitrate the question whether Adolph is an aggrieved employee. (Opn., at pp. 6, 9.)

The Court of Appeal's refusal to allow the parties to arbitrate their individual disputes conflicts with *Viking River*. There, the Supreme Court held that the FAA preempts *Iskanian* to the extent it invalidated agreements to arbitrate PAGA claims concerning only violations that the plaintiff allegedly experienced. Because "arbitration is a matter of consent," parties may freely "determine the issues subject to arbitration and the rules by which they will arbitrate." (*Viking River*, 142 S.Ct. at pp. 1922–1923, cleaned up.) But the PAGA joinder rule impinged on the parties' freedom by forcing them to choose between litigation or arbitration of "a massive number of claims in a single-package suit." (*Id.* at p. 1924.) Some claims arise from

"Labor Code violations actually sustained by the plaintiff," while others stem from "events involving other employees." (*Id.* at p. 1916.) The Court sought to clear up the confusion by calling the former "individual" PAGA claims and the latter "non-individual" PAGA claims. (*Id.* at pp. 1924–1925.) Under *Viking River*, the FAA preempts *Iskanian* "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Id.* at p. 1924.)

Not only does the FAA allow the parties to split a PAGA action into individual and non-individual claims, but the parties also opted to do so here. Adolph agreed "to resolve any claim that [he] may have against … Uber on an individual basis." (6-CT-1570, § 15.3.) He also waived the right to bring a PAGA claim on behalf of other drivers. (6-CT-1574, § 15.3(v).) But the parties agreed that, if this waiver was "found to be unenforceable," (1) "the provision shall be severed," (2) the severance "shall have no impact whatsoever" on "attempts to arbitrate any remaining claims on an individual basis," and (3) the non-individual PAGA claims shall remain in litigation. (*Ibid.*) In other words, the arbitration provision ensures that, in the event the PAGA waiver is unenforceable, the parties nonetheless will arbitrate their individual disputes.

These contractual provisions require Adolph to arbitrate his individual PAGA claim against Uber for the same reasons as the arbitration agreement in *Viking River*. The U.S. Supreme Court acknowledged that the parties' PAGA waiver would be invalid "if construed as a wholesale waiver" of the claim because

its decision left standing that aspect of *Iskanian*. (*Viking River*, 142 S.Ct. at pp. 1924–1925.) But the parties' agreement there also contained a severability clause specifying that if the waiver "[wa]s invalid in some respect, any 'portion' of the waiver that remain[ed] valid must still be 'enforced in arbitration.'" (*Id.* at p. 1925.) The terms of "this clause," the Court held, entitled the employer "to enforce the agreement insofar as it mandated arbitration of [the] individual PAGA claim." (*Ibid.*)

Because the FAA grants parties the right to divide up claims as the arbitration agreement does here, the Court of Appeal erred in affirming the preliminary injunction halting arbitration and the denial of Uber's petition to compel.

II. Adolph's Non-individual PAGA Claims Should Be Dismissed for Lack of Statutory Standing.

After determining that the FAA requires the enforcement of an agreement to arbitrate an individual PAGA claim, the U.S. Supreme Court in *Viking River* held that remaining non-individual claims must be dismissed for lack of statutory standing. This result, as *Viking River* explains, flows from the text of the PAGA statute and this Court's precedent interpreting PAGA's standing requirement. Although Adolph invoked this Court's opinion in *Kim* to advance a contrary view in his petition-stage briefing, that decision only reinforces that a PAGA plaintiff lacks standing unless his action seeks civil penalties for violations that he allegedly suffered.

A. The U.S. Supreme Court's Interpretation of PAGA's Standing Requirement in *Viking River* Warrants Substantial Deference.

In *Viking River*, the Supreme Court concluded that "PAGA provides no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (142 S.Ct. at p. 1925.) That result followed from the Legislature's rejection of "general public" standing under PAGA. (*Kim*, 9 Cal.5th at p. 90.) Instead, PAGA actions can be maintained only by a "person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" to bring suit "on behalf of himself or herself and other employees." (Lab. Code, § 2699, subds. (a), (c).) So "[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." (*Viking River*, 142 S.Ct. at p. 1925.) The upshot is that a plaintiff without her *own* individual PAGA claim in court "lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Ibid.*)

Adolph urges this Court to entirely disregard the considered views of a majority of the U.S. Supreme Court on this issue. In fact, his attorney has proclaimed that "the U.S. Supreme Court can 'do what it wants' and issue what in effect are advisory opinions, but the California justices have the authority to decide California law and standing for Golden State residents." Dorothy Atkins, *Calif. Justices to Review Uber PAGA Fight After*

Viking River (July 22, 2022) <https://tinyurl.com/4awvs68t>. Similarly, Adolph has told this Court that Justices Alito, Breyer, Sotomayor, Kagan, and Gorsuch "simply guessed" at the meaning of California law just to get it entirely wrong. (Adolph Supp. Letter Br., at pp. 4–5.)

But *Viking River* was no mere "advisory" decision and was certainly not an ill-considered "guess[]." It was instead a square holding from five Justices of the U.S. Supreme Court based on a straightforward reading of PAGA's standing requirement. And the *Viking River* majority reached this conclusion even though three of their colleagues would have declined to address the issue at all. (See 142 S.Ct. at p. 1926 [Barrett, J., concurring in part and concurring in the judgment].) While Adolph cavalierly urges this Court to give no weight to the views of the U.S. Supreme Court on this issue, it is telling that not a single Justice read California law as permitting a plaintiff such as Adolph to continue to pursue non-individual PAGA claims in court if his individual PAGA claim must be arbitrated.

This Court's precedent shows that deference, not derision, is owed to the U.S. Supreme Court's considered judgment on this issue. This Court "do[es] not depart lightly from clear United States Supreme Court rulings"—even going so far as to generally adopt into *California* law the U.S. Supreme Court's interpretations of *federal* law. (*People v. Houston* (1986) 42 Cal.3d 595, 609.) "[I]n the absence of good cause for departure," this Court defers "to United States Supreme Court decisions." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353.) That is to say

that Adolph has the burden to come forward with "persuasive reasons" to break with *Viking River* and "tak[e] a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.)

This respectful consideration applies no less to "decisions of the federal courts interpreting California law," which this Court has recognized as "persuasive" even though they are "not binding" on matters of state law. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 299.) Even where only a lower federal court has interpreted California law, California courts start from the position that the federal court got it right—not wrong, as Adolph would have it. In *Garcia v. Wetzel* (1984) 159 Cal.App.3d 1093, for instance, the Court of Appeal deferred to the Ninth Circuit's interpretation of Civil Code section 1916.1 after finding its analysis to be "persuasive" and even "compelling." (*Id.* at p. 1098.) Here, the persuasive power of *Viking River* is at its apex: The interpretation came not from a lower federal court, but from the U.S. Supreme Court. (See *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 12.)

B. A Plaintiff Who Must Arbitrate His Individual PAGA Claim Lacks Standing to Maintain Non-individual PAGA Claims in Court.

Absent a "persuasive[] reason" to depart from the U.S. Supreme Court's interpretation of PAGA standing (*Teresinski*, 30 Cal.3d at p. 836), *Viking River* should control the disposition of this case and require that Adolph's non-individual PAGA claims be dismissed. No such persuasive reason exists. In fact, the U.S. Supreme Court got it exactly right. PAGA's text and legislative history, as well as this Court's decisions, show that Adolph lacks

standing to maintain non-individual PAGA claims concerning only alleged violations suffered by *other* alleged employees.

Statutory interpretation begins with the "plain and commonsense meaning" of the text. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165, citation omitted.) This Court places the language "in the context of the statutory framework as a whole to discern its scope and to harmonize various parts of the enactment." (*Mendoza v. Fonseca McElroy Grinding Co.* (2021) 11 Cal.5th 1118, 1125.) If the provision remains ambiguous, this Court may consult legislative history. (See, e.g., *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

PAGA recognized a new type of action to recover civil penalties on behalf of the State for Labor Code violations. It authorized an action "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code, § 2699, subd. (a), italics added.) The plaintiff is not an "aggrieved employee" unless—as the term suggests and the statute mandates—the person (1) "was employed by the alleged violator" and (2) suffered "one or more of the alleged violations." (§ 2699, subd. (c).)

Read together, these provisions defining "aggrieved employee" status establish that the indispensable core of PAGA standing is the request for civil penalties for violations that allegedly occurred to the plaintiff. As another court has aptly put it, PAGA "allows an aggrieved employee to bring a civil action 'on behalf of himself or herself *and* other current or former

employees,' not on behalf of himself *or* other employees." (*Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1141, quoting Lab. Code, § 2699, subd. (a).)

That view is consistent with this Court's explanation that every PAGA action must, at minimum, seek "penalties for Labor Code violations" for at least "one aggrieved employee—the plaintiff bringing the action." (*Iskanian*, 59 Cal.4th at p. 387.) While a PAGA plaintiff may seek to represent "other employees *as well*" (*ibid.*, italics added), he cannot recover penalties based only on violations to others (see *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 678 [a PAGA plaintiff may "su[e] solely on behalf of himself or herself or *also* on behalf of other employees"], italics added). Thus, as *Viking River* and other courts have concluded, "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action." (*Viking River*, 142 S.Ct. at p. 1925; see also, e.g., *Quevedo*, 798 F.Supp.2d at p. 1141 ["employee can pursue claims on behalf of others only if he also pursues claims on behalf of himself"]; *Miguel v. JPMorgan Chase Bank, N.A.* (C.D.Cal., Feb. 5, 2013) 2013 WL 452418, at *9 [same].)

There are additional textual clues in the statute that confirm that a plaintiff seeking to pursue non-individual PAGA claims must also bring the action at least in part on behalf of himself or herself. Section 2699, subdivision (g)(1), clarifies that PAGA does not "limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."

This qualification would be unnecessary if PAGA was an all-purpose grant of authority to represent *other* employees, whether or not the plaintiff had any personal rights at stake.

Section 2699, subdivision (i), meanwhile allocates 75 percent of civil penalties to the State and 25 percent to "the aggrieved employees." If the plaintiff did not have to be an aggrieved employee with respect to any of the violations in court, the plaintiff could not share in any recovery and thus would personally lack the financial incentive to litigate vigorously on behalf of the State (even if her counsel would still desire to recover an attorneys' fee award). (See *Iskanian*, 59 Cal.4th at p. 382 [critical aspect of PAGA is that the "citizen bringing the suit" can recover a "portion of the penalty"]; cf. *Vt. Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 772 [qui tam relator has "a 'concrete private interest in the outcome of [the] suit'" by virtue of "the bounty he will receive if the suit is successful"], citation omitted.)

Legislative history also confirms that PAGA permits only "an 'aggrieved employee' [to] bring a civil action *personally* and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, italics added, quoting Lab. Code, § 2699, subd. (a).) The Legislature designed PAGA standing to be "unlike the UCL" standing provisions in effect at the time, which allowed suits by "persons who suffered no harm from the alleged wrongful act." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) Apr. 29, 2003, p. 7.) Those standing

provisions had led to "well publicized allegations of private plaintiff abuse," which the legislature specifically sought to avoid in enacting PAGA. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) June 26, 2003, p. 6 [hereafter Assem. Com. Analysis]; see also *Kim*, 9 Cal.5th at p. 90 [recounting how "some private attorneys had exploited the generous standing requirement of the UCL by filing shakedown suits to extort money from small businesses for minor or technical violations where no client had suffered an actual injury"], cleaned up.)

The consequence is that PAGA, "[u]nlike the UCL," does "not permit private actions by persons who suffered no harm from the alleged wrongful act." (Assem. Com. Analysis, at p. 6.) Instead, a PAGA plaintiff must show that she is someone "against whom the alleged violation was committed"—not a member of the general public who is a stranger to the suit. (*Ibid.*) "Only persons who have actually been harmed may bring an action." (*Ibid.*, cleaned up.)*

The legislative history thus makes clear that a plaintiff has standing under PAGA only when pursuing civil penalties for violations that he personally suffered. While PAGA permits such suits to "*also* include fellow employees *also* harmed by the alleged

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* Proposition 64 eliminated "general public" standing under the UCL by requiring plaintiffs who assert UCL claims to have "lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

violation" (Assem. Com. Analysis, at p. 6, italics added), it does not permit a PAGA action that is based solely on alleged violations that others experienced. In this manner, the Legislature intended for "PAGA's standing requirement … to be a departure from the 'general public' standing originally allowed under the UCL." (*Kim*, 9 Cal.5th at p. 90, citation omitted.)

Adolph nonetheless seeks to maintain *only* non-individual PAGA claims in court, as his individual PAGA claim must be arbitrated. But PAGA forecloses this species of "general public" standing. This Court explained why in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993. There, a union sought to bring a PAGA claim based on its association with its members, who had allegedly suffered Labor Code violations. (*Id.* at p. 999.) PAGA cut off this attempt because the union did not "bring an action on behalf of himself or herself," but solely "on behalf of its members." (*Id.* at p. 1004.)

Like the union in *Amalgamated Transit*, Adolph cannot seek recovery only for violations suffered by other employees and not for any personally experienced violations. PAGA requires each "civil action" to be brought by an aggrieved employee against whom "one or more of the *alleged* violations was committed." (Lab. Code, § 2699, subds. (a), (c), italics added.) But Adolph cannot allege any personally sustained violations here because such individual claims must be severed and compelled to arbitration. (*Viking River*, 142 S.Ct. at p. 1925.) That also means that Adolph cannot seek civil penalties "on behalf of himself" in court—as every PAGA plaintiff must do.

(Lab. Code, § 2699, subd. (a).) It would take a serious rewriting of subdivisions (a) and (c) of section 2699 to allow Adolph to pursue penalties in court for violations that allegedly occurred only to *other* employees after the Legislature intentionally acted to prevent such an outcome.

That Adolph may still assert an individual PAGA claim in arbitration does not give him standing to bring non-individual PAGA claims separately in court. The FAA demands that his individual PAGA claim be severed from his non-individual claims. (*Viking River*, 142 S.Ct. at p. 1925.) And that means that what was once "a single action" must now proceed as "two … separate and distinct actions with consequent separate judgments." (*Bodine v. Superior Court in and for Santa Barbara County* (1962) 209 Cal.App.2d 354, 361.) As this Court has explained, "severance of an action" results "in[] two or more separate actions." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 738, fn. 3.) And nothing in PAGA suggests that a plaintiff can point to a separate proceeding in a different forum to establish that he has standing. Whatever he might attempt to prove in arbitration, Adolph simply cannot establish he satisfies the "aggrieved employee" requirement in a standalone court action once his own PAGA claim is sent to arbitration.

Justice Sotomayor noted that California courts and the Legislature will "have the last word" on the contours of California law. (*Viking River*, 142 S.Ct. at p. 1925 [Sotomayor, J., concurring].) To be sure, the Legislature could revisit whether to expand statutory standing to allow anyone—whether or not he or

she seeks to litigate "on behalf of himself or herself" (Lab. Code, § 2699, subd. (a))—to sue over violations only *others* have experienced. But the *existing* PAGA statute before this Court forecloses such a result by judicial interpretation, as Justice Sotomayor herself concluded in joining the Court's opinion dismissing the non-individual claims for lack of standing. (*Viking River*, 142 S.Ct. at p. 1925.) Because Adolph cannot allege a personally sustained violation or seek any relief on his own behalf in court, he does not meet the "aggrieved employee" requirement for his non-individual PAGA claims, which should therefore be dismissed. (See *Amalgamated Transit Union*, 46 Cal.4th at p. 1005.)

C. *Kim v. Reins* Supports *Viking River*'s Interpretation of PAGA's Standing Requirement.

Adolph has asserted that this Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 requires a different result, but that decision only confirms that Adolph lacks standing to maintain a non-individual claim. In fact, the U.S. Supreme Court expressly relied on *Kim* in support of its analysis of PAGA's standing requirement in *Viking River*. (142 S.Ct. at p. 1925 ["'PAGA's standing requirement was meant to be a departure from the general public standing originally allowed' under other California statutes"], cleaned up, quoting *Kim*, 9 Cal.5th at p. 90.) The U.S. Supreme Court correctly read *Kim* as foreclosing the idea that a plaintiff who cannot maintain an individual PAGA claim in court can nonetheless pursue non-individual PAGA claims.

Kim reaffirmed the two core requirements of PAGA standing discussed above. (See *ante*, at pp. 27–28.) Specifically, "[t]he plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim*, 9 Cal.5th at pp. 83–84, quoting Lab. Code, § 2699, subd. (c).) The employer in *Kim* argued that PAGA standing requires that a plaintiff must also have viable individual claims for relief under the Labor Code, and thus that if such claims were settled, the plaintiff could no longer be considered to be an "aggrieved employee." (*Id.* at pp. 82–83.) This Court, however, rejected the notion that "standing somehow ended when [the employee] settled his claims for individual relief." (*Id.* at p. 84.)

Critically, the plaintiff in *Kim* was still seeking penalties under PAGA "on behalf of himself" for personally suffered violations. (Lab. Code, § 2699, subd. (a).) He had settled only "individual Labor Code claims," *not* any claim for civil penalties under PAGA. (*Kim*, 9 Cal.5th at pp. 82–83.) As this Court was careful to clarify, "the civil penalties a PAGA plaintiff may recover … are distinct from the statutory damages or penalties that may be available to employees suing for individual violations." (*Id.* at p. 81; see also *Iskanian*, 59 Cal.4th at p. 381, cleaned up.) Settlement of one does not affect the other.

The plaintiff in *Kim* continued to press his request for civil penalties on the ground "that he personally suffered at least one Labor Code violation on which the PAGA claim is based." (9 Cal.5th at p. 84.) He had "specifically carved" the whole PAGA

claim "out of the settlement" with his employer. (*Id.* at p. 92, fn. 7.) That was enough to keep his PAGA claim in court. An "employee has PAGA standing," this Court emphasized, "if '*one or more* of the alleged violations was committed' against him." (*Id.* at p. 85, quoting Lab. Code, § 2699, subd. (c).) Because the plaintiff could have brought a "stand-alone PAGA claim[]" to start, his decision to settle his personal Labor Code damages claims could not retroactively defeat his PAGA standing. (*Kim*, 9 Cal.5th at p. 88.)

Adolph argues that he will not "lose" his statutory standing to bring non-individual PAGA claims if he must arbitrate his individual PAGA claim, just as the plaintiff in *Kim* did not lose standing after settling personal damages claims. (Adolph Supp. Letter Br., at pp. 4–5.) But Adolph glosses over the key distinction: PAGA standing depends on the plaintiff being able to assert an individual claim for PAGA penalties. That is why the settlement of damages claims under other provisions of the Labor Code has no impact on a plaintiff's ability to pursue a PAGA claim. By contrast, Adolph is unable to maintain his non-individual PAGA claims if he cannot assert any individual PAGA claim in court.

Suppose, for instance, that Adolph's initial complaint had pleaded a standalone non-individual PAGA claim, seeking civil penalties for violations that occurred *only* to other employees but not to himself. The court would have been required to dismiss such a claim under PAGA, as Adolph would not have brought "the action 'on behalf of himself … and other current or former

employees.'" (*Arias*, 46 Cal.4th at p. 987, fn. 7, quoting Lab. Code, § 2699, subd. (a).) Nor could he satisfy section 2699, subd. (c), because he would not be "affected by at least one of the violations alleged" in the non-individual PAGA claim. (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 754; compare *Kim*, 9 Cal.5th at p. 88.)

Adolph cannot acquire standing to bring a standalone non-individual PAGA claim simply by joining that claim with an individual PAGA claim in violation of an enforceable arbitration agreement, as he has attempted to do here. As explained above, the FAA preempts *Iskanian*'s joinder rule and requires enforcement of agreements to arbitrate PAGA claims on an individualized basis. (See *ante*, at pp. 20–23.) And because "[t]he Legislature defined PAGA standing in terms of *violations*" composing the action, once Adolph's individual PAGA claim is sent to arbitration, he will not be an aggrieved employee for his non-individual claims because none of the alleged "Labor Code violations were committed against him." (*Kim*, 9 Cal.5th at p. 84, italics added; see Lab. Code, § 2699, subd. (c).)

This does not mean that Adolph's standing "expir[ed]" or somehow was "extinguished." (*Kim*, 9 Cal.5th at pp. 83, 85.) To be clear, Uber disputes that Adolph has standing to bring *any* PAGA claim because he is not an aggrieved employee at all. But his standing for a non-individual claim fails twice over because he cannot maintain a claim in court to recover penalties for violations he allegedly suffered. And the fact that Adolph violated his enforceable agreement to arbitrate his individual

PAGA claim does not mean that the remaining non-individual claims are an action "brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." (Lab. Code § 2699, subd. (a), italics added.) Instead, because Adolph must arbitrate any individual PAGA claim he might attempt to assert in court, this action is necessarily limited solely to non-individual PAGA claims that do not include "[a]t least one violation" that was allegedly "committed against the representative plaintiff." (*Rope v. Auto-Chlor System of Wash., Inc.* (2013) 220 Cal.App.4th 635, 651, fn. 7, superseded by statute on another ground as discussed in *Moore v. Regents of Univ. of Cal.* (2016) 248 Cal.App.4th 216, 245–247.)

Adopting the contrary position would permanently exempt a plaintiff from PAGA's standing requirement so long as the plaintiff is willing to violate an enforceable agreement to arbitrate. Not only would that exalt form over substance, it would also flout the bedrock principle that "standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232–233; see also, e.g., *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1119 [plaintiff who ceases to be a stockholder may lose standing to continue shareholder's derivative suit].)

The Court of Appeal's decision in *Robinson v. Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476, illustrates this point. There, a PAGA settlement in another case precluded the plaintiff from continuing to pursue penalties for violations before a certain

date. (*Id.* at p. 483.) The plaintiff cut his losses and sought penalties only for subsequent violations not covered by the settlement. But there was a problem: He had no longer been employed by the defendant during the period postdating the settlement. (*Id.* at p. 484.) Now that the settlement had occurred, the fact that he once had standing to bring a PAGA action on behalf of himself and others did not forever imbue him with "standing to pursue claims based solely on violations alleged to have occurred after his termination" and that did not affect him at all. (*Id.* at pp. 484–485; accord, e.g., *Gau v. Hillstone Restaurant Group, Inc.* (N.D.Cal., July 20, 2022) 2022 WL 2833977, at *7 [plaintiff not aggrieved employee under revised timespan for PAGA action].)

Adolph is no different from the plaintiff in *Robinson*. Here, as there, Adolph initially sought penalties for violations he allegedly suffered. But the arbitration agreement here, like the preclusive settlement in *Robinson*, means that the only remaining PAGA claim in court will be based on alleged violations experienced only by other employees. That is the end of the road for the non-individual claim under PAGA. (See *Viking River*, 142 S.Ct. at p. 1925.)

This Court's precedent settles beyond any doubt that plaintiffs who are not aggrieved employees have no standing under PAGA. (See *Kim*, 9 Cal.5th at pp. 83–84; *Amalgamated Transit Union*, 46 Cal.4th at p. 1005.) But Adolph's proposed rule would be completely unworkable with respect to this requirement. If a plaintiff does not prove his "aggrieved

employee" status in court, then the court cannot determine whether the plaintiff actually has standing to bring a PAGA claim as a proxy of the State. And under *Viking River*, agreements to arbitrate an individual PAGA claim—which necessarily includes the question whether the plaintiff is an "aggrieved employee" who personally suffered "one or more of the alleged violations" (Lab. Code, § 2699, subd. (c))—must be enforced (*Viking River*, 142 S.Ct. at p. 1923). If a plaintiff who is bound by such an agreement is nonetheless permitted to litigate his "aggrieved employee" status in court (so as to prove that he has standing to pursue non-individual PAGA claims), that would violate the parties' enforceable agreement and thus contravene the FAA as interpreted in *Viking River*.

This case illustrates the problem. The Court of Appeal affirmed the denial of Uber's petition to compel arbitration as to Adolph's status as an aggrieved employee. (Opn., at pp. 7–9.) That ruling cannot be squared with *Viking River*, which compels enforcement of agreements like the one here. The question then is how could Adolph prove that he is an "aggrieved employee" in this action, if it were permitted to proceed on a non-individual basis only. Simply exempting Adolph from the threshold "aggrieved employee" issue would, of course, violate PAGA's plain text. (Lab. Code, § 2699, subd. (c).) Yet allowing him to litigate that issue in court would defy *Viking River*, as it would essentially resurrect *Iskanian*'s preempted joinder rule and deny the parties the right to "determine the issues subject to arbitration." (*Viking River*, 142 S.Ct. at pp. 1922–1923.) The

correct approach, as a majority of the U.S. Supreme Court has already recognized, is to hold that there is "no mechanism" that would "enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." (*Id.* at p. 1925.)

III. In the Alternative, Adolph's Non-individual PAGA Claims Should Be Stayed.

A proper application of the FAA and PAGA sends Adolph's individual claim to arbitration and dismisses the non-individual claims for lack of standing. But if this Court breaks with the *Viking River* decision and concludes that Adolph can still pursue non-individual PAGA claims even though he must arbitrate his individual PAGA claim, Uber would at minimum be entitled to a stay of the non-individual claims.

First, the parties agreed to a stay if anything remains in court. Specifically, Adolph assented to the condition that, "[t]o the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect to those claims, the Parties agree that litigation of those claims *shall be stayed* pending the outcome of any individual claims in arbitration." (6-CT-1598, § 15.3(v), italics added.) That agreement is enforceable, as this Court has held that parties can select stay procedures by contract. (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394.)

Second, Code of Civil Procedure section 1281.4 would call for a stay in any event. The overlap between the individual and non-individual claims justifies a stay "to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues that are subject to arbitration." (*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966; see, e.g., *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966 [same rule for severance of request for public injunctive relief].)

CONCLUSION

The Court should reverse the Court of Appeal and order that Adolph's individual claim be compelled to arbitration and that his non-individual claims be dismissed. In the alternative, this Court should order a stay of the non-individual claims pending the arbitration of the individual PAGA claim and the threshold classification issue.

Dated: September 19, 2022

Respectfully Submitted,

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Pursuant to rule 8.520(c)(1) of the California Rules of Court, the undersigned hereby certifies that the Opening Brief on the Merits contains 8,513 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: September 19, 2022

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