Nos. 23-1130, 23-1132

IN THE
Supreme Court of the United States

UBER TECHNOLOGIES, INC., ET AL.,
Petitioners,

v.

CALIFORNIA, ET AL.,
Respondents.

LYFT, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the California Court of Appeal

BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND THE CALIFORNIA RETAIL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 *amicus* briefs on issues of importance to the retail industry, some of which have been relied on by this Court. *See South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (citing the RLC's brief); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013) (citing the RLC's brief).

The California Retail Association (CRA) promotes, preserves and enhances the retail industry in California. The CRA is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, online markets, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision,

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least 10 days prior to the due date. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

jewelry, hardware and home stores. The CRA provides the voice to retail, which is vital to California's economy and diverse workforce.

The RLC and CRA have a particular interest in these related petitions because many of the associations' members use arbitration programs to resolve disputes with employees and customers individually and efficiently. This Court has repeatedly confirmed that the Federal Arbitration Act (FAA) secures the right to contract for individual arbitration and protects parties from being forced into classwide proceedings. In the cases below and others like them, however, state actors have sought to circumvent this Court's jurisprudence by bringing enforcement actions that—for all practical purposes—amount to class actions seeking victim-specific relief on behalf of individuals who agreed to arbitrate. This growing trend threatens to undermine the federal arbitration framework that Congress enacted and on which the associations' members rely.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the FAA to combat "widespread judicial hostility to arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). Congress recognized that arbitration can resolve bona fide disputes more quickly and less expensively than the judicial process. Arbitration's efficiencies flow in part from the limited scope of an arbitration proceeding: Because the prototypical individual arbitration involves the discrete claims of the parties to the proceedings, discovery is substantially more streamlined, and the parties can rely on informal procedures. Individual arbitrations stand in sharp contrast to class actions,

which often aggregate many thousands of small claims into a single complaint seeking massive amounts of combined alleged liability (although, typically, individuals in the class receive minimal recovery), prompting costly discovery on a class-wide basis and more complicated procedures.

The FAA ensures that courts enforce the right of consumers, employees and companies to contract into inexpensive and efficient individual arbitration and out of costly, class-wide proceedings. But hostility to individual arbitration remains alive and well. In the past decade, this Court repeatedly resisted efforts to aggregate claims despite a contractual agreement to individual arbitration, and thereby reined in efforts to circumvent individual arbitration's limited scope. *See, e.g.*, *Lamps Plus, Inc.* v. *Varela*, 587 U.S. 176, 186 (2019); *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 505 (2018); *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 236 (2013); *Concepcion*, 563 U.S. at 339; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). As Justice Barrett recently explained, this Court's modern arbitration precedent stands for the proposition that the FAA forbids "aggregation devices" being "imposed on a party to an arbitration agreement." *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 664 (2022) (Barrett, J., concurring in part and concurring in the judgment).

The enforcement actions that are the focus of these petitions represent the latest salvo against individual arbitration. Beyond requesting public-facing relief (*i.e.*, fines flowing to the government and permanent injunctions), these lawsuits seek to litigate individual claims subject to arbitration agreements and to turn over any damages collected through the litigation to

the individuals who agreed to binding arbitration. In all but name, these lawsuits are class actions seeking class-wide monetary relief that will be paid to drivers—the very thing that Petitioners and their respective drivers contracted to avoid. Anti-arbitration activists view these kinds of *parens patriae* actions as a tool for circumventing the FAA's strong protection for individual arbitration. These same activists have encouraged states to rely on self-interested *private class actions lawyers* to find, investigate, and litigate class-wide claims on behalf of the state in enforcement actions just like these. This important issue deserves this Court's attention.

The California Court of Appeal erred when it concluded that *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), authorizes California to circumvent contractually agreed-to individual arbitration agreements that the FAA would otherwise protect. In *Waffle House*, this Court reconciled the FAA with a federal statute authorizing the Equal Employment Opportunity Commission (EEOC) to bring enforcement actions. Based on a careful analysis of the two statutes, the Court held that Congress had intended to permit the EEOC to pursue an enforcement action seeking victim-specific relief on behalf of an employee who had signed an arbitration agreement. But *Waffle House* predated this Court's modern jurisprudence preventing aggregation devices when parties agree to arbitration, and it should not be extended to permit aggregation. Nor does *Waffle House* permit *state* actors to bring class-wide actions seeking relief on behalf of individuals who agreed to arbitration. As Petitioners correctly explain, *Waffle House* was focused on a different problem—how to reconcile two *federal* statutes passed by Congress—that has little to do with

whether the FAA preempts *state* efforts to undermine arbitration.

Moreover, there would be good reasons for Congress to have permitted the EEOC to bring enforcement actions on behalf of individuals bound by arbitration agreements—but not to have permitted state actors to bring similar suits. Congress monitors and exercises direct oversight over federal agencies, ensuring that those agencies do not unduly undermine the federal policy in favor of arbitration, and that the federal government does not employ overly aggressive private lawyers motivated by contingency fees. By contrast, Congress cannot as effectively control the many actors in the fifty states authorized to bring enforcement actions, which include private plaintiffs lawyers deputized to find and file lawsuits in a state's name, and cannot as rapidly respond to state efforts to undermine the FAA.

This Court should grant these important Petitions, reverse, and hold that the FAA preempts states from bringing these class-actions in disguise.

ARGUMENT

I. THIS COURT HAS SOUGHT TO PROTECT INDIVIDUAL ARBITRATION AND ITS EFFICIENCIES.

A. "The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339. The Act mandates that courts "place arbitration agreements on an equal footing with other contracts" "and enforce them according to their terms." *Id.* (citing *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006) and *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland*

Stanford Junior Univ., 489 U.S. 468, 478 (1989)). In enacting the FAA, Congress understood that "arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Sys.*, 584 U.S. at 505, "the ability to choose expert adjudicators to resolve specialized disputes," *Stolt-Nielsen*, 559 U.S. at 685, and "confidential" proceedings, *Concepcion*, 563 U.S. at 345.

The benefits of arbitration accrue to both plaintiffs and defendants. Plaintiffs are often "better off" proceeding in arbitration than "in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 352 (quotation marks and italics omitted). A recent empirical study found that consumers who initiate cases are more likely to prevail in arbitration (41.7%) than in litigation (29.3%). *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* 4 (2022), *available at* https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf. The same study found that consumer awards in successful arbitrations are over $8,000 larger than in litigation, and the proceedings are more than 100 days shorter. *Id*. The study found similar results for employees proceeding in arbitration, who also prevail more frequently, win larger awards, and receive those awards more quickly compared to employees who litigate in court. *Id*. Because arbitration is informal, plaintiffs can even effectively represent themselves—saving the expense of hiring a lawyer.

The chief losers in arbitration are the class action plaintiffs lawyers—who all too often seek multi-million dollar fees but deliver little benefit to the enormous classes they purportedly represent. *See, e.g.*, *Lowery* v. *Rhapsody Int'l, Inc.*, 75 F.4th 985, 988 (9th Cir. 2023) ("[P]laintiffs' lawyers filed a class action" "recovering a little over $50,000," "asked the court to award them $6 million in legal fees," and "the court authorized $1.7 million in legal fees—more than thirty times the amount that the class received.").

B. Individual arbitration's efficiencies are necessarily related to the limited scope of the proceedings. The small number of claims reduces the need for expensive discovery, and the lower stakes decrease the cost of potential error, which allows parties to "forgo the procedural rigor and appellate review of the courts." *Stolt-Nielsen*, 559 U.S. at 685. The result: Streamlined, informal proceedings regarding a specific consumer or employee's complaint, which move quickly toward resolution at lower cost for all concerned.

Arbitration's informal and inexpensive procedures stand in sharp contrast to cumbersome and costly class actions. By their nature, class actions require expansive discovery regarding the claims of an entire class, as well as complicated mechanisms to protect the rights of absent class members. *Concepcion*, 563 U.S. at 348-350. And because class actions aggregate many small claims into potentially ruinous amounts of liability, defendants cannot risk relying on informal procedures, as they might in informal arbitration. *Stolt-Nielsen*, 559 U.S. at 685.

C. Since 1925, the FAA has protected the right of companies and consumers alike to replace

cumbersome and costly class proceedings with faster and more efficient individual arbitration. But the same hostility to arbitration that prompted Congress to enact the FAA a century ago is unfortunately alive and well today, and this Court has remained "alert to new devices and formulas that" seek to circumvent the FAA's protections for individual arbitration. *Epic Sys.*, 584 U.S. at 509. In particular, over the last decade, this Court has repeatedly confronted efforts "to interfere with" "arbitration's fundamental attributes" by forcing defendants back into class-wide proceedings involving the aggregation of a large number of small claims. *Id*. at 508.

Consider the arc of this Court's precedent:

In 2011, *Concepcion* held that the FAA forbids states from conditioning the enforceability of "arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at 336.

Two years later in *Italian Colors*, this Court again upheld the legality of "class-action waiver[s]" that "limit[] arbitration to the two contracting parties." *Italian Colors*, 570 U.S. at 236.

In *Stolt-Nielson* and *Lamps Plus*, this Court rejected the notion that silence or ambiguity in arbitration agreements authorizes class-wide arbitration. Both decisions prevent courts from undermining the fundamentally bilateral aspect of individual arbitration. *See Lamps Plus*, 587 U.S. at 186 (explaining that "[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself."); *Stolt-Nielsen*, 559 U.S. at 686 (detailing "the fundamental changes brought about by

the shift from bilateral arbitration to class-action arbitration").

And in *Epic Systems*, this Court confirmed that the National Labor Relations Act does not stand in the way of companies and employees entering into individual arbitration agreements. *Epic Sys.*, 584 U.S. at 524.

This Court has also been attentive to more subtle efforts to undermine individual arbitration. Last Term, in *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736 (2023), this Court held that the FAA automatically divests a federal district court of jurisdiction to proceed with pending litigation while a defendant appeals the denial of a motion to compel arbitration, *id*. at 740. The Court explained that, absent "a stay, parties * * * could be forced to settle to avoid the district court proceedings (including discovery and trial) that they contracted to avoid through arbitration." *Id*. at 743. The Court emphasized that the "potential for coercion is especially pronounced in [putative] class actions, where the possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.' " *Id*. (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

II. THE DECISION BELOW UNDERMINES THIS COURT'S PRECEDENT AND MERITS REVIEW.

The lawsuits against Petitioners—and other similar actions like them—are the latest attempt to frustrate the FAA's protection for individual arbitration. Beyond seeking public relief, these cases attempt to pursue and recover victim-specific relief on behalf of workers under the guise of state enforcement actions. In practice, these lawsuits aggregate claims that

would otherwise proceed in individual arbitrations into a single massive proceeding in state court. These are, effectively, class actions in all but name on behalf of individuals who agreed to arbitrate their disputes.

More remarkably, state attorneys general can and do rely on private class-action lawyers to litigate cases on contingency—meaning the same plaintiffs' lawyers who could recover significant fees for bringing a class action can now bring these "enforcement actions." This newest "aggregation device[]" is inconsistent with the FAA's protection for individual arbitration, and this concerning issue calls out for this Court's review. *Viking River Cruises*, 596 U.S. at 664 (Barrett, J., concurring in part and concurring in the judgment).

A. Anti-arbitration activists have advocated for using state enforcement actions as mechanisms to aggregate claims and undermine this Court's FAA jurisprudence.

In a prominent article written as an immediate response to *Concepcion*, a law professor and class-action lawyer bemoaned that "[c]lass actions are on the ropes." Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility* v *Concepcion*, 79 U. Chi. L. Rev. 623, 658 (2012). The solution: State attorneys general should bring *parens patrae* lawsuits—like the two enforcement actions presented in the petitions—to sidestep arbitration clauses in consumer and employment contracts, and aggregate many thousands of claims into a single proceeding.

Such enforcement actions need be litigated by the state in name only. According to the authors, attorneys general should hire private counsel (read: the

class action plaintiff's bar) to do the work of "finding and vetting the case, writing the court papers, conducting the discovery, or trying the case." *Id*. at 669. More recently, the same law professor has argued that "[o]utside firms (and funders) can be expected to line up for the chance to contribute the out-of-pocket costs required for major public-enforcer-led damages litigation." Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 Fordham L. Rev. 2223, 2232 (2018); *see also, e.g.*, Nikko Price, Note, *Better Together? The Peril and Promise of Aggregate Litigation for Trafficked Workers*, 129 Yale L.J. 1214, 1262, 1266 (2020) (explaining that the state is "immune to challenge of forced arbitration" and that "outside lawyers" operating on "contingent-fee arrangements" can "front[]" "the costs of investigation and litigation").

In addition to improperly side-stepping this Court's precedent forbidding claim aggregation in the face of a valid arbitration agreement, the use of private class action lawyers paid on contingency carries other troubling implications. Because such lawyers have a personal stake in the outcome of the public enforcement actions which they litigate, they have an economic incentive to wield state power in ways that may not always advance the public's interest. That personal stake could influence what claims private lawyers choose to pursue, the manner in which they litigate cases, the types of relief they seek, and how they attempt to resolve matters prior to trial—all of which might differ from how disinterested public servants would act in the same circumstances. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 84 (2010) ("Sometimes public

interest considerations dictate dropping litigation altogether or focusing on nonmonetary relief more than monetary relief, something that contingency fee lawyers for obvious reasons are unlikely to pursue." (quotation mark omitted)); *see also id*. at 81 ("[G]overnmental attorneys even in civil cases have the obligation to respect and pursue the public interest in a manner that does not control the behavior of attorneys acting on behalf of private clients.").[2]

To be sure, in the two cases before this Court, the lawyers representing California appear to be fulltime state and local employees. But nothing prevents California officials with authority to bring *parens patriae* actions from relying on private class-action lawyers working on contingency in the next case. And as these cases demonstrate, California law authorizes *many* state and local entities to sue in the state's name.[3] The plethora of state actors with enforcement authority increases the likelihood that some will deputize private plaintiffs' attorneys to find and pursue these cases on contingency.

The County of Los Angeles already has done just that. In February 2024, the County brought a *parens patriae* lawsuit in the state's name against a food delivery app over the fees it charges to customers, and

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[2] As Professor Redish has explained, "[t]o comprehend the problematic nature of the situation brought on by government's use of private contingent fee lawyers, one need only hypothesize a situation in which governmental prosecutors are given a financial arrangement in which they are to be paid when and only when they obtain a conviction." Redish, *supra* at 80.

[3] Petitioners are being sued by lawyers working for five different state actors with litigation authority: The California Attorney General, the California Labor Commissioner, and the individual City Attorneys for San Francisco, Los Angeles, and San Diego.

seeks (among other things) victim-specific restitution. *See People of the State of California* v. *Grubhub Inc.*, No. 24STCV04326 (Cal. Super. Ct. L.A. Cnty. filed Feb. 21, 2024). Much as with the cases presented to the Court here, if the company's customers had sued to bring those claims directly seeking the same relief, the customers could have been compelled to arbitrate. *See* Grubhub Holdings, Inc., *Terms of Use* (effective December 14, 2021), *available at* https://www.grubhub.com/legal/terms-of-use (providing for binding arbitration between company and customers). The County is represented in that enforcement action by a private plaintiff-side firm.

There is every reason to expect California officials will continue to bring enforcement actions to aggregate claims and circumvent valid arbitration agreements. Shortly after the decision in this case, the California legislature codified the decision below into a statute providing that "a public prosecutor or the Labor Commissioner" may pursue actions like the ones against Petitioners regardless of "any individual agreement between a worker and employer that purports to limit representative actions or to mandate private arbitration." Cal. Lab. Code § 182.

Nor is the problem limited to California. For example, in 2022, the Minnesota Attorney General brought an enforcement action against a delivery service, arguing that the company had improperly classified delivery workers as independent contractors (essentially a mirror image of the claims against Petitioners in these cases). In his press release, the Minnesota Attorney General explained that he had brought the action because the company's "form contract includes a binding arbitration agreement and a class action

waiver," which in turn prevented the delivery workers from aggregating claims in a single proceeding. *See* Office of the Minnesota Attorney General, *Attorney General Ellison Sues Shipt for Misclassifying 'Shoppers' As Independent Contractors Instead of Employees* (Oct. 24, 2022), *available at* https://www.ag.state.mn.us/Office/Communications/2022/10/27_Shipt.asp. Just like the lawsuits against Petitioners, the Minnesota lawsuit seeks restitution on behalf of each individual delivery worker. This is a naked effort to circumvent the FAA and undercut this Court's precedent protecting agreements to individual arbitration of disputes.

In short, the serious issue presented by these petitions is already significant, and it will only worsen with time.

B. The court below was wrong when it concluded that the FAA permits states to sidestep arbitration agreements by seeking relief for specific individuals through an enforcement action in the state's name—when the same individuals would otherwise be required to proceed in arbitration.

The court below held that the state enforcement actions are exempt from the FAA under *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). But for starters, *Waffle House* predated this Court's recent precedent forbidding procedures for aggregating claims that "fundamentally change[] the nature of the 'traditional individualized arbitration' envisioned by the FAA." *Lamps Plus*, 587 U.S. at 178 (quoting *Epic Sys.*, 584 U.S. at 509). To the extent *Waffle House* can be read to facilitate aggregation, it is in tension with that precedent, and should not be extended. Indeed, it is notable that *Waffle House* involved a claim on behalf

of one individual—not a class action—and the Court did not consider the decision's potential ramifications for class actions. *Waffle House*, 534 U.S. at 283-284.

Moreover, as Petitioners persuasively explain, *Waffle House* did not address the question presented. *Waffle House* sought to reconcile two federal statutes passed by Congress—the FAA and a statute authorizing the EEOC to bring enforcement actions seeking victim-specific relief. Whatever may be said for the merits of that decision, it involved this Court's efforts to square two statutes passed by the same sovereign. *Waffle House*'s logic has no bearing on whether the *Federal* Arbitration Act and Supremacy Clause preempt a *state* law that frustrates the federal statute's purpose. *See* Uber Pet. 24; Lyft Pet. 14-15.

Perhaps most importantly, there are strong policy reasons for why Congress may have authorized federal agencies to bring enforcement actions seeking victim-specific relief—without permitting anyone deputized by the fifty states to do the same. Congress directly controls the ability of federal agencies to bring enforcement actions (and the scope thereof) through each agency's authorizing statutes, and carefully chooses which agencies may act and in what enforcement contexts. For example, in *Waffle House*, the Court highlighted the fact that, because Congress ensured "the EEOC cannot pursue a claim in court without first engaging in a conciliation process," any enforcement action brought by the EEOC would necessarily incorporate "some of the benefits" present in arbitration. *Waffle House*, 534 U.S. at 290 n.7.

Congress also authorizes federal appropriations, and federal agencies are limited in the number of enforcement actions they may bring based on the

resources Congress appropriates. Thus, in *Waffle House*, this Court noted that "the EEOC files suit in a small fraction" of cases in which it receives a complaint from an employee. *Id.* And Congress exercises even more direct checks on federal agencies through the confirmation process and oversight hearings.

In addition to these Article I powers, Congress can also reasonably rely the President, who is bound by the Take Care Clause, to judiciously exercise enforcement authority and deploy the limited resources Congress authorizes with an eye toward vindicating the federal policy in favor of arbitration. *See* U.S. Const. art. 2, § 3. Moreover, unlike state and local actors' aggressive use of private counsel, the Executive Branch has banned the use of most contingent fee arrangements when the federal government hires outside counsel for nearly two decades. *See* Protecting American Taxpayers From Payment of Contingency Fees, Exec. Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007).

In contrast, Congress dictates neither whom each state authorizes to sue in its name, nor the funding of the fifty states. Nor can Congress easily rein in an attorney general or another of the many state actors with enforcement authority bent on undermining the FAA. Congress may have sensibly concluded that a few enforcement actions seeking victim-specific relief brought by the EEOC under the President's direction and Congress's close supervision would not fatally undermine the federal policy in favor of arbitration—but many more actions brought by private class-action plaintiffs' lawyers in a state's name would upset the balance.

In short, nothing suggests Congress wanted to permit states to bring class-actions-in-all-but-name that directly circumvent the FAA's protections for individual arbitration. This Court should not allow state courts to apply *Waffle House* in a significantly different context and undermine the FAA's strong federal policy in favor of arbitration. Instead, the Court should grant the petitions and reverse the decision below.

CONCLUSION

For the foregoing reasons, and those in the petitions, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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