No. 23A_____

IN THE

Supreme Court of the United States

LOWE'S HOME CENTERS, LLC,

Applicant,

v.

MARIA JOHNSON,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Under this Court's Rule 13.5, applicant Lowe's Home Centers, LLC respectfully requests a 60-day extension of time, to and including August 31, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.* The court of appeals entered its judgment on February 12, 2024, App., *infra*, 1a, and denied applicant's timely petition for panel rehearing and rehearing en banc on April 3, 2024, *id.* at 17a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on July 2, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Counsel for respondent Maria Johnson does not oppose this request.

1. This case presents an important question concerning the Federal Arbitration Act (FAA). In *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639 (2022), this Court held that the FAA preempts California law "insofar as it precludes division of" actions brought under the California Labor Code Private Attorneys General Act (PAGA) "into individual and non-individual claims through an agreement to arbitrate." *Id.* at 662. This Court explained that the individual PAGA claim must be severed from the non-individual claims and "committed to a separate proceeding" for arbitration. *Id.* at 663. Following *Viking River*, however, the California Supreme Court held that PAGA claims constitute "a single action" in which the individual PAGA claim compelled to arbitration remains in court for the purpose of allowing a

* Under this Court's Rule 29.6, applicant Lowe's Home Centers, LLC states that it is a wholly owned subsidiary of Lowe's Companies, Inc., a publicly held corporation. No publicly held corporation owns 10% or more of the stock of Lowe's Companies, Inc.

plaintiff to establish statutory standing to pursue the non-individual claims. *Adolph* v. *Uber Technologies, Inc.*, 532 P.3d 682, 695 (Cal. 2023). The Ninth Circuit in this case upheld *Adolph* against applicant's FAA preemption challenge. App., *infra*, 9a-11a.

a. Respondent worked at one of applicant's home improvement stores. App., *infra*, 5a. As a condition of her employment, she agreed to arbitrate "'any controversy between [herself] and Lowe's * * * arising out of [her] employment or the termination of [her] employment.'" *Ibid.* She also agreed to a representative-action waiver that prohibited disputes from being "'arbitrated as a representative action or as a private attorney general action, including but not limited to claims brought pursuant to [PAGA].'" *Ibid.* And she agreed to a severability clause in the event that the representative-action waiver is invalidated in whole or in part. *Id.* at 9a.

b. Despite agreeing to arbitrate disputes with applicant on an individualized basis, respondent filed an action in California state court alleging "both individual and non-individual PAGA claims." App., *infra*, 5a. Applicant removed the action to federal district court. *Ibid.* After this Court's decision in *Viking River*, applicant moved to compel arbitration of respondent's individual PAGA claim and to dismiss the remaining non-individual PAGA claims. *Ibid.* The district court granted those motions in full. *Ibid.*

c. The Ninth Circuit affirmed the district court's granting of the motion to compel arbitration of respondent's individual PAGA claim, but vacated and remanded the dismissal of the non-individual PAGA claims. App., *infra*, 4a-11a; *id.* at 11a-16a (Lee, J., concurring).

i. In an opinion joined by all three judges, the Ninth Circuit held that respondent had agreed to arbitrate her individual PAGA claim, but that the district court had erred in dismissing the remaining non-individual PAGA claims under *Viking River*. App., *infra*, 9a. The Ninth Circuit reasoned that the California Supreme Court in *Adolph* had the authority to revisit this Court's interpretation of California law. *Id.* at 9a-10a. The Ninth Circuit also rejected applicant's argument that *Adolph*—by allowing plaintiffs to rely in court on the arbitrable individual claim for purposes of proving statutory standing for the non-individual claims—conflicts with the FAA. *Id.* at 10a-11a.

ii. Judge Lee wrote separately "to highlight a lurking tension between *Adolph* and the [FAA]." App., *infra*, 11a (concurring opinion). He explained that "the bifurcation procedure outlined in *Adolph*—where a plaintiff's individual PAGA claim will be committed to arbitration while the non-individual PAGA claims will be stayed and remain in court—might blunt the efficiency and informality of arbitration in some cases." *Id.* at 12a. Specifically, allowing courts to borrow the arbitral findings to decide issues for non-arbitrable claims could turn "the arbitration decision of a low-stakes individual PAGA claim" into a proxy war over "the high-stakes non-individual PAGA claim in federal court." *Id.* at 13a. Faced with that risk, "companies may have little choice but to bring in the legal cavalry and devote substantial resources at that individual arbitration," thereby "undermin[ing] the benefits of arbitration for everyone." *Ibid.* Judge Lee put off resolution of this conflict only because he believed that Article III could weed out non-individual PAGA claims from federal court and because issue preclusion might not "prevent an employer from re-litigating issues

decided in an individual PAGA arbitration" where the employer lacked an adequate incentive to litigate the issue in arbitration to the hilt. *Id.* at 14a-15a.

2. The Ninth Circuit's decision conflicts with the FAA and *Viking River*. In line with the California Supreme Court's decision in *Adolph*, the Ninth Circuit affirmed the order compelling the individual PAGA claim to arbitration but allowed respondent to rely on that arbitrable claim for purposes of proving statutory standing for the non-individual claims in court. App., *infra*, 9a. The Ninth Circuit then asserted (with little elaboration) that "[t]here is nothing in *Adolph* that is inconsistent with the federal law articulated in *Viking River*." *Id.* at 10a. In reality, though, the Ninth Circuit's application of *Adolph* defies *Viking River*'s central federal holding that the FAA requires an individual PAGA claim to be "pared away" and "committed to a separate proceeding" when parties have agreed to arbitrate only individualized issues. 596 U.S. at 663. Neither of the California Supreme Court's two reasons in *Adolph* for discounting *Viking River* hold up to scrutiny under the governing principles of FAA preemption.

First, the California Supreme Court suggested that the courts could prevent relitigation of arbitrable issues by staying judicial proceedings pending arbitration. *Adolph*, 532 P.3d at 692. But the embrace of the potential for a stay only confirms the underlying preemption problem because, if the courts below had fully compelled the individual PAGA claim to arbitration, then a stay of the non-individual claims pending arbitration would not have been necessary.

Second, the California Supreme Court expanded the scope and stakes of the arbitration to which the parties agreed. *Viking River* made clear that PAGA's

mandatory joinder rule interfered with the FAA by "coerc[ing] parties into withholding PAGA claims from arbitration" because the "absence of 'multilayered review' in arbitral proceedings" makes them "'poorly suited to the higher stakes' of massive-scale disputes of this kind." 596 U.S. at 661-662. As Judge Lee warned, the preclusion rule adopted in *Adolph* and endorsed by the Ninth Circuit here likewise transforms a "low-stakes" arbitration of an individual PAGA claim into a "high-stakes" contest over standing for non-individual PAGA claims. App., *infra*, 13a (concurring opinion). Whether through joinder on the front end or preclusion on the back end, a party must effectively tie the non-individual (non-arbitrable) claims to the outcome of the individual (arbitrable) claim and thereby imposes the same dilemma on the parties: "either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether." *Viking River*, 596 U.S. at 661. That "irreconcilable conflict" is here today, not a faraway concern for tomorrow. Cf. App., *infra*, 16a (Lee, J., concurring).

3. Additional time is necessary to permit counsel to prepare and file a petition that would be helpful to the Court. Counsel for applicant have had—and will continue to have—significant professional responsibilities in other time-sensitive matters, and preexisting professional and personal travel plans, in the period before and after the current July 2 deadline.

4. Counsel for respondent does not oppose the requested extension.

Accordingly, applicant respectfully requests that its time to file a petition for a writ of certiorari be extended by 60 days, to and including August 31, 2024.

Respectfully submitted.

/s/ Allyson N. Ho

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