No. 20-1573

IN THE

Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ANNA-ROSE MATHIESON
Counsel of Record
SUSAN YORKE
CALIFORNIA APPELLATE LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700
annarose@calapplaw.com

Counsel for Amicus CNCDA

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BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus respectfully submits this brief in support of petitioner Viking River Cruises, Inc.[1]

INTEREST OF AMICUS CURIAE

The California New Car Dealers Association (CNCDA) is the nation's largest state automobile dealer association, representing nearly 1,200 franchised new car and truck dealers throughout California. Like many businesses throughout the United States, CNCDA's members enter into contracts that adopt the time- and cost-saving options afforded by the Federal Arbitration Act (FAA) to resolve disputes promptly. Judicial decisions that undermine the FAA thwart these efforts to achieve a swift, economical, and fair outcome when disagreements arise.

The ruling here frustrates the purposes of the FAA and singles out arbitration agreements for disfavored treatment. This Court should reverse for the reasons explained below and in petitioner's brief on the merits.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amicus or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties granted consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Angie Moriana signed a contract promising to arbitrate—not litigate—any claims arising out of her employment. She then sued her employer, asserting just such claims on behalf of herself and hundreds of other employees. Should she be able to do that? The answer seems obvious: No.

But California says it's fine. Why? Because California has decided that employment claims under California's Private Attorneys General Act (PAGA) can't be waived. So even employees who agreed to bilateral arbitration of employment-related claims can still sue their employer under PAGA for almost any violation of California's 800+ page Labor Code.

That result can't be right—and it isn't. More than 100 years ago, Congress passed the Federal Arbitration Act (FAA) to combat judicial hostility to arbitration. But California has repeatedly tried to circumvent the FAA, and its no-waiver-for-PAGA-claims rule is just the latest attempt.

In the five years after California announced the rule in *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal. 4th 348 (2014), the average number of PAGA notices more than doubled compared to the five-year period before *Iskanian*. The total value of PAGA claims went up even more, rising 600% in those five years. These numbers are still increasing. And these increases aren't just coincidental; many plaintiffs who at first asserted only class action claims hastily added PAGA claims after the defendant pointed out they had signed an arbitration agreement waiving all class and representative claims.

The *Iskanian* rule—and the explosion of PAGA cases it engendered—hurts businesses and individuals. It exposes companies to potentially catastrophic liabilities and makes them vulnerable to opportunistic plaintiffs' lawyers. It encourages employees to breach their contracts and ignore arbitration agreements they signed. And it is not necessarily better for employees, who may wait years for resolution of their claims and end up recovering very little while their lawyers reap the benefits. In fact, the lawyers are the only ones that gain from the inefficiency and increased costs in the current system. Meanwhile, both employers and employees lose the benefits of the private dispute resolution to which they agreed. That result contravenes the FAA and this Court's precedent.

This Court should reverse the decision below and require California courts to follow federal law.

ARGUMENT

I. PAGA gives plaintiffs carte blanche to sue businesses for even minor employment violations.

California's Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code §§ 2698 et seq., allows employees in California to file suit for nearly any violation of the California Labor Code. *Id.* §§ 22, 2699(a).[2]

[2] PAGA provides that "any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself

Although employees ostensibly file such suits on behalf of the California Attorney General, the employee controls the litigation. *See Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021). The employee drafts the complaint, handles motions practice, and decides which witnesses to call at trial. *See* Cal. Lab. Code § 2699(*l*)(1).[3] The employee can decide whether to settle or dismiss the suit. Cal. Lab. Code §§ 2699(a), (g)(1), (h), 2699.3(b)(4). And the employee shares in any verdict or settlement proceeds. *Id*. § 2699(i).

PAGA allows suit for virtually any employment claim that a plaintiff could bring, and the statute also allows suit for many technical violations of the Labor Code that wouldn't normally provide a basis for a civil suit. Cal. Lab. Code § 2699(a). And while PAGA doesn't allow the employee to collect the same types of damages as a regular suit or class action, the penalties can be as high or higher, with a statutory $100 penalty per employee per pay period for the first

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and other current or former employees . . . ." Cal. Lab. Code § 2699(a). The code defines a "violation" as "a failure to comply with any requirement of the code." *Id*. § 22. The employee must notify California's Labor and Workforce Development Agency (LWDA) of the violation, and if the agency fails to respond or declines to pursue the issue the employee may bring suit. *Id.* § 2699.3(a)(1)(A), (a)(2).

[3] *See also* Laura Reathaford, *PAGA Performance*, L.A. Law., June 2016, at 18, 20 (discussing PAGA plaintiffs' various litigation choices, including which Labor Code violations to allege, how to define the group of "aggrieved employees," and whether to use statistical sampling to attempt to prove their claims); *Wesson v. Staples The Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021) (discussing PAGA plaintiff's pleading decisions and trial plan).

violation and $200 per employee per period for any later violations.[4] Cal. Lab. Code § 2699(f)(2). Plus, of course, attorney's fees. *Id.* § 2699(g)(1).

Not only can any employment claim be repackaged as a PAGA claim, but once a plaintiff asserts a single PAGA claim they can assert all other conceivable claims by any other employee under PAGA, *even if the plaintiff wasn't affected by the other alleged violations at all*. *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745, 750-51 (2018) (any plaintiff who brings a PAGA claim may seek penalties not only for the Labor Code violation that affected them but also for different violations that affected other employees).[5] This means that PAGA suits can snowball into catastrophic liabilities for businesses—especially small ones—even when brought by minimally aggrieved plaintiffs.

While the general scope of the PAGA statute might be a matter of state policy, whether it can override an arbitration agreement is not. Yet since the California

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[4] *See also* Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1164 (2015) ("The civil penalties imposed by PAGA are cumulative and hefty[.]"); Lisa Nagele-Piazza, *California Employers Face Significant Penalties for Pay Stub Violations*, SHRM (Feb. 7, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-employer-penalties-pay-stub-violations.aspx (explaining how penalties under PAGA can quickly add up).

[5] Under California's court hierarchy, any appellate decision binds every trial court in the state, so throughout the state plaintiffs need only have standing for one PAGA claim to bring every other possible PAGA claim against their employer. *See Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353-54 (2007).

Supreme Court's 2014 decision in *Iskanian*, plaintiffs can bring a PAGA suit despite having signed an arbitration agreement promising not to do so. 59 Cal. 4th at 360, 382-87. Under the *Iskanian* rule, California courts refuse to enforce PAGA waivers in bilateral arbitration agreements.

Taken together, this means that California plaintiffs can sue their employer in court despite having promised to arbitrate any and all claims arising out of their employment. They can sue even for very minor employment-related violations, and add claims on behalf of hundreds or thousands of others. And they can seek massive statutory penalties that result in devastating liability for businesses.

II. Since *Iskanian*, plaintiffs routinely use PAGA to avoid their promises to arbitrate.

Since the June 2014 decision in *Iskanian*, California has seen a dramatic surge in PAGA claims as strategic plaintiffs seek to avoid the arbitration agreements they signed.[6]

In the five years after *Iskanian*, the average number of PAGA notices more than *doubled* compared to the five years before *Iskanian*:

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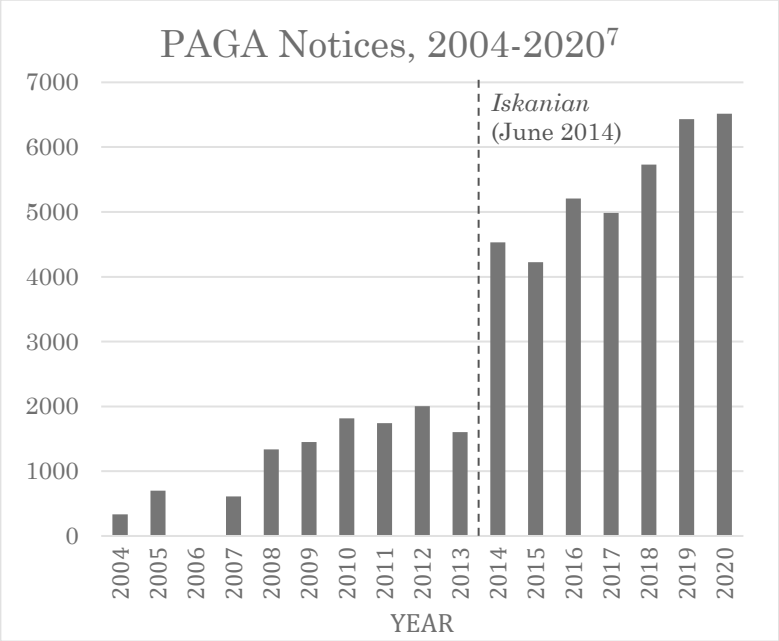
[6] Ivan Muñoz, *Has PAGA Met Its Final Match?*, 60 Santa Clara L. Rev. 397, 399 n.7, 422 n.202 (2020) (using data provided by the California Department of Industrial Relations, *see* note 7).



And the Department of Industrial Relations predicts the number of notices will keep on rising, estimating that plaintiffs will file over 7,000 notices in fiscal year 2022-23.[8] Not only did the sheer number of PAGA claims skyrocket after *Iskanian*, but the amount that businesses were forced to pay for PAGA

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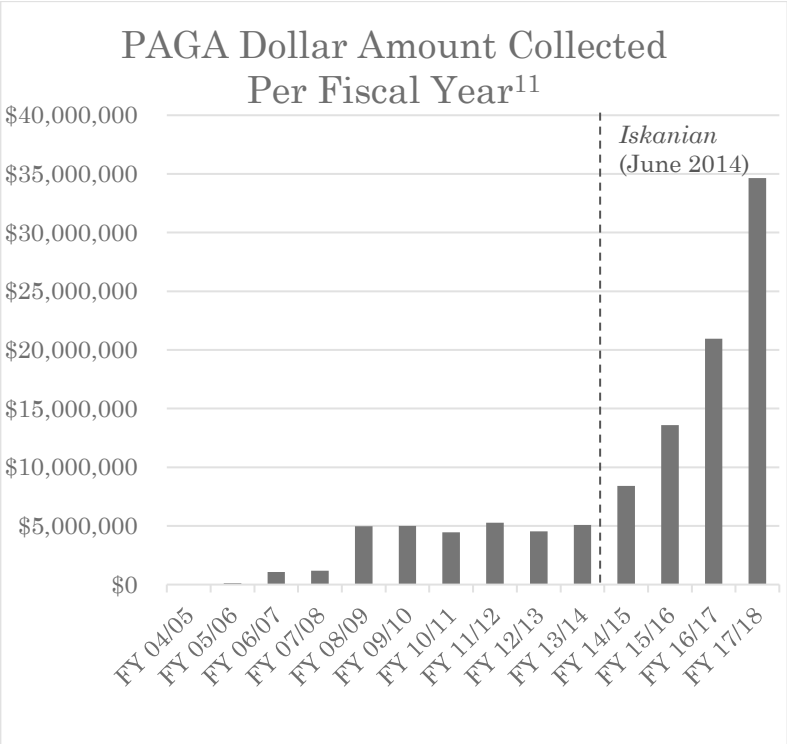
[7] Chart created using publicly available data from the California Department of Industrial Relations, *Private Attorneys General Act (PAGA) Case Search*, https://cadir.secure.force.com/PagaSearch/ (last visited Feb. 2, 2022). Data points reflect the total number of PAGA Notices filed for that calendar year (January 1 through December 31).

[8] California Department of Industrial Relations, *Budget Change Proposal Fiscal Year 2019-20* 7 (May 10, 2019), *available at* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

suits increased by more than 600% in the five years after *Iskanian*.[9] In fiscal year 2013-2014, the state collected approximately $5 million from PAGA suits; by fiscal year 2017-2018 that figure was nearly $35 million:[10]



[9] Muñoz, *supra* note 6, at 422.

[10] *Id.*

[11] Chart adapted from Muñoz, *supra* note 6, at 399 n.7, 422 (using data provided by the California Department of Industrial Relations, *see* note 7). The California state government's fiscal year runs from July 1 to June 30. *See* California Senate, *The Budget Process: A Citizen's Guide to Participation* 15, *available at* senate.ca.gov/sites/senate.ca.gov/files/the_budget_process.pdf.

And the numbers are still on the rise: in fiscal year 2019-2020, the total hit $43 million.[12] Estimates for fiscal years 2020-2021 and 2021-2022 are $50 million.[13] Moreover, because these numbers include only the state's portion of the PAGA proceeds, they dramatically underestimate the total costs to employers.[14]

Real-world examples from California courts reveal the extent of the gamesmanship at work here. Countless plaintiffs have strategically added a PAGA claim to avoid arbitration after the defendant invoked the parties' arbitration agreement. Viking River's brief

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[12] Baker & Welsh, LLC, *California Private Attorneys General Act of 2004: Outcomes and Recommendations* 1, 3 (Oct. 2021), *available at* https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf; *see also* Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DePaul L. Rev. 357, 372 (2020) ("Private enforcer recovery of penalties via PAGA has grown dramatically since 2012, from about $4.5 million to over $41 million per year.").

Other estimates for 2019 are even higher. *See* Rachel Deutsch et al., *California's Hero Labor Law* 8 (Feb. 2020), *available at* https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf (according to a report by the UCLA Labor Center, the state collected $88 million in PAGA penalties, including filing fees, in 2019); Elmore, *supra*, 69 DePaul L. Rev. at 372 n.66 ("California reports $63.7 million in PAGA penalties collected in the six months from July 2019 to January 2020.").

[13] Baker & Welsh, *supra* note 12, at 1, 3.

[14] Cal. Chamber of Commerce, *Reform Needed to Stop Abuse Forcing Employers into Costly Settlements* (Jan. 2021), *available at* https://advocacy.calchamber.com/policy/issues/private-attorneys-general-act/. Plaintiffs' attorneys often try to structure settlements to maximize their fee recovery—a significant cost to employers that is not included in the figures above. *See id.*

cites several examples, Merits Br. at 43-45, and there are many more. *E.g.*, *Kelly v. Kiewit Infrastructure W. Co.*, No. CV 18-5807-MWF (AGRx), 2018 WL 6566555, at *1 & Dkt. 19, at 9 (C.D. Cal. Sept. 12, 2018) (plaintiff first brought putative class action, but after defendant sought to compel arbitration plaintiff amended the complaint to include PAGA claim); *McElhannon v. Carmax Auto Superstores W. Coast, Inc.*, No. 3:19-CV-00586-WHO, 2019 WL 2354879, at *1 (N.D. Cal. June 4, 2019) (after defendants moved to compel arbitration, two plaintiffs filed an amended complaint stating they would "forego their remaining claims in order to pursue only the PAGA claims").

In many other cases, plaintiffs simply filed a new action seeking relief under PAGA when faced with a motion to compel arbitration. *E.g.*, *Sanchez v. Gruma Corp.*, No. 19-CV-02015-WHO, 2019 WL 2716539, at *1 (N.D. Cal. June 28, 2019) (after motion to compel arbitration of state law employment claims granted, plaintiff filed second suit alleging PAGA claim based on same facts); *Herrera v. CarMax Auto Superstores California, LLC*, No. EDCV-14-776-MWF (VBKx), 2014 WL 12567154, at *1 (C.D. Cal. Aug. 27, 2014) (federal court compelled arbitration and dismissed original suit; two months later plaintiff filed a second action in state court that "makes the same factual allegations as the Complaint in the First Action, but only seeks remedies under" PAGA); *see also Bautista v. Fantasy Activewear, Inc.*, 52 Cal. App. 5th 650, 653 (2020) (defendant moved to compel arbitration, plaintiffs dismissed class action and kept only PAGA claims, and arbitration of those claims was denied).

This strategic use of PAGA to avoid arbitration flows directly from the California Supreme Court's ill-

considered *Iskanian* decision. Plaintiffs and their lawyers can avoid arbitration agreements simply by bringing PAGA representative claims instead of class claims.[15] And as shown in the charts above, this risk is far from theoretical—the non-waivability of PAGA claims has spawned an explosive increase in litigation of employment claims that were, by contract, supposed to be arbitrated. This subverts the policies Congress sought to protect in passing the FAA. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). And, as explained below, it harms individuals and companies throughout the country.

III. The proliferation of PAGA cases harms individuals and businesses.

The increase in PAGA claims hurts businesses and individuals. Businesses may be exposed to significant liability—even for minor or technical violations—and are deprived of their bargained-for agreements to arbitrate. Meanwhile, the costs of litigating PAGA claims are substantial, and the litigation process is long and inefficient. When courts resolve PAGA claims, everyone loses (except the lawyers).

From the employer's point of view, there is little distinction between class actions, collective actions,

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[15] *See Rivas v. Coverall North America, Inc.*, 842 Fed. App'x 55, 58 & n.1 (9th Cir. 2021) (cert. pet. pending, No. 20-55140) (Bumatay, J., concurring) ("We now creep closer to the day that a party may always sidestep an arbitration agreement simply by filing a PAGA claim. . . When we arrive there formally, we'll be late to the party: California courts have already said as much.").

and PAGA actions.[16] All require the employer to engage in costly and complicated litigation. All include the risk of significant liability. All can lead to substantial awards of attorney's fees. And all deprive the employer of the benefit of the arbitration agreement they signed. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 447 (9th Cir. 2015) (N.R. Smith, J., dissenting).

The post-*Iskanian* explosion of PAGA claims harms companies even when cases aren't litigated to verdict. The possibility of massive penalties for even inadvertent violations, combined with the cost of defending such actions, encourages early resolution.[17] And this can lead to settlement of dubious claims in

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[16] *See* Bonaccorso, *supra* note 4, at 1164 (Under PAGA, "a single employee can sue as a proxy for all aggrieved employees, functionally creating a public enforcement action that bears many similarities to a class action without imposing the requirements of class certification."); Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the "Sue Your Boss" Law*, 49 U. Pac. L. Rev 265, 279 (2018) ("A PAGA claim is a class action in disguise that avoids some of the pitfalls of class actions normally encountered by plaintiffs.").

[17] *See* Karimah Lamar, *Can an Employee Pursue PAGA Claims for Violations He Did Not Suffer?*, 28 No. 17 Cal. Emp. L. Letter 1 (Jun. 2018) ("[T]he concern for employers, at a minimum, is a PAGA action being used as an end run to a class action, which has more stringent requirements for potential plaintiffs, or as a way to shake down the employer and extract an extortion-like settlement based on its fear of the cost of mounting a defense and exposure to hefty penalties."); Baker & Welsh, *supra* note 12, at 1, 3.

agreements designed mostly to line the pockets of plaintiffs' attorneys.[18]

In a PAGA claim against Uber, for example, the parties eventually reached a $7.75 million settlement—the Uber drivers got $1.08 each, while the plaintiffs' lawyers got $2.3 million.[19] In a PAGA claim against Walmart for not providing chairs for its cashiers, the parties settled for $65 million; the employees each received around a hundred dollars, while the plaintiffs' attorneys got $21 million.[20]

And the costs of California's no-PAGA-waiver rule aren't adequately captured by court records, since plaintiffs' lawyers routinely send demand letters to scare businesses—especially small ones—into settling before the case is even filed.[21] These kinds of

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[18] Baker & Welsh, *supra* note 12, at 1, 3; *see also* Micheli, *supra* note 16, 49 U. Pac. L. Rev at 281 (noting that PAGA "is being over-utilized to extract excessive settlements against legitimate businesses in the State of California"); Cal. Chamber of Commerce, *supra* note 14, at 85-86 (cost and risk of litigating PAGA claims often results in settlements that mainly benefit plaintiffs' lawyers).

[19] Order Granting Approval of PAGA Settlement and Judgment Thereon, *Price v. Uber Technologies, Inc.*, No. BC554512 (Sup. Ct. Los Angeles Jan. 31, 2018); Melissa Daniels, *Calif. Judge OKs $7.75M Uber Driver Deal Over Objections*, Law360 (Jan. 16, 2018, 11:25 PM), https://www.law360.com/articles/1002461/calif-judge-oks-7-75m-uber-driver-deal-over-objections.

[20] Order and Final Judgment Approving Settlement Between Settlement Class Plaintiffs and Wal-Mart Stores, Inc., *Brown v. Wal-Mart Stores, Inc.*, No. 5:09-cv-03339-EJD (N.D. Cal. Mar. 28, 2019).

[21] Baker & Welsh, *supra* note 12, at 1, 3.

out-of-court settlements don't generate a public paper trail, so there's no way to know how much they cost.[22] Even perfectly compliant companies may settle in the face of threats of litigation from unscrupulous plaintiffs or attorneys—a result that hurts businesses while providing zero benefit to the public.

The risks are particularly acute for small businesses.[23] Again, the penalties imposed under PAGA can be substantial, even for minor violations.[24] As one study found, "[t]he ambiguity and technical language in the [California] labor code adds to the complexity of achieving compliance—many employers believe they are complying, when in fact, technical violations expose them to devastating penalties."[25] The litigation costs and fees for third-party settlement administrators paid by employers average $45,000—and that doesn't include the employers' own legal fees.[26] This means the legal and administrative costs of

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[22] *Id.*

[23] *See, e.g.*, Colin Froment, *NFIB Attorney: PAGA Reform 'Priority Concern' When It Comes to Small Business*, Northern California Record (Jul. 27, 2019), https://norcalrecord.com/stories/512782631-nfib-attorney-paga-reform-priority-concern-when-it-comes-to-small-business.

[24] *See* Muñoz, *supra* note 6, at 426; Ken Monroe, *Frivolous PAGA Lawsuits Are Making Some Lawyers Rich, but They Aren't Helping Workers or Employers*, Los Angeles Times (Dec. 6, 2018), https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html ("[T]hese penalties can add up fast, easily reaching hundreds of thousands of dollars for a small company like ours (and millions for larger businesses).").

[25] Muñoz, *supra* note 6, at 426.

[26] Baker & Welsh, *supra* note 12, at 8-9.

litigating a PAGA case can alone ruin small businesses.[27] No wonder businesses are often pressured to settle even dubious claims as early as possible.

But employees don't necessarily win here either. A recent study found that court adjudication of PAGA claims doesn't benefit employees, and employees actually received less on average from PAGA court cases than they would if their claims were resolved by an agency.[28] And PAGA claims aren't quick—they take an average of almost two years.[29] Moreover, when a claim settles in response to a demand letter before the case is filed, there is no way to know whether employees are receiving those funds properly or promptly.[30]

Under the current rule, *both* sides lose the benefits of the arbitration procedure they agreed to use. In traditional bilateral arbitration, " 'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.' " *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 348 (2011) (quoting *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 685 (2010)). As this Court has noted, allowing representative proceedings "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final

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[27] Froment, *supra* note 23.

[28] Baker & Welsh, *supra* note 12, at 1, 8-9.

[29] *Id.* at 9.

[30] *Id.* at 3.

judgment." *Id.* California's experience bears this out—resolving PAGA claims in court takes a long time, and it costs a lot.[31] That's exactly what the parties agreed to avoid by promising to resolve their disputes through bilateral arbitration. *See Sakkab*, 803 F.3d at 444 (Judge N.R. Smith, dissenting) ("the *Iskanian* rule interferes with the parties' freedom to craft arbitration in a way that preserves the informal procedures and simplicity of arbitration").

This Court has also warned that representative actions—like PAGA cases—are likely to discourage arbitration. "[T]here is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Concepcion*, 563 U.S. at 348. This problem can prove even more serious when the representative pursues a PAGA claim, which can result in a far greater recovery (at least for the employee's attorney) than a private arbitration of the employee's personal claims.

In fact, the only clear winners in this situation are plaintiffs' attorneys. A handful of plaintiffs' side firms paper the courts with PAGA suits—thirteen law firms have each filed more than 500 PAGA suits, and one law firm filed over 1,000 suits.[32] And as the examples involving Uber and Walmart discussed above show, the potential for an attorney-fee windfall is

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[31] Baker & Welsh, *supra* note 12, at 8-9.

[32] California Business and Industrial Alliance, *PAGA Lawsuit Data*, https://www.cabia.org/firm/ (last visited February 3, 2022).

huge. On average, attorney fees account for 33% of the payments made by employers in PAGA cases.[33] That breeds inefficiency and unfairness: Businesses are saddled with huge bills, and funds are diverted from employees to lawyers.

All of this thwarts the goals of the FAA: fairness, efficiency, and respect for the parties' promises to each other. *See Concepcion*, 563 U.S. at 344. Under the FAA and this Court's precedent, if the parties have agreed that disputes should be resolved through individualized arbitration, then the dispute should indeed be subject to arbitration rather than some other proceeding in a different forum. California's rule barring arbitration waivers for PAGA actions undermines that basic premise, with disastrous results.

IV. This Court should reverse.

Moriana promised to arbitrate any disputes arising out of her employment with Viking. The agreement she signed foreclosed PAGA claims by name, and it allowed her to opt out of that waiver clause, but she did not opt out. Yet Moriana has been able to proceed in court—in direct contravention of her agreement—because California says PAGA claims can't be waived.

As explained fully in Viking River's merits brief, the California Supreme Court got this wrong. The Iskanian decision rested heavily on the claim that PAGA waivers were different from class action waivers; the court stressed that the right to bring a PAGA action cannot be waived because *that* right belongs to

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[33] Baker & Welsh, *supra* note 12, at 9.

the state, and the state never agreed to the waiver. *Iskanian*, 59 Cal. 4th at 386-87.[34]

But the state neither brings nor controls a PAGA action. *See id.* at 384, 386. While the state has many ways that it can enforce its Labor Code, PAGA gives aggrieved *employees* the right to sue. Cal. Lab. Code § 2699(a). A PAGA claim is "an alternative" to enforcement by the state. *Id.* § 2699(a). An employee's PAGA suit can proceed only if the state declines to proceed. *Id.* § 2699(h).

The employee controls all aspects of PAGA litigation. *See id.* § 2699(a), (g)(1), (*l*). Indeed, the state so completely abdicates control over the litigation that "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee." *Magadia*, 999 F.3d at 677. Once the state decides not to pursue the issue on its own, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee. . . PAGA thus lacks the 'procedural controls' necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains 'substantial authority' over the case." *Id.*

The court also stressed that California public policy required allowing PAGA suits to proceed in court.

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[34] This Court had previously struck down California's policy of refusing to enforce class action waivers in arbitration agreements. *Concepcion*, 563 U.S. 333. The *Iskanian* court acknowledged this ruling but insisted that representative actions under PAGA were different, holding that even though the FAA preempts state rules refusing to enforce class action waivers the FAA does not preempt state rules refusing to enforce representative/PAGA waivers. *Iskanian,* 59 Cal. 4th at 360, 384.

Iskanian, 59 Cal. 4th at 386-88. But California generally invokes its policy interests when trying to avoid arbitration agreements.[35] *See, e.g.*, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 100-01 (2000) (holding there was "no question" that the state's Fair Employment and Housing Act is an important public policy statute and so its provisions cannot be waived by arbitration agreements); *Gentry v. Superior Ct.*, 42 Cal. 4th 443, 456 (2007) (the right to overtime pay "is mandated by statute and is based on an important public policy" and thus "is unwaivable"), abrogated on other grounds in *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111 (2019); *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 684, 689 (2011), *vacated*, 565 U.S. 973 (2011).

California says its "historic police power" over "the enactment and enforcement of laws concerning wages, hours, and other terms of employment" trumps federal law. *Iskanian*, 59 Cal. 4th at 388. But that generalized interest can't justify a state rule aimed at undermining the FAA. *See, e.g.*, *Epic*, 138 S. Ct. at 1623, 1632; *Concepcion*, 563 U.S. at 342. Nor would it make sense to allow a state to ignore federal law simply by claiming that state policy requires enforcement of nearly every aspect of its 800-page Labor Code in court rather than through arbitration.

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[35] *See also* Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 Fordham L. Rev. 451, 452 (2020) (exploring California's long history of finding laws unwaivable on public policy grounds and noting that, "[a]s time passed, laws 'established for a public reason' grew to fill volumes of California's code[.]").

California's no-waiver rule is wrong. It is a transparent attempt to circumvent the FAA, and it is not California's first. This Court has struck down many of those past attempts, repeatedly reminding California that states may not apply "rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343; *see also, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). For the reasons ably explained in the merits brief, the Court should again do so here.

CONCLUSION

For all the reasons set out above and in the brief on the merits, the Court should reverse.

Respectfully submitted,

ANNA-ROSE MATHIESON
Counsel of Record
SUSAN YORKE
CALIFORNIA APPELLATE LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700
annarose@calapplaw.com
Attorneys for Amicus California New Car Dealers Association

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