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 EMPLOYMENT LAW COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2, the California Employment Law Council ("CELC") respectfully files this *amicus curiae* brief in support of Petitioner.[1]

CELC is an organization of approximately 60 major employers, many of them national and global in scope, that have significant operations in California. CELC regularly files *amicus* briefs in major employment cases in support of fair and equitable employment laws that benefit employer and employee alike. Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), CELC-member employers regularly enter into arbitration agreements with their employees to resolve, on an individual basis, virtually cost free to the employee, any and all employment disputes. This Court, in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 352 (2011), held such agreements required individualized dispute resolution rather than class litigation.

That all changed when the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that such individual arbitration agreements were unenforceable as to representative claims brought in court under the California Private Attorneys General Act of 2004 ("PAGA") ("*Iskanian* Rule"). PAGA allows an "aggrieved employee," *i.e.*, one who can claim her employer violated any one of her Labor Code rights, to seek civil

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[1] Pursuant to this Court's Rule 37.6, CELC affirms that no party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Petitioner and Respondent have each filed with the Court blanket consents to the filing of *amicus* briefs.

penalties from her employer based on any or all alleged Labor Code violations as to all other employees. Not only has the *Iskanian* Rule eliminated individual arbitration of PAGA claims, but it has forced employers to litigate class-like PAGA actions without any of the protections of class action procedures. Potential PAGA awards are in the millions against small employers and the tens or hundreds of millions against large employers. The *Iskanian* Rule has thus made PAGA litigation the overwhelmingly favored way for employees' attorneys to bring class-type wage-and-hour claims against employers. In so doing, PAGA has wreaked havoc on California employers and those out-of-state employers doing business in California.

CELC is uniquely well positioned to report on the impact of the *Iskanian* Rule because nearly all of CELC's members have had their arbitration agreements with their employees declared unenforceable as to PAGA, and they have had to suffer not only multiple PAGA actions filed against them, but often multiple PAGA actions filed against them at the same time by different plaintiffs regarding the same alleged wage-and-hour violations with respect to the same employees during the same time period. CELC files this brief in support of Petitioner Viking River Cruises because the *Iskanian* Rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,'" under the FAA. *Concepcion*, 563 U.S. at 352 (citation omitted). The *Iskanian* Rule should be preempted, the California Court of Appeal's decision in *Viking River Cruises*, which relied on the *Iskanian* Rule in reaching its decision, should be reversed, and arbitration limited to Respondent's individual claims against Viking River Cruises should be ordered.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA." *Chamber of Commerce of United States v. Bonta*, 13 F.4th 766, 782 (9th Cir. 2021) (Ikuta, J., dissenting). While the FAA was enacted in response to widespread judicial hostility to arbitration agreements, "it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 339, 342. This despite the fact that this Court has held, time and again, that the FAA protects and enforces traditional, individualized arbitration – so much so that, even if an arbitration agreement is silent about class arbitration, "because class-action arbitration changes the nature of arbitration to such a degree[,] . . . it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010). Indeed, even if an arbitration agreement is ambiguous on the subject of class arbitration, "ambiguity does not provide a sufficient basis that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of [individualized] arbitration.'" *Lamps Plus, Inc. v. Varela*, __ U.S. __, 139 S.Ct. 1407, 1416 (2019).

Shortly after *Stolt-Nielsen*, this Court again reconfirmed that the FAA continues to protect individualized arbitration in *Concepcion.* In that case this Court held the FAA preempted the California Supreme Court's "*Discover Bank* Rule" because such

a Rule made it difficult for parties to enforce agreements requiring the *individual* arbitration of consumer disputes. *See Concepcion*, 563 U.S. at 340; *see also Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). This Court's rationale could not have been clearer: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

But only three years after *Concepcion*, the California Supreme Court bounced back with an end run around it in *Iskanian*. Although *Iskanian* bowed to *Concepcion's* holding that California had to enforce employment agreements requiring individualized arbitration of *class claims*, it held that *Concepcion* did *not* require California to enforce individualized arbitration of PAGA *representative claims*. *See* 59 Cal. 4th at 364, 366, 384. Why would the FAA protect individual arbitration agreements as to class action claims but not as to PAGA representative action claims? *Iskanian's* unsatisfying answer is that the FAA concerns itself only with the resolution of private disputes, and PAGA disputes are not private because they are supposedly between an employer and the State of California. *See id.* at 386-87. Yet, the California Supreme Court "offer[ed] no case law support" for its position. *Id.* at 396 (Chin, J., concurring). Nor could it. The decision is contrary to this Court's FAA jurisprudence. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351.

While *Iskanian* cannot be squared with *Stolt-Nielsen, Concepcion and Lamps Plus*, it nevertheless remains the law in California. By allowing any plaintiff to swaddle an employment class action in PAGA

clothing, *Iskanian* has been able to prevent employers from enforcing individualized arbitration agreements. *See* 59 Cal. 4th at 384. Not surprisingly, the number of PAGA actions filed after the *Iskanian* decision increased six-fold from 1,051 PAGA cases filed in FY 2013/14 to 6,942 PAGA cases filed in FY 2019/20, with an average of 5,200 PAGA actions filed each year between FY 2016/17 – FY 2019/20.[2] Because of the exponential calculation of potential civil penalties under PAGA, the amount of PAGA penalties can quickly jump into the tens of millions of dollars even for a small employer, and it has been conservatively estimated that employers pay many billions a year to settle PAGA lawsuits.[3] Not surprisingly, such actions are often not litigated but quickly settled, as a hybrid class/PAGA action with a small fraction of the settlement designated as PAGA civil penalties payable to the State. The way it works in the real world against our CELC members with arbitration agreements is as follows: (1) a PAGA only action is filed; (2) the enormous risk forces the employer to agree to mediation; (3) at mediation, the plaintiff's counsel proposes that in exchange for a nominal PAGA settlement the employer waive its arbitration agreements and settle for millions on a class basis; and (4) the plaintiff's counsel receives 25-35% of the class settlement as attorneys' fees for very little work. The *Iskanian* Rule has thus resurrected what this Court apparently interred in

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[2] CABIA Foundation, "California Private Attorneys General Act of 2004 Outcomes and Recommendations" (Oct. 2021), p. 8, https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf ("PAGA Outcomes").

[3] *Id*.

Concepcion: "the risk of 'in terrorem' settlements that class actions entail." *Concepcion*, 563 U.S. at 350.

* * *

Plaintiff-Respondent Angie Moriana ("Respondent") agreed to submit any dispute arising out of her employment with Defendant-Petitioner Viking River Cruises, Inc. ("Viking") to binding, individual arbitration, waiving any right to bring a class, collective, representative or private attorney general action. "[T]his much the [Federal] Arbitration Act seems to protect *pretty absolutely*." *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (emphasis supplied). Regardless, when Viking moved to compel Respondent to arbitrate her PAGA claims on an individual basis, the court below invoked the *Iskanian* Rule and held the agreement unenforceable. *See Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508, *2 (Cal. Ct. App. Sept. 18, 2020) (unpublished). Based on this Court's FAA decisions, the *Iskanian* Rule should be preempted, and the *Viking* decision should be reversed. This amicus brief accordingly focuses on three related issues:

1. The reality of PAGA litigation: The State of California receives little in the way of PAGA penalties, but plaintiffs' counsel use PAGA as a club to bludgeon class-based settlements that this Court's arbitration cases forbid.

2. *Iskanian* incorrectly held this Court's arbitration precedents are inapplicable to a PAGA action because it is a type of *Qui Tam* claim.

3. A PAGA action, filed in the face of an arbitration agreement, frustrates the FAA's objectives as much as or more than a class action.

ARGUMENT

I. The Reality Of PAGA Litigation: The State Of California Receives Little In PAGA Penalties, But Plaintiffs' Counsel Use PAGA As A Club To Bludgeon Class-Based Settlements That This Court's Arbitration Cases Forbid.

Respondent and her *amici* will romanticize PAGA litigation as securing workplace justice and producing civil penalties to the State of California that its Labor and Workforce Development Agency ("LWDA") can use in its law-enforcement efforts. As shown below, however, the reality differs markedly from the romanticization. PAGA, as the California courts have applied it, nullifies this Court's arbitration precedents.

A. Almost All Of CELC's Members Have Been Subjected To Multiple PAGA Actions As A Result Of The *Iskanian* Rule.

CELC's members are regularly sued by one or more of the numerous plaintiff litigation mills that sprouted in California because of PAGA. These mills use non-lawyers to solicit and find disgruntled or recently terminated employees to serve as named plaintiffs for PAGA actions. Plaintiff's attorney then files a generic letter with the LWDA, waits 65 days, and if the LWDA chooses not to pursue the case, files a generic wage-and-hour complaint alleging the same violations of California's requirements as in all of their complaints, *e.g.*, meal and rest break laws, regular-rate-of-pay issues, off-the-clock work and failure to reimburse expenses, without reference to any facts. The top 10 PAGA law firms (based on the num-

ber of PAGA actions filed) each filed between 380-750 PAGA actions in the 15-year period from 2005-2019.[4]

The PAGA claim ostensibly is brought to recover civil penalties, 75% of which are supposed to go to the State of California. At mediation, however, even if the employer has an arbitration agreement that requires individual arbitrations, plaintiffs propose amending the complaint to add class allegations (even though such claims would be individually arbitrable and not subject to a class action), since in class settlements courts routinely approve attorney fee awards in the 25-35% range despite frequently little work by plaintiff's counsel.

For example, in a typical $10 million PAGA/class settlement, (1) plaintiff's attorney will receive a third of the settlement ($3,300,000), (2) costs and administration charges will be specified ($500,000), (3) an enhancement for the named plaintiff will be granted ($10,000), (4) a small allocation will be designated as PAGA civil penalties ($200,000-$400,000), 75% of which will be sent to the LWDA, and (5) the remainder is distributed as damages to the class. It makes little or no difference whether the employer actually has done anything wrong, because the massive cost of PAGA defense and the theoretical risk of astronomical pyramided PAGA penalties will force a logical employer to settle regardless of the merits, and regardless of arbitration agreements requiring individualized arbitration. Through the *Iskanian* Rule, PAGA thus becomes a club plaintiffs will use to bludgeon a class action settlement; once PAGA has

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[4] *See* Complaint, *California Business & Industrial Alliance v. Becerra*, Orange County Superior Court Case No. 30-2018-01035180-cv-JR-CXC (July 12, 2019) at pp. 46-47.

served its purpose, it essentially drops out of the action.

B. Plaintiffs Bank On PAGA Claims Not Being Arbitrable On An Individual Basis And Not Being Removable In Filing PAGA Actions Instead Of Class Actions.

Iskanian held that "[r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." *Iskanian*, 59 Cal. 4th at 387. Nothing could be further from the truth. Under the *Iskanian* Rule, as interpreted by subsequent courts, PAGA cases cannot be compelled to arbitration. *See, e.g., Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602, 622 (Cal. Ct. App. 2019) (PAGA claim not subject to arbitration); *Collie v. Icee Company*, 52 Cal. App. 5th 477, 483 (Cal. Ct. App. 2020) (same). Under Ninth Circuit law, the only PAGA civil penalties that can be counted towards the jurisdictional minimum to remove an action to federal court are the potential civil penalties that could be awarded to the plaintiff. *See Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013). Consequently, if a plaintiff files a PAGA action instead of a class action, he or she knows that not only can the defendant not enforce its individual arbitration agreement, but the defendant will be unable to remove the action to federal court, regardless of the actual total amount in controversy.

Consequently, because classic class actions can be either removed (under the Class Action Fairness Act or through diversity jurisdiction) or compelled to individual arbitration (under *Concepcion* and this

Court's later cases), plaintiffs now file PAGA actions instead. After *Iskanian*, the number of PAGA actions increased six-fold with an average of 5,200 PAGA actions filed a year during the period.[5] California employers, and those doing business in California, had to spend billions to settle PAGA actions since *Iskanian* was decided.[6]

Moreover, as discussed above, many (if not most) PAGA actions are settled, not as PAGA actions, but as class actions with PAGA claims. The PAGA plaintiff is thus able to use his or her position as a "proxy or agent of the state's labor law enforcement agencies" (*Iskanian*, 59 Cal. 4th at 380) as a cudgel to accomplish what was originally intended: To file a class action against the employer, with a substantial percentage of the settlement becoming attorneys' fees, notwithstanding plaintiff's agreement to arbitrate on an individual basis.

C. Trivial Violations Can Lead To Millions In Penalties.

PAGA civil penalties are calculated based on the number of Labor Code violations per pay period per allegedly aggrieved employee. *See* Cal. Lab. Code § 2699(f)(2). These penalties by themselves generally eclipse whatever small compensatory remedy would result from many trivial Labor Code oversights, such as omitting the last four digits of an employee's Social Security number on a wage statement. *See Lopez v. Friant & Assocs*., LLC, 15 Cal. App. 5th 773, 779 (Cal. Ct. App. 2017). If an employer has 5,000 employees, each with three Labor Code violations over a two-year

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[5] *See* PAGA Outcomes, p. 12.

[6] *See id*.

period, the maximum liability could be over $200 million. It is easy to understand how a business faced with the specter of potentially paying such sums would be eager to settle, even if settling meant waiving individual arbitration agreements and settling on a class action basis. This Court has noted that, even in true class actions, with the procedural protections Rule 23 offers, the specter of massive potential liability as a practical matter compels settlements regardless of the strength of the case or applicable defenses. *See, e.g., Concepcion*, 563 U.S. at 350 ("in terrorem" settlements); *Epic*, 138 S.Ct. at 1632 (class actions "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claim"). The practical compulsion to settle is even greater in a PAGA case, which is not subject to Rule 23 (or its California counterpart).

D. Millions In Potential Penalties Compel Settlements.

A number of PAGA settlements and judgments illustrate this point. *See, e.g., O'Connor v. Uber Technologies, Inc.*, 201 F. Supp. 3d 1110, 1128 (N.D. Cal. 2016). In *O'Connor*, Uber eventually settled for $84 million, with $1 million allocated to PAGA penalties. Other examples abound: *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2016 WL 5907869 (N.D. Cal. Oct. 11, 2016) (approving a $6 million settlement); *John Doe v. Google Inc.*, (San Francisco Cnty. Sup. Ct. Case No. CGC-16-556034, June 1, 2018) (approving $1 million settlement); *Gunther v. Alaska Airlines, Inc.*, 72 Cal.App.5th 334, 246 (Cal. Ct. App. 2021) (awarding $25 million in PAGA penalties (reversed on appeal)); *Sharp v. Safeway*, (Santa Clara Cnty. Sup. Ct. Case No. 2011-1-CV-202901, Oct. 18, 2019) (approving $12 million settlement in a PAGA

suitable seating action); *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021) ($24.8 million PAGA civil penalties); *Brown v. Wal-Mart Inc.*, (N.D. Cal. Case No. 5:09-cv-03339-EJD) (approving $65 million settlement in a PAGA suitable-seating action); *Garrett v. Bank of America*, No. RG13699027, 2016 WL 11431495 (Alameda Cnty. Sup. Ct. Oct. 28, 2016) (approving $15 million settlement in a PAGA suitable seating action); *Reed v. CVS Pharmacy, Inc.*, No. RG-17-855592, 2019 WL 12314054 (Alameda Cnty. Sup. Ct. Oct. 30, 2019) (approving $19.5 million settlement in a PAGA suitable-seating action).

E. PAGA Lacks Meaningful Standing Requirements.

If a PAGA plaintiff can prove that he or she suffered even one Labor Code violation, as a private attorney general under PAGA, he or she may pursue penalties for unrelated Labor Code violations allegedly suffered only by *other* employees. *See Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745, 750-51 (Cal. Ct. App. 2018). Thus, an employee, whose only claim is that an employer's wage statement contains some technical defect, can sue the employer for violation of any of the more than 9,000 sections of the Labor Code that may have been suffered by other employees, creating overwhelming exposure for employers.

More recently, the California Supreme Court has held that even if an employer makes an employee whole by compensating her for any damages suffered by having her Labor Code rights violated, she can still bring a PAGA action for the civil penalties based on the rationale that her Labor Code rights were violated in the first place (apart from any later settlement or make-whole payment). *See Kim v. Reins*

International Corporation, 9 Cal. 5th 73, 80, 88 (Cal 2020). Based on *Kim*, a California Court of Appeal has held that a PAGA plaintiff need not have suffered an injury to her Labor Code rights during the statute of limitations for the claim, because PAGA provides that any "aggrieved employee" can bring a PAGA action, with no limitation on when the Labor Code rights were violated. *See Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924, 930 (Cal. App. 2021) (plaintiff can sue under PAGA even if her own claim is time-barred). All of these decisions expose employers to unwieldy and overwhelming exposure not only for civil penalties, but also for the costs of defense of unbounded actions. Most employers cannot withstand those risks and expenses and therefore choose to settle even meritless PAGA actions instead – even where an arbitration agreement would require individualized arbitration of the claims of the named plaintiff or the employees he or she claims to represent.

* * *

All this is the reality. As shown below, that reality cannot be reconciled with this Court's arbitration precedents.

II. *Iskanian* Incorrectly Held This Court's Arbitration Precedents Are Inapplicable To A PAGA Action Because It Is A Type Of *Qui Tam* Claim.

A. The FAA Enforces Agreements Providing For Individual Arbitration "Pretty Absolutely."

The FAA requires courts to "rigorously" enforce "arbitration agreements according to their terms." *American Express Co. v. Italian Colors Restaurant*,

570 U.S. 288, 233 (2013). And the FAA "seems to protect pretty absolutely" arbitration agreements providing for "individualized rather than class or collective actions procedures." *Epic*, 138 S.Ct. at 1621. *See also Lamps Plus*, 139 S.Ct. at 1418 (even if agreement is silent or ambiguous, class arbitration cannot be implied because it is so antithetical to individualized arbitration).

B. Contrary To The Holding In *Waffle House, Iskanian* Held That A PAGA Action Is A Type Of State *Qui Tam* Action That "Lies Outside The FAA's Coverage."

As the California Supreme Court itself has acknowledged, PAGA allows an "aggrieved employee," *i.e.*, "any person who was employed by the alleged violator and against whom *one* or more of the alleged violations was committed," 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*, 46 Cal. 4th 969, 981 (Cal. 2009) (emphasis supplied). Under California law, PAGA actions are not class actions and are not required to be certified. *See id.* at 981-88. The California Supreme Court has held that a PAGA plaintiff sues "as the proxy or agent" of the LWDA, and that a PAGA action "is fundamentally a law enforcement action." *Id.* at 986. Based on this reasoning, *Iskanian* found a PAGA claim to be "a type of *qui tam* action" because it met some of the traditional *qui tam* requirements, such as allowing an "informer" to bring suit to recover penalties for violations of law, for which the informer is allowed to recover part of the penalty. *See Iskanian*, 59 Cal. 4th at 382.

Iskanian reasoned that arbitration of *individual* PAGA claims would be contrary to public policy, as employers would escape their own wrongdoing, and individual arbitrations would prevent PAGA from exacting the "penalties contemplated under the PAGA to punish and deter [unlawful] employer practices." 59 Cal. 4th at 383-84. But why would the FAA enforce individualized arbitration agreements of class actions, as *Concepcion* held, and not also enforce individualized arbitration agreements of PAGA representative actions? Citing no case support, *Iskanian* held the FAA applies only to "disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency." *Id.* at 385.

Yet, PAGA actions clearly arise from a dispute between the employer and employee. To bring a PAGA action, the plaintiff must be an "aggrieved employee," which the statute defines as "any person who was employed by the alleged violator and against whom *one* or more of the alleged violations was committed." Cal. Lab. Code § 2699(a), (c) (emphasis added). Said differently, to have a PAGA claim, a PAGA plaintiff must have worked for the defendant employer and must have an individual Labor Code dispute with that employer, *i.e.*, a private dispute, which *Iskanian* admits is the subject of the FAA. *Iskanian*, 59 Cal. 4th at 386-87. "Thus, although the scope of a PAGA action may extend beyond the contractual relationship between the plaintiff – employee and the employer – because the plaintiff may recover civil penalties for violations as to other employees – *the dispute arises, first and fundamentally, out of that relationship*." *Id.* at 395 (Chin, J., concurring) (emphasis supplied).

Iskanian is also contrary to this Court's holding in *Waffle House*, where the EEOC prosecuted a claim

against an employer who allegedly discriminated against an employee in violation of the Americans with Disabilities Act. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 283-84 (2002). The employer had an arbitration agreement with the employee. The employee filed a charge with the EEOC. The EEOC elected to sue. The employer moved to compel the EEOC to arbitration. Had the employee sued his employer in court, the employee would have been required to arbitrate. But that was not the case, as the EEOC directly prosecuted the action in its own name and on its own authority. Consequently, this Court held that, even though the FAA "ensures the enforceability of private agreements to arbitrate," the employer could not enforce the employee's arbitration agreement against the EEOC because the EEOC was not a party to the arbitration agreement. 534 U.S. at 289-291. This Court reasoned that if "the EEOC could prosecute its claim only with [the employee's] consent, or if its prayer for relief could be dictated by [the employee]," the EEOC action might be bound by the arbitration agreement. *Id.* at 291. "But once a charge is filed, the exact opposite is true under the statute – the EEOC is in command of the process." *Id.*

Iskanian asserted that *Waffle House* supported its reasoning, but in fact the opposite is true. If a government agency, upon receipt of a charge, elects to pursue, on its own authority, an alleged violation of the law with respect to an employee, the fact the employee has an arbitration agreement with his employer has no impact on the action: the agency is operating under its own, independent statutory authority, and it has never agreed to arbitrate any dispute it has with the employer. *See* 534 U.S. at 291. However, if the government agency does not sue, and *the employee* brings an action against his employer,

with whom he has agreed to individually arbitrate any claims he had against it, then the employee is bound by the arbitration agreement. *See id.* In a PAGA case, for example, if the LWDA on receipt of the employee's allegations decides to pursue, on its own authority, a violation of the Labor Code against an employer, it may do so unfettered by any arbitration agreement that the employee may have made. *See* Cal. Lab. Code § 2699.3(a)(2)(A) (LWDA may choose to sue in its own name). However, if as in this case the LWDA declines to pursue the claims, and if an employee brings a PAGA action against his employer, with whom he agreed to arbitrate on an individual basis any claims against it, then the employee should be similarly bound by the arbitration agreement. *See Waffle House*, 534 U.S. at 297.

Here, Respondent entered into an individual, bilateral arbitration agreement with Viking, and when she sued she was the only "party" doing so. And once Respondent filed her PAGA action, the LWDA had surrendered all control over the action. *See* Cal. Lab. Code § 2699.3(a)(2)(A). The FAA "ensures the enforceability of private agreements to arbitrate," and nothing in *Waffle House* counsels otherwise. "*Waffle House* "casts considerable doubt on the [*Iskanian*] majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable." *Iskanian*, 59 Cal. 4th at 396 (Chin, J., concurring).

C. The Ninth Circuit Explained That PAGA Actions Are Not Like *Qui Tam* Actions Under Federal Law.

In a federal *qui tam* action, the government partially assigns its claims to the relator, who then may sue based upon the government's injury. *See Magadia*

v. Wal-Mart Associates, Inc., 999 F.3d 668, 674-75 (9th Cir. 2021). In *Magadia*, the Ninth Circuit explained how and why a PAGA action is not in fact a *qui tam* action. First, PAGA is brought on behalf of other parties, which conflicts with a core principle of *qui tam* actions, which is that the plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties."[7] *Id.* at 676-77. Specifically, PAGA allows an employee to bring a civil action "on behalf of himself or herself and *other current or former employees*," and PAGA requires a portion of the penalty to go to "*all employees affected by the Labor Code violation*." *Id.* Also, a judgment under PAGA binds California, the plaintiff, *and the nonparty employees* from seeking additional penalties under the statute, therefore creating *nonparty interest* in the penalties. *Id.*

Moreover, a traditional *qui tam* action acts as only a partial assignment of the government's claim; the government remains the real party in interest throughout the litigation and may take complete control of the case if it wishes. *See Magadia*, 999 F.3d at 677. Under the Federal False Claims Act ("FCA") the government can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed. *See* 31 U.S.C. § 3730(b)-(f). "These 'significant procedural controls' ensure that the government maintains 'substantial authority over the action,' such that "even

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[7] California's *qui tam* statute, the False Claims Act ("FCA"), California Government Code sections 12650-12656, closely follows the federal statute, and the California *qui tam* plaintiff does not bring the action on behalf of other third parties but only on behalf of the *qui tam* plaintiff and the State of California or one of its political subdivisions. *See* Cal. Gov't Code § 12652(c)(1).

if the government partially assigns a claim to a relator, 'it retains a significant role in the way the action is conducted.'"[8] *Magadia*, 999 F.3d at 677. In contrast, "PAGA represents a permanent, full assignment of California's interest to the aggrieved employee." *Id.* Although the LWDA can choose to prosecute the claim itself, if it does not, 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.* Such a complete assignment to the plaintiff "undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.* at 677.

The factual predicate for PAGA is likewise entirely different from a *qui tam* action. In the typical *qui tam* action, an employee works for a government contractor, discovers fraud against the government, and obtains permission from the government to sue his employer for the funds that were obtained through the fraud. The employee does not have an employment "dispute" with his employer (since the employee was not defrauded); instead, the employee sues his employer for a non-employment fraud claim. A *qui tam* action is thus also a "one-issue" case focused on the employer's fraud. By contrast, a PAGA plaintiff sues his employer under PAGA because he is claiming his Labor Code rights have been violated, and he or

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[8] Likewise, the California FCA provides similar safeguards and controls. *See* Cal. Gov't Code § 12652(c)(1)-(10), (e)(1)-(2), (f)(1)-(2).

she seeks civil penalties for each and every Labor Code violation to every other employee.

D. Regardless Of Whether It Is A *Qui Tam* Action, Because PAGA Is A *State* Action, It Is Not Outside The FAA.

The California Supreme court provided no case to support its proposition that a PAGA claim, as a type of *qui tam* 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." *Iskanian*, 59 Cal. 4th at 395 (Chin, J., concurring). Quite simply, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting law is displaced by the FAA." *Concepcion*, 563 U.S. at 341. Accordingly, PAGA is not a type of *qui tam* action and, even if it were, states are not free to prohibit arbitration under the FAA of state claims.

III. A PAGA Action, Filed In The Face Of An Arbitration Agreement, Frustrates The FAA's Objectives As Much As Or More Than A Class Action.

A. Regardless Of How Laudable A State Law Might Be, It Is Preempted If It Interferes With The Fundamental Attributes Of Arbitration.

This Court in *Concepcion* identified three primary reasons class arbitrations are inconsistent with the FAA. "First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly and more likely to generate procedural morass than final judgment." *Concepcion*, 563

U.S. at 348. "Second, class arbitration *requires* procedural formality." *Id.* at 349. "Third, class arbitration greatly increases risks to defendants." *Id.* at 350. Although *Iskanian* recognized that *Concepcion* required California to enforce individualized arbitration agreements of class claims, it held that PAGA representative action claims could not be subject to individual arbitration. *See Iskanian*, 59 Cal. 4th at 366. Yet, class action arbitrations and PAGA representative arbitrations are equally inconsistent with the "fundamental attributes" of individualized arbitration under the FAA.

B. Both Class And PAGA Actions Lack Informality, Making Them Slower, More Costly, And More Likely To Generate Procedural Morass Than Individual, Bilateral Arbitrations.

Class and PAGA claims, involving the rights of third parties, cannot help but be slower, more costly, and more procedurally complicated than the individual arbitration that the FAA requires. Before an arbitrator can "decide the merits of a claim in class-wide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Concepcion*, 563 U.S. at 348.

While a PAGA action is not a "class action," *e.g.*, it does not require class certification, PAGA nevertheless "explicitly involves the interests of others besides California and the plaintiff employee – it also implicates the interests of nonparty aggrieved employees." *Magadia*, 999 F.3d at 676. The civil penalties recovered are based on the number of Labor Code violations in every pay period that allegedly aggrieved

employees worked, with the initial default penalty being $100 per Labor Code violation ($200 for subsequent violations), regardless of any actual harm. *See Kim*, 9 Cal. 5th at 80, 88 (a plaintiff, even though made whole as to the underlying claim, still has standing to seek civil penalties for violation of the Labor Code); Cal. Lab. Code § 2699(f)(2). Because of the way civil penalties are calculated, large employers can be liable for tens of millions of dollars in civil penalties. *See Magadia v. Wal-Mart Associates, Inc.*, 384 F. Supp. 3d 1058, 1111 (N.D. Cal. 2019) (award of approximately $48 million in PAGA penalties based on an alleged improper reporting of retroactive overtime pay as a result of a quarterly bonus even though the employees were not underpaid wages), *rev'd on unrelated grounds*, 999 F.3d 668, 680-82 (9th Cir. 2021).

Even for small employers, PAGA civil penalties quickly add up to potential multi-million-dollar liability. Assume a small employer with 100 employees, with weekly pay periods, and the relevant time period at mediation is two years – approximately 100 pay periods, which, multiplied by 100 employees is 10,000 pay periods. (1) Assume plaintiff alleges that once a pay period a rest period is interrupted by a question. The maximum initial PAGA civil penalty award could be 10,000 pay periods x $50 penalty (Cal. Lab. Code § 558) = $500,000 in penalties. (2) Assume plaintiff also makes the typical allegations that every pay period they also had a late or interrupted meal period ($50 – § 558); (3) they were asked to do something after they clocked out, for which they were not paid ($100 – § 1197.1); (3) which could also mean they had unpaid overtime ($100 – § 2699(f)(2); (4) which could also mean their wage statement was not accurate ($100 – § 2699(f)(2)); and (5) had to use their cell

phone for which they were not reimbursed ($100 – § 2699(f)(2)). Using the same calculations, the potential liability is now $ 4 million plus costs and plaintiff's attorney's fees. And if the small employer is unlucky enough to have 200 employees, then the potential liability becomes $ 8 million.

In *Sakkab v. Luxottica Retail North America, Inc.*, the Ninth Circuit held that PAGA arbitrations "do not require the formal procedures of class arbitrations" because the PAGA plaintiff seeks only civil penalties on behalf of the LWDA, which does not implicate the due process rights of the "aggrieved employees." 803 F.3d 425, 436 (9th Cir. 2015). What the Ninth Circuit overlooked is the due process right of *the employer*, who can be subject to millions of dollars of liability. *Sakkab* also understated the difficulty of trying PAGA claims without any form of certification. "PAGA claims may well present more significant manageability concerns that those involved in class actions."[9] *Wesson v. Staples the Office Superstore*, 68 Cal.App.5th 746, 859-60 (Cal. Ct. App. 2021). This is because PAGA defines 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." Cal. Lab. Code § 2699(c). Consequently, unlike class actions, "a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant." *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1260 (C.D. Cal. 2011). Yet, because PAGA has no class certification requirement, it may "cover a vast number of employees, each of

[9] *Wesson* refused to allow the case to proceed for a unique reason. The plaintiff ignored the trial court's order to submit a trial plan. *See Wesson*, 68 Cal.App.5th at 851-52.

whom may have markedly different experiences relevant to the alleged violations." *Wesson*, 68 Cal. App. 5th at 859. "Under those circumstances, determining whether the employer committed Labor Code violations *with respect to each employee* may raise practical difficulties and may prove to be unmanageable." *Id.* (emphasis supplied). Given the high stakes involved in these determinations, "both of these issues would likely be fiercely contested by parties." *Id.* In any event, compared to individual, bilateral arbitration, PAGA representative arbitrations, no less than class arbitrations, will be slower, more costly, and likely "to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348.

C. In *Williams*, The California Supreme Court Noted The Similarities Between Class And PAGA Representative Actions, Which Require Procedures That Individual, Bilateral Arbitrations Avoid.

In individual, bilateral arbitrations envisioned by the FAA, the parties are already knowledgeable of the subject matter, making discovery less of an issue. "In an individual arbitration, the employee already has access to all of his own employment records (or can easily obtain them from his employer)." *Sakkab*, 803 F.3d at 446 (N.R. Smith, J., dissenting). In such an arbitration, the employee knows how long he has been working for the employer, knows how many pay periods he has worked, and "knows whether he has been affected by the Labor Code violations he is alleging and can provide individual evidence to support his claims." *Id.*

In either a class or a PAGA arbitration, by contrast, when claims of nonparties are being adjudicated, an arbitrator must ensure the adjudication of

nonparty claims against the employer are within the bounds of due process. Consequently, class actions "require[] procedural formality." *Concepcion*, 563 U.S. at 349. In adjudicating third-party claims in a class action, both federal (Fed. R. Civ. Pro. 23) and state (Cal. Code Civ. Proc. § 382) procedures require the plaintiff to establish, *inter alia*, predominant common questions of law or fact; class representatives with claims typical of the class; and class representatives who can adequately represent the class. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012); *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1186 (9th Cir. 2001).

In this respect, the California Supreme Court has held that discovery in both class and PAGA actions should be the same because of "the similarities between these forms of action." *Williams v. Superior Court*, 3 Cal. 5th 531, 547 (Cal. 2017). For instance, *Williams* found that contact information of all putative class members and aggrieved employees was discoverable because in a class action, "[f]ellow class members are potential percipient witnesses to alleged illegalities," just as "allegedly aggrieved" employees are also "percipient witness[es]." *Id.* at 547-48. *Williams* also found that "absent fellow employees will be bound by the outcome of any PAGA action [citations omitted], just as absent class members are bound [citations omitted]. *Id.* at 548.

> To allow broad discovery of contact information in one type of representative action but not the other, and impose unique hurdles in PAGA actions that inhibit communication with affected employees, would enhance the risk those employees will be bound by a

> judgment they had no awareness of and no opportunity to contribute to or oppose.

Id. Finally, *Williams* found that "overlapping policy considerations support extending PAGA discovery as broadly as class action discovery" because both concern *enforcing* the laws. Specifically, plaintiffs in class actions need to contact other class members to facilitate "meaningful classwide enforcement of consumer and worker protection statutes," while the plaintiff in a PAGA action needs the same information to "directly enforce the *state's* interest in penalizing and deterring employers who violate California labor laws." *Id.*

Quite simply, as the California courts have applied PAGA, *both* PAGA and class actions require the same discovery because plaintiffs in *both* need information from third-party percipient witnesses, because in *both* actions these potential witnesses will be bound by the judgment, and because *both* actions facilitate the state's interest in enforcing consumer and labor laws. *See also Sakkab*, 803 F.3d at 447 (N.R. Smith, J., dissenting) ("procedural complexity" in both PAGA and class actions "is a function of the sheer number of tasks and procedural hurdles present in bringing a [class or] representative PAGA claim.").

D. Both Class And PAGA Actions Greatly Increase The Risks To Defendants Compared To Individual, Bilateral Arbitrations.

"[C]lass arbitration greatly increases risks to defendants," and it is certainly "poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. Arbitration lacks the "multilayered review," which "makes it more likely that errors will go uncor-

rected." *Id.* While an employer is willing to accept these errors in individual arbitrations, where the impact is limited, an employer will be unlikely to agree to an arbitration where it could be liable to potentially "tens of thousands of potential claimants," where "risk of an error will often become unacceptable." *Id.*

Employers enter into agreements to arbitrate on an individual, bilateral basis, and the FAA enforces those rights. Indeed, so strong is the presumption of individual arbitration that even if the parties are *silent* on the issue of class arbitration in the agreement, a court cannot imply class arbitration "because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. "Class arbitration not only 'introduce[s] new risks and costs for both sides,' [citation omitted], it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class – again, with only limited judicial review." *Lamps Plus*, 139 S.Ct. at 1416. Indeed, even if the arbitration agreement is *ambiguous* on the issue of class arbitration, because class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of arbitration.'" *Id.* at 1416, 1418. As with class actions, PAGA judgments can be in the millions, if not tens of millions, of dollars depending on the size of the workforce. It is hard to imagine that any employer would willingly enter into an agreement to adjudicate an action with such potential liability

without the ability to appeal the verdict. *See Sakkab*, 803 F.3d at 448 (Smith, N.R., J., dissenting).

E. *Iskanian* Notwithstanding, PAGA Claims Can Be Arbitrated On An Individual Basis.

"When state law prohibits outright the [individualized] arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 564 U.S. at 341. In this respect, "[t]he FAA requires courts to 'enforce arbitration agreements according to their terms.'" *Lamps Plus*, 139 S.Ct. at 1415. Unless the parties agreed to class arbitration, a PAGA plaintiff must arbitrate only her own PAGA claims and not those of others, *i.e.*, those Labor Code rights the PAGA plaintiff claims her employer violated as to her only. *See id.* at 1416. If an arbitrator awards civil penalties to the plaintiff, she must distribute 75% of those penalties to the LWDA. *See* Cal. Lab. Code § 2699(i).

CONCLUSION

In *Epic*, this Court asked the question of whether "employees and employers [should] be allowed to agree that any disputes between them will be resolved through one-on-one arbitration." 138 S.Ct. at 1619. This Court answered "Yes." *Iskanian* answered "No." The issue herein is not about waiving PAGA claims but enforcing an agreement for "one-on-one arbitration."

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