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 RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers.

The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in nearly 200 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013). It also participated as amicus curiae at the petition stage of this case in this Court. *See* Br. of RLC as *Amicus Curiae* in Support of Petitioner (filed June 14, 2021).

The National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

community on dozens of topics, including arbitration, workplace safety, and antidiscrimination laws.

Together, Amici's members represent the breadth and diversity of an industry that is the nation's largest private sector employer with more than 52 million employees and that contributes $3.9 trillion annually to GDP. Retail supports 25% of jobs in California, encompassing 3.7 million direct retail jobs and 6 million total jobs supported. Retail has a direct impact of more than $200 billion on the state's fisc and provides more than $140 billion of direct labor income.

Amici's members have an important interest in this Court's resolution of the question presented here. That is because the California courts' carveout from the Federal Arbitration Act (FAA) for representative claims brought under California's Private Attorneys General Act (PAGA) has prevented both employers and their employees in California from obtaining the principal benefit that bilateral arbitration agreements are designed to confer. The essence of many such agreements is that both parties agree *ex ante* that they will replace the uncertainty and costs of using representative litigation in the courts to resolve *any* disputes down the road with the streamlined and much-more-predictable alternative of one-on-one arbitration. The goal is to create certainty about what will happen should disputes arise. And because the California Supreme Court holding here essentially cordons off a large set of those disputes when they are prosecuted as PAGA claims, that goal is frustrated almost completely in one of the Nation's largest and most important states for employers like Amici's members.

Put another way, in a regime where employers and employees are allowed to reach an agreement on bilateral arbitration with respect to possible future violations when those claims are brought under private causes of action—but cannot forge such an agreement covering identical claims about the exact same conduct brought under PAGA in the state of California—there will often be limited value in reaching an arbitration agreement at all. And that is so despite the clear congressional recognition in the FAA that arbitration will often be in the best interests of all.

Meanwhile, California's artificial PAGA carveout from the FAA's regime frustrates arbitration agreements even more broadly, because those PAGA claims can serve as a hook to keep *other* claims in court when plaintiffs' lawyers bring them as part of the same case. The upshot is that allowing PAGA claims to proceed outside freely chosen arbitration agreements makes it exceedingly difficult to count on the benefits of bilateral arbitration in California not just with respect to PAGA claims themselves, but in general.

And yet, despite the clear policy of the FAA, this is the status quo for many major employers in California, including Amici's members. The California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles*, *LLC*, 327 P.3d 129 (Cal. 2014), holds that employers and employees simply cannot commit to arbitrate PAGA claims on a bilateral basis. The result is that employees and employers are foreclosed from committing to bilateral arbitration of any and all claims no matter how much they might want to trade the right to bring representative litigation for other benefits. Indeed, the ability of an employee (really, her lawyer) to bring a representative action under PAGA means that the procedural device will sweep in countless other employees who are also foreclosed from the benefits of *ex ante* arbitration agreements (including, not having to fork over 75% of the judgment that will be generated from arbitration of a valid claim).

This case vividly demonstrates that it does not matter how much *both* parties may prefer bilateral arbitration *ex ante*: Here, the contractual provision waiving court claims in favor of arbitration described PAGA actions with particularity and included a checkbox allowing the employee to opt out of the arbitration agreement at her discretion. California's rule that PAGA claims are nonetheless exempt from arbitration thus leaves Amici's members and their employees with no way to forge precisely the kind of mutual, bilateral arbitration agreement that the FAA directs all courts to respect.

The on-the-ground reality is thus that California has placed many of its labor-law disputes entirely outside the FAA by merely designating a part of the recovery as the property of the State. That is a huge proportion of national labor-law claims: Current U.S. Bureau of Labor Statistics figures indicate that over 11% of all nonfarm employees in the United States are in California. And so, when it comes to one of the most critical areas of law for retailers in the Nation's most economically critical State, there might as well not be an FAA at all.

Thankfully, California's choice is foreclosed by the text of the FAA itself, which does not permit states to make their laws hostile to arbitration agreements. This Court should reverse the decision below and abrogate the *Iskanian* rule in terms sufficiently plain to preclude California's recidivist tendencies regarding arbitration.

SUMMARY OF ARGUMENT

Because the petitioner ably explains that the *Iskanian* rule is in the teeth of this Court's holdings in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *and Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)—*see* Petr. Br. 20-22—this brief is limited to two central and related points about the defenses that have been marshalled in favor of California's rule.

First, we write to emphasize that the *Iskanian* rule violates not only this Court's recent precedents like *Concepcion*, but even older cases that stand for the uncontroversial proposition that States cannot exempt entire categories of claims from bilateral arbitration agreements without running afoul of the FAA. Indeed, when one focuses on the *effect* of PAGA and *Iskanian* on freely chosen bilateral arbitration agreements—rather than airy formalisms about PAGA claims being "owned by" or "belonging to" the State—it becomes utterly clear that California's regime embodies the hostility to arbitration that the FAA condemns. In practice, that regime allows employees (and their attorneys) to buy a "Get Out of Bilateral Arbitration Free" card in exchange for pledging 75 percent of the winnings to the State. There is simply no way to square such a system with a federal statute that makes bilateral arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

This first point suffices to show that there is no legal weight to the highly formalistic notion that PAGA claims "belong" to the State. But our second point amplifies the first by explaining that there is also no on-the-ground, functional substance to that formalism. In fact, the concept of "ownership" here is really just a legal Rube Goldberg contrivance—a needlessly complicated way to conceptualize a law in order to obscure the exact prohibited effect described above.

This can be seen in many ways, but the most important is that PAGA litigation like this case leaves a claim that arises from an alleged legal harm to an employee entirely in the hands of that employee to prosecute, making PAGA claims indistinguishable from the kind of private cause of action that the employee owns and to which the FAA plainly applies. Indeed, the State's primary interest in a litigation like this one is its portion of the damages—which is not dissimilar to other States' interest in collecting taxes on such an amount.

That reality makes a PAGA action very different from either a qui tam action (where a whistleblower prosecutes a harm visited on the state or U.S. treasury) or a case in which the government itself prosecutes the harm done to an employee. *Compare EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297-98 (2002). A defendant in a PAGA case is not negotiating with a public officer who has the public's wellbeing in mind, nor is the defendant's experience in any way distinguishable from the defense of an ordinary class or collective action. There is accordingly no reason to treat PAGA claims any differently from the mine run of class action litigations that can be bypassed with an *ex ante* arbitration agreement, notwithstanding the formalistic notion that the State "owns" a PAGA claim because it gets a cut of the spoils.

In short, in both form and function, PAGA claims are just like other kinds of claims for which the FAA forbids mandatory state-law exemptions from mutual, bilateral arbitration agreements. This Court should so hold in unmistakably clear terms, and reverse.

ARGUMENT

I. The *Iskanian* Rule Reflects the Hostility to Arbitration That the FAA Forbids and Should Be Expressly Rejected.

This Court has said repeatedly that the core purpose and effect of the FAA was to reverse "centuries of judicial hostility to arbitration agreements" by denying effect to any state or federal rules that would make arbitration agreements uniquely unenforceable. *See, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). Courts are thus required to disregard any state-law doctrine that does not "place[] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). This rule is reflected in the plain text of the statute, which makes an agreement to arbitrate any "controversy" of any kind "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. §2 (emphasis added).

The result is a very uncontroversial rule—established well before *Concepcion* or *Epic Systems*—that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the … conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). Indeed, this Court has described this rule as the "straightforward" consequence of the FAA's text, *id.*, and essentially no one disputes it.

For example, the claim at issue in *Preston v. Ferrer* involved another California statute that placed disputes about contracts involving talent agents within the initially exclusive jurisdiction of a state commissioner. *See* 552 U.S. at 354-56 (describing the California Talent Agencies Act (TAA)). Writing for an all-but unanimous Court, Justice Ginsburg explained that the FAA preempted the state law at issue insofar as it "grant[ed] the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate," and "impose[d] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Id.* at 356.[2]

The proposition that placing particular kinds of claims outside of arbitration is a "straightforward" violation of the FAA is facially sufficient to resolve this case: Under *Iskanian*, PAGA does precisely that with respect to any California labor-law claims prosecuted thereunder. *See* Petr. Br. 8-12 (explaining existing regime in California under *Iskanian* and *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015)). Put another way, an employee who attempts to use PAGA to submit a given "controversy," 9 U.S.C. §2, about their employment to a court rather than an arbitrator is doing precisely the same thing Ferrer did when he tried to keep his controversy away from an arbitrator by invoking the exclusive jurisdiction of the Labor Commissioner to hear that kind of claim under California's TAA. PAGA is thus preempted to the extent that it "grants [the courts] exclusive jurisdiction to decide *an issue* that the parties agreed to arbitrate." *Preston*, 552 U.S. at 356 (emphasis added).

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[2] Justice Thomas alone dissented in *Preston* for unique reasons unrelated to this proposition. *See* 552 U.S. at 363 (Thomas, J., dissenting).

Iskanian and its advocates claim that this prohibited effect should nonetheless be permitted because it comes not from hostility to arbitration agreements as such but from the fact that the State in some sense "owns" the PAGA claim—making it "a dispute between an employer and the state" that is litigated by the employee only as an "agent" of California. *See Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 151 (Cal. 2014). The limits of that analogy are discussed below, *see infra* at p.14, but the important insight here is that the decision to assert "ownership" of the claim on behalf of the State—in a way that forecloses enforcement of the commitment to bilateral arbitration—is itself a policy choice that the State is making with the immediate effect of taking away from the arbitrator "an issue that the parties agreed to arbitrate." *Preston*, 552 U.S. at 356. Indeed, nothing would stop California from expanding the PAGA/*Iskanian* regime to encompass other torts—including all manner of employment or consumer claims—and thus effectively abrogating every private commitment to arbitrate through the same mechanism. Thus, at *very* best, this legal design is but a "subtle method[]," of "interfering with [the] fundamental attributes of arbitration," of the kind this Court condemned in *Epic Systems* and *Concepcion*. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal quotation marks and alteration omitted).

California's impermissible policy choice—and the concomitant irrelevance of any claim of "ownership"—becomes easier to see if we hypothesize a situation in which the California legislature enacts a version of PAGA that expressly incorporates the *Iskanian* rule *after* this Court's holdings in cases like *Concepcion*.[3] Imagine the sponsors of this hypothetical legislation giving impassioned speeches about how employees should "always have the ability to engage in collective litigation of employment disputes," and how the State must "do something" to ensure that right after decisions like *Preston* and *Concepcion*. To that end, they decide to create a new kind of procedure for litigating employment claims collectively, where the putative plaintiff can bring a mass action to court so long as the State gets the first choice to litigate the case itself and also receives 75 percent of any amounts recovered. And to ensure that its purpose isn't missed, this imagined version of PAGA incorporates magic language that says what *Iskanian* later holds: *i.e.*, that this claim "belongs to the State" and is therefore exempt from any arbitration agreement to which an employee might agree.

In this telling, there would be no question that both the purpose and effect of the hypothetical California regime would be in the teeth of the FAA's contrary purpose and effect. California's imagined design would invalidate employee agreements to arbitrate any claim that PAGA procedures cover even though Congress's real-life design was to place those agreements on equal footing with other chosen obligations between parties. If our hypothetical statute is not expressing "hostility" to both arbitration agreements

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[3] In fact, this hypothetical is not wholly fanciful. The California Supreme Court's *Iskanian* decision dates only to 2014, and it is expressly rooted in the exact same California Code provisions as the "*Discover Bank*" rule that this Court invalidated in *Concepcion*: California Civil Code sections 1668 and 3513. *See Iskanian*, 327 P.3d at 148-49; *Concepcion*, 563 U.S. at 340.

and the "fundamental attributes of arbitration," nothing is.

Critically, however, the effect of the real PAGA is utterly indistinguishable from this imagined one: Once the California courts adopted the *Iskanian* rule, every California employee now has exactly the same ability to escape their bilateral arbitration agreement *(for themselves and for countless other employees whom the plaintiff claims to sweep into the representative PAGA mechanism)* by pledging to the State a portion of the recovery. Worse still, the threat to go to court and litigate the claim in a more expensive fashion is one that the employee wields unilaterally: The employer (unlike the employee) remains bound to its promise and cannot threaten to move the relevant litigation to court if that forum proves more advantageous.

This all makes it very easy to see that the *Iskanian* regime cannot be upheld. One state legal regime cannot be more valid than another just because it was passed in a different year or by legislators who had some different purpose in mind. Such a law must be judged by its *effect*, and that effect does not change just because the State says that it is the technical owner of the claim. In other words, the unmistakable effect of PAGA and *Iskanian* together is to make it simply impossible for employers and employees to agree *ex ante* to arbitrate a certain class of claim— regardless of who technically "owns" it. And that is the precise hostility to arbitration that the FAA forbids.

Indeed, as the facts in this case vividly demonstrate, there should be no illusion that *Iskanian* does anything other than invalidate agreements that are *expressly* and *consciously* entered into by parties who intend to choose bilateral arbitration over representative actions before they know what disputes might arise and which party's leverage might be increased by the ability to go to court. The agreement here identified PAGA by name and included a checkbox where the employee could choose—at her unilateral election—to opt out of the arbitration provision altogether.

These facts show quite clearly that the law created out of thin air by *Iskanian* rejects bilateral arbitration as such and refuses to give force to the employee's *ex ante* agreement no matter how knowing and intentional it might be. Indeed, a bilateral arbitration agreement could appear in a bespoke employment contract drafted by a company's incoming general counsel to govern the terms of her own employment and would *still* not be enforceable under *Iskanian* if that employee eventually discovers that it is in her interest to bring a representative action rather than abide by the contract she herself drafted.

To state this result is to acknowledge that *Iskanian* cannot be reconciled with *Concepcion*, *Epic*, and FAA decisions of even older vintage. Here, there can be no conceit that PAGA claims should escape an agreement to substitute representative litigation with bilateral arbitration because of a neutral rule of state contract law, as in *Lamps Plus*. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414-15 (2019). Nor is there any argument that PAGA claims are exempted by a federal agency's interpretation of a different federal statute, as in *Epic*. *See* 138 S. Ct. at 1629-30.

Unlike the theories propounded in *Concepcion* itself, the *Iskanian* rule does not even *purport* to sound in a ground that "exist[s] at law or in equity for the revocation of any contract," 9 U.S.C. §2, such as the unconscionability doctrine. *See Concepcion*, 563 U.S. at 341 (discussing but rejecting plaintiffs' argument that "the *Discover Bank* rule" that *Concepcion* rejected had "its origins in California's unconscionability doctrine"). Instead, this is just the "straightforward" situation where "state law prohibits outright the arbitration of a particular type of claim," and so "[t]he conflicting rule is displaced by the FAA." *Id.* (citing *Preston*, 552 U.S. at 353). *Concepcion*'s holding that state laws requiring classwide dispute resolution "stand as an obstacle to the accomplishment of the FAA's objectives," *id.* at 343, thus helps to clarify the problem with *Iskanian*, but is not even necessary to invalidate it.

That said, it is now clearly time for this Court to make it plain that the problem is not *how* laws frustrate bilateral arbitration agreements, but rather *the fact* that they do so. Period. There is no doubt a view in some state legislatures (and executive agencies) that arbitration agreements are "bad" and honoring them is thus "bad" public policy. As a result, each time this Court invalidates one effort to make bilateral arbitration agreements impossible in one state or another, two more spring up Hydra-like to replace it. And nowhere is that more true than in California.

But whether it is good public policy or bad public policy to honor such agreements, it is *Congress's* policy, so the place to debate its value or to carve out certain claims is in Congress. The message from this Court to that effect must be clear and unmistakable so that employers and employees can plan on valid and enforceable agreements and so that States will stop creating end-runs around it. The Court need not create any new law, but it may need to use even more pointed language to ensure that this debate finally shifts back to the branch of our federal system where it firmly belongs.

II. There Is Neither Legal nor Practical Substance to the Idea That California Owns PAGA Claims.

It is also worth noting that, both as a matter of law and as a matter of real-world consequence, there is nothing to the formalistic assertion that California somehow "owns" a claim brought under PAGA. Indeed, the principal practical consequence is to foster an unfortunate dynamic where genuinely injured plaintiffs cannot find lawyers who want to help them arbitrate their cases for 100% of their claim because attorneys are instead focused on swelling the fee through a representative litigation that will cost each individual employee 75% of their recovery. This practical devaluation of employees' underlying, *non*-PAGA claims may represent a loss to employees, but it does not vest ownership of anything in the State of California.

In fact, PAGA "claims" are not really claims at all in the ordinary ownership sense. Instead, PAGA is a procedural mechanism for *litigating* certain underlying claims or controversies under the California Labor Code, not a chose in action that anyone (except of course the injured party with the underlying claim) can possess. This is obvious because the employee invoking PAGA still needs an underlying employment-law claim of legal injury to serve as the basis for their PAGA action—PAGA does not itself provide a standalone cause of action. *See* Petr. Br. 6. And there is no question that employees fully own those underlying choses in action and can arbitrate, litigate, or abandon them as they see fit—with or without invoking PAGA.

This means that, at very best, they—or, more accurately, their attorneys—have chosen to *gift* a portion of their legal property to the State, who will then gift a portion of it back, all so that employees can avoid their freely chosen bilateral arbitration agreements (and plaintiffs' attorneys can collect larger fees). Hostility to arbitration is equally condemned by the FAA whether achieved by plainspoken legislation or Rube Goldberg machine.

Notably, the fact that a PAGA claim is both prosecuted by the employee *and* about an injury to the employee makes it just like an ordinary private claim while also making it markedly different from two adjacent but quite distinguishable kinds of claims that could well be subject to different rules: the qui tam action and the public enforcement action.

First, consider a qui tam action litigated by an employee with an arbitration agreement—say, a False Claims Act case brought by a whistleblowing employee that the government declines to prosecute itself. There is a reasonable intuition that such a claim should be exempt from an employee's arbitration agreement because the government—which is the real party in interest—made no such commitment to arbitration. Indeed, the qui tam action is critically different because the injured party was *the government itself* and so the claim *originally* belonged to the government in full. The government may well have the right to empower anyone it chooses to litigate the government's own case in exchange for 25 percent of the recovery as a bounty, whether that someone has an arbitration agreement with the defendant or not. But that does not remotely entail the idea that the government can empower an employee to bypass her arbitration commitment by merely receiving the right to 75 percent of any judgment the employee wins to compensate *for her own injury*. Indeed, from an ownership perspective, the qui tam and PAGA scenarios are less like apples and oranges and more like apples and bicycles.

This leads to a second difference between qui tam actions and PAGA claims that shows the latter to be much more akin to private causes of action. A qui tam action can be prosecuted not only by a whistleblower but by *anyone*, whether or not they were injured (or had anything at all to do with the controversy). Indeed, the qui tam plaintiff's identity is essentially irrelevant because it sues entirely in the government's name, and the plaintiff's right to receive certain proceeds from the case is based solely on the work performed and whether some unique knowledge was contributed. *See* 31 U.S.C. §3730(d).

PAGA claims, in contrast, do not stand alone but only exist if an employee alleges harm—*to herself*—that gives rise to the right to sue. *See Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). That is, again, the essential feature of the private cause of action that the employee freely agreed to arbitrate, and it makes the PAGA claim much more like that kind of case than like a qui tam action belonging to the government.

Nor are these the only indicia of ownership on which the two regimes differ; in fact, there are many practical differences between the two kinds of claims as well. Unlike traditional qui tam actions, once California has declined to pursue a PAGA claim (which it generally does by failing to respond to an employee's notice of intent to pursue a PAGA claim), the employee has "a permanent, *full* assignment of California's interest" in controlling the suit. *See, e.g.*, *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668, 677 (9th Cir. 2021). Compare that to the False Claims Act, where the United States retains many important rights over the conduct of qui tam actions in its name. *See* 31 U.S.C. §3730(b)-(c). For example, no False Claims Act action can be dismissed without the United States' consent, which effectively gives the United States a veto in any settlement discussions. *See id.* §3730(b)(1). The government is also entitled to receive documents as they are filed, and to intervene even late into a litigation for good cause. *See id.* §3730(b), (c)(3). This is important because, under this provision and other related ones, the government retains the right to alter or abandon the litigation altogether whenever that is in the public interest. *See id.* §3730(c)(3) (government may intervene at any time for good cause), §3730(c)(1)-(c)(2) (giving government wide-ranging powers to control litigation in which it participates). The California fisc may get a big slice of the financial action under PAGA, but the State in no way controls the litigation.

This difference is not just a bona fide way to distinguish the two; it also has enormous practical significance because it means that no public officer charged with pursuing the public interest retains any power over the case that California allegedly "owns" under PAGA. Settlement negotiations are thus conducted with plaintiffs who have only their private interests in mind—or, in practice, with the attorneys who stand to receive a significant share of the much larger representative recovery for which they are angling. Accordingly, it has been the experience of RLC and NRF members that representative actions under PAGA are largely indistinguishable from private class actions or other forms of mass litigation that would clearly be subject to an arbitration agreement like the one here.

A claim meaningfully owned and litigated by a public official would be quite different in this regard. For example, consider the fact that many PAGA claims involve highly technical violations that cause very little or no practical harm to employees. A *public* attorney general might see such alleged violations and prioritize securing programmatic changes over pursuing massive, collective statutory damages—particularly because any individual employee who did suffer a serious harm would retain the right to arbitrate the private claim individually and receive just compensation for actual harms without having to turn over ¾ of it to the State. But plaintiff's counsel for a "private attorney general" has no state interest in mind and so will necessarily prioritize extracting the maximum financial recovery (and concomitant attorneys' fees) she can obtain—all while using the leverage of a collective action about a controversy that the actual employees had agreed to arbitrate. In fact, there is even an unfortunate dynamic where plaintiffs' counsel—after using the leverage of a PAGA action to secure a settlement—will then allocate as little of the settlement as possible to the representative PAGA claim (and as much as possible to any other claims attached to the litigation) so as to shield as much of the reward as possible from the State.

It thus matters very much to employers whether claims of multiple, identical violations of highly technical requirements will be addressed through public enforcement or through what is essentially a class action. For example, imagine that an employee comes forward asserting some very technical alleged violations of California's wage and hour laws on every paycheck generated by a large automated system. An employer who has agreed to arbitrate such disputes bilaterally might be willing to change its practices right away, free from any concern that this correction will be punished when a massive representative claim is brought on behalf of innumerable workers who argue that this change proves that the employer knew it was doing something wrong all along. To be sure, that employer knows that it might still be subject to public enforcement. But it also knows that public authorities are more likely to view corrective measures as a good thing, rather than a reason to run to court claiming massive representative statutory damages. And that is particularly true because many of these alleged technical violations may not be violations at all, and public enforcers will typically have the good sense not to seek massive fines in obvious edge cases.

This is not an idle concern: In one recent PAGA case, an RLC and NRF member faced *$100 million in damages* premised on two alleged, technical errors on employee wage statements that the Ninth Circuit eventually found *to comply with California law*. *See Magadia*, 999 F.3d at 672. The whole point of agreeing to bilateral arbitration is to prevent this dynamic; the employer and employee will use expedited procedures to ensure full compensation for anyone who is genuinely aggrieved without inviting the distortions to best corporate practices created by the threat of mass-action litigation.

Ultimately, the point is that the on-the-ground reality of litigation is very much affected by whether the claim belongs to the State *in substance* rather than only in name. And if that is true for qui tam actions for the reasons given above, it is doubly true with respect to public enforcement actions for private harms, where the entire right to bring and conduct the litigation belongs to the government. That was the situation in *EEOC v. Waffle House, Inc.*, which held that a public enforcer can prosecute a claim against an employer even when the underlying employee injury at issue is subject to that employee's arbitration agreement. 534 U.S. 279, 297-98 (2002). The continued availability of such enforcement mechanisms is important, but of course says nothing about whether privately controlled collective litigation about private injuries should be allowed when those private harms are covered by a bilateral arbitration agreement.

The *Waffle House* rule also shows that this case in no way implicates the ability of States to secure effective *public-minded* enforcement of their laws. If California wants to ensure that more labor-law issues are litigated, it has lots of options to do so that do not sidestep Congress's policy empowering employers and employees to choose bilateral arbitration *ex ante*. For instance, the State can hire more enforcers and process more cases itself. In fact, studies indicate that very few cases if any are accepted for processing by California's authorities at the threshold stage, but that those that are processed by the State bring substantially larger awards to the plaintiffs than court proceedings. *See* Baker & Welsh, LLC, *California Private Attorneys General Act of 2004, Outcomes and Recommendations* (Oct. 2021), https://bit.ly/34oaIeX. And, of course, private individuals who have not signed bilateral arbitration agreements can also act.

But respect for the parties' agreement and the text of the FAA prevent the State from merely stamping one kind of claim with its imprimatur and thereby insulating it from a freely chosen arbitration agreement. That is all that California has done here. This Court should make clear that California should not be able to circumvent congressional will and the Court's precedent by this sleight of hand.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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February 7, 2022