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 FOR RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state's longstanding, neutral rule prohibiting contractual waivers of statutory causes of action intended to protect the public—here, a representative, private attorney general action for civil penalties on behalf of the State.

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INTRODUCTION

California's Labor Code Private Attorneys General Act (PAGA) establishes a cause of action authorizing "aggrieved employees" to recover civil penalties on behalf of the State based on their employers' violations of the California Labor Code. Under California law, a PAGA action is by definition prosecuted by an employee in a representative, private attorney general capacity, with the State as the real party in interest.

Petitioner Viking River Cruises' employment agreement with respondent Angie Moriana expressly prohibited her from pursuing any representative or private attorney general claim in any forum. Because the California Supreme Court and the Ninth Circuit (applying California law) have long invalidated such contractual waivers, *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), the state courts in this case refused to enforce Viking's waiver.

Viking argues that the Federal Arbitration Act (FAA) impliedly preempts California's anti-waiver principle as applied to PAGA. The FAA's text and structure, however, make clear that although agreements to *settle controversies by arbitration* are presumptively enforceable, the FAA does not require enforcement of agreements that prospectively extinguish claims by prohibiting parties from asserting them in any forum. While this Court has held that courts must enforce agreements to arbitrate claims bilaterally even though that restriction bars otherwise available class proceedings, the Court has never held that the FAA requires enforcement of agreements that flatly bar statutory causes of action. Unlike class

actions, moreover, PAGA actions *are* bilateral and require no special procedures incompatible with any fundamental attribute of arbitration.

Viking's arguments amount to a request that this Court transform the FAA from a vehicle for protecting parties' agreements to arbitrate into one for precluding individuals from submitting claims for resolution in court *or* arbitration, a result contrary to the FAA's pro-arbitration policies.

STATUTES INVOLVED

Petitioner's brief reproduces section 2 of the FAA. Sections 3 and 4 of the FAA (9 U.S.C. §§ 3-4), relevant portions of PAGA (Cal. Lab. Code §§ 2698, 2699, and 2699.3), and California Civil Code §§ 1668 and 3513 are printed in this brief's appendix.

STATEMENT OF THE CASE

1. PAGA

The California Legislature enacted PAGA in 2003 to address two flaws in the State's Labor Code enforcement scheme: (1) civil penalties were not available to redress many Code provisions, which could only be enforced through criminal prosecution; and (2) government enforcement agencies were under-staffed, under-funded, and lacked the resources necessary to pursue relief against most Labor Code violators. *See Iskanian*, 327 P.3d at 145-47; *Arias v. Super. Ct.*, 209 P.3d 923, 933 (Cal. 2009); *Sakkab*, 803 F.3d at 429-30. PAGA addressed these problems by authorizing an "aggrieved employee" acting as the State's "agent" or "proxy," *Arias*, 209 P.3d at 985-86, to bring suit as a private attorney general to recover civil penalties on behalf of the State, including penalties not previously available. Seventy-five percent of the penalties

recovered for the State in a PAGA action are paid to the State Labor and Workforce Development Agency (LWDA) "for enforcement of labor laws and education of employers and employees," and 25 percent are distributed "to the aggrieved employees." Cal. Lab. Code § 2699(i).

The California Supreme Court has described the PAGA representative action as "a type of *qui tam* action." *Iskanian*, 327 P.3d at 148. An employee cannot pursue a PAGA claim without first providing the LWDA and the employer notice of the violation and the opportunity to address it. If the LWDA declines to issue a citation, the employee may sue on the State's behalf, "represent[ing] the same legal right and interest as state labor law enforcement agencies." *Arias*, 209 P.3d at 933. The resulting action "is a dispute between an employer and the state," *Iskanian*, 327 P.3d at 151, in which the plaintiff asserts the "interest of the state" in obtaining the designated penalties. *ZB, N.A. v. Super. Ct.*, 448 P.3d 239, 250 (Cal. 2019). Because PAGA relief does not include compensatory or injunctive remedies and is limited to civil penalties the State could otherwise pursue for itself, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian*, 327 P.3d at 148. "All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf." *ZB*, 448 P.3d at 243; *see Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1131 (Cal. 2020); *Iskanian*, 327 P.3d at 151.

Unlike a class action, a PAGA claim for civil penalties "is not simply a collection of individual claims for relief." *Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 856 (9th Cir. 2020) (quoting *Kim*, 459 P.3d at 1130). Although other aggrieved employees may share

in the plaintiff's bounty, those employees have no "individual stake" in a PAGA action and are not "parties." *Saucillo v. Peck*, __ F.4th __, 2022 WL 414692 at *6 (9th Cir. 2022). Moreover, other employees may still pursue their claims for individualized remedies provided by the Labor Code without regard to how any related PAGA action has been resolved. *ZB*, 448 P.3d at 250-51; *Iskanian*, 327 P.3d at 145-47; *Kim* 459 P.3d at 1132.

Because a PAGA action does not resolve any employee's individual claims, it does not trigger the procedural due-process protections that absent class members enjoy in an action that adjudicates their claims. *See Arias*, 209 P.3d at 929-34; *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014). A PAGA judgment binds other employees *only* with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Arias*, 209 P.3d at 933.

2. *Iskanian*

The plaintiff in *Iskanian* filed a putative class action for damages and a representative claim for PAGA penalties. The employer sought to compel arbitration under an agreement that barred litigation of class, representative, and private attorney general claims. The California Supreme Court upheld the validity of the class action ban. But all seven justices, applying longstanding principles of state law prohibiting exculpatory agreements and agreements to waive public protections, agreed that the agreement was unenforceable because it left the plaintiff no forum in which to pursue the State's PAGA claim. *See* 327 P.3d at 149; *see also ZB*, 448 P.3d at 241 ("*Iskanian* established an important principle: employers cannot compel

employees to waive their right to enforce the state's interests when the PAGA has empowered employees to do so.").

The court further held that the FAA does not impliedly preempt California's 150-year-old anti-waiver rule as applied to PAGA claims. *See Iskanian*, 327 P.3d at 150-53. The five-justice majority rested that holding on its state-law determination that a PAGA action is always a representative action filed on behalf of the State as the real party in interest. *See id.* at 151. Because "a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency," *id.* at 149, and because the State is not a party to the arbitration agreement containing the waiver, the majority held that permitting the PAGA action to proceed would not conflict with the FAA's requirement that private arbitration agreements be enforced as between the parties, *id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). The court remanded for a determination of which claims should be arbitrated and which litigated, given that the plaintiff had the right to pursue PAGA claims in "some forum." *Id.* at 155.

Justices Chin and Baxter concurred in the judgment that the FAA does not preempt California's anti-waiver rule in the PAGA context, but for different reasons. Citing this Court's statements that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," *id.* at 157 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013)), they concluded that California's anti-waiver rule "does not run afoul of the FAA" because the FAA does not authorize employers to use arbitration agreements to strip employees of statutory PAGA rights. *Id.*

3. *Sakkab*

The Ninth Circuit in *Sakkab* agreed with the California Supreme Court that the FAA does not preempt California law prohibiting waiver of the right to bring PAGA claims. 803 F.3d at 429. *Sakkab* held that the anti-waiver rule is preserved by the FAA's saving clause, which makes agreements to arbitrate enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Recognizing that "a state contract defense must be 'generally applicable' to be preserved by § 2's saving clause," 803 F.3d at 432 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)), *Sakkab* concluded that California's anti-waiver rule is "generally applicable" because it "place[s] arbitration agreements on equal footing with non-arbitration agreements" and bars a prospective PAGA waiver "regardless of whether [it] appears in an arbitration agreement or a non-arbitration agreement." *Id.*

Sakkab added that the anti-waiver rule, unlike "state laws prohibiting the arbitration of specific types of claims," does not conflict with the FAA's purpose of overcoming judicial hostility to arbitration. *Id.* at 434 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531-33 (2012), and *Preston v. Ferrer*, 552 U.S. 346, 356-59 (2008)). The anti-waiver rule "expresses no preference" for whether PAGA claims "are litigated or arbitrated" but "provides only that representative PAGA claims may not be waived outright." *Id.*

Sakkab also held that *Iskanian* does not "interfere[ ] with arbitration," unlike the rule against class-action waivers in *Concepcion*, because of "'fundamental[ ]' differences between PAGA actions and class

actions." *Id.* at 434-35 (citation omitted). A class action is a "procedural device" in which individual claims of multiple plaintiffs are adjudicated together, necessitating formal procedures such as class certification, classwide notice, and opt-out rights to protect the class members' property interests in their individual claims. *Id*. at 435. "By contrast, a PAGA action is a statutory action" in which the State, represented by the employee who brings the action "as the proxy or agent of the state's labor law enforcement agencies," litigates one-on-one against the defendant to recover civil penalties rather than compensatory damages or other personal relief. *Id*. (citations omitted). Because the plaintiff is not seeking to aggregate claims of other employees, "there is no need to protect absent employees' due process rights in PAGA arbitrations." *Id*. at 436.

Sakkab acknowledged that the amount of penalties some defendants may face under PAGA could be substantial. *Id.* at 437. *But cf.* Cal. Lab. Code § 2699(e)(2) (granting courts authority to reduce PAGA penalties in enumerated circumstances). But it concluded that "the FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." 803 F.3d at 437. "Nor … would the FAA require courts to enforce a provision limiting a party's liability in such an action, even if that provision appeared in an arbitration agreement." *Id.* (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (Roberts, J.)).

Finally, *Sakkab* invoked this Court's admonition that "'[i]n all pre-emption cases' we must 'start with the assumption that the historic police powers of the

States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id*. at 439 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). In PAGA, the State exercised "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State" by creating "a form of qui tam action" to supplement the State's limited enforcement resources. *Id*. (citation omitted). "The FAA," the court concluded, "was not intended to preclude states from authorizing qui tam actions to enforce state law" or to "require courts to enforce agreements that severely limit the right to recover penalties" in such actions. *Id*. at 439-40.

4. This Case

Respondent Angie Moriana was a sales representative for Viking from May 31, 2016, through June 15, 2017. During that time, Viking allegedly subjected her and other sales representatives to multiple Labor Code violations. *See* JA 10-34. Under PAGA, the State was entitled to seek civil penalties for those violations, separate and apart from Moriana's or any other employee's right to seek backpay, injunctive relief, or other individual remedies under the Labor Code.

Moriana submitted a timely PAGA notice to the LWDA and Viking. JA 42-48. After the LWDA failed to respond within 65 days, she filed this action in state court. Her one-count complaint pleaded a single PAGA representative claim for civil penalties "on behalf [of] the State of California." JA 10.[1]

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[1] Echoing PAGA's language, the complaint also alleged that Moriana was acting on behalf of other employees, JA 10, but the

(*Footnote continued*)

Viking sought an order "compelling Plaintiff to submit her PAGA claim to binding arbitration on an individual basis" and "dismissing Plaintiff's representative claim." JA 66. Viking invoked the Dispute Resolution Provision (DRP) in an employment agreement it claimed Moriana had executed online with the company Viking retained to handle personnel management. JA 68-77. With exceptions not relevant here, the DRP required employees to arbitrate "any dispute … arising out of or relating to your employment with your company," except that "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action." JA 86, 89. Viking's DRP further specified that "[d]isputes regarding the validity and enforceability of the [waiver] may be resolved only by a civil court of competent jurisdiction and not by an arbitrator"; and if all or part of the waiver is unenforceable, "the class, collective, representative and/or private attorney general action must be litigated in … court," except that any "portion of the [waiver] that is enforceable shall be enforced in arbitration." JA 90.

Although Viking's motion sought to compel "individual" arbitration of Moriana's PAGA claim, JA 66, Viking acknowledged that its DRP prohibited her from asserting a PAGA claim in any forum, in violation of *Iskanian*. Viking argued that this Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), effectively overruled *Iskanian*. The trial court disagreed and the California Court of Appeal affirmed, holding that California's anti-waiver rule lawfully prohibits employers from escaping liability by

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real party in interest she represents, under state law, is the LWDA. *See supra* 3.

"precluding PAGA actions in any forum." Pet. App. 6. The court also rejected Viking's argument that "Moriana's 'individual PAGA claim' should be compelled to arbitration," concluding that under controlling California Supreme Court precedent "[a]ll PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf." *Id.* (quoting *ZB*, 448 P.3d at 243). The court held that Moriana had brought only a "single representative claim" rather than a "personal claim seeking compensation that might be individually arbitrated" and that her contractual waiver of that claim was invalid. *Id.* at 6-7.

The California Supreme Court denied Viking's petition for review.

SUMMARY OF ARGUMENT

This case is not about whether a party may be required to arbitrate a PAGA claim but whether PAGA claims are subject to contractual forfeiture. PAGA creates a cause of action that is representative by nature, filed by a private attorney general on the State's behalf to recover statutory civil penalties for Labor Code violations. California law prohibits contractual waivers of statutory protections enacted for public reasons, including the right to bring a PAGA action, but Viking's DRP expressly prohibits employees from asserting PAGA claims in court *or* arbitration. The issue in this case is whether the FAA, enacted to promote enforcement of agreements to arbitrate claims, preempts California's application of its longstanding anti-waiver rule to Viking's *preclusion* of all PAGA claims, including claims asserted in arbitration.

Nothing in the FAA's language requires invalidation of that state-law anti-waiver rule. The FAA provides that *agreements* to *settle a controversy by*

arbitration are valid, enforceable, and irrevocable. 9 U.S.C. § 2. It says nothing about agreements to strip contracting parties of the right to pursue state public-policy claims in all forums. The statute's structure and context and this Court's precedents underscore that the FAA promotes arbitration as an alternative forum, not a mechanism for forfeiture of rights.

Viking argues that California's anti-waiver rule is impliedly preempted because it conflicts with the purposes and objectives of the FAA. But implied preemption analysis requires an actual conflict between state law and articulated congressional objectives. The FAA's text reveals no intent to authorize companies to contractually immunize themselves from state law liabilities.

This Court has held that state laws that require procedures incompatible with arbitration's informal, bilateral nature—such as laws preventing parties from waiving their procedural right to pursue individual claims on a class-action basis—conflict with the purposes and objectives of the FAA. California's anti-waiver rule creates no such conflict. PAGA actions are bilateral proceedings where a single plaintiff asserts a claim as the State's representative. PAGA actions do not aggregate claims belonging to multiple individuals and do not trigger the procedural formalities that due process requires in class or collective actions. If arbitrated, a PAGA claim proceeds under the same streamlined, cost-effective rules applicable to any other bilateral arbitration. Moreover, the contemporaneous understanding of "arbitration" in 1925 unambiguously included bilateral, representative proceedings, such as arbitrations between unions and employers.

Section 2's saving clause confirms that the FAA does not preempt California's anti-waiver rule. California's longstanding rule prohibiting waiver of laws enacted for a public purpose is a generally applicable, nondiscriminatory ground for revocation of any contract. 9 U.S.C. § 2. Under California law, no contract—arbitration or otherwise—may waive public-policy rights.

Because Viking does not seek arbitration of Moriana's PAGA claim, this Court need not decide whether the FAA would require enforcement of an agreement to arbitrate a PAGA claim that the real party in interest—the State—had not agreed to arbitrate. But as the *Iskanian* majority concluded, the FAA does not authorize enforcement of arbitration agreements against parties not bound by them. PAGA claims belong to the State. Preventing the State from asserting those claims through its chosen agent would bind it to a contract to which it is not a party. Extending the FAA to impose such a limitation on the State's law-enforcement functions would require a clear authorization that the FAA does not provide.

Viking's rhetorical assertion that the PAGA anti-waiver rule permits parties to circumvent *Concepcion* by "relabeling" class actions as PAGA claims is fundamentally mistaken. PAGA claims for civil penalties and class claims for compensatory and injunctive relief seek entirely different remedies on behalf of different real parties in interest.

If, as Viking contends, the FAA authorized companies to prohibit all "representative" actions against them, they could use the same language to immunize themselves from state and federal qui tam actions, ERISA claims brought on behalf of benefit plans,

shareholder derivative claims brought on behalf of corporations, and claims by trustees or beneficiaries on behalf of trusts—all of which are representative actions in the same way PAGA claims are. An enforceable ban on all "private attorney general" actions could sweep even more broadly. Nothing in the FAA's pro-arbitration text or purposes empowers parties with superior bargaining power to immunize themselves contractually from all such claims.

ARGUMENT

I. The FAA does not require enforcement of agreements to waive representative, private attorney general claims.

Each of this Court's implied-preemption cases under the FAA involved state-law rules that either imposed heightened procedural requirements on arbitration contracts, *see, e.g., Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996), or on the arbitration process itself, *see, e.g., Concepcion*, 563 U.S. 333, or exempted certain causes of action from arbitration, *see, e.g., Preston*, 552 U.S. 346. This case, in sharp contrast, involves the validity of an agreement that *precludes* arbitration and any other adjudication of a cause of action. Nothing in the FAA's text or purposes requires states to enforce such rights-stripping waivers.

A. Viking's DRP prohibits Moriana from asserting a PAGA cause of action in any forum.

Although Viking purportedly sought to compel Moriana to arbitrate her claim on an "individual" basis, its express prohibition of "representative or private attorney general" actions barred her from asserting any PAGA claim in any forum. As the California Supreme

Court has repeatedly held, all PAGA claims for civil penalties—the only remedy available under PAGA—are representative, private attorney general claims in which the PAGA plaintiff represents the State in asserting its claim for civil penalties. *ZB*, 448 P.3d at 243; *Iskanian*, 327 P.3d at 151. While Viking at times suggests that its DRP might permit arbitration of an "individual" PAGA claim, it elsewhere concedes that the agreement's reference to "private attorney general" actions bars all "PAGA actions *by name*," Br. 16 (emphasis added), and unequivocally requires an employee to "forgo PAGA claims," *id.* at 19. Even if a PAGA claim could be split into a claim for penalties for the violations suffered by the PAGA plaintiff and claims for penalties attributable to violations suffered by others—which no court has ever permitted—the DRP would still ban the former as a representative, private attorney general claim on behalf of the State.

Viking invoked the FAA in its motion to compel in order to overcome the invalidity under California law of agreements that strip employees of statutory PAGA rights. JA 66. At the same time, Viking sought an order "dismissing Plaintiff's representative claim," JA 66, consistent with the DRP's requirement that disputes over the enforceability of its waiver clause "may be resolved only by a … court … and not by an arbitrator." JA 90. Had the trial court found Viking's waiver enforceable, the court would have had to dismiss Moriana's PAGA cause of action, leaving nothing for it to compel to arbitration. Viking's request for an order compelling Moriana "to submit her PAGA claim to binding arbitration on an individual basis" was therefore meaningless except as an alternative way of extinguishing her PAGA claim, because a PAGA

action has "no individual component." *Kim*, 459 P.3d at 1131.

This case, therefore, is not about whether a claim should be arbitrated or litigated, or about how to arbitrate it. Rather, it is about whether an employer may use an arbitration clause as a device for precluding the assertion in *any* forum of a state law claim whose waiver is forbidden by state law.

B. Nothing in the FAA's text, structure, or stated purposes requires enforcement of agreements to waive statutory claims.

1. The FAA favors enforcement of agreements to arbitrate claims, not to preclude them.

To determine whether the FAA requires enforcement of an agreement to waive PAGA rights, the Court "start[s] with a careful consideration of the text" of the statute. *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2337 (2021). Preemption questions, like all questions of "statutory meaning," turn on a statute's "text and structure," *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901-03 (2019) (lead opinion), which "necessarily contain[ ] the best evidence of Congress' pre-emptive intent," *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013).

The FAA reflects Congress's choice "to preempt state laws that aim to channel disputes into litigation rather than arbitration." *Howard v. Ferrellgas Partners*, 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J.). Its text provides no indication that Congress intended to require judicial enforcement of agreements to waive claims rather than arbitrate them.

Section 2 of the FAA, which sets forth its central substantive command (and is the exclusive basis for Viking's implied-preemption argument) provides for the validity, irrevocability, and enforceability of a contractual provision "*to settle by arbitration a controversy*." 9 U.S.C. § 2 (emphasis added). That language plainly refers to enforcement of agreements for resolution of disputes by arbitrators, not agreements to extinguish claims by precluding parties from asserting them in arbitration or in court.

When the FAA was enacted in 1925, the words "settle by arbitration a controversy" had an established meaning, referring to a mechanism for resolving disputed issues, not for waiving claims. The relevant meaning of "settle" is "[t]o determine, as something which is exposed to doubt or question … as, … to settle questions of law." *Webster's Revised Unabridged Dictionary* 1318 (1913); *see also Black's Law Dictionary* 1649 (11th ed. 2019) (to "end or resolve (an agreement or disagreement, etc.)"). A "controversy," in legal and statutory parlance, is a "litigated question," *Black's Law Dictionary* 265 (2d ed. 1910)—that is, a dispute "capable of final adjudication," *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 260 (1933), regarding an issue or issues that may be asserted as part of a case, *see Barney v. Latham*, 103 U.S. 205, 210-14 (1880); *see also Black's 11th* 417 (a "justiciable dispute"). "Arbitration," in turn, refers to a "method for the settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specially nominated for the purpose." J.P.H. Soper, *A Treatise on the Law and Practice of Arbitrations and Awards* 1 (5th ed. 1935); *see also* J. Murray, *A New English Dictionary on Historical Principles* 426 (Vol. I 1888)

(defining "arbitration" as "[t]he settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims"); *Black's 2d* 83 (similar); *Webster's Revised* 77 (similar); *AMF Inc. v Brunswick Corp.*, 621 F.Supp. 456, 460 (E.D.N.Y. 1985) (Weinstein, J.) ("[H]av[ing] third parties decide disputes" is "the essence of arbitration.").

An agreement to "settle by arbitration a controversy" is therefore an agreement to submit a disputed issue or issues to an arbitrator for decision. *See AMF*, 621 F.Supp. at 460 ("If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration."). When the FAA was enacted, identical language in the New York Arbitration Law, which Congress borrowed in Section 2 of the FAA, had been construed to have exactly that meaning. *See*, *e.g.*, *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 130-31 & n.10 (1924); *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921) (Cardozo, J.).[2]

As is often the case, the "statute's plain meaning 'becomes even more apparent when viewed in' the broader statutory context." *Babcock v. Kijakazi*, 142 S.Ct. 641, 645 (2022) (citation omitted). The FAA's procedural provisions, which work together with section 2 as "integral parts of a whole," *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956), underscore Congress's intent to facilitate enforcement of agreements to *arbitrate* disputed issues, not

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[2] These two cases are repeatedly cited in the FAA's legislative history. *See* Hearing on S. 4213 and S. 4212 Before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. at 2, 18-22 (1923); Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the House Committee on the Judiciary, 68th Cong., 1st Sess., at 33-41 (1924).

agreements to preclude arbitration. Section 3 provides for a stay of judicial proceedings in suits involving "any *issue referable to arbitration* under an agreement in writing for such arbitration" once a court is satisfied that "the *issue involved … is referable to arbitration* under such an agreement," and directs that the stay remain in effect "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Section 4 similarly provides that when a party wrongfully refuses "to arbitrate under a written agreement to arbitrate," a court has authority to "direct[ ] the parties to proceed with the arbitration in accordance with the terms" of the agreement. *Id.* § 4. These provisions plainly anticipate that the parties' dispute will be submitted to an arbitrator for resolution pursuant to an agreed-upon set of procedures. They provide no authority to bar a court from adjudicating issues that, like the PAGA claims here, are expressly *not* "referable to arbitration" under the parties' agreement.

The FAA's other provisions confirm Congress's intent to create procedural mechanisms for *deciding* arbitrable controversies, not preluding them. Section 7 provides for compulsory process to secure attendance of witnesses and production of items "deemed material as evidence in the case." *Id.* § 7. Section 9 provides for the entry of judgment on "the award made pursuant to the arbitration." *Id.* § 9. Section 10 provides for vacatur if, among other things, the arbitrators "refus[e] to hear evidence pertinent and material to the controversy" or fail to make "a mutual, final, and definite award upon the subject matter submitted." *Id.* § 10. The text of these provisions and the overall statutory structure demonstrate that Congress intended to ensure judicial enforcement of agreements to

submit issues in controversy for decision by arbitrators, not to create a mechanism for precluding assertion of otherwise non-waivable statutory claims.

This Court and others have long recognized that an agreement to settle a controversy by arbitration determines the forum where a claim is heard and the procedures for resolving it but does not impair the claim itself. Shortly after the adoption of New York's Arbitration Law, the New York Court of Appeals emphasized that arbitration is only "a form of procedure whereby differences may be settled," which "vindicate[s] by a new method" rights already "existing." *Berkovitz*, 130 N.E. at 270. This Court, in subsequently determining that New York's law could be applied to maritime disputes otherwise cognizable in state courts, likewise emphasized that the statute "does not attempt … to modify the substantive maritime law." *Red Cross Line*, 284 U.S. at 124.

The Court has interpreted the FAA the same way. An agreement to settle a controversy by arbitration, the Court has emphasized, is not "a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). It is only an agreement to pursue them "in an arbitral, rather than a judicial, forum." *Id.* at 628; *accord Italian Colors*, 570 U.S. at 236; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009); *Waffle House*, 534 U.S. at 295 n.10; *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228-30 (1987). Just as an arbitration agreement cannot waive a claimant's right to punitive

damages, injunctive relief, or the full statutory limitations period, *see Booker*, 413 F.3d at 79, neither can it waive an entire statutory cause of action. The Court's decisions derive from the FAA's language authorizing enforcement of agreements to arbitrate controversies; but nothing in the FAA authorizes agreements to foreclose claims in all forums.

2. Nothing in the FAA's purposes requires enforcement of agreements to waive claims.

The statutory text and structure and this Court's longstanding construction of the FAA provide ample basis for rejecting Viking's reading of the statute, but the absence of any other indication of congressional intent to authorize enforcement of agreements to waive statutory claims clinches the matter. As this Court has repeatedly explained, the context and history of the FAA demonstrate Congress's intent to displace "judicial hostility to arbitration agreements" by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 68-96, at 1 (1924)). The statute was aimed at reversing some courts' refusal to specifically enforce otherwise valid arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 & n.6 (1985); *see also Red Cross Line*, 264 U.S. at 120-21 (describing pre-FAA doctrine that arbitration agreements were lawful but not specifically enforceable).

The FAA's purposes, as described by this Court and set forth in the legislative history, did not include authorizing enforcement of contracts waiving statutory causes of action or remedies enacted for a public purpose. Common-law and statutory prohibitions

against waiver of such public-policy rights were well-established under state law in 1925. *See*, *e.g.*, *Union Constr. Co. v. W. Union Tel. Co.*, 163 Cal. 298, 312-15 (1912); *Tarbell v. Rutland R. Co.*, 51 A. 6, 7 (Vt. 1901). The California statutes prohibiting exculpatory contracts and waivers of the protection of laws established for public reasons, for example, were enacted in 1872. *See* Cal. Civ. Code §§ 1668, 3513. Had Congress intended the FAA to require enforcement of such contractual waivers, it would have said so.

The principle that Congress "does not … hide elephants in mouseholes," *Epic*, 138 S.Ct. at 1627 (citation omitted), applies with special force when the issue is whether Congress has displaced state law in an area of traditional state authority such as contract law. This Court's precedents "require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837, 1849-50 (2020). The FAA contains no clear statement of intent to authorize waivers of statutory causes of action.[3]

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[3] Whether the FAA may *ever* have preemptive effect in a state-court proceeding remains an issue of disagreement within this Court. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1429-30 (2017) (Thomas, J., dissenting) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting). Under Justice Thomas's stated view, the FAA cannot displace enforcement of California's anti-waiver rule in this state-court case.

C. Viking's assertion that PAGA claims are subject to waiver under the FAA because they arise under state law and are "procedural" rather than "substantive" is meritless.

Viking does not point to anything in section 2 or elsewhere that authorizes enforcement of an agreement to waive causes of action. Viking suggests that the principle that courts will not enforce provisions in arbitration agreements that waive public-policy claims or remedies applies only to claims based on federal law. Yet this Court has never held that an arbitration agreement may be used to expressly extinguish a state-law claim or remedy. While no free-standing federal policy prohibits waiver of state law claims (or guarantees their effective vindication, *see Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting)), that is because whether a particular state-law claim is waivable is exclusively a question of state law.

The implied-preemption issue here is not whether the FAA affirmatively forbids agreements waiving state law claims—it does not—but whether the FAA affirmatively *requires* state courts to enforce such waivers when state law forbids them. Nothing in the FAA imposes such a requirement, as this Court implicitly recognized in *Preston v. Ferrer*, when it concluded that the arbitration agreement at issue was enforceable in part because the plaintiff "relinquishe[d] no substantive rights … California law may accord him" by signing the agreement. 552 U.S. at 359.

Viking does not contest that this Court has repeatedly stated that the FAA does not require enforcement of arbitration agreements that waive "substantive" rights. *See, e.g.*, *Mitsubishi*, 473 U.S. at 628; *Pyett*, 556

U.S. at 265-66. Viking seeks to avoid this principle by citing the California Supreme Court's reference to PAGA rights as "procedural" in *Amalgamated Transit Union, Local 1756 v. Super. Ct.*, 209 P.3d 937, 943 (Cal. 2009), but it misconstrues that statement.

The issue in *Amalgamated Transit Union* was whether the right to seek PAGA civil penalties on behalf of the State, once assigned to an aggrieved employee by the LWDA, could be re-assigned to an entity that the LWDA had not authorized to pursue the claim. The court characterized PAGA as "procedural" rather than "substantive" only in the sense that PAGA claims could not be reassigned by the state's delegated agent to a third party not otherwise eligible under PAGA to represent the State. 209 P.3d at 943. At the same time, the court emphasized that PAGA *does* give the designated plaintiff an independent cause of action "to recover civil penalties … that otherwise would be sought by state labor law enforcement agencies." *Id.*

A PAGA cause of action is "procedural" only in the sense that it entitles a specific plaintiff to initiate a legal proceeding and to obtain remedies, rather than directly regulating primary conduct. *See id.* But laws such as PAGA that impose civil penalties for conduct that previously did not give rise to civil penalty liability and that create causes of action to recover them are "substantive" under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), no less than laws that prescribe standards of conduct directly. *Erie* treats laws that determine what causes of action exist, who can assert them, and what remedies they make available as substantive. *See, e.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (scope of liability); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56

(1949) (shareholder's entitlement to sue on behalf of corporation); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) (capacity to enforce contract); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949) (cause of action); *Angel v. Bullington*, 330 U.S. 183, 191-92 (1947) (remedy). Thus, whether a California plaintiff can pursue a claim on a class action basis in federal court is a procedural issue governed by Federal Rule of Civil Procedure 23, not California Code of Civil Procedure § 382; but whether she can pursue a representative-action PAGA claim is a substantive issue governed by PAGA itself. *See*, *e.g.*, *Achal v. Gate Gourmet Inc.*, 114 F.Supp.3d 781, 809-10 (N.D. Cal. 2015).

This Court's repeated statements that arbitration under the FAA reflects a choice of forum and is not a mechanism for forfeiting "substantive" rights embodies a similar conception of substantive rights. In *Mitsubishi*, the Court's admonition that a party who agrees to arbitrate does not "forgo … substantive rights" referred to the statutory cause of action for treble damages under the Clayton Act. 473 U.S. at 628, 635-37 & n.9. In *McMahon* and *Rodriquez de Quijas*, the substantive rights that arbitration could not impair were the rights to pursue claims under RICO, the Securities Exchange Act, and the Securities Act. *See McMahon*, 482 U.S. at 228-30, 240; *Rodriguez de Quijas*, 490 U.S. at 481. In *Gilmer* and *Pyett*, the substantive rights at issue were causes of action under the Age Discrimination in Employment Act. *Pyett*, 556 U.S. at 265-66; *Gilmer*, 500 U.S. at 26.

Notably, in all these cases the "substantive" rights the Court referred to were the causes of action created by the statutes at issue (such as the Clayton Act cause of action for antitrust violations), not the underlying

proscriptions of anticompetitive, fraudulent, racketeering, or discriminatory *conduct*. PAGA claims are substantive in the same sense as the causes of action at issue in those cases: PAGA creates and defines a cause of action, designates who is entitled to pursue it, and specifies the remedy if the claim is successful—including the right to pursue civil penalty remedies that were not previously available to employees *or* the State. *See* Cal. Lab. Code § 2699(f); *Bright v. 99¢ Only Stores*, 118 Cal.Rptr.3d 723, 729 (Ct. App. 2010). The FAA does not authorize enforcement of agreements to waive PAGA claims any more than it authorizes agreements to waive the rights and remedies made available by those other statutes.

II. A PAGA claim does not involve procedures incompatible with arbitration.

Because the FAA's language and purpose require enforcement of agreements to arbitrate claims and do not directly conflict with California's anti-waiver rule, Viking's argument for implied preemption rests upon its insistence that California's rule conflicts with the FAA's "purposes and objectives." *See Kansas v. Garcia*, 140 S.Ct. 791, 801, 806-07 (2020); *Va. Uranium*, 139 S.Ct. at 1907 (lead opinion); *id*. at 1912 (Ginsburg, J., concurring in judgment); *see also Wyeth v. Levine*, 555 U.S. 555, 589-90 (2009) (Thomas, J., concurring in judgment) (distinguishing implied preemption based on directly conflicting state and federal laws from implied preemption based on asserted conflict with "purposes and objectives" of federal law). This Court has cautioned, however, that purposes-and-objectives preemption must rest on the text of a federal statute, not "on a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives."

Garcia, 140 S.Ct. at 801 (cleaned up); *Va. Uranium*, 139 S.Ct. at 1901-03 (lead opinion).[4]

A. The FAA does not authorize waivers of claims just because they are complex and involve potentially large stakes.

Achieving the objectives of the FAA does not require enforcing an otherwise unenforceable PAGA waiver just because that waiver is tucked into an arbitration agreement. Viking's contrary argument principally rests upon the assertion that PAGA imposes potentially large penalties for seemingly technical Labor Code violations and that because companies may be reluctant to arbitrate rather than litigate such "bet-the-company" claims, they must be permitted a third option—contractual immunity. Viking further asserts that arbitration of PAGA claims might be unduly complex because the statutory remedy, once a violation is established, could require the arbitrator to consider evidence of multiple Labor Code violations affecting many employees (although the calculation of the PAGA civil penalty remedy is limited to one violation per employee per pay period during the applicable one-year limitations period, Cal. Lab. Code § 2699(f); Cal. Code Civ. P. § 340(a)). But even if Viking's characterizations were accurate, those are policy arguments best directed at the California Legislature. They do not establish that the FAA's purposes and objectives have anything to do with allowing defendants

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[4] Justices Thomas and Gorsuch have refused to accept "purposes and objectives" preemption at all because it rests on speculation about unenacted congressional intent that cannot, under the Supremacy Clause, preempt state law. *Garcia*, 140 S.Ct. at 808 (Thomas, J., concurring).

to avoid large liabilities or complex claims or remedial schemes.

Viking points to nothing in the statutory text, structure, or context that suggests that the FAA's purposes and objectives include preventing states from authorizing individuals to pursue claims whose magnitude and complexity are inconsistent with a defendant's view of what is suitable for arbitration, let alone relieving defendants from remedies they consider excessive *regardless* of the forum in which they are sought. As its text indicates, the FAA was enacted to enable contracting parties to make arbitration their agreed-upon option for resolving controversies that arise between them under applicable law. It does not require states to tailor causes of action and statutory remedies to accommodate parties whose preference is neither to litigate nor arbitrate a claim, but to extinguish it at the outset.

For decades, this Court has recognized that arbitration is well suited for resolving complex, high-stakes disputes that may require consideration of the effects of a defendant's conduct on third parties. In *Mitsubishi*, for example, the Court rejected the assertion that the "complexity" of antitrust claims made them "inherently insusceptible to resolution by arbitration"—even though antitrust claims typically require proof of such issues as market power, anticompetitive impact, and market-wide effects of a defendant's conduct. 473 U.S. at 633. The Court emphasized that arbitration's advantages, including its streamlined proceedings and the availability of arbitrators with "access to expertise," make arbitration particularly appropriate for resolving such complex disputes. *Id.*; *see also Italian Colors*, 570 U.S. at 231 (arbitration suitable for resolving antitrust claims requiring

proof of effect of American Express's market power on credit card market).

The Court has similarly held that securities-fraud and RICO claims are compatible with arbitration notwithstanding their complexity. *McMahon*, 482 U.S. at 239. Both types of claims often require consideration of the effects of a defendant's challenged conduct on persons other than the plaintiff. RICO claims (with a four-year limitations period, in contrast to PAGA's one-year period) require proof that a defendant engaged in a pattern or practice of racketeering activity that may involve multiple predicate acts including fraud, extortion, and other criminal conduct directed at third parties. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648 (2008). Securities fraud claims may require proof of the characteristics of the market in which a security was traded and the effect of alleged misrepresentations on market participants. *See Goldman Sachs Grp. v. Ark. Teacher Ret. Sys.*, 141 S.Ct. 1951, 1958 (2021). Claims under the ADEA, as held arbitrable in *Gilmer* and *Pyett*, may require proof of the disparate impact of a defendant's practices, a complex matter requiring consideration of the effect of challenged conduct on a wide range of employees. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 242 (2005). These decisions foreclose Viking's argument that claims that may require consideration of evidence about the impact of a defendant's actions on others (or, as in PAGA, that provide a remedy requiring consideration of that evidence) are so incompatible with arbitration that the FAA requires enforcement of agreements to waive them.

B. PAGA claims are compatible with arbitration's "bilateral" nature.

This Court's decisions do not support Viking's position that the FAA's unstated purposes require enforcement of agreements prohibiting assertion of causes of action a defendant finds objectionable. Nonetheless, the Court has held that states may not mandate *procedures* for adjudicating arbitrable claims if those procedures are incompatible with arbitration—in particular, its "bilateral" nature. *See Concepcion*, 563 U.S. at 347-51. As the Court put it in *Epic*, the FAA rules out the "argument that a contract is unenforceable *just because it requires bilateral arbitration*." 138 S.Ct. at 1623.

That principle has no application here because PAGA claims *are* bilateral: They are brought by an individual aggrieved employee, acting as the State's "agent" or "proxy," against an employer. California's rule that PAGA claims cannot be waived does not target bilateral dispute resolution.

Viking's contrary argument presupposes that a "representative" or "private attorney general" action is a multilateral procedure in the same way as a class or collective action and is therefore incompatible with the FAA's implied preference for bilateral arbitration proceedings. Class actions, however, materially differ from PAGA representative actions. A class or collective action is not a cause of action, but a "species" of "joinder" that "enables a … court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Ortho. Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). The Rule 23 device aggregates "separate entitlements to relief" belonging to multiple individuals who are, in a real sense, parties

to the action. *Id.*; *see Devlin v. Scardelletti*, 536 U.S. 1, 9-11 (2002). Those absent parties' interests require such due-process protections as adequate representation, notice, opt-out rights, and the opportunity to be heard. *See Concepcion*, 563 U.S. at 349.

Imposing those constitutionally required features on an arbitral proceeding, the Court has held, would require a "'fundamental' change" to "the traditionally individualized and informal nature of arbitration." *Epic*, 138 S.Ct. at 1623 (citation omitted). Aggregate adjudication of multiple individuals' claims "*requires* procedural formality" to bind absent parties to the resolution of their own claims consistent with due process. *Concepcion*, 563 U.S. at 349. Such procedural formality "sacrifices the principal advantage of arbitration … and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id*. at 348. That is why the Court has held that a rule prohibiting waivers of class procedures "interfere[s] with a fundamental attribute of arbitration." *Epic*, 138 S.Ct. at 1622.

A PAGA action, by contrast, does not aggregate separate claims belonging to different individuals. *See Canela*, 971 F.3d at 851, 856. Like an action brought by a guardian on behalf of a minor, a trustee on behalf of a trust, or an agent on behalf of a principal, a PAGA plaintiff brings a single claim belonging to a single entity, the State of California, for civil penalties based on violations of its Labor Code. The rights adjudicated in a PAGA action have "no individual component" and are asserted by a plaintiff "*only* as the state's designated proxy." *Saucillo*, 2022 WL 414692 at *5 (quoting *Kim*, 459 P.3d at 1130-31).

Because the outcome of a PAGA action binds other employees only as to the state's civil-penalties claim, without precluding them from pursuing their own claims for compensatory remedies, those employees have no "individual stake" and "are not 'parties' to a PAGA suit in the same sense that absent class members are 'parties' to a class action." *Saucillo*, 2022 WL 414692, at *6. While California for its own policy reasons has chosen to share 25% of its civil-penalty recovery with aggrieved employees, the availability of a shared bounty payment does not grant other employees participatory rights or procedural protections in the PAGA action, any more than if the State had given the bounty to the individual plaintiff alone. *Id*. at *6-*7.[5]

Viking quibbles with the "type of qui tam action" label the California Supreme Court has applied to PAGA, but the differences it identifies go to how much control the State retains over the conduct of the proceeding, not whether the claim *belongs to* the State. Viking asserts that a PAGA plaintiff prosecutes her cause of action pursuant to a "*full* assignment" of the state's claim. Br. 42 (quoting *Magadia v. Wal-Mart Assocs*., 999 F.3d 668, 677 (9th Cir. 2021)). That the scope of a PAGA plaintiff's litigation authority may be greater in some respects than a traditional qui tam relator's (although not materially, in cases where the

[5] Some of Viking's amici suggest that PAGA plaintiffs have no legally protectible interests because their claims could instead be pursued by the State or by an aggrieved employee who did not agree to arbitrate. Practical considerations aside, a plaintiff's standing to pursue a statutory cause of action does not disappear just because another plaintiff may also have standing—for example, to pursue identical injunctive relief for the same wrongful practice.

government declines intervention, *see* 31 U.S.C. § 3730(b)(4)(B)), does not make the PAGA action multilateral. Indeed, Viking's "full assignment" characterization highlights that a PAGA action involves a single claim, asserted by a single plaintiff, as the assignee of a single entity. Such an action does not require the "procedural formality" inherent in multiparty proceedings, *Concepcion*, 563 U.S. at 349, any more than an enforcement action brought unilaterally by the state does.[6]

If Viking's DRP *required* arbitration of PAGA claims (rather than prohibiting it), the parties could have resolved Moriana's PAGA claim using the informal procedures "normally available in arbitration." *Sakkab*, 803 F.3d at 439. That arbitration would have proceeded bilaterally with only two parties: Moriana (as private attorney general for the State) and Viking. No third parties would be entitled to notice, adequate representation, participation, or opt-out rights, and no procedures would be necessary to certify the arbitration as a class or collective proceeding. There would be no resort to the JAMS Class Action Procedures, which, like the AAA rules discussed in *Concepcion*, "mimic the Federal Rules of Civil Procedure," 563 U.S. at 349, and require multiple procedural determinations and opportunities for interlocutory judicial review.[7] Instead, the streamlined procedures set forth in the DRP and the JAMS Employment Arbitration Rules

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[6] Viking's assertion that the State cannot intervene in a PAGA action is also mistaken. Br. 38. As the real party in interest, the LWDA can intervene, and has done so, under Cal. Code Civ. P. § 387. *See, e.g., McCracken v. Riot Games, Inc.*, L.A. Superior Court, Case No. 18STCV03957 (2020).

[7] The JAMS Class Action Procedures are at https://www.jamsadr.com/rules-employment-arbitration/english.

would apply, *see* JA 88-89, including Rule 17, which provides for speedy, informal, discretionary discovery procedures; Rule 18, which allows summary disposition of claims; Rules 19 and 22, which largely dispense with formal rules of evidence and grant the arbitrator substantial discretion over scheduling and conducting hearings; and Rule 24, which requires a speedy award once the arbitrator closes the hearing.[8] Nothing about California's rule prohibiting statutory waivers is inconsistent with resort to such informal, speedy and cost-effective bilateral procedures. *See Sakkab*, 803 F.3d at 839-40.[9]

Paradoxically, Viking seeks to turn the absence of procedural formality *against* PAGA, characterizing it as worse than a class action because it lacks Rule 23's procedural protections for absent class members (though Viking wrongly suggests those procedures exist principally to protect defendants). Br. 29. Viking's arguments miss the point. *Concepcion* held that the requirement of procedural formality made class

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[8] The JAMS Employment Arbitration Rules and Procedures are at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2021.pdf.

[9] Viking and its amici make much of the California Court of Appeal decision in *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502 (Ct. App. 2018), which permits a PAGA plaintiff to seek penalties for the State based on the number of pay periods in which the employer committed different Labor Code violations against co-workers (a ruling the California Supreme Court has not yet addressed and that the Ninth Circuit rejected on Article III grounds in *Magadia*. 999 F.3d 668). Under the current state of California law, however, an arbitrator could presumably restrict the scope of a PAGA claim to ensure its manageability just as a judge could do if the case were litigated. *See Wesson v. Staples the Office Superstore, LLC*, 283 Cal.Rptr.3d 846 (Ct. App. 2021).

proceedings incompatible with arbitration. PAGA actions lack the characteristics that make procedural formalities necessary in a class action, as there are no third parties with interests at stake requiring due-process protections. Consequently, there is no basis for concluding that PAGA actions share class actions' incompatibility with arbitration's informal, bilateral nature.

Viking's arguments reflect disagreement with California's choice in 2003 (eight years before *Concepcion*) to create a representative action in which the number of employee pay periods in which a violation occurred determines the maximum civil penalty, even though other employees are not parties. That disagreement has nothing to do with whether a PAGA claim requires procedures incompatible with arbitration and provides no basis for using the FAA as a vehicle for extinguishing the cause of action that California created to provide to ensure adequate Labor Code enforcement.

C. Viking's claim that representative proceedings are inconsistent with arbitration contradicts Congress's contemporaneous understanding.

Viking's contention that a "representative" action necessarily involves procedures incompatible with arbitration is ahistorical. When Congress enacted the FAA, the meaning of "settle by arbitration a controversy" included representative arbitration conducted on a bilateral basis. Far from being incompatible with the "form of arbitration envisioned by the FAA," *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1416 (2019), and "the virtues Congress originally saw in arbitration," *Epic*, 138 S.Ct. at 1623, bilateral,

representative arbitration of employment disputes was common in 1925 and recognized by several contemporaneous federal statutes.

In the early 1920's, the two most common categories of arbitration were commercial and maritime disputes (the principal focus of the FAA), and labor disputes arising in unionized industries, which were frequently resolved by bilateral arbitrations between unions (as representatives of the interests of their members) and employers.[10] Agreements providing for such representative labor arbitration, to the extent they involved transportation workers, were excluded from the FAA because Congress had already expressly authorized arbitration of such disputes—*not* because they were incompatible with fundamental attributes of arbitration:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. § 651 (repealed).

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001).

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[10] See briefs of amici curiae AFL-CIO and National Academy of Arbitrators.

Notably, Congress used the same words in the Railway Labor Act (RLA) as in the FAA to describe the dispute resolution procedures established by statute: "arbitration" of a "controversy." Pub. L. No. 69-257, § 5(c), 44 Stat. at 580. The RLA made clear that Congress contemplated bilateral arbitration between a representative of a "group of employees" and a "carrier." *Id*. § 5. The statute emphasized the bilateral character of such arbitration by referring to the employee representative and the employer as "either party." *Id*. An earlier statute, the Newlands Act, Pub. L. No. 63-6, 38 Stat. 103 (1913), which similarly provided for enforcement of agreements to submit a railway labor "controversy" to "arbitration," likewise made plain that such arbitration would be conducted on a representative, bilateral basis between the employer and a labor organization (or ad hoc committee) representing workers. *Id*. § 3, 38 Stat. at 104-05.

Although class actions (in the sense of aggregated proceedings involving separate individual claims) may not have been within Congress's contemplation in 1925, *Epic*, 138 S.Ct. at 1624, bilateral, representative proceedings involving employment controversies were well within its contemporaneous understanding of "arbitration." Construing "settle by arbitration a controversy" in section 2 of the FAA to exclude bilateral, representative proceedings involving employment disputes would run afoul of the "fundamental canon of statute construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019) (cleaned up). That reading would also suggest that submitting a "controversy" to "arbitration" had a different meaning for employees subject to the RLA (and

excluded from the FAA's coverage) and non-transportation employees within the FAA's scope—even though the statutes were enacted at nearly the same time and used similar language.

That result can no more be squared with the policies of the statutes than with their text. Congress's decided preference for bilateral arbitration between employers and workers' representatives to resolve labor disputes furthers the same interests—speed, informality, and expertise—that are typically invoked as benefits of FAA arbitration. The recognition of those benefits in employment arbitration continued under the National Labor Relations Act, *see Pyett*, 556 U.S. at 256-57, and this Court has repeatedly endorsed arbitration of representative labor claims. *See, e.g., AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643 (1986); *Nolde Bros. v. Bakery Workers*, 430 U.S. 243 (1977); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp*, 363 U.S. 593 (1960); *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957). The use of representative arbitration in the unionized workplace, where the stakes may be very high and the complexity of disputes makes expert decisionmakers desirable, also refutes the suggestion that high stakes and substantive complexity (in the absence of procedural requirements incompatible with arbitration) require treating bilateral, representative workplace actions as outside the realm of arbitration as envisioned in 1925.

III. The FAA's saving clause provides further support for California's anti-waiver rule.

Because section 2 does not require enforcement of agreements to prohibit PAGA claims, the validity of California's anti-waiver rule as applied to PAGA waivers does not depend on section 2's "saving clause," which provides that enforcement of an agreement to arbitrate may be withheld "upon such grounds as exist at law or in equity for the revocation of any contract." Nonetheless, even if the FAA could be read to apply to the enforceability of a PAGA waiver, the saving clause would require courts to give effect to California's 150-year-old anti-waiver rule as an application of a legal ground for "revocation of any contract."

This Court has repeatedly held that the saving clause creates a federal "'equal-treatment rule' for arbitration agreements." *Epic*, 138 S.Ct. at 1622 (citation omitted). Under this equal-treatment principle, enforcement of arbitration agreements is subject to "generally applicable contract defenses," *Doctor's Assocs.*, 517 U.S. at 687: that is, defenses that "govern issues concerning the validity, revocability, and enforceability of contracts generally," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); that do not "apply only to arbitration or … derive their meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339; and that do not "disfavor[ ] contracts that … have the defining features of arbitration agreements," *Kindred*, 137 S.Ct. at 1426. In these ways, the FAA puts arbitration agreements "on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). It makes them "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

California's rule prohibiting contractual waivers, as applied to PAGA, is such a generally applicable contract defense. The rule rests upon the general principle that any contract that exempts anyone from responsibility for legal violations or waives the protection of a law established for a public purpose (rather than to confer a private benefit) is unenforceable. Cal. Civ. Code §§ 1668, 3513; *see also* Cal. Lab. Code § 925 (contracts that deprive employees of substantive protections of California law with respect to controversies arising in California are voidable). These principles do not single out arbitration agreements for disfavored treatment. Instead, they apply to "any contract" and provide a generally applicable ground for contract "revocation"—that is, the "recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void." *Black's 2d* 1036; *see also Black's 11th* 1579 ("annulment, cancellation, or reversal").

Unlike a rule that prohibits arbitration of particular claims or imposes heightened procedural requirements on arbitration agreements, application of California's rule against waiver of statutory public-policy claims to PAGA does not "discriminate on its face against arbitration" or "disfavor[ ] contracts that … have the defining features of arbitration agreements." *Kindred*, 137 S.Ct. at 1426. Nor does it apply only "to arbitration agreements and black swans." *Id*. at 1428. While employers may choose to insert PAGA waivers into arbitration agreements in an attempt to invoke implied FAA preemption, the value of those waivers to employers is independent of any preference for arbitration. If PAGA waivers were legally enforceable in California, employers would impose those waivers

whether or not they otherwise preferred arbitration to litigation. California's anti-waiver rule thus does not reflect "hostility to arbitration." *Id.* at 1427-28.

Viking asserts that the California anti-waiver rule does not apply to "any" contract because it requires examination of particular contractual provisions to determine whether they violate the rule. According to Viking, this feature distinguishes the anti-waiver principle from other contract-law doctrines, such as unconscionability, that the Court has recognized as encompassed within the saving clause. *See*, *e.g.*, *Concepcion*, 563 U.S. at 339. But the defining characteristic of unconscionability—substantive and procedural unfairness—requires a *more* individualized assessment of a contract than the prohibition of contracts that on their face are exculpatory or waive public protections. Not *every* contract violates those prohibitions, just as not every contract is unconscionable. But *all* contracts, not just arbitration agreements, are subject to those prohibitions. That is what the saving clause's reference to legal principles applicable to "any contract" means. *See Epic*, 138 S.Ct. at 1622.

Viking further contends that the saving clause's reference to grounds for contract "revocation" refers only to grounds that "go to the formation of the contract itself." Br. 33. But there is a fundamental distinction between "revocation," which refers to setting aside something that has already occurred, and principles that determine whether a contract was formed to begin with. State-law principles concerning contract formation are incorporated into the FAA, not by the saving clause, but because section 2 assumes the existence of a contract without providing a body of law defining the requisites of contract formation and interpretation and because there is no general federal

common law of contract. That is why, in determining whether parties have entered into an agreement to arbitrate under the FAA, courts "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

The saving clause only comes into play when the parties have entered into an agreement and a question arises whether one of the parties can enforce it, in whole or in part, over the other's objection. Section 2 precludes not only the defense that an arbitration agreement, as such, is invalid or unenforceable, but also the previously prevailing common-law view that, even if validly formed and otherwise lawful, an arbitration agreement is revocable by a party until issuance of an award. *See* Restatement (First) of Contracts § 550, comment a (1932); *see also Toledo S.S. Co. v. Zenith Transp. Co.*, 184 F. 391, 395 (6th Cir. 1911). The statute's reference to *irrevocability* is explicitly aimed at the latter doctrine. J. Cohen & K. Drayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 265 (1926). It would therefore be anomalous to read the saving clause's use of the parallel phrase "grounds for revocation" to refer *only* to situations where no contract was formed or where, as Viking alternatively suggests, the contract was void. Rather, in context, the use of the term "revocation" reflects a broader intent to encompass generally applicable contract-law doctrines that permit a party to elect not to be bound by a contractual provision. The principle of California law that an exculpatory agreement or waiver of statutory public protections is unenforceable meets that criterion no less than defenses that Viking concedes are within the saving clause.

Viking's assertion that the saving clause applies only to defenses that would render an arbitration agreement *entirely* unenforceable, Br. 33-35, lacks any basis in the savings clause's language and gets contract law backward. The defenses Viking points to, especially unconscionability, typically provide courts authority in appropriate circumstances to sever invalid provisions and enforce the remainder of an agreement. *See* Cal. Civ. Code § 1670.5. Courts applying general contract principles regularly sever unenforceable provisions of arbitration agreements while enforcing the rest. *See*, *e.g.*, *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 124 (2d Cir. 2010); *Booker*, 413 F.3d at 83-85. Indeed, *failure* to apply generally applicable contract severance principles when determining whether state law provides grounds for revocation of an arbitration agreement would discriminate against arbitration agreements. *See Booker*, 413 F.3d at 83-85.

The saving clause carve-out from section 2 goes no further than required to give effect to state contract-law defenses under generally applicable principles. Here, the unenforceability of the PAGA waiver rests on grounds for the revocation of any contract, and the saving clause thus precludes section 2 from giving effect to Viking's PAGA waiver. That the DRP's requirement of individual arbitration could have been enforced against other *non*-PAGA claims that Moriana might have brought (but did not) does not make the saving clause inapplicable as to the PAGA claim she did bring.

IV. The State did not consent to waive its statutory right to civil penalties under PAGA.

As explained above, after the California Supreme Court's five-member majority in *Iskanian* held that California's anti-waiver rule precluded the enforcement of PAGA waivers, it concluded that the FAA did not impliedly preempt that rule because the FAA is concerned with enforcement of private agreements to arbitrate, yet the State as real party in interest did not agree to the arbitration agreement at issue. That ground provides an alternative basis for affirmance, because the State never consented to the DRP in this case either.

Viking does not dispute that, as a matter of state-law statutory construction, a PAGA action for civil penalties, whether brought by state officers or a PAGA plaintiff acting on its behalf, is "a dispute between an employer and the state" acting "through its agents." *Iskanian*, 327 P.3d at 151.[11] Under state law, the State is entitled to the civil penalties sought in a PAGA action, subject only to its choice to distribute a portion of its recovery to aggrieved employees.

This Court has repeatedly held that "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l B'hood of Teamsters*, 561 U.S. 287, 299 (2010) (cleaned up); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (FAA does

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[11] *Magadia*'s holding that the individual plaintiff is the real party in interest *for Article III purposes*, whether correct or not, does not override state law defining the claim. *See Saucillo*, 2022 WL 414692 at *7.

not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)"). Except in circumstances where traditional principles of contract law authorize enforcement of a contract against or by a nonparty (for example, under theories of assumption, estoppel, alter ego, or third-party beneficiary), the FAA permits enforcement of arbitration agreements only against those who agreed to be bound. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S.Ct. 1637, 1643-44 (2020). As this Court held in *Waffle House*, "[i]t goes without saying that a contract cannot bind a non-party." 534 U.S. at 294.

Viking does not contend that the State of California was a party to its DRP or that it has any other recognized contractual grounds for binding the State to its agreement with Moriana. To enforce the DRP's waiver against the State's claim would, as in *Waffle House,* "turn[ ] what is effectively a forum selection clause [requiring individual plaintiffs to arbitrate rather than litigate their individual claims] into a waiver of a nonparty's statutory remedies." *Id*. at 295. The FAA "ensures the enforceability of private agreements to arbitrate," but "does not mention enforcement by public agencies" or otherwise "purport to place any restriction on a nonparty's choice of a judicial forum." *Id*. at 289.

Viking argues that this case is different because the State is not prosecuting this PAGA case in its own name but has authorized Moriana, with whom Viking has an arbitration agreement, to seek PAGA civil penalties on the State's behalf. The difference, according to Viking, is that a PAGA plaintiff has greater control over prosecutorial decisions in a PAGA action than a

charging party has in an EEOC enforcement action. Br. 41-42. But the Court's focus in *Waffle House* was on *whose claim* was at issue. *See* 534 U.S. at 294 & n.9. What mattered was whether the government entity had consented to impairment of *its* claim, not whether by statute the claims were prosecuted by a delegated agent empowered to make decisions on the government's behalf. *See id.* at 289.

Where the State has chosen by statute to pursue its claim for penalties in a civil action brought on its behalf by an agent, enforcement of a waiver in that agent's individual arbitration agreement against the State would deprive the State of its chosen remedy. The State's claim for civil penalties does not arise from a private contractual or transactional relationship; it arises from the employer's alleged violation of public duties imposed by the Labor Code. At a minimum, a State's chosen mechanisms for enforcing its laws and for determining who may pursue enforcement as its agent cannot be impliedly preempted without far more explicit statutory language than section 2 provides. *See Sheriff v. Gillie*, 578 U.S. 317, 327-28 (2016) (declining to read Fair Debt Collection Practices Act to interfere with how Ohio allows private attorneys to collect debts on its behalf).

V. Viking's policy arguments are meritless.

Finally, Viking argues that by prohibiting PAGA waivers, California has circumvented *Concepcion*'s holding that class action waivers are enforceable in arbitration. Applying California's anti-waiver rule to the PAGA claims, Viking contends, allows plaintiffs to evade *Concepcion* merely by relabeling their class action claims as PAGA claims.

Viking's argument misperceives the difference between a representative PAGA action for civil penalties and a Labor Code class action for compensatory relief. Those actions assert independent sets of rights, further distinct statutory purposes, and give rise to non-overlapping remedies. While an employee whose Labor Code rights have been violated may choose whether to pursue a PAGA claim, a personal Labor Code claim, or both, each is independent of the other. For that reason, an individual's settlement of her personal Labor Code claim does not preclude her from separately maintaining a PAGA claim on behalf of the State absent an express release of her PAGA claims. *See Kim*, 459 P.3d at 1126.

Viking is wrong in asserting that under *Iskanian*, "plaintiffs who should be engaging in bilateral arbitration pursuant to the unambiguous terms of the agreements they signed can instead just replace the words 'class action' in their pleadings with 'PAGA action' and then proceed to litigate in court as if *Concepcion* and *Epic* never happened." Br. 43. A plaintiff seeking relief for a Labor Code claim (on an individual or class basis) may seek compensatory damages or back pay dating back three or four years prior to filing and, in many cases, injunctive relief. Under PAGA, that plaintiff is limited to seeking civil penalties on behalf of the State, for a one-year limitations period. No compensatory damages are available under PAGA for any violation. *See ZB*, 448 P.3d at 241. Far from providing an end run around *Concepcion* and *Epic*, California's anti-waiver rule applies only when a plaintiff moves to a different playing field entirely, one that allows her to seek penalties on behalf of the State rather than compensatory relief for herself and other employees.

That many employees who are barred from pursuing classwide relief may turn to PAGA says less about the interchangeability of those claims than the fact that Labor Code violations in California remain rampant, particularly among low-wage workers (a sizeable portion of the state's 19 million workers).[12] Meanwhile, the state labor enforcement agency—which prosecutes hundreds of Labor Code cases each year, generally under Labor Code § 98.3 rather than PAGA—still lacks adequate resources to protect law-abiding companies from being placed at a competitive disadvantage by Labor Code violators (including those who violate provisions of the Labor Code that, before PAGA, did not make civil penalties available to aggrieved employees *or* the LWDA, *see supra* 25).

The statistics cited by Viking and its amici do nothing to support their assertion that PAGA claims are incompatible with arbitration. Their fundamental objection is that there are too many PAGA claims, and that this Court rather than the California Legislature should curtail the availability of PAGA to benefit the subset of California businesses that compete unfairly by cutting labor costs in violation of the Labor Code. But this Court has no basis for second-guessing California's judgment that the pervasiveness of unremedied Labor Code violations requires greater enforcement efforts than the State is able to provide by itself, let alone for expanding the doctrine of implied FAA preemption beyond recognition to accomplish that result.

Adoption of Viking's position, moreover, would have far-reaching negative consequences. Although

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[12] *See* https://www.bls.gov/news.release/laus.t01.htm#.

Viking's DRP does not define "private attorney general" claims, that prohibition could encompass any public policy claim eligible for fee-shifting under California Code of Civil Procedure § 1021.5, California's "private attorney general" fees statute. *See Serrano v. Unruh*, 652 P.2d 985, 993 (Cal. 1982); *see also* W. Rubinstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129 (2004).

Further, if this Court were to agree that "representative" claims are incompatible with arbitration and that state-law rules precluding contractual waiver of representative claims are impliedly preempted by the FAA, opportunistic companies would not hesitate to apply their arbitration waiver language beyond PAGA or other state-law representative actions. Qui tam actions brought on behalf of the federal or state governments by individual employees against their employers under the False Claims Act, actions brought under ERISA by individual employee benefit plan beneficiaries on behalf of plans, derivative actions brought by individual shareholders on behalf of corporations, actions brought on behalf of trusts by trustees (and in some circumstances by individual beneficiaries), and many other actions are brought on a representative basis in exactly the same sense as PAGA claims, under state as well as federal law. Each of these claims, and many others, entitles an individual plaintiff to bring a claim for the benefit of the person or entity whose interest the plaintiff represents.

If all such representative actions were incompatible with arbitration as envisioned by the FAA, the FAA would require enforcement of agreements imposed by employers, plans, corporations, or other parties with contractual relationships with prospective

plaintiffs forbidding them from bringing a claim in a representative capacity. *See Epic*, 138 S.Ct. at 1621-23. Those waivers would be enforceable against plaintiffs asserting representative actions based on state or federal law. Although federal laws authorizing such causes of action could displace the FAA through clear congressional command, *see id.* at 1627; *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 98 (2012), existing federal statutes like the False Claims Act and ERISA do not appear to satisfy that requirement.[13] And state laws authorizing private attorney general actions and representative actions on behalf of trusts or derivative actions on behalf of corporations would never escape preemption unless Congress created an express exception to the FAA.

The FAA does not grant potential defendants such unfettered power to choose which claims can be brought against them.

CONCLUSION

The Court should affirm the judgment of the court of appeal.

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[13] Viking suggests that the Court need not concern itself about the False Claims Act because many arbitration agreements are not written broadly enough to encompass such actions but apply only to claims *belonging* to the contracting parties. *See United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 799-800 (9th Cir. 2017). As *Welch* points out, however, agreements can easily be written to apply to "all" claims, just as the agreement here is not limited to claims that belong to Moriana. *Id.* at 800 n.3. If Viking's position in this case were correct, it would take only a slight edit to existing agreements to enable companies to immunize themselves from "representative" qui tam claims.

Respectfully submitted,

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STATUTORY APPENDIX

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1. 9 U.S.C. § 3 provides:

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

2. 9 U.S.C. § 4 provides:

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil

Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

3. California's Labor Code Private Attorneys General Act, Cal. Labor Code, Div. 2, Pt. 13, provides, in pertinent part:

§ 2698. Short title

This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

§ 2699. Actions brought by an aggrieved employee or on behalf of self or other current or former employees; authority; gap-filler penalties; attorneys fees; exclusion; distribution of recovered penalties

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, 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 and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

* * *

(e) (1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

* * *

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on

behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be

continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

* * *

(l) (1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

* * *

§ 2699.3. Requirements for aggrieved employee to commence a civil action

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) (A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

* * *

(2) (A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

(B) If the agency intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 65 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five

business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the time limits prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action pursuant to Section 2699.

* * *

4. Cal. Civ. Code §§ 1668 and 3513 provide:

§ 1668. Contracts contrary to policy of law

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

§ 3513. Waiver of advantage; law established for public reason

Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.