No. 20-1573

IN THE
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC. and CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

California Rural Legal Assistance, Inc. ("CRLA"), a non-profit legal services organization, has provided services to rural communities since 1966. Through its 16 field offices, CRLA has represented tens of thousands of low-wage workers, many of whom have legitimate fears of retaliation that prevent them from personally filing or reporting a labor law violation. While many cases are brought individually, representative actions, such as the Private Attorney General Act ("PAGA"), provide redress for our clients and their co-workers, whose wages were stolen and working conditions compromised by employers who break the law. CRLA has recovered tens of millions of dollars in wages, damages and penalties for violations of California's basic labor law protections and, put money back into the pockets of the workers who raise or serve our food, clean our businesses and care for our aged. PAGA has proved an effective, and often the only mechanism for bringing these claims.

California Rural Legal Assistance Foundation ("CRLAF") is a legal nonprofit that for over three decades has represented California's immigrant farmworkers and other low-wage workers in class, representative, and PAGA actions, and engaged in regulatory and legislative advocacy on their behalf. CRLAF works with California state agencies to address the most pressing needs of the farmworker community in labor, housing,

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[1] This brief is submitted with consent of the parties under Supreme Court Rule 37.3(a). This brief was not authored in whole or in part by counsel for a party. No person or entity, other than the *Amici*, their members or their counsel, made any monetary contribution to the preparation or submission of the brief.

safety, and health by bringing complaints that prompt state action. Because of the widespread incidence of worker exploitation, wage theft, health and safety violations, and the ineffectiveness of individual actions and limited state enforcement resources, CRLAF sponsored PAGA in 2003, and provided testimony on the dire need for the bill.

CRLA and CRLAF regularly file PAGA lawsuits involving unpaid wages and workplace health and safety violations. Agricultural workers are seasonal, and fear termination or being passed over for recall if they complain or participate in a complaint. With the dramatic increase of the H-2A[2] program, we have seen a dramatic increase in labor violations. For these workers to come forward and voice their individual claims could mean, no job, no home, and immediate loss of the right to work in the United States. Using PAGA, millions of dollars have been recovered for workers and the State of California in egregious cases involving agricultural workers. Most of these workers speak little English and have low literacy in any language.

These cases include, *inter alia*, a case alleging off-the-clock work and minimum wage and overtime violations suffered by some 2,200 H-2A lettuce workers resolved for $2.2 million, with $1.7 million distributed to plaintiffs, the State, and other aggrieved employees.[3] Tomato workers denied rest and meal breaks and alleged health and safety violations related to production standards, ergonomics, and heat illness,

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[2] The H-2A program allows agricultural employers to recruit and hire foreign workers who are admitted to the U.S. solely for the purpose of performing work for that employer. *See* 8 U.S.C. § 1101(a)(h)(ii)(a).

[3] *Lopez-Gutierrez v. Foothill Packing,* Monterey County Superior Court, Case No. 17CV001629 (2017).

recovered $635,000.00 for other aggrieved employees and the State.[4] Vineyard and orchard workers paid nothing for the last weeks of work and regularly denied meal periods settled their case against the grower for $300,000.00, with $200,000.00 distributed to workers and the State.[5] An H-2A sheepherder recruited from Peru was forced to work in haying operations while being paid the significantly lower sub-minimum wage allowed for sheepherders. He sued and recovered $250,000.00 in underpaid wages and penalties for himself, 30 other workers, and the State.[6]

After this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) we encountered for the first time, arbitration clauses signed by our low-income clients. The clauses were buried in multi-page documents and signed under the understanding it was a condition of employment. Until the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles* ("*Iskanian*"),[7] we were forced to challenge arbitration agreements purporting to waive the right to bring a representative action under situations where our clients genuinely had no idea they had waived any right. The clear intent of these provisions was to destroy the ability to pursue a representative action. The *Iskanian* decision restored that crit-

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[4] *Espinoza v. West Coast Tomato Growers, LLC*, U.S.D.C. Southern District of California, Case No.: 3:14-cv-02984-JLS-KSC (2014).

[5] *Tenorio v. Gallardo*, U.S.D.C., Eastern District of California, Case No. 1:16-CV-00283-DAD JLT(2016).

[6] *Vilcapoma v. Western Range*, Imperial County Superior Court Case No.: ECU07266 (2012).

[7] *Iskanian v. CLS Transportation, Los Angeles,* 173 Cal. Rptr. 3d 289, 312-313 (Cal. 2014).

ical means of redress. Reversal of the holding in *Iskanian* would likely prompt another surge in arbitration agreements and severely and negatively impact CRLA and CRLAF's work to combat rampant violations of the wage and hour and workplace health and safety rights, and improve the working conditions for low-wage workers in rural California.

INTRODUCTION AND SUMMARY OF ARGUMENT

The multitude of consistent decisions challenged by Petitioner, Viking River Cruises, Inc. ("Viking"), have recognized that the employees in those cases, like Respondent, Angie Moriana, were standing in the shoes of the State of California, enforcing penalties designed "to punish and deter employer practices that violate the rights of numerous employees under the Labor Code."[8] This conclusion is premised on the elemental truth that PAGA is not a waivable personal right, but that "[c]ivil penalties are an interest of the state. Employees could not recover them until PAGA authorized aggrieved employees to do so as agents of the state."[9]

Viking urges this Court to reject these holdings and countenance the virtual elimination of a key element of California's labor rights enforcement by application of an employee's agreement to arbitrate her personal claims. This would frustrate the very purpose of the PAGA statute as recognized by California's highest court in *Arias v. Superior Court,* 95 Cal. Rptr. 3d 588 (Cal. 2009) and *Iskanian*. Such a construction

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[8] *Iskanian,* 173 Cal. Rptr. 3d at 313, citing *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (2011).

[9] *ZB, N.A. v. Superior Court,* 252 Cal. Rptr. 3d 228, 242 (Cal. 2019).

necessarily elevates the Federal Arbitration Act ("FAA")—an act of Congress that does not address, much less pre-empt, state governance of minimum wages and working conditions—above the constitutionally protected sovereign powers of the State.

Viking complains that the PAGA "vastly expands the scope of employment disputes." (Brief for Petitioner, p. 26.) Not true. By their nature, violations of minimum wage, overtime, payday and health and safety laws are generally broadly imposed, workforce wide. As such, they are enforced on a workforce wide basis by the State of California through its citations or civil litigation authority.[10]

Viking also complains that "PAGA actions 'increase[] risks to defendants . . ." (Brief for Petitioner, p. 30.) Also, not true. The risk of prosecution under PAGA does not arise from the employment relationship or contractual agreement with any particular employee. It arises from the duties imposed by California and enforced through its designees. Viking, like all California employers was, and is, always at risk of having to defend a workforce wide prosecution if it violates the California Labor Code, with or without PAGA. What PAGA does, and what Viking and supporting amici fear, is merely expand the cadre of individuals who can bring those State enforcement actions, by deputizing private employees to enforce the California labor protections designed to protect all workers.

Amici in this brief will demonstrate that regulation of the minimum terms and conditions of employ-

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[10] *See, e.g.*, Lila Garcia-Bower, *2018-2019 The Bureau of Field Enforcement Fiscal Year Report,* California Labor Commissioner's Office, https://www.dir.ca.gov/dlse/BOFE_LegReport2019.pdf (last visited Feb. 22, 2022).

ment is within the purview of the states. PAGA is a fundamental tool used by the State of California to enforce its labor laws, and such enforcement measures are not pre-empted by federal law directly or indirectly. They are not inconsistent with the FAA, as they do not impact the adjudication of personal claims of the individuals who enter into arbitration agreements. Therefore, the State's decisions about how to enforce its own laws are not preempted, and this Court should reject Viking's invitation to invalidate the holding in *Iskanian*.

ARGUMENT

I. FOR OVER A HUNDRED YEARS, CALIFORNIA HAS CREATED A STATUTORY ENFORCEMENT SCHEME DESIGNED TO PROTECT THE WORKER AND, IN TURN, THE PUBLIC INTEREST.

California, like many states, has departed from common law and enacted its broad labor law protections and enforcement strategies in recognition that basic mandates had to be established to protect workers from exploitation. It was not an effort to protect individual contract rights, but to address wrongs impacting the public as a whole.

A. California Began Regulating Employment Relationships To Further Workers' Common Interest And Promote The State's Interests In Preserving The Common Good.

While the employment relationship between a worker and employer is fundamentally contractual, the effects of this relationship permeate into the public's economic interests, welfare, and safety.

In the 19th and early 20th Century, children as young as five worked alongside their parents and suffered injuries from industrial accidents and poisoning.[11] Most working women lived in "subnormal living" conditions which had the "most disastrous effect" on their health and morals.[12] California employers paid wages at a time and manner of their choosing,[13] and employees cheated of wages had limited recourse through the courts.[14] The employers' failure to pay wages caused "unrest, dissatisfaction, and hardship" on the workers who had to travel long distances to obtain their wages months after discharge.[15] This delay and loss of wages resulted—and still results today—in the "deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public."[16]

California's "public conscience . . . . awakened to the fact that the public safety and welfare" demanded laws providing for "a reasonable wage . . . to exempt from execution a part of his earnings,[and] to give him sanitary and otherwise safe surroundings."[17] As a result, the California Legislature began regulating employ-

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[11] Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 Rutgers L. Rev. 59, 61 (2010).

[12] *Martinez v. Combs*, 109 Cal. Rptr. 3d 514, 527 (Cal. 2010).

[13] *Smith v. Superior Court*, 45 Cal. Rptr. 3d 394, 401-402 (Cal. 2006).

[14] *See, e.g.*, *Duncan v. Hawn*, 37 P. 626 (Cal. 1894).

[15] *Smith*, 45 Cal. Rptr. 3d at 401-402.

[16] *Moore v. Indian Spring Channel Gold Mining Co.*, 174 P. 378, 381 (Cal. Ct. App. 1918).

[17] *Id.*

ment relationships with laws addressing the payment of wages and worker safety and health. In 1905, for example, California prohibited the employment of illiterate minors and minors under a certain age because "[p]rotecting minors from injury by overwork and . . . facilitating their attendance at schools" promoted the general welfare.[18] In 1911, it limited women's labor to eight hours a day.[19]

To better protect worker welfare and the public interest, in 1913, California established the Industrial Wage Commission ("IWC").[20] The IWC was tasked with investigating various industries and setting minimum wages[21] "adequate to supply . . . the necessary cost of proper living and to maintain [worker] health and welfare," maximum work hours, and conditions of labor in various industries by way of wage orders.[22] California voters then approved an amendment in 1914 to the California Constitution affirming the Legislature's actions.[23]

Subsequently, California prohibited the payment of wages in checks or orders not redeemable on demand in cash;[24] mandated the prompt payment of

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[18] *See In re. Spencer*, 86 P. 896, 897 (Cal. 1906).

[19] *See In re Application of Miller*, 162 Cal. 697 (Cal. 1912).

[20] *Martinez*, 109 Cal. Rptr. 3d at 526.

[21] No state law provided for a minimum wage before 1912. *Martinez*, 109 Cal. Rptr. 3d at 526.

[22] *Martinez*, 109 Cal. Rptr. 3d at 528 (citations and quotations omitted).

[23] Former article XX, section 17 1/2, of the California Constitution provided: "The legislature may . . . provide for the comfort, health, safety and general welfare of any and all employees." *Martinez*, 109 Cal. Rptr. 3d at 527, n. 20.

[24] *See In re Petition of Ballestra*, 161 P. 120 (Cal. 1916); Cal.

wages at termination;[25] and required semi-monthly payment of wages.[26] In 1916, women and children in the canning industry became the first employees in California to receive a legally established minimum wage.[27] California had by then joined other states in passing minimum wage protections.[28] "The widespread adoption of similar statutes by so many states evidences a general conviction that minimum wage requirements are definitely in the interest of the general public welfare."[29] This Court observed that "[t]he adoption of similar [minimum wage] requirements by many States evidences a deep seated conviction both as to the presence of the evil and as to the means adapted to check it."[30]

Employers then, as now, complained. However, this Court recognized the police power of states to regulate the employment conditions of its citizens, upholding Washington's minimum wage law for women and stating that "the courts have recognized a wide latitude for the legislature to determine the necessity for protecting the peace, health, safety, morals and general welfare of the people."[31] This Court further recognized that states may use their police power to protect their economic interests which affect the public as a whole:

Lab. Code § 212.

[25] *See Moore*, 174 P. 378; Cal. Lab. Code §§ 201, 202.

[26] *See In re Application of Moffett,* 64 P.2d 1190 (Cal. Ct. App. 1937); and Cal. Lab. Code § 204.

[27] *Martinez*, 109 Cal. Rptr. 3d at 530.

[28] *Id*. at 526.

[29] *Shalz v. Union Sch. Dist.*, 137 P.2d 762, 767 (Cal. Ct. App. 1943).

[30] *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

[31] *Id.* at 386.

> Where, in the earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and the question is no longer merely that of one party to a contact against another, *but of the use of reasonable means to safeguard the economic structure upon which the good of all depends*.[32]

California workers were eventually given the right to recover their own wages, statutory penalties, and liquidated damages through an administrative hearing[33] or a civil action.[34] Employees may also recover liquidated damages and statutory penalties, in addition to their actual wages lost.[35] These statutory damages and penalties recognize that merely requiring that an employer pay the wages owed and comply with the laws in the future does not compensate the individual worker for the lost use of their wages or restore the benefits of labor protections.

These California protections still exist today,[36] and have been extended to all workers, and augmented by

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[32] *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 442 (1934) (emphasis added).

[33] Cal. Lab. Code § 98.

[34] Cal. Lab. Code §§ 218, 218.5, 226(e) and (f), and 1194.

[35] Individual workers may recover waiting time penalties and late payment penalties (Cal. Lab. Code §§ 203, 210); damages for wage statement violations (Cal. Lab. Code § 226 (e)); additional compensation for meal and rest period violations (Cal. Lab. Code § 226.7), and liquidated damages for unpaid minimum wages (Cal. Lab. Code § 1194.2).

[36] California's wage and hour claims are governed today by the Labor Code and 18 wage orders adopted by the Industrial

additional protections including requiring printed wage statements,[37] codifying daily overtime;[38] and mandating meal and rest periods.[39] But recognizing that these laws aim at promoting the well-being of workers as a whole, and individual enforcement is not enough, California went further.

B. California Has Incentivized Compliance With Minimum Employment Protections Through State Enforcement and Civil Penalties.

California's labor law enforcement strategy does not solely rely on the personal enforcement of individual labor protections. Instead, it is a multi-pronged approach that recognizes: 1) the overarching right of the State to enforce its laws through an administrative citation, criminal prosecution, or civil action; and 2) the right of the employee to independently pursue their personal claims through administrative complaints, small claims, or civil actions. PAGA is a state enforcement action that is consistent with the first prong of California's historical approach to labor law enforcement.

Wage Commission. *Kilby v. CVS Pharm., Inc.*, 201 Cal. Rptr. 3d 1, 7 (Cal. 2016). In 1937, California established the Labor Code, repealing and readopting prior acts related to wage and hour issues. *See, e.g.,* S*mith,* 45 Cal. Rptr. 3d at 400-01, n. 4.

[37] Cal. Lab. Code § 226.

[38] *See* Cal. Lab. Code § 510(g) as amended. "Therefore, the Legislature affirms the importance of the eight-hour workday, declares that it should be protected, and reaffirms the state's unwavering commitment to upholding the eight-hour workday as a fundamental protection for working people." Cal. Code Regs. § 1170 (1999); AB 60, Cal. stats 1999 ch. 134 § 4.

[39] Cal. Lab. Code § 226.7.

1. California Established Civil Penalties Enforceable Only by the State.

Beginning in the 1930s, California began imposing civil penalties on employers failing to comply with employment laws.[40] These penalties are recoverable only by the State.[41] They are "not a punishment [however,] . . . in the sense ordinarily applicable to the term, but *rather the recovery of the penalty as a fixed sum by way of indemnity to the public* by reason of the violation of the statute and to charge [the offender] with a pecuniary liability."[42] These penalties are paid to the State and compensate the public for the harm caused to it by the employer's failure to follow the Labor Code. The State bears the costs of workers, highly dependent upon their wages for their subsistence and that of their family, who face poverty, homelessness, and become a public charge when deprived of the wages they earned. Most of these penalties are assessed per employee, per violation in recognition of the workforce wide enforcement approach engrained in the Labor Code.[43]

Contemporaneously, acknowledging that the violation of these laws is not a purely a civil matter, California imposed Criminal sanctions that may be enforced locally or by the State.[44] Criminal liability has been reinforced and prioritized in recent legisla-

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[40] *See, e.g.*, Cal. Lab. Code §§ 210, 226.3, 558, 1021, 1197.1, 1308, 1403, and 6319.

[41] *Id.*

[42] *Shalz*, 137 P.2d at 766 (emphasis added).

[43] *See, e.g.*, Cal. Lab. Code §§ 226.3, 558, 1021, 1197.1.

[44] *See, e.g.* Cal. Lab. Code § 215, 216, 218, 1199.

tion by making intentional wage theft by employers a form of grand larceny and a felony.[45]

2. California Established A Labor Law Enforcement Division.

Since 1939, California has made clear that "[o]ne of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment."[46] In 1986, California established the Division of Labor Standards Enforcement (DLSE) reiterating the State's policy "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."[47] It wasn't enough.

II. WIDESPREAD VIOLATIONS OF CALIFORNIA'S LABOR LAWS AND THE LACK OF STATEWIDE RESOURCES PROMPTED CALIFORNIA TO ENACT PAGA.

California first considered the PAGA legislation on the heels of the broad recognition of continued and widespread violations of labor protections by businesses characterized as the "underground

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[45] Cal. Pen. Code § 487m.

[46] Cal. Lab. Code § 50.5, (Added Stats 1939 ch. 276 § 1).

[47] Cal. Lab. Code § 90.5(a); *see also*, Cal. Lab. Code § 98.3.

economy."[48] The State recognized this was not a problem of individual worker exploitation but a pattern of workforce and industry-wide practices that impacted workers, communities, law-abiding employers, state revenues and the common good.[49] This reality is in stark contrast to the picture painted by Viking and supporting amici.

According to the U.S. Department of Labor, minimum wage violations in California occur approximately 372,000 times each week.[50] This single type of violation robs employees of almost $2 billion per year, while the cost is an estimated $15 billion per year across the country.[51] This number is higher than the estimated total yearly value of all robberies, burglar-

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[48] *See* Daniel Flaming & Pascale Joasart, *Workers Without Rights The Informal Economy in Los Angeles*, Economic Roundtable Briefing Paper (2002) https://economicrt.org/wp-content/uploads/2002/05/Workers_Without_Rights_2002.pdf (last visited Feb. 22, 2022).

[49] *See* Daniel Flaming, et al., *Hopeful Workers, Marginal Jobs: LA's Off-The-Books Labor Force, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, The Economic Roundtable (2005) https://economicrt.org/wp-content/uploads/2005/12/Hopeful_Workers_Marginal_Jobs_2005.pdf (last visited Feb. 22, 2022); Annette Bernhardt & Ruth Milkman, *Unprotected Workers: Violations of Employment and Labor Laws in American Cities* (Sept. 21, 2009).

[50] Eli Wolfe, W*e're Being Robbed': Wage Theft in California Often Goes Unpunished by State*, KQED (Oct. 16, 2019), available at https://www.kqed.org/news/11780059/were-being-robbed-california-employers-who-cheat-workers-often-not-held-accountable-by-state (last visited Feb. 13, 2022).

[51] David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, Economic Policy Institute (May 10, 2017), available at https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/, at p. 10 (last visited Feb. 22, 2022).

ies, larceny, and motor vehicle theft in the United States.[52] However, while those criminal violations are enforced by various law enforcement agencies, The Division of Labor Standards Enforcement was able to conduct only 792 inspections in 2017 and 751 in 2018.[53] That figure went down in 2019 to 691 inspections and in 2020 to 118 inspections.[54] Imagine how different our communities would be if, statewide, the police only investigated 118 instances of robberies, burglaries, larceny and motor vehicle theft.

Wage theft is concentrated in the low-wage worker sector, with the highest rates of citations by the California Labor Commissioner in the agriculture, restaurant, construction, retail, and warehouse sectors, totaling more than $77.4 million in stolen wages in a single fiscal year.[55] Reports show that more than a quarter of workers experience minimum wage violations and regularly work "off the clock" without pay.[56]

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[52] Cooper, at p. 28.

[53] *See* Victoria Hassid, *Labor Enforcement Task Force Report to the Legislature*, at p. 5 (Mar. 2019), https://www.dir.ca.gov/letf/LETF-Legislative-Report-2019.pdf (last visited Mar. 3, 2022).

[54] *Labor Enforcement Task Force Report to the Legislature*, at p. 5.

[55] Nadia Lopez, *Wage Theft Is a Serious Issue in California. Here's who it impacts most, how to get help*, Fresno Bee (Feb. 10, 2022), available at https://www.mercedsunstar.com/news/california/article258132413.html (last visited Feb. 13, 2022).

[56] *See generally*, Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at p. 20. *See also*, Ruth Milkman, et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*, UCLA Labor Center (2010) https://www.labor.ucla.edu/wp-content/uploads/2018/06/LAwagetheft.pdf (last visited Feb. 13 2022).

In 2017 and 2018, the California Labor Enforcement Task Force, charged with combating the underground economy,[57] found that an average 93% of businesses inspected each month were found to be out of compliance by at least one agency.[58] In 2017 and 2018, DLSE cited 52% of businesses inspected while in 2019 and 2020, the citation rate remained almost the same at 53%.[59] While California has tackled this persistent problem in various ways, including through the measures listed in Section I above, violations of minimum wage, overtime, meal and rest periods, and other basic worker protections persist. The State may never have the resources necessary to address the problem solely through direct State enforcement activity.

As such, California enacted PAGA "to achieve maximum compliance with state labor laws" and "to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices."[60]

As the California Supreme Court noted:

> Evidence gathered by the Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR) "was failing to effectively enforce labor law violations. Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and li-

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[57] *See generally Labor Enforcement Task Force Report to the Legislature.*

[58] *Labor Enforcement Task Force Report to the Legislature*, at p. 5.

[59] *Labor Enforcement Task Force Report to the Legislature*, at p. 5.

[60] Cal. Stats. 2003, ch. 906, § 1.

censing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California." (Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended July 2, 2003, p. 3.).[61]

In short, PAGA was passed to address the rampant widespread violations that the State is unable to pursue on its own.

III. THE CIVIL PENALTIES RECOVERABLE UNDER PAGA ARE THE STATE'S AND NOT SUBJECT TO CONTRACTUAL WAIVER BY INDIVIDUAL EMPLOYEES.

Facing a crisis in the underground economy and decreasing state resources for enforcing these protections, California through PAGA designed a system to deputize employees who suffered violations of their labor rights to promote enforcement of its laws. PAGA is a prophylactic law meant to protect the public's economic interests and welfare interest. PAGA achieves this goal in four ways. First, it increases enforcement of civil penalties for violations of labor laws dating back to the 1930s. Second, it creates new civil penal-

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[61] *Iskanian*, 173 Cal. Rptr. 3d at 309.

ties for violations of certain Labor Code provisions that previously had no civil penalty that could be assessed.[62] Third, it reimburses workers and their counsel who, as an extension of the State, take on the burden and risks of enforcing labor law. Fourth, it increases revenues for the agency charged with enforcing the labor protections by remitting 75% of the penalties to the State. All while the State retains its primary right to enforce California law.

A. PAGA Expands the State's Enforcement Reach By Allowing Individual Aggrieved Employees to Enforce Civil Penalties for the State.

PAGA allows an aggrieved employee to bring a civil action to enforce and recover civil penalties for California Labor Code violations.[63] As explained by California's Labor Workforce and Development Agency ("LWDA"):

> PAGA benefits the public by augmenting the state's enforcement capabilities, encouraging compliance with the Labor Code provisions, and deterring noncompliance. This furthers the state's policy to protect workers from substandard and unlawful conditions and also to protect employers "who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."[64]

PAGA allocates 25% of the penalties, which would otherwise be paid to the State, to the plaintiff and oth-

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[62] Cal. Lab. Code § 2699(f).

[63] *See* Cal. Lab. Code § 2699(a).

[64] *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (quoting the LWDA response).

er aggrieved employees. It also creates new penalties, enforceable only through PAGA.[65] Both the PAGA Plaintiff's right to recover compensation for enforcing these labor laws, and the State's right to recover funds through enforcement of these PAGA only penalties are stripped away under Viking's construction. As fully addressed in Respondent's brief, this is contrary to California's long-standing anti-waiver rule—which applies to all contracts, not just arbitration agreements. (Respondent's Brief on the Merits at pp. 38-42.)

B. PAGA Was Created To Protect The Public Interest, Not The Personal Interests of an Individual Employee. The State Retains Significant Control Over a PAGA Claim.

PAGA's purpose is to promote the public interest. [66] Citing the legislative history, the California Supreme Court in *Arias*, made clear that aggrieved employees stand in the shoes of the state to recover civil penalties "with the understanding that labor law enforcement agencies [] retain primacy over private enforcement efforts."[67] This primacy is built into the statute[68], making clear that PAGA is an enforcement tool, not a private recovery mechanism subject to contractual waiver. In this respect, it is far closer to

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[65] Cal. Lab. Code § 2699(f).

[66] *See Moniz v. Adecco USA, Inc.*, 287 Cal. Rptr. 3d 107 (72 Cal. App. 5th 56, 77) (Cal. Ct. Appt. 2021) ("Given PAGA's purpose to protect the public interest, we also agree with the [State of California] and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair in view of PAGA's purpose's and policies.").

[67] *Arias,* 95 Cal. Rptr. 3d at 595.

[68] Cal. Stats. 2003, ch. 906 § 1.

a *qui tam* action than Viking and supporting amici would have this Court believe.

An aggrieved employee cannot file a PAGA claim without first informing the State and giving them an opportunity to investigate the claim by submitting online a written notice of the alleged violations, often referred to as the "PAGA Notice."[69] This protects California's interests and gives it the first opportunity to intervene and investigate the case. Simultaneously, the employee must send the notice by certified mail to the employer.[70] Critically, the State may notify the employer within 65 calendars days of the postmark date of the PAGA notice that it intends to investigate and has an additional 120 to 180 days to investigate.[71] It is ONLY if the State does not investigate and issue a citation that an aggrieved employee may file a PAGA claim.[72]

The State is given an another opportunity to step in once a complaint has been filed,[73] and yet again when a tentative settlement has been reached.[74] Finally, courts must approve the settlement[75] by reviewing it to determine if it "is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor violations, deter future ones, and to maximize enforcement of state labor laws."[76]

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[69] Cal. Lab. Code § 2699.3(a)(1)(A); § 2699.3(c)(1)(A).

[70] Cal. Lab. Code § 2699.3(a)(1)(A); § 2699.3(c)(1)(A).

[71] *Id.*

[72] *Id.*

[73] Cal. Lab.Code § 2699(l)(1).

[74] Cal. Lab.Code § 2699(l)(1).

[75] Cal. Lab.Code § 2699(l)(2); § 2699.3(b)(4).

[76] *Moniz*, 287 Cal. Rptr. 3d 107, (72 Cal. App. 5th at 77).

California's interest in protecting employees' labor rights is paramount. It is the State whose interest is to prevent labor violations, deter future ones, and enforce labor laws. It is, after all, within its power to cite an employer or find that an employer has violated the labor laws of California. An employee does not have this power. Combining the procedural requirements of filing a PAGA action with court approval of a proposed PAGA settlement ensures that, while aggrieved employees may enforce these protections in the name of the State, they do not have the unchecked power they would have to resolve their private rights of action.

C. Employers Have The Right To Cure a Violation, Which If Done, Stops a PAGA Action.

Unique to PAGA is the employers' right to cure certain violations alleged in the PAGA notice and avoid civil penalty liability. This focus on correcting the violation, demonstrates that PAGA is not a mechanism for recovery in an individual employee's claim.[77] Once an employer cures the violation and gives written notice to the employee and the State, an employee may dispute the alleged cure(s) but it is the State who reviews the actions and decides whether the violations were cured.[78] If cured, an aggrieved employee would be prohibited from filing a cause of action under PAGA.[79]

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[77] Cal. Lab. Code § 2699.3(c)(2)(A). The employer may cure a violation alleging a violation other than those listed in section 2699.5 or sections 6300-9104.

[78] An employee may challenge that decision by filing a civil action. Cal. Lab. Code § 2699.3(c)(3).

[79] Cal. Lab. Code § 2699.3(c)(3).

The aggrieved employee's personal claims are unaffected by the employer's cure of violations under PAGA and may still be pursued by the individual employee, including through arbitration. The State holds the right to the civil penalties subject to PAGA, not the employee—even if that employee suffered the violations giving raise to the civil penalties. Thus, employees cannot contractually waive a PAGA claim.

Employers' right to cure violations shows the State's interest in compliance over the collection of penalties, evidencing the fact that the PAGA statute is a procedural tool used to protect the interests of the State and the public and not the interests of individual plaintiffs. California's goal remains the same since the 1920s: for "employer[s] to keep faith with [their] employees."[80]

D. The Number Of Interventions Or Objections Submitted By The State Is Not An Indication The System Is Broken But That It Is Working.

The number of PAGA claims filed and the number of interventions or objections submitted by the State is actually an indication that the intent of the law is being fulfilled and that the need underlying its passage has not abated. Staffing levels for the state have remained consistently low while the underground economy has continued to thrive.

When enacted, the Legislature declared: "Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future."[81]

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[80] *Moore*, 174 P. at 381.

[81] Cal. Stats. 2003 ch 906, § 1.

Sadly, and perhaps inevitably, this understaffing persists. As of February 15, 2022, for example, the Department of Industrial Relations had 94 open positions.[82] Cal/OSHA, the State's Division of Occupational Safety and Health (DOSH), had 55 vacancies as of January 31, 2022.[83] However, only 16 of those vacancies were posted as open positions.[84] Clearly, the State continues to suffer from a labor shortage, which the Legislature anticipated would happen. The administrative claims process available to workers pursuing their individual claims suffers the same lack of resources.[85] Now more than ever, PAGA is an essential mechanism by which aggrieved employees may continue to pursue the public's interest and help fight against substandard and unlawful working conditions.

A recent study confirms the positive and meaningful impact PAGA has had across the State in various

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[82] Department of Industrial Relations, *Job Search Results, Department of Industrial Relations*, CalCareers, https://www.jobs.ca.gov/CalHRPublic/Search/JobSearchResults.aspx#depid=83 (last visited Feb. 15, 2022).

[83] Department of Industrial Relations, *Cal/OSHA Recruiting and Hiring*, Cal/OSHA, https://www.dir.ca.gov/dosh/DOSH-Recruitment-Hiring.html (last updated February 2022) (last visited Feb. 22, 2022).

[84] *Job Search Results, Department of Industrial Relations*, CalCareers, https://www.jobs.ca.gov/CalHRPublic/Search/JobSearchResults.aspx#kw=OSHA&depid=83 (last visited Feb. 15, 2022).

[85] Farida Jhabvala Romero, *California Workers Face Years-Long Waits for Justice in Wage Theft Cases, State Data Shows,* KQED, March 12, 2022, found at https://www.kqed.org/news/11906889/california-workers-face-years-long-waits-for-justice-in-wage-theft-cases-state-data-shows (last visited Mar. 2, 2022.)

low-wage industries. PAGA actions generated $88 million in civil penalties in 2019 alone.[86]

Without this enforcement mechanism to incentivize employers to comply with labor laws, employees will continue to suffer shocking rates of wage theft and the State's economy and general well-being will continue to suffer. This is not a statute used to catch unintentional violations. As the UCLA study demonstrates, 89% of PAGA cases analyzed claimed wage theft (*Id.* at 10).

IV. PAGA, AS AN ELEMENT OF THE STATE'S ENFORCEMENT STRATEGY, IS AN EXERCISE OF ITS POLICE POWERS NECESSARY TO MAXIMIZE THE ENFORCEMENT OF LABOR PROTECTIONS.

"There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the 'general power of governing,' including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government."[87] "[I]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be super-

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[86] Rachel Deutch, et al., *California Hero Labor Law: The Private Attorney's General Act fights wage theft and recovers millions from lawbreaking corporations*, at p. 8 (Feb. 2020), available at https://www.labor.ucla.edu/publication/paga/ (last visited Feb. 13, 2022).

[87] *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch concurring, acknowledging the authority of and action by the states to establish health and safety protections to address the Covid-19 pandemic) (citing *National Federation of Independent Business v. Sebelius,* 567 U. S. 519, 536, (2012) (opinion of Roberts, C. J.); U. S. Const., Amdt. 10).

seded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[88]

California has unequivocally and repeatedly made clear that its regulation of employment inures to the benefit of the common weal, not just individual employees.

The preservation of States' sovereignty is based on the recognition that the regulation of certain activities is more appropriately vested in the States:

> The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.[89]

What could be more fundamental to the notion of sovereignty than the State's right to enforce its own non-preempted laws? PAGA is part of California's enforcement strategy designed to promote compliance with California laws that are neither pre-empted nor limited by federal act, but are within the recognized power of the State to establish and enforce more pro-

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[88] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (Federal regulation of drugs does not pre-empt state common law tort finding of liability) (citations omitted).

[89] *Bond v. United States*, 564 U.S. 211, 221-222 (2011) (citation and quotation omitted).

tective local standards.[90] The federalist system created by the Constitution recognizes that States are in a special position to provide for the specific needs of their citizenry given their privity to each other:

> The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other—a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. [91]

As the court in *Printz* and other cases recognize, this reservation of rights to the states, is particularly important in the context of regulating public safety and health.[92]

Viking's argument, if accepted, forces California to design its enforcement strategy in a manner that implements and consequently becomes shackled by the federal regulation of arbitration agreements. This commandeering of state policy forces California to limit its choice of who may enforce its laws—on its behalf—from amongst a limited number of employees who have not signed arbitration agreements, or as to those businesses who had not required their employees to do so.

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[90] *See* 29 U.S.C. § 218 (a); *Terminal Assn. v. Trainmen*, 318 U.S. 1 (1943) (Railway Act did not preempt states' regulation of health and safety provisions).

[91] *Printz v. United States*, 521 U.S. 898, 920 (1997) (citations and quotations omitted).

[92] *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667.

Viking argues that the FAA controls who California can and cannot deputize. By application, it coopts the state into enforcing the FAA—which regulates the acts of individuals, not the State—by restricting the enforcement of state law, based on an arbitration agreement to which the State is not a party.

Arbitration clauses, such as those signed by Ms. Moriana, are generally required as a condition of employment for all workers in a particular classification company-wide. Accordingly, by manipulating the FAA, employers can deprive the State of the ability to use this enforcement arm altogether. This will likely promote the wholesale requirement of adhesive arbitration agreements, buried in multipage employee handbooks.

The FAA is not intended in any way to either address the regulation of places of employment or a state's authority to enforce their own laws. This is inimical to the notion of the independent sovereignty of the states:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.[93]

The court in *Murphy v. NCAA* struck provisions of the federal gaming act that limited the States' ability to pass certain gambling laws; holding that federal law

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[93] *Murphy v. NCAA*, 138 S. Ct. 1461, 1476-1477 (2018) (quotations and citation omitted).

limiting the State's action, as opposed to directing it, nonetheless improperly invaded the State's powers.[94]

Nor is there any concern that the preservation of California's method of enforcing its laws will detract from the intended impact of the FAA:

> When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. *See Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 533, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) ('We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language') (Blackmun, J., concurring); *id.*, at 523 (opinion of Stevens, J.); *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U.S. 130, 140, 93 L. Ed. 2d 449, 107 S. Ct. 499 (1986). We will interpret a statute to pre-empt the traditional state powers only if that result is 'the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947).[95]

The self-stated purpose of the FAA is to "make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations."[96] California's sovereign right to deputize an aggrieved employee, to enforce its laws is not at odds with that purpose. Pursuant to previous rulings of this Court, the FAA does not

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[94] *Id.* at 1478, construing the holdings in *New York v. United States*, 505 U.S. 144 (1992); *Printz*, 521 U.S. 898.

[95] *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 345 (1994).

[96] 68 P.L. 401, 43 Stat. 883, 68 Cong. Ch. 213.

limit the rights of employers to enter into or enforce their private agreements to arbitrate personal claims with those employees. Congress has not, however, acted to limit the states' power to legislate and enforce minimum terms and conditions of employment.

While Congress may exert control over states' policies under the Commerce Clause through pre-emption of the subject matter, that is not what is argued here. Viking and supporting amici argue that Congress can tie the State's hands when it comes to devising and following an enforcement strategy. But, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[97]

No case law has construed the FAA in a manner that directly impedes state enforcement of its laws that are not otherwise preempted.[98] Yet Viking would have this Court carve out a new and invasive restriction on states that is not found in the language of the FAA or any other preemptive statutory scheme. As Chief Justice Roberts noted:

> Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action.[99]

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[97] *New York*, 505 U.S. at 178.

[98] Indeed, there is disagreement as to whether the FAA was intended to preempt State law. *See Kindred Nursing Cttrs. 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); *Kansas v. Garcia*, 140 S.Ct. 791, 808 (2020) (Thomas, J., concurring).

[99] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 549

Viking urges this Court to engage in "judicial guesswork" about the purpose and intent of the FAA as it relates to state enforcement. This "purposes and objectives" application of preemption is neither required nor consistent with the Supremacy Clause.[100]

PAGA creates an enforcement arm of the State, staffed by individual employees who are uniquely able to identify those violations of state civil and criminal laws because they have suffered those very violations. California's interest in enforcing these protections is equal to and independent of that of individual workers, if not paramount.[101] Preserving that interest does not undermine the purpose of the FAA.[102] The FAA does not address the enforcement or adjudication of the rights between the State and employers and construing it to do so is a reach too far.

In fact, the only purpose served by the Viking's contrived construction of the FAA is to further the interests of unscrupulous employers. It promotes arbitration, not as an efficient alternative to litigation but as a means of reducing and avoiding the risk of workforce-wide liability for the widespread violations of the labor laws employers contrive as a means of maximizing their profits.[103]

(2012) (quotations and citations omitted).

[100] *Kansas v. Garcia*, 140 S. Ct. at 808 (Thomas, J. concurring).

[101] *See* Cal. Stats. 2003, ch. 906, § 1(d).

[102] As Respondents point out in their brief, PAGA, likewise, does not exempt itself from arbitration, Viking's error is in its attempt to force the waiver of the PAGA representative action and concomitantly eliminating recovery for the State, the PAGA plaintiff and other aggrieved workers.

[103] The lack of disincentive that comes from the risk of facing

CONCLUSION

Individual lawsuits and administrative actions simply cannot fill the need for workforce wide enforcement of labor protections. California carefully constructed PAGA in order to expand its enforcement resources by deputizing workers who had themselves suffered at the hands of law-breaking employers. It has served that purpose and resulted in the enforcement of protections with monetary sanctions imposed, not worker, by worker, but for the whole affected workforces. Preserving the State's right to deputize and enforce its laws in this manner does not impede or interfere with the rights of employers and employees to agree to arbitrate their personal claims. But, eliminating that enforcement strategy will return California to the sorry state of labor law enforcement which prompted its legislature to act in 2003 and pass PAGA.

The California Court of Appeal's decision below is correct and should be affirmed and the California Supreme Court's decision in *Iskanian* should remain undisturbed.

Respectfully Submitted,

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individual, personal claims is demonstrated by Viking's own characterization of the recoveries for many labor law violations as "paltry." (Viking's Brief on the Merits at p. 30.)

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