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 CIVIL PROCEDURE AND ARBITRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a group of law professors with extensive experience teaching and writing about

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission, except for printing costs that were paid by the Impact Fund.

arbitration, civil procedure, and related fields. Based on that experience, *amici* proffer this brief to help inform the Court's consideration of whether the FAA preempts the California rule against waiver of claims under that state's Private Attorney General Act. *Amici*, as proceduralists, write to emphasize that what matters is whether the *procedures* involved in arbitrating a PAGA claim are inimical to the core attributes of arbitration. As *amici* discuss below, a PAGA claim is entirely bilateral and implicates none of the procedures that this Court has found inconsistent with the FAA in *Concepcion*.

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SUMMARY OF THE ARGUMENT

California's rule providing that PAGA claims are not waivable in employment contracts reflects a general principle of long-established state contract law that does not discriminate against arbitration on its face. In practice, moreover, the arbitral forum can well accommodate PAGA claims in a manner that is consistent with this Court's understanding of arbitration.

If the complexity of a given PAGA claim threatens to render the proceeding unmanageable, the arbitrator has the power under California law to trim the action as needed, including the power to dismiss claims. Because PAGA claims require none of the procedures that this Court held incompatible with arbitration in *Concepcion* and *Epic*, the California rule precluding waiver of PAGA claims does not interfere with the core attributes of arbitration and is not preempted by the FAA.

ARGUMENT

Section 2 of the Federal Arbitration Act ("FAA") provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under this latter clause, generally referred to as the "saving clause," courts may deny enforcement of arbitration agreements based upon any legal or equitable grounds that would support refusing to enforce "*any contract*."

This Court has interpreted the saving clause to encompass only contractual defenses that apply equally to arbitration contracts as they do to other agreements. *See*, *e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (by "recogniz[ing] only defenses that apply to 'any' contract[,] . . . the clause establishes a sort of 'equal-treatment' rule for arbitration contracts") (quoting *Kindred Nursing Centers L. P. v. Clark*, 137 S. Ct. 1421, 1426 (2017)). The saving clause, under this

Court's jurisprudence, "offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Epic Sys.*, 138 S. Ct. at 1622 (quoting *AT&T v. Concepcion*, 563 U.S. 333, 339 (2011)). Moreover, "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Sys.*, 138 S. Ct. at 1622 (quoting *Concepcion*, 563 U.S. at 344).

In this case, California's rule providing that claims under its Private Attorney General Act ("PAGA") are not waivable in employment contracts (the "Anti-Waiver" rule) reflects a general principle of long-established state contract law. *See* Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 FORDHAM L. REV. 451 (2020) (tracing the 19th century origins of California's anti-waiver and anti-exculpation laws). Because the Anti-Waiver rule neither discriminates against arbitration on its face nor interferes with fundamental attributes of arbitration, it is consistent with the equal-treatment requirement imposed by the saving clause and is not preempted by the FAA.

I. California's Anti-Waiver Rule Is A Facially Neutral Ground For The Revocation Of Any Contract

California law bars enforcement of contractual waivers of the right to bring claims seeking to

vindicate public interests, such as PAGA claims. This Anti-Waiver rule stems from an 1872 statute, where the California legislature provided that "[a]ny 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." CAL. CIV. CODE § 3513.[3] Under this principle, the California Supreme Court explained in 1905, "there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public." *Grannis v. Superior Court of S.F.*, 146 Cal. 245, 253 (1905). And that court applied the same Anti-Waiver rule in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014), to reach the "conclusion that an employee's right to bring a PAGA action is unwaivable" under California law. 59 Cal. 4th at 383.

On its face, California's rule providing that PAGA claims are not waivable in employment contracts is a general principle of state contract law applicable both to arbitration agreements and to other contracts. The Anti-Waiver rule, in other words, is facially neutral. The employee may not waive the right to bring a PAGA claim in court or in arbitration. The rule, which predates the FAA by some 50 years, does not "derive [its]

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[3] Civil Code Section 3513 is often cited in tandem with another law from the 1872 legislative session, California Civil Code section 1668, which states: "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." *See Iskanian*, 59 Cal. 4th at 382 (citing both statutes together).

meaning from the fact that an agreement to arbitrate is at issue," *Epic Sys.*, 138 S. Ct. at 1622, nor does it place arbitration agreements on an "unequal 'footing'" with other contracts. *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). By providing even-handedly that an employment agreement may not require employees to waive the right to bring PAGA actions, in whatever forum, the Anti-Waiver rule falls well within the principle that the FAA does not preempt state laws concerning the "enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *see also* 9 U.S.C. § 2.

But that hardly ends the inquiry. The equal treatment principle further seeks to ensure that the state law policy does not obstruct the purposes of the FAA "by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Sys.*, 138 S. Ct. at 1622. As detailed below, California's Anti-Waiver rule in no way interferes with the fundamental attributes of arbitration.

II. The Anti-Waiver Rule Does Not In Practice "Interfere With Fundamental Attributes Of Arbitration"

Where a putative waiver of the right to bring a PAGA claim is accompanied by an agreement to arbitrate all claims, the Anti-Waiver rule effectively compels arbitration of the PAGA claim. If arbitration of a PAGA claim would by necessity interfere with fundamental attributes of arbitration, the California

Anti-Waiver rule would for that reason run afoul of the equal treatment principle of the saving clause, and would risk preemption under this Court's decision in *Concepcion*.

As shown below, however, the arbitral forum can well accommodate PAGA claims without sacrificing any of the attributes of arbitration that this Court has identified as fundamental. Arbitrators can and regularly do hear factually complicated actions, using informal procedures and (presumably) resolving claims more quickly than their judicial counterparts. And if the complexity of a given PAGA claim threatens to render the proceeding unmanageable, California law gives judges and arbitrators tools to trim the action as warranted. Finally, PAGA claims require none of the procedures that this Court held incompatible with arbitration in *Concepcion* and *Epic*.

A. The Broad Factual Scope of PAGA Claims Does Not Interfere With Arbitration

The core of the preemption argument in this case is that the broad factual scope of PAGA claims is irreconcilable with the FAA's goal of promoting the speedy, informal and inexpensive resolution of disputes. Thus, Petitioner argues that the resolution of PAGA "claims would require an arbitrator to undertake factual and legal assessments for hundreds of absent employees employed in different capacities, paid on different scales, and subject to different policies—and to do so

for every alleged Labor Code violation and every pay period. Such unwieldy and outsized inquiries would plainly eliminate the 'lower costs' and 'greater efficiency and speed' that the parties chose individualized arbitration to ensure." Pet. Br. at 27. *See also id.* at 24 ("by allowing a plaintiff aggrieved by one violation to pursue relief for other violations that did not affect her personally, [PAGA] greatly expand[s] the potential scope of the action"); *id.* at 26 ("the *Iskanian* rule vastly expands the scope of employment disputes").

Arguments based on the potentially sprawling complexity of PAGA claims are misplaced, for two reasons. First, arbitrators tackle complex factual cases every day. Even if " 'representative PAGA actions take longer or cost more to arbitrate than other types of claims, the same could be said of any complex or fact-intensive claim,' such as antitrust claims." *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 438 (9th Cir. 2015). Viking would distinguish antitrust and other complex cases on the grounds that these claims are "inherently complicated," whereas PAGA claims are made complicated because they implicate evidence about nonparties. Pet. Br. at 28. But that distinction fails to account for the fact that many perfectly arbitrable cases implicate evidence about nonparties. Civil RICO cases are arbitrable, even though the plaintiff must show a pattern of independently illegal racketeering activities. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987). Workplace civil rights cases are arbitrable, *see, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), even

though a plaintiff pursuing a disparate impact theory, or a hostile work environment claim, must adduce a great deal of evidence regarding nonparties.

More generally, this Court has repeatedly recognized that complex legal claims requiring wide-ranging evidence may appropriately be subject to arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985), this Court rejected lower court case law holding that "antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are ill-adapted to strengths of the arbitral process." 473 U.S. at 632 (internal quotation omitted). The Court instead held that antitrust claims are arbitrable, cautioning that "potential complexity should not suffice to ward off arbitration." *Id.* at 633. *McMahon* followed suit, taking note of *Mitsubishi* and reasoning that if "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims" they can likewise handle civil RICO claims. 482 U.S. at 232. *See also id*. at 239 ("the 'adaptability and access to expertise' characteristic of arbitration rebut[s] the view 'that an arbitral tribunal could not properly handle' " complex matters) (quoting *Mitsubishi*, 473 U.S. at 633-34). *See also Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477 (1989) (claims under federal securities statutes are fully arbitrable).

What all these cases recognize is that the complexity of the underlying claim does not make the informal procedures of arbitration inapt; indeed, streamlined, informal arbitration procedures can expedite the

resolution of factually complex cases. *See*, *e.g.*, *Mitsubishi*, 473 U.S. at 633 ("streamlined proceedings and expeditious results" in arbitration may "best serve [parties'] needs" in complex antitrust case). *See also* Pet. Br. at 28 ("inherently complicated [claims] . . . will likely be less complicated and more streamlined in arbitration").

The second reason why the potential breadth and factual complexity of PAGA claims do not undermine fundamental attributes of arbitration is that California courts and arbitrators have full authority to ensure that only *manageable* PAGA claims may proceed, and to strike any portions of a PAGA claim that cannot be rendered manageable. In *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746 (2021), *review denied* (Dec. 22, 2021), the Court of Appeals concluded that PAGA claims are subject to a manageability requirement; the court held that courts have the authority to fully or partially "strike the claim, if necessary—and that this authority is not inconsistent with PAGA's procedures and objectives, or with applicable precedent." *Id.* at 763. Other California courts have been quick to follow *Wesson*. *See Goro v. Flowers*, 2021 WL 5761694, at *5 (C.D. Cal. Dec. 3, 2021) (under *Wesson*, the court "may strike a PAGA claim that cannot be rendered manageable") (quotations and brackets omitted); *Chavez v. Charter Commc'ns, LLC*, 2021 WL 6496864, at *3 (C.D. Cal. Dec. 1, 2021) (striking plaintiff's PAGA claims as unmanageable); *Feltzs v. Cox Commc'ns Cal., LLC*, 2021 WL 4947306, at *4 (C.D. Cal. Oct. 21, 2021)

(limiting the scope of PAGA claims under *Wesson*, but not striking them entirely).[4]

In other words, California courts recognize that PAGA claims can sometimes present factual inquiries that are difficult to manage and, in response, they have developed doctrinal tools to trim back PAGA claims where necessary and ensure that only *manageable* claims may proceed. The specific parameters of this developing doctrine remain to be worked out—how unwieldy is too unwieldy? Is there a difference between what is manageable in court and what is manageable in arbitration? Presumably, these questions will be answered in time, as the traditional common-law process plays out. But there is no basis to pretermit the common-law process entirely and announce that PAGA claims may not proceed in arbitration, even where it

[4] California law is clear that arbitrators have the same authority as courts to strike or dismiss all or part of a claim. The California Arbitration Act provides that the arbitrator may "make such orders" as are "necessary or appropriate at any time or stage in the course of the arbitration, and such orders shall be as conclusive, final, and enforceable as an arbitration award on the merits." CAL. CIV. CODE § 1283.05(c). Specifically, the arbitrator is empowered to make "orders imposing such terms, conditions, consequences, liabilities, sanctions, and penalties" as he deems appropriate—a litany that plainly encompasses orders striking or partially dismissing a claim. That the arbitrator is empowered to strike all or part of a PAGA claim likewise follows from the Federal Arbitration Act. In their arbitration contract, the parties bargained that an arbitrator would apply the applicable law. If a PAGA claim would be subject to dismissal or partial dismissal in superior court, it must likewise be subject to dismissal in arbitration on the same bases.

would be entirely *manageable* to arbitrate the PAGA claim.

B. PAGA Does Not Interfere With The Attributes Of Bilateral Arbitration That This Court Has Identified As Fundamental

PAGA presents none of the features that led this Court to conclude that class and collective actions are irreconcilable with bilateral arbitration in *Concepcion* and *Epic*. Most significantly, class and collective actions are intrinsically multilateral, while PAGA is not.

In class actions, absent class members are "parties" for multiple purposes. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Class members have broad rights to participate in the action including by receiving notice of class certification and electing whether to opt out, challenging the sufficiency of notice, objecting to settlements, and taking appeals from settlement approval. *See id*. at 9-10; *see also* Fed. R. Civ. P. 23(e). Class members are bound by a judgment and the pendency of the class case tolls their own time to file. *Id.* at 10, citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). And even where their participation is not guaranteed as a matter of right, absent class members hover over class action proceedings, and can seek intervention to protect their considerable interests as owners of the underlying claims. Collective actions are similar (with the obvious difference that class

members must opt in versus exercising an opt-out election). *See* Fair Labor Standards Act, 29 U.S.C. § 216(b).

PAGA cases are different. Non-party employees have no role in a PAGA action. They are not "parties" in any of the multiple senses that class members are. *See Devlin.* They neither opt in (as in *Epic*) nor opt out (as in *Concepcion*). Their own individual claims against the employer, if any, are not extinguished by an adverse judgment. And, as a consequence, the non-party employees have no right to receive notice of compromise, much less object. *See Saucillo v. Peck*, ___ F. 4th ___, 2022 WL 414692 (9th Cir. February 11, 2022) (aggrieved non-party employees have no standing to object to settlement of PAGA claim); *see also* Janet Alexander, *To Skin A Cat: Qui Tam Actions As a State Legislative Response to* Concepcion, 46 U. MICH. J. OF LEG. REF. 1203, 1227 (2013) ("Because PAGA actions do not adjudicate anyone's individual claims, they do not present the issues of notice, due process, and commonality that the Supreme Court considered beyond the ken of arbitrators.").

PAGA cases, moreover, are bilateral. Here, only two parties have any right to participate in the arbitral process: claimant Angie Moriana and respondent Viking River Cruises. That is it. PAGA by its terms gives the State no authority to intervene into the PAGA action once it has been filed.[5] *See Magadia v. Wal-Mart*

[5] Before filing a claim under PAGA, an aggrieved employee must provide the California Labor and Workforce Development Agency notice, and the agency may then either allow the employee to proceed or may "issue a citation" to the employer and

Assocs., 999 F.3d 668, 677 (9th Cir. 2021) (once suit is filed, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee"). Neither the State nor any aggrieved non-party employees have any warrant to participate in the arbitration, or even hover as a potential intervenor.

Because PAGA actions involve only two parties, they are bilateral—irrespective of whether they also vindicate public interests, or the interests of other employees in addition to those of the named plaintiff. In some instances, vindication may inure beyond the immediate parties, but that subsequent effect does not alter the structure of the arbitration. Under this Court's interpretation of the FAA, what matters is *how* the arbitration of the PAGA claim will be conducted, and whether that process is consistent with the attributes of bilateral arbitration that this Court understands to be required by the FAA.

These distinctions, between PAGA on the one hand and class and collective actions on the other, are dispositive. The underlying premise of *Concepcion* is that the arbitral forum is ill-suited to class-action procedures, in several ways. The exacting requirements of class certification and settlement approval, this Court held, conflict with a core arbitral attribute of informality. Likewise, in the Court's view, providing notice to interested class members and conducting proceedings

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investigate on its own. Cal. Labor Code § 2699.3. If the LWDA does not issue a citation within a specified time, the employee may sue. *Id.*

under their watchful eyes is inconsistent with contractual commitments to confidentiality that are ubiquitous in arbitration agreements and backed by Section 2 of the FAA. The arbitration of a PAGA claim, by contrast, requires no processes that are inconsistent with the FAA. Because there is no reason why a PAGA claim cannot be arbitrated on a bilateral basis, the obstacle-preemption argument fails.

CONCLUSION

California's rule providing that PAGA claims are not waivable in employment contracts is a ground for the revocation of any contract. The rule neither discriminates against arbitration on its face nor "by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic Sys.*, 138 S. Ct. at 1622.

Respectfully submitted,

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