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 AMICUS CURIAE PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

LESLIE A. BRUECKNER
BAILEY & GLASSER, LLP
1999 Harrison St.
Ste. 660
Oakland, CA 94612
(510) 272-8000

ELLEN NOBLE
Counsel of Record
KARLA GILBRIDE
PUBLIC JUSTICE
1620 L St. NW
Ste. 630
Washington, DC 20036
(240) 620-3645
enoble@publicjustice.net

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE

Public Justice is a national public interest legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct.[1] Public Justice has long maintained an Access to Justice Project, which seeks to ensure that the civil courts are an effective tool that people with less societal power can use to win just and equitable outcomes and hold to account those with more power.

Towards that end, Public Justice has an interest in the law surrounding mandatory arbitration and ensuring that the Federal Arbitration Act ("FAA") is applied consistently with its text. Public Justice has appeared before this Court as a party or amicus in numerous cases regarding mandatory arbitration and the interpretation of the FAA.

SUMMARY OF ARGUMENT

The question presented in this case is whether the Federal Arbitration Act requires the enforcement of an arbitration agreement that, contrary to state law, prohibits employees from bringing any representative

[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus, its members and its counsel has made a monetary contribution to support the brief's preparation or submission. Petitioner and Respondent have granted blanket consent to the filing of amicus briefs.

action, including a claim under California's Private Attorneys General Act ("PAGA") for civil penalties on behalf of the State. Petitioner insists that this question is answered by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that courts must enforce arbitration agreements that ban class actions, even when state law prohibits such bans, because the class action procedure interferes with fundamental attributes of arbitration. Petitioner argues "there is no meaningful distinction" between class or collective actions and a representative PAGA action. Pet. Br. at 2.

But not all representative actions are the same. Unlike class or collective actions which involve the aggregation of many independent claims, most representative actions—including PAGA actions—simply involve one entity stepping into the shoes of another and litigating on its behalf. For example, in wrongful death actions, a person's heirs bring claims on behalf of the estate. In guardian ad litem actions, a child pursues claims through a parent or "next friend." Corporate shareholders bring derivative actions on behalf of the corporation in which they hold shares. And the Employee Retirement Income Security Act ("ERISA") allows individual beneficiaries to bring breach of fiduciary duty claims on behalf of an employee benefit plan.

These individualized representative actions differ from class or collective actions in two important ways, and each provides an independent reason this Court should affirm the opinion below.

First, individualized representative actions, including PAGA actions, are consistent with the fundamental attributes of arbitration. While the aggregation of multiple individuals' separate claims makes class or collective actions complicated and burdensome to adjudicate, individualized representative actions—like wrongful death suits, actions on behalf of a trust, shareholder derivative suits, or ERISA actions—can be, and have been, resolved through ordinary, bilateral arbitration. They are structurally distinct from class or collective actions and do not raise the same procedural issues that animated this Court's decision in *Concepcion*. PAGA claims fall into this category of individualized representative actions that are compatible with bilateral arbitration. Thus, the California rule prohibiting the waiver of PAGA claims does not conflict with the FAA.

Second, a sweeping ban on any representative action precludes substantive causes of action, not just certain procedural mechanisms. Courts have recognized that the FAA does not apply to arbitration agreements that forbid a person from asserting their substantive, statutory rights. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). Faced with a class action ban, plaintiffs can still pursue their substantive rights individually, but there are a myriad of substantive, statutory rights that can *only* be brought in the form of a representative action. If this Court were to place representative action waivers on the same plane as class action waivers, it would allow parties—like nursing homes concerned about wrongful

death suits or corporations looking to dodge obligations to shareholders—to immunize themselves from liability.

For these reasons, a ban on any "representative" action is not the same as the class action ban that this Court enforced in *Concepcion*. Far from preserving fundamental attributes of arbitration, licensing broad waivers of any representative action would prevent injured parties from asserting certain claims, whether in court *or* in arbitration. The FAA does not require, or indeed permit, that result, and the Court should affirm the decision of the court of appeal.

ARGUMENT

I. A wide variety of representative actions, including PAGA actions, are fully compatible with traditional, bilateral arbitration.

Contrary to Petitioner's argument, the core element of a representative action—the act of standing in the shoes of another—is compatible with traditional, bilateral arbitration.[2] Petitioner argues that representative actions like PAGA undermine the fundamental

[2] This Court need only decide whether individualized representative actions like PAGA are compatible with bilateral arbitration if it first concludes that an agreement to waive representative actions is within the scope of section 2 of the FAA. As explained below, the FAA does not authorize enforcement of agreements to waive substantive, statutory rights, and thus the FAA does not apply to the employment agreement at issue. *See infra* at Part II; *see also* Resp. Br. at 16-25.

attributes of arbitration just as class actions do, and thus the FAA preempts state laws that prohibit representative action waivers just as it preempts state laws that prohibit class action waivers. *See* Pet. Br. at 22-35. But the reasoning of the Court's decision in *Concepcion* regarding class action waivers does not extend to a waiver of representative actions like PAGA.

In *Concepcion*, the Court held that a state law "[r]equiring the availability of classwide arbitration . . . creates a scheme inconsistent with the FAA" because "the switch from bilateral to class arbitration . . . makes the process slower, more costly, and more likely to generate procedural morass" and requires complex, burdensome procedural formalities to ensure absent parties are bound by the results of the arbitration. 563 U.S. at 334, 348-49; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

But many representative actions, including PAGA claims under California law, are bilateral and can be arbitrated without any of the procedural formalities that class actions demand. Legislatures began authorizing representative actions in response to the very early common law maxim that tort actions end with the death of either the injured party or the tortfeasors. As early as 1330, the statute "De Bonis Asportatis in Vita Testatoris" permitted an executor to sue for trespasses done to personal property of the testator. *See Survival of Actions Brought Under Federal Statutes*, 63 Colum. L. Rev. 290, 290 (1963).

Today, every state has some form of wrongful death or survival statute, which permits a personal injury action to continue after the death of either the plaintiff or defendant. *See* W. Page Keeton et al., Prosser & Keeton on Torts § 126, at 942 (5th ed. 1984); *see also*, *e.g.*, Conn. Gen. Stat. § 52-555; Iowa Code § 611.20; Tenn. Code Ann. § 20-607. These statutory causes of action are, by nature, representative because someone must stand in the shoes of the decedent to pursue their claim or make their defense. *See* 1 Am. Jur. 2d Abatement, Survival, and Revival § 52 (noting these actions are "maintained by or against the personal representative of a decedent").

Similarly, Federal Rule of Civil Procedure 17(c) provides that a guardian, conservator, or next of kin may sue or defend a suit on behalf of an infant or incompetent person. And most states have statutes that require minors involved in civil actions to have a guardian represent their interests in the litigation. *See*, *e.g.*, *Dengler by Dengler v. Crisman*, 516 A.2d 1231, 1234 (Pa. Super. 1986) (explaining mother may bring suit on behalf of minor child injured in car accident).

These representative actions are routinely resolved through traditional, bilateral arbitration. For example, in *Kindred Nursing Centers Limited Partnership v. Clark*, this Court enforced arbitration agreements with respect to representative wrongful death actions. 137 S. Ct. 1421, 1429 (2017). The Court held that an agent possessing the power of attorney to make decisions for an incapacitated family member could enter into a binding arbitration agreement on that family

member's behalf. It further concluded that the subsequent wrongful death action brought by a representative of the family member's estate must be arbitrated pursuant to that agreement. *Id.*

In the employment context, representative wrongful death actions are also routinely resolved through bilateral arbitration. For example, the Texas Supreme Court has held that an arbitration agreement between an employee and employer, signed before the employee's death, requires the employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer even though they did not sign the agreement. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009).

In *Labatt*, the Texas Supreme Court relied on the fact that the cause of action available to beneficiaries under Texas's Wrongful Death Act is "entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death"—the "beneficiaries' claims place them in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject." *Id.* at 644. Other states send employee wrongful death actions to arbitration on the same grounds. *See*, *e.g.*, *Lindsey v. C&J Well Servs., Inc.*, No. 1:16-CV-019, 2018 WL 6268200, at *4 (D.N.D. Nov. 30, 2018); *Bales v. Arbor Manor*, No. 4:08CV3072, 2008 WL 2660366, at *1 (D. Neb. July 3, 2008).

Unlike class actions, where there may be multiple, even thousands of, individualized claims and defenses

that raise procedural complexities, these representative actions are bilateral or "one-on-one." The same claims and defenses are at play—they are just raised by a proxy. PAGA actions are no different. A single plaintiff steps into the shoes of the State, raising the same claims the State would have brought itself. These individualized representative actions proceed under the same streamlined procedures applicable to any other bilateral arbitration. Put another way, a representative action that does not aggregate separate claims belonging to different individuals—whether it's a wrongful death action or a PAGA claim—is a bilateral dispute that is fully compatible with the fundamental attributes of arbitration.

A PAGA action may seem different than a wrongful death or guardian ad litem action since a PAGA action serves a public purpose. But there are many complex representative actions that, like PAGA actions, serve the interests of many but don't involve the formal aggregation of multiple claims. These too are compatible with traditional, bilateral arbitration.

For example, shareholder derivative suits under Federal Rule of Civil Procedure 23.1 are representative actions that would be banned under the waiver language at issue in this case. *See* JA 86, 89. In these derivative actions, "a shareholder asserts on behalf of a corporation a claim [that belongs] not to the shareholder, but to the corporation." *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991). These representative actions "insure corporate accountability," "protecting corporations and minority shareholders against officers and

directors who . . . place other interests ahead of those of the corporation." 19 Am. Jur. 2d Corporations § 1933; *see*, *e.g.*, *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 515 (N.D. Cal. 2020), *aff'd*, 845 F. App'x 563 (9th Cir. 2021) (shareholder derivative suit that secured a $240 million settlement requiring meaningful corporate governance reforms to protect consumers and future investors).

The arbitrability of shareholder derivative claims is widely accepted in close corporations and is potentially on the rise in public corporations. *See* Jeffrey A. Sanborn, *The Rise of 'Shareholder Derivative Arbitration' in Public Corporations: In Re Salomon Inc. Shareholders' Derivative Litigation*, 31 Wake Forest L. Rev. 337, 340 (1996); Sarah N. Lynch, *U.S. SEC's Piwowar urges companies to pursue mandatory arbitration clauses*, Reuters (July 17, 2017).[3] Close corporations have included arbitration clauses in negotiated shareholder agreements for many decades, requiring arbitration of shareholder derivative actions. *See*, *e.g.*, *In re Carl*, 32 N.Y.S.2d 410 (1942); *Lumsden v. Lumsden Bros. & Taylor Inc.*, 275 N.Y.S. 221 (1934). And courts have recognized the arbitrability of such representative actions brought on behalf of public corporations too. *See In re Salomon Inc. Shareholders' Derivative Litig.*, No. 91 CIV. 5500, 1994 WL 533595, at *8 (S.D.N.Y. Sept. 30,

[3] https://www.reuters.com/article/us-usa-sec-arbitration/u-s-secs-piwowar-urges-companies-to-pursue-mandatory-arbitration-clauses-idUSKBN1A221Y.

1994) (approving use of arbitration in shareholder derivative suit on behalf of public corporation).

A trustee may also bring an action on behalf of a trust. *See* 76 Am. Jur. 2d Trusts § 612. And if a trustee fails to properly protect the interests of beneficiaries, those beneficiaries may bring claims on behalf of the trust much like shareholders may bring claims on behalf of the corporation. *See* 16A Fletcher Cyc. Corp. § 8260.20. Representative actions by a trustee are often resolved through bilateral arbitration. *See* Arbitration—Trustee in bankruptcy, 1 Commercial Arbitration § 23:25.

In the employment context, representative actions are often brought under the Employee Retirement Income Security Act ("ERISA"). The federal statute establishes fiduciary standards for private employers who sponsor employee benefit plans and for the entities that manage those plans. The statute also establishes a cause of action, empowering individual plan beneficiaries to seek damages *on behalf of the plan* for losses caused by a breach of a fiduciary duty. *See* 29 U.S.C. § 1132(a)(2); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 (2008).

These ERISA actions brought on behalf of a benefit plan or trust are also arbitrable. *See Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 513 (9th Cir. 2019) (observing that "every circuit to consider the question" has held that such ERISA claims can be arbitrated); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Williams v. Imhoff*, 203 F.3d 758, 767

(10th Cir. 2000); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988); *see also Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 622 (7th Cir. 2021) (finding no conflict between the FAA and an ERISA action that authorizes one beneficiary to bring suit on behalf of the plan, seeking relief that benefits others).

These representative actions on behalf of a corporation, trust, or benefit plan are still resolved through traditional, bilateral arbitration even though they seek relief that would impact the interests of many others. Because there is no formal aggregation of claims, there is no need for the "burdensome procedural formalities" necessary "to ensure absent parties are bound." *Concepcion*, 563 U.S. at 334. Similarly, a PAGA action under California law does not resolve any employee's individual claim; it seeks civil penalties on behalf of the State. *See Arias v. Super. Ct.*, 209 P.3d 923, 933 (Cal. 2009). Thus, the public-serving nature of a PAGA action does not make it incompatible with traditional arbitration.

All these examples illustrate that representative actions come in many different forms and arise in many different areas of the law. Given the breadth of representative actions, the Court should not paint with a broad brush and assume all are the same. Collective and class actions like those at issue in *Concepcion* and *Epic Systems* may have a representative component,

but they also involve the aggregation of many individual claims. And it is that aggregation of multiple claims that triggers the "procedural morass" that makes the arbitration process "slower" and "more costly." *Concepcion*, 563 U.S. at 334.

None of that is at stake in individualized representative actions, including PAGA actions. Instead, there is a single representative claim brought on behalf of a single entity—be it a decedent, child, corporation, trust, benefit plan, or State. Thus, the Court's reasoning in *Concepcion* should not control and the FAA should not preempt a state law that prohibits waivers of individualized, public-serving representative actions like PAGA.

II. A waiver of representative actions is a waiver of substantive rights.

A contractual waiver of representative actions is also unlike a class action waiver because it requires the signatories to forgo their substantive, not just procedural, rights. This Court has long recognized that arbitration agreements enforced under the FAA should not operate as 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). The prospective litigant must be able to effectively vindicate their statutory cause of action in the arbitral forum. *Italian Colors Rest.*, 570 U.S. at 235.

Unlike class action waivers, a waiver of representative actions completely closes the door to certain

substantive causes of action, making it impossible for plaintiffs to pursue their statutory rights. A class action waiver does not eliminate a plaintiff's "*right to pursue* [a] remedy," *id.* at 236, because plaintiffs can still pursue their rights on an individual basis. But that's not the case for the larger category of representative actions—a category that includes, but is not limited to, claim-aggregating procedural devices like class and collective actions. Many statutory rights can only be secured through a representative action.

For example, the statutory rights provided by the many state wrongful death and survival statutes are only available through representative actions. These statutes give the next of kin or a decedent's estate the right to bring damages claims on behalf of the decedent. If one is prohibited from bringing representative actions, there is no remedy at all. The decedent cannot seek justice on his own behalf from beyond the grave.

Without representative actions under wrongful death and survival statutes there would be no retribution—no justice—in response to wrongful conduct that caused someone's death. *See*, *e.g.*, *Beer v. Islamic Republic of Iran*, No. 08-CV-1807-RCL, 2010 WL 5105174, at *14 (D.D.C. Dec. 9, 2010) (sibling recovered damages on behalf of decedent brother after he was killed by suicide bomb); *Robinson Prop. Grp., Ltd. P'ship v. McCalman*, 51 So.3d 946, 947-48 (Miss. 2011) (family members recovered damages on behalf of teen killed by drunk driver).

Shareholder derivative suits are another example of a substantive right that can only be accessed through a representative action. "The overwhelming majority rule is that an action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and *must* be brought derivatively." *Simmons v. Miller*, 544 S.E.2d 666, 674 (Va. 2001) (emphasis added) (citing cases). Similarly, in many states, the beneficiaries of a trust can *only* bring an action against the trustee through a derivative suit. *See Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 188 (S.D.N.Y. 2011) (explaining that, in New York, "when an alleged injury is not unique to the plaintiff, a suit brought by a beneficiary against the trustees can only be brought derivatively").

Likewise, with respect to ERISA, this Court has held that certain statutory causes of action alleging a breach of a fiduciary duty *must* be brought in a representative capacity. *See LaRue*, 552 U.S. at 251-52; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 376 (5th Cir. 2008) ("Based on *Russell*, many courts have held that claims for breach of fiduciary duty under § 502(a)(2) must be brought in a representative capacity.").

These examples all illustrate the same point: unlike a class action, which can reasonably be viewed as a procedural device that allows aggregation of claims that can also be brought individually, representative actions are often the *only* way to pursue the substantive right at issue. By permitting waivers of representative

actions in arbitration agreements, this Court would not just be funneling claims into bilateral arbitration, it would be eliminating claims altogether. That would run afoul of the Court's repeated recognition that arbitration agreements should not be used to strip people of their substantive, statutory remedies. *See Italian Colors Rest.*, 570 U.S. at 235; *Mitsubishi Motors Corp.*, 473 U.S. at 628.

If this Court finds that the representative action waiver is enforceable here, it will be a green light for all sorts of actors to adopt such broad waiver language as a shield to evade liability all together—in any forum. Such a broad ban on all representative actions could begin appearing in employment medical benefit plans, admissions paperwork for nursing homes, or corporate bylaws outlining the rights of shareholders. The FAA would no longer facilitate an efficient means of resolving disputes, but instead be used to strip people of their substantive rights under state and federal law. That result would violate the spirit and letter of the FAA, and should be rejected.

CONCLUSION

This Court should affirm the opinion of the California Court of Appeal.

Respectfully submitted,

LESLIE A. BRUECKNER
BAILEY & GLASSER, LLP
1999 Harrison St.
Ste. 660
Oakland, CA 94612
(510) 272-8000

ELLEN NOBLE
Counsel of Record
KARLA GILBRIDE
PUBLIC JUSTICE
1620 L St. NW
Ste. 630
Washington, DC 20036
(240) 620-3645
enoble@publicjustice.net

Counsel for Amicus Curiae

March 2022