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 THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of over 12.5 million working men and women, including more than 1.5 million who work in California.[1] Those employees, and the millions of California employees who do not have the benefit of union representation, depend on the effective enforcement of state employment laws to protect their livelihood and their health and safety while at work. The AFL-CIO, therefore, has a strong interest in the issue presented in this case: whether an employer can require[2] an employee to waive their right to bring a claim under the Private Attorney General Act (PAGA) as a condition of employment.

## SUMMARY OF ARGUMENT

California adopted the PAGA to address a problem squarely within the State's police powers – law enforcement authorities' chronic under-enforcement of the State's labor code. The solution that California adopted to address this problem – the creation of statutory penalties for certain violations

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[1] Counsel for the Petitioner and counsel for the Respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

[2] While the agreement here gave Respondent Moriana the option to opt out of the waiver, JA90, the clear result of accepting Petitioner Viking's argument and of reversing the Ninth Circuit would be to permit employers to require such waivers as a condition of employment. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

that previously carried only criminal sanctions, the deputizing of employees as private attorney generals to bring suit where the State will not, and a remedial scheme where 75 percent of the recovery is retained by the State with the remainder distributed to affected employees – does not conflict in any way with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq*. Certainly, the FAA does not permit an employer to require an employee to waive their right to bring a PAGA cause of action in *all* forums, as Petitioner Viking River Cruises proposes here.

As to arbitration specifically, although a PAGA plaintiff may seek penalties resulting from their employer's violation of their coworkers' rights, a PAGA proceeding remains a bilateral proceeding between the employee stating the PAGA claim and the employer, not a class or collective action of the sort this Court has held is incompatible with arbitration. Indeed, a PAGA claim is similar to the sort of arbitration proceedings that routinely take place pursuant to collective bargaining agreements, a type of arbitration that long predated the FAA. In labor arbitrations, unions routinely arbitrate matters that affect multiple employees. However, because the union alone represents the employees' interests in the matter, the arbitration proceeding remains bilateral.

Viking's claim reduces to an argument that because PAGA claims can be complex and awards may be high, this Court should allow employers to bar the claims entirely. Obviously, that is not the law. Many statutory claims, such as those brought under antitrust and securities law, are complex, but this Court has made clear that they may be resolved in arbitration. And, it need hardly be stated that claims of significant economic consequence are routinely

resolved in arbitral proceedings. Viking's arguments are thus better directed to the California legislature than to this Court.

## ARGUMENT

### I. PAGA Constitutes an Appropriate Exercise of the Police Power by California to Protect Workers Within the State

The principle that the states have authority to create causes of action, define their elements and provide appropriate remedies within all areas outside the federal government's exclusive jurisdiction is fundamental to the constitutional system of federalism. There is no question that states have such authority in the area of employment. As this Court has recognized, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *De Canas v. Bica,* 424 U.S. 351, 356 (1976). And this Court has made clear that it "must presume that Congress did not intend to pre-empt areas of traditional state regulation." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (citing *Jones v. Rath Packing Co.,* 430 U. S. 519, 525 (1977)). The California legislature exercised that clear constitutional authority here in enacting the PAGA. Contrary to Viking's contention, this is "a prerogative states enjoy under the FAA." Pet'rs Br. at 16.

The California legislature adopted the PAGA and designed its specific features, including who can bring a PAGA action, the elements of the cause of action,

and the available remedies, to address a problem the legislature identified in the enforcement of the State's labor code. The legislature found that the state agencies charged with enforcing the labor code were not adequately enforcing the code and, acting alone, could not do so. In particular, the legislature found that the state agencies could not adequately collect penalties owed the state for violations of the code, penalties that were needed to fund the State's own education and enforcement efforts.

As the California Supreme Court explained in *Arias v. Superior Court*, 209 P.3d 923, 929-30 (Cal. 2009):

> The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations. . . .

In other words, "[T]he lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through the PAGA." *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 154 (Cal. 2014).

The State Supreme Court's finding concerning the legislature's intent is well-founded in the legislative history. In enacting the original version of the PAGA,

the law's sponsors explained that "private actions to enforce the Labor Code are needed because [the state labor agency] simply does not have the resources to pursue all of the labor violations occurring in the garment industry, agriculture, and other industries." Cal. B. Analysis, S.B. 796 Assemb. (June 26, 2003) (Westlaw). The legislature reiterated these concerns when it amended the PAGA the following year, explaining that "the state's current inability to enforce labor laws effectively is due to inadequate staffing and the continued growth of the underground economy" and that, therefore, "private actions to enforce the provisions of the Labor Code were necessary to ensure compliance with the law." Cal. B. Analysis, S.B. 1809 Assemb. (July 27, 2004) (Westlaw).

State legislatures have and must continue to have discretion concerning the means of enforcing state law, consistent with the FAA. This Court has held that agreements to arbitrate cannot prevent a government agency from enforcing the law in court, even when the enforcement is initiated by a charge filed by an employee who is party to an arbitration agreement and even when that employee may benefit from the government enforcement. *EEOC v. Waffle House*, 534 U.S. 279 (2002). The same is true when a state legislature decides that it is necessary to vest enforcement authority in a private party not acting through a class action or other form of joinder procedure.

Conditional on an employee first giving notice to the relevant State enforcement agency of the specific provisions of the Labor Code the employee alleges were violated and the State notifying the employee that it does not intend to investigate or failing to

respond within a specified period, the California legislature has vested a substantive right in an employee whose rights under the State Labor Code are violated to act as a private attorney general and collect penalties both for the State and for him or herself as well as for other employees of the same employer. Cal. Lab. Code §§ 2699, 2699.3. The legislature also vested in employees a substantive right to collect attorney's fees for vindicating the state's interests in this manner. Cal. Lab. Code § 2699(g)(1). Those are *all* essential elements of the cause of action created by the legislature, including the individual employee's right to seek penalties for the violation of fellow employees' rights. As the California Supreme Court specifically observed in *Iskanian*, "a prohibition of [claims for penalties due to the violation of other employees' rights] frustrates the PAGA's objectives." 327 P.3d at 313. Allowing an individual employee to seek only penalties resulting from the violation of her or his own rights, the Court found, "will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." *Id.* (*quoting Arias*, 209 P.3d at 932-34).[3]

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[3] Viking's central argument, that the PAGA does not confer any substantive rights, Petitioner's Brief at 6, is simply wrong. If a state legislature adopted a prohibition against employment discrimination and provided only for compensatory damages in one statute and then, subsequently, adopted a second statute permitting recovery of civil penalties and attorney's fees, clearly the second statute would create substantive rights. It would not merely be a procedural statute. That is exactly what the California legislature did in the PAGA. And, as Respondent Moriana demonstrates, each element of the cause of action created by the California legislature in the PAGA as well as each

The State legislature chose to vest a private right of action under the PAGA in each individual employee whose rights are violated. Knowing that employees, particularly those who remain employed by the employer that violated their rights, are often reluctant to enforce their rights[4] and that employees are more likely to have knowledge of the violation of their coworkers' rights than the State enforcement agency, the State legislature also chose to encourage private enforcement by (1) permitting the individual employee who brings the PAGA action to retain a percentage of the penalties assessed, (2) permitting the individual who brings the PAGA action to seek penalties for the violation of the rights of other employees of the same employer, and (3) permitting the employee who brings the PAGA action to collect attorney's fees. Each of those aspects of the individual employee's PAGA cause of action created by the State is essential to the vindication of the State's clear and legitimate objective.

This Court found in *Waffle House* that "these statutes unambiguously authorize the EEOC to obtain the relief that it seeks in its complaint if it can prove its case against [the employer.]" 534 U.S. at 287. So too here; the PAGA "unambiguously authorize[s]" a single employee "to obtain the relief that [he or she] seeks in [the] complaint if [he or she]

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form of available relief is clearly substantive and not procedural under *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Resp't Br. at 23-24.

[4] As this Court has observed, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960).

can prove [his or her] case against [the employer.]" And courts cannot "announce a categorical rule precluding an expressly authorized form of relief as inappropriate in all cases in which the employee has signed an arbitration agreement." *Id.* at 293. "To hold otherwise would undermine the detailed enforcement scheme created by [the legislature]." *Id.* at 296. Viking's suggestion that "[n]othing that happens here will affect California's ability to enforce its wage-and-hour laws," Petitioner's Brief at 48, both flies in the fact of the State legislature's findings and conclusions and is patently wrong.

Finally, the State legislature chose to create a cause of action in the PAGA and to establish available remedies that do not require or depend on any form of representative proceeding. That is the clear and binding holding of *Arias*. A single employee can seek all the relief authorized in the PAGA and need not seek class certification or any other form of joinder in order to do so. *Arias*, 209 P.3d at 929-34. "PAGA claims do not require any special procedures. . . . Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims." *Sakkab v. Luxottica Retail N.A., Inc.*, 803 F.3d 425, 436 (9th Cir. 2015).

## II. Viking's Claim that It May Require Its Employees to Waive Their Right to Bring a PAGA Claim in Any Forum Flies in the Face of this Court's FAA Jurisprudence

Under this Court's FAA jurisprudence, agreements to arbitrate are enforceable only if, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by [a] statute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). By forbidding the pursuit of PAGA claims in court *and* in arbitration, the agreement at issue here requires employees to "forgo the substantive rights afforded by the [PAGA]." *Id.* at 628. Indeed, Viking acknowledges that the agreement requires that employees "forgo PAGA claims." Pet'rs Br. at 19. This case thus stands in stark contrast to *Preston v. Ferrer*, 552 U.S. 346 (2008), where this Court enforced the agreement to arbitrate because the case presented "only a question concerning the forum in which the parties' dispute will be heard. . . . So [the parties] relinquish[] no substantive rights . . . California law may accord [them]." *Id.* at 359.

This Court's FAA jurisprudence precludes not only waiver of an entire cause of action but waiver of available remedies. *See Mitsubishi Motors*, 473 U.S. at 637 n. 19. As this Court held in *Pyett*, quoting *Gilmer*, enforcing arbitration agreements encompassing statutory employment claims is required by the FAA when "arbitrating [the statutory claims] would not undermine the statute's 'remedial and deterrent function.'" *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (*quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30

(1991)). But preventing an individual employee from bringing a PAGA claim in any forum or barring that employee from seeking all the remedies provided for in the PAGA would certainly undermine the statute's intended function.

The fact that Viking's argument flies in the face of this Court's established FAA jurisprudence is illustrated by the following hypotheticals. If the legislature had adopted the PAGA but provided for employer-wide injunctive relief as a remedy for the violation of the statutory rights of employees other than the plaintiff rather than civil penalties, Viking's argument that the cause of action could be waived in an arbitration agreement would be baseless. Similarly, if the legislature had adopted the PAGA, but provided that 100 percent of the penalties due for violation of the statutory rights of employees other than the plaintiff would be paid to the State, Viking would have no argument whatsoever that arbitration of the PAGA claim would be inconsistent with the fundamental attributes of arbitration.[5] Finally, if the legislature had adopted the PAGA, but provided that 25 percent of the penalties due for violation of the statutory rights of employees other than the plaintiff would be paid to the plaintiff, Viking would similarly have no argument whatsoever under the FAA. The fact that the legislature actually adopted the provisions contained in the PAGA and provided that 25 percent of the penalties due for violation of the

[5] Or "the Legislature could have chosen to deputize citizens who were not employees of the defendant employer to prosecute qui tam actions." *Iskanian*, 327 P.3d at 152. *See also Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020) ("The state can deputize anyone it likes to pursue its claim, including a plaintiff who has suffered no actual injury.").

statutory rights of employees other than the plaintiff are paid to employees who are not party to the action does not in any manner alter the conclusion.

It is no answer if Viking replies that, even if this Court reverses the holding below to the extent that it permits individual employees to seek penalties resulting from the violation of other employees' rights, all individual employees will remain free to seek the penalties provided in the PAGA resulting from the violation of their own rights in individual arbitration proceedings. The PAGA vests a cause of action in individual employees and the remedies available under the PAGA all attach to that individual's cause of action. Permitting an individual employee to waive the remedies he or she can seek for the violation of other employees' rights is inconsistent with this Court's precedents and would defeat the core purpose of the PAGA. *See Williams v. Superior Ct. of L.A. Cnty.*, 398 P.3d 69, 79 (Cal. 2017) (legislature intended to both "expand[] the universe of those who might enforce the law" and "expand[] . . . the sanctions violators might be subject to" in actions brought be a single employer in order to "advance the state's public policy of affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry").

## III. PAGA Claims, like Labor Arbitrations, Are Bilateral Proceedings Notwithstanding that They May Benefit Multiple Employees

A PAGA action is no different than arbitration proceedings that are routine under collective bargaining agreements and have been since prior to the enactment of the FAA.[6] Labor unions, in their representative capacity, bilaterally arbitrate grievances on behalf of employees. *See, e.g.*, *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 564 (1960) ("This suit was brought by petitioner union . . . to compel arbitration of a 'grievance' that petitioner, acting for . . . a union member, had filed with the respondent [] employer."). Unions regularly file and arbitrate grievances on behalf of multiple employees. *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 545, 551 (1964) (union's grievances filed on behalf of all represented employees). Arbitrators are empowered to extend remedies to all affected employees. Nat'l Academy of Arbitrators, The Common Law of the Workplace § 10.39 (Theodore J. St. Antoine, ed., 2d ed. 1999) ("An arbitrator may appropriately grant class relief when the grievance is filed by the union as a representative of a group of similarly situated employees, or the grievance is clearly intended to apply to all employees in a group.").

Labor arbitrations frequently involve the types of violations that gave rise to Petitioner Moriana's PAGA action. *See, e.g.*, *T.J. Maxx*, 113 Lab. Arb. Rep. (BL) 534 (1999) (Richman, Arb.) (finding employer

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[6] *See* Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fl. L. Rev. 373 (1983).

violated overtime provisions of the parties' contract by assigning probationary employees to work overtime when regular employees were available); *South Charleston Stamping & Mfg.*, 115 Lab. Arb. Rep. (BL) 710 (2001) (Feldman, Arb.) (finding employer violated the parties' contract by assigning employees to work overtime without paying overtime rates); *U.S. Steel Corp.*, 124 Lab. Arb. Rep. (BL) 106 (2007) (Bethel, Arb.) (finding employer violated the parties' contract by failing to provide paid meal period, and instead requiring employees to work more than eight hours per day); *HS Automotive*, 105 Lab. Arb. Rep. (BL) 621 (1995) (Duda, Arb.) (finding employer violated the parties' contract by reducing employees' pay for meal period). Crafting remedies for contractual violations often requires considerable individualized inquiry in order to make employees whole. *See, e.g.*, *T.J. Maxx*, 113 Lab. Arb. Rep. at 538 (requiring determination, for nearly a one-year period, of which regular employees were available to work when probationary employees were given overtime hours, and awarding overtime pay to those employees); *South Charleston Stamping & Mfg.*, 115 Lab. Arb. Rep. at 714 (requiring determination, for six-month period, of which employees worked three-day, twelve hour shift and were thus entitled to time-and-a-half or double-time pay, depending on days they worked); *U.S. Steel*, 124 Lab. Arb. Rep. at 110 (requiring determination of which employees were denied paid meal periods, and thus worked longer than eight hour shifts, going back more than two years, and were therefore entitled to overtime pay for hours worked in excess of eight per day); *HS Automotive*, 105 Lab. Arb. Rep. at 626 (requiring determination of which employees were improperly

docked pay, and whether the additional work hours qualified employees for overtime pay). *See also* Br. of Amicus Nat'l Acad. of Arbs. at 12-14, 16-23. Arbitration of PAGA claims would actually be far simpler than labor arbitrations, as the PAGA arbitration would involve less individualized inquiry because PAGA claims do not require any inquiry into the actual damages suffered by individual employees.

While Viking claims that PAGA claims cannot be arbitrated because they may seek penalties for a wide variety of violations, labor arbitrators commonly allow multiple and disparate grievances to be adjudication in one proceeding. *See, e.g.*, *Apex Smelting Co.*, 53 Lab. Arb. Rep. (BL) 239, 244-46 (1969) (Dworkin, Arb.) (allowing consolidation, over employer objection, of three separate and unrelated disciplinary grievances, involving three different employees, where each grievance was ripe for arbitration, and stating that "[b]oth courts and arbitrators have ruled that several cases may be consolidated for the purpose of arbitration proceedings"); *see also Avon Prods., Inc. v. UAW Loc. 710*, 386 F.2d 651, 659 and n. 6 (8th Cir. 1967) (holding that disputes over whether multiple grievances can be consolidated into one arbitration hearing is for the arbitrator to decide, and collecting cases in which arbitrators have allowed for such consolidation).

Despite these characteristics, this Court has made clear that labor arbitration is far from inconsistent with the fundamental attributes of arbitration, stating that employers and unions, as the representatives of employees, "generally favor arbitration precisely because of the economics of dispute resolution." *Pyett*, 556 U.S. at 257.

The concerns this Court has expressed about state laws or judicial doctrines that permit "[c]lasswide arbitration," despite an agreement to the contrary, are not present in arbitration of PAGA claims. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Arbitration of PAGA claims does not involve "absent parties" as there are no parties other than the individual employee bringing the PAGA claim and the employer. *Id.* Arbitration of PAGA claims also does not require that the arbitrator be "knowledgeable in the often-dominant procedural aspects of [class] certification" because there is no class and no certification. *Id.* Arbitration of PAGA claims is not "more likely to generate procedural morass." *Id.* Arbitration of a PAGA claim does not "*require*[] procedural formality." *Id* at 349 (emphasis in original). While arbitrating PAGA claims may involve "higher stakes," *id.*, that alone cannot be grounds for preempting a state law intended specifically to create "higher stakes" in order to serve a legitimate and traditional state purpose.

The California Supreme Court held in *Arias* not only that a PAGA plaintiff need not invoke class action procedures under State law in order to pursue all the remedies available under the PAGA, but that "PAGA actions [are] fundamentally different from class actions." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014) (*citing Arias*). *See also Williams*, 398 P.3d at 80 ("PAGA actions and certified class actions have a host of identifiable procedural differences."); *Sakkab*, 803 F.3d at 435 (recognizing "'fundamental[]' differences between PAGA actions and class actions") (alteration in original) (*quoting Baumann*, 747 F.3d at 1123).

Indeed, in *Baumann*, the Ninth Circuit held that PAGA actions are not even brought under a state rule that is "similar" to or that "closely resembles" Federal Rule of Civil Procedure 23 (for purposes of permitting removal under the Class Action Fairness Act). 747 F.3d at 1121. The Ninth Circuit explained at length:

> PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees—critical requirements in federal class actions under Rules 23(a)(4) and (g) . . . . Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality. . . . In addition, the finality of PAGA judgments differs distinctly from that of class action judgments. The Federal Rules ensure that members of the class receiving notice and declining to opt out are bound by a judgment. Fed. R. Civ. P. 23(c)(3). Class action judgments are also preclusive as to all claims the class could have brought. . . .

*Id.* at 1123.

In contrast, PAGA expressly provides that employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Cal. Lab. Code § 2699(g)(1). "[I]f the employer defeats a PAGA claim, the nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not

bound by the judgment as to remedies other than civil penalties." *Ochoa–Hernandez v. Cjaders Foods, Inc.,* No. C 08–2073 MHP, 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010); *see Arias,* 209 P.3d at 934.

In short, "a PAGA suit is fundamentally different than a class action." *McKenzie v. Fed. Express Corp.,* 765 F. Supp. 2d 1222, 1233 (C.D. Cal. 2011). These differences stem from the central nature of PAGA. PAGA plaintiffs are private attorneys general who, stepping into the shoes of the Labor & Workforce Development Agency (LWDA), bring claims on behalf of the state agency. *Baumann*, 747 F.3d at 1122-23. *See also Canela v. Costco Wholesale Corp*., 971 F.3d 845, 850-56 (9th Cir. 2020) (same).[7]

Moreover, the California Supreme Court ruled in 2020 that an employee whose own claims under the Labor Code had been fully remedied can still pursue a PAGA action in contrast to the rule governing a named plaintiff in a class action. *Compare Kim*, 459 P.3d at 1126, *with Campbell-Ewald Co. v. Gomez*, 577

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[7] While Viking expresses outrage about the fact that the PAGA permits a single plaintiff to recover penalties, not only for other employees who suffered the same type of violation of the Labor Code, but also for others who suffered dissimilar violations, *see* Petitioner's Brief at 7, that fact clearly distinguishes PAGA actions from class actions. The California courts have rejected efforts to limit the penalties that a plaintiff can recover under the PAGA on precisely that grounds. *Huff v. Securitas Sec. Servs. USA, Inc*., 23 Cal. App. 5th 745, 757 (2018) ("But a representative action under PAGA is not a class action.") *But see Magadia v. Wal-Mart Assocs., Inc*., 999 F.3d 668, 673-78 (9th Cir. 2021) (holding that employee lacks Article III standing to bring PAGA claim in federal court relating to violation of Labor Code the employee did not suffer). And, in fact, Viking acknowledges that PAGA actions are "less truly representative, than class actions." Pet'r's Br. at 7.

U.S. 153, 160-61 (2016) (stating, with regards to class and collective actions, that "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot") (citation and quotation marks omitted). And, just this year, the Ninth Circuit held that a non-party employee who received a portion of a settlement of both class and PAGA claims could appeal a trial court's approval of the settlement of the class claims but not the PAGA claims. *Saucillo v. Swift Transp. Co. of Ariz., LLC*, Nos. 20-55119, 20-55159, 2022 WL 414692, at *7 (9th Cir. Feb. 11, 2022) ("objectors to a PAGA settlement are not 'parties' to a PAGA suit in the same sense that absent class members are 'parties' to a class action.") Viking's contention that "there is no meaningful difference between the class action at issue in *Concepcion,* the collective actions at issue in *Epic*, and the representative PAGA action at issue here," Petitioner's Brief at 23, simply ignores all of these "meaningful difference[s]."

Viking's argument that the fact that adjudication of PAGA claims might involve assessment of allegations that the rights of multiple employees have been violated under multiple sections of the Labor Code makes such claims inappropriate for arbitration would have this Court revert to the jurisprudence that was expressly rejected in *Gilmer* and *Pyett*. But those "misconceptions have been corrected. For example, the Court has 'recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims.'" *Pyett*, 556 U.S. at 268 (*quoting Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)). And this

Court has stated that "potential complexity should not suffice to ward off arbitration." *Mitsubishi Motors*, 473 U.S. at 633.

## IV. Viking's Arguments Concerning the Cost and Complexity of PAGA Claims Are Better Addressed to the State Legislature than to this Court

At bottom, Viking argues that permitting individual employees to bring PAGA claims in court or in arbitration would be so expensive for employers that employers should be permitted to extinguish employees' cause of action entirely by simply including language waiving the right to bring a PAGA claim in arbitration agreements. *See, e.g.*, Pet'r's Br. at 3 ("lawsuits . . . extracting millions of dollars from employers"); at 7 ("PAGA authorizes civil penalties that can quickly pile up"); at 17 (PAGA claims involve "the same, if not greater, risks" to employers than class actions); at 47 ("the size, scope, and potential monetary awards in a single PAGA action are staggering"). In fact, Viking attacks the California legislature for providing for the award of "substantial civil penalties" for "trivial Labor Code foot-faults like not including 'the start date for the pay period' on a pay stub." Pet'r's Br. at 30. *See also id.* at 46 ("the Labor Code's regulation of virtually every minutiae of an employer's pay practices"). But that is not a cognizable argument under the FAA and is an argument that was made unsuccessfully to the California legislature. *See* Cal. B. Analysis, S.B. 796 Assemb. (June 26, 2003) (Westlaw) (explaining that opponents of the PAGA argued unsuccessfully to the legislature that enactment of the law would lead to employers being penalized for "minor and inadvertent actions" such as the "inadvertent

deletion of information on a paycheck" and that the legislation could lead to "penalties that could reach staggering amounts").

Viking and other employers are free to advocate for reform of the PAGA in the State legislature, but this Court cannot permit Viking to subvert the decisions of the democratically-elected branch concerning what causes of action to create, the elements of those causes of action, or the available remedies. The FAA requires no such thing. Rather, the policy in favor of arbitration this Court has found implicit in the FAA also favors arbitration of PAGA claims.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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