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 Court of Appeal of California, Second Appellate District**

## BRIEF OF TRACY CHEN, IN HER REPRESENTATIVE PROXY CAPACITY ON BEHALF OF THE STATE OF CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MARK F. HUMENIK
*Counsel of Record*
POLK KABAT, LLP
423 South Estate Drive
Orange, CA 92869
(949) 636-5754
mhumenik@polkkabat.com

*Counsel for Amicus Curiae, Tracy Chen*

March 9, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## INTEREST OF *AMICUS CURIAE*[1]

The "'prerogative of *parens patriae*'" is "'inherent in the supreme power of every state'" and allows each State to enact and enforce laws aimed at protecting "the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 602 (1982) (quoting *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)). California's Private Attorneys General Act, Cal. Lab. Code § 2698, et. seq. (PAGA), is a quintessential use of California's *parens patriae* authority to *enact* and *enforce* a set of laws under its police powers for the welfare of its citizens. California's *Iskanian* rule -- prohibiting contractual waivers of private attorney general enforcement authority *before* the State deputizes an aggrieved employee to act on its behalf -- reinforces the State's sovereign right to enforce its Labor Code through mechanisms and incentives that the Legislative and Executive branches of government (not the federal judiciary) determined best serve the local public interest. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 152-53 (Cal. 2014). *Iskanian*'s anti-waiver rule is correct, because a state's *parens patriae* authority should not be neutralized by private agreement. And the Federal Arbitration Act (FAA) is agnostic concerning this issue. It does not authorize claim waivers or displace state law enforcement mechanisms.

---

[1] No counsel for a party authored this brief in whole or in part and no one other than the amicus and her counsel made a monetary contribution to fund the preparation or submission of this brief. All parties to this case filed consents allowing submission of amicus briefs.

Tracy Chen, a proxy of the State of California's Labor and Workforce Development Agency (LWDA) pursuant to PAGA and appellant in a case before the United States Court of Appeals for the Ninth Circuit, *Harvey v. Morgan Stanley Smith Barney LLC*, Case Nos. 19-16955, 20-15510, and 20-15548, has an interest in the outcome of this case. Any decision in *Viking River Cruises, Inc. v. Moriana* will implicate "core principles of federalism" and potentially "displace state law," *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 292 (1995) (Thomas, J., dissenting), including whether the FAA overrides the "starting presumption" and traditional deference to the "historic police powers of the State" which is embodied in PAGA, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654–55 (1995).

As a proxy of the LWDA, Chen – like every other current and future aggrieved employee in California – has a keen interest in defending the LWDA's statutory authority to enforce its *public* police powers and exercise its *parens patriae* authority under California's Labor Code, through delegated private citizen proxies like her. This Court should affirm.

## SUMMARY OF ARGUMENT

Respondent's brief thoroughly explains the many reasons why the FAA's text and purpose do not require the enforcement of agreements that prospectively extinguish claims (and bypass the arbitral forum altogether) by prohibiting a PAGA claim in any forum. Amicus Chen highlights additional reasons why *this* PAGA law enforcement claim, prosecuted by a proxy of

LWDA in state court, does not meet the "high bar" required for implied FAA preemption. *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1186 (11th Cir. 2017) (en banc).

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting). PAGA is the tool crafted by the California legislature to maximize Labor Code enforcement via "delegation of California's power to enforce its labor law to private parties." *Saucillo v. Peck*, ___ F.4th ___, 2022 WL 414692 at *6 (9th Cir. 2022).

Judicial embrace of Petitioner's exoneration clause and waiver of private attorney general enforcement activity under state law would upend federal-state comity principles and circumvent state law enforcement measures. Finding FAA preemption in these circumstances would override California's determination that a particular statutory scheme and mode of law enforcement will serve the public interest. It would give employers throughout California the ability to write themselves "get out of Labor Code enforcement free" cards simply by conditioning employment on a reciprocal "arbitration agreement" that includes a promise to never serve as a private attorney general for the public's benefit. This would directly undermine the incentive structure that California's Legislature adopted to promote Labor Code enforcement, a result that could not be achieved in a

stand-alone waiver, uncoupled from an "arbitration" agreement. Viking thus asks the Court to place its arbitration agreement on *unequal* footing over other contracts and elevate it above state sovereignty itself -- a result that Congress never intended when it enacted the FAA nearly a century ago.

The doctrine of *parens patriae* recognizes that a sovereign state maintains "the power to create and enforce a legal code, both civil and criminal," which "extends to individuals and entities within the relevant jurisdiction" to protect the interests of its residents. *Alfred L. Snapp & Son*, 458 U.S. at 601. Relying on its *parens patriae* authority, California enacted a comprehensive Labor Code that regulates many aspects of the employer-employee relationship within its borders, including numerous statutes "designed to protect the health, safety, and compensation of workers." *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1126 (Cal. 2020).

Before PAGA's enactment in 2003, California's Labor Code was critically underenforced because most violations went unpunished. Recognizing the grave risk to citizens and the State's economy caused by systemic underenforcement, California's Legislature responded in two ways. First, the Legislature added civil penalties for Labor Code violations that did not previously provide for them. Cal. Lab. Code § 2699(f). Second, in furtherance of its *parens patriae* charge to "achieve maximum compliance with state labor laws," the Legislature declared that it was "in the public interest" to authorize "aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor

Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." *Arias v. Superior Ct.*, 209 P.3d 923, 929-930 (Cal. 2009); see also, Cal. Lab. Code § 2699(a).

PAGA actions, prosecuted by private informant citizen proxies of the government "as an alternative" to LWDA enforcement of the Labor Code, belong to the State. *Id.* "PAGA plaintiffs stand in the shoes of the administrative agency and possess the same right and interest as it does. The nature of that right is administrative regulatory enforcement." *LaFace v. Ralphs Grocery Co.,* ___ Cal.Rptr.3d ____, 2022 WL 498847 at *5 (Ct. App. 2022). The right is administrative (and not personal) because the State's PAGA claim does not arise out of the *contractual* relationship between the employer and the aggrieved employees; it arises separately from the employer's violation(s) of the Labor Code stemming from the employer's relationship with the State and corresponding privilege to do business within it. *Id.*; *Iskanian*, 327 P.3d at 149.

The only injury at issue in a PAGA action is a sovereign one: the underlying violation(s) of California's Labor Code committed within the State's borders. The only available redress is a *civil penalty* paid to the State. The residual 25% portion of that penalty award, shared with all aggrieved employees post-suit, is "an incentive to perform a service for the state," not redress for any *personal* injury or damages suffered by them. *Saucillo*, 2022 WL 414692 at *6 quoting *Canela v. Costco Wholesale Corp.,* 971 F.3d

845, 852 (9th Cir. 2020). And because a PAGA action has "no individual component," aggrieved employees and proxies like Moriana have no individual stake in the State's enforcement suit. *Id.*, quoting *Kim*, 459 P.3d at 1131.[2]

Private parties' attempts to thwart the State's *parens patriae* authority by private contract pre-date the FAA. Since 1872 (53 years before the FAA's enactment) those efforts were ineffective under California law. Contractual waivers of violations of a public law are void *ab initio*. Cal. Civil Code §§ 1668 and 3513.

California's anti-waver rule does not discriminate. Exculpatory terms are equally unlawful whether

---

[2] As a state law enforcement vehicle with *only* sovereign injuries at stake, PAGA actions are not bound by the confines of Article III. PAGA actions are properly litigated in California's own courts, under its own laws, for conduct occurring within its own borders. Because *this* PAGA action was initiated in state court under state law, there is no occasion for this Court to decide (1) the thorny issues raised by implied preemption of state law enforcement statutes, judicial rules grounded in state sovereignty, or whether the FAA applies at all in these circumstances, see e.g., *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("I continue to believe that Congress never intended the [FAA] to apply in state courts"), 513 U.S. at 284-85 (Scalia, J., dissenting) (similar), and 513 U.S. at 285 (Thomas, J., dissenting) (same); or (2) whether proxies like Moriana have Article III standing to prosecute PAGA actions in a representative capacity in federal court, see, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal of certiorari as improvidently granted) (recognizing that private attorney generals lacked Article III standing in a case brought by an uninjured private citizen on the public's behalf under California's unfair competition and false advertising laws).

located in a standalone employment agreement without an arbitration clause, or in a pre-dispute waiver styled as an "arbitration" agreement.

The *Iskanian* rule is neutral rather than hostile to arbitration. The rule allows for resolution of PAGA claims in a judicial or arbitral forum. There is no right to a jury trial under PAGA, primarily because PAGA actions are not analogs of common law breach of contract actions between the proxy/aggrieved employee and the employer. *LaFace*, 2022 WL 498847 at *5, n.9. Procedurally, there is no material difference whether the State's PAGA claim is litigated in a bench trial or arbitrated before a single arbitrator. The *Iskanian* rule neutrally prohibits only the waiver of PAGA claims in all forums, which is Petitioner's admitted goal.

Contrary to Petitioner's and their amici's mischaracterizations, a PAGA action is not an artfully mislabeled class claim, the leg of the class action dog masquerading as the tail. (Civil Justice Ass'n of Cal.'s amicus, p. 26). As the California Supreme Court and Ninth Circuit consistently recognize, PAGA is a different animal altogether, lacking the key attributes of the class action: adequacy, typicality, commonality, and predominance; with the two representative action types being more dissimilar than alike. *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014); *Kim,* 459 P.3d at 1130. "[T]hese two actions are distinct, with different parties and procedures." *Saucillo*, 2022 WL 414692 at *5; see also, *Canela*, 965 F.3d at 700 ("PAGA causes of action [are] nothing like Rule 23 class actions.").

Viking's chief complaint has nothing to do with class arbitration or the ability of *private* parties to choose an arbitral forum to resolve *individual* disputes. Seeking to avoid the self-proclaimed "tax for doing business in California" (Pet.Br. at p. 3) and opportunize the shortage of government resources that led to PAGA's enactment in the first place, the goal of Viking and their amici is to gut PAGA by neutralizing its putative army of attorneys general. In truth, Viking seeks an exculpatory ruling from this Court under the guise of FAA preemption. Rather than preserving resort to an arbitral forum, Viking wants to eliminate its exposure to penalty liability and avoid governmental prosecution for its Labor Code violations – effectively restoring the pre-PAGA era when unscrupulous employers engaged in profitable, but unlawful, Labor Code violations with impunity.

Allowing employers to circumvent state law prosecution measures by private contract weaponizes the FAA far beyond what Congress could have envisioned in 1925. Left unchecked, employers could freely use their superior bargaining power to frustrate law enforcement measures that rely on employee or insider participation, including prospective waivers of whistleblower reporting activity affecting other employees (i.e., prohibitions against reporting corporate wrongdoing to the EEOC, SEC, OSHA, and comparable state agencies). There is no meaningful difference between an "agreement to arbitrate" that prohibits an employee from serving as a private attorney general on the LWDA's behalf versus prohibiting an employee from filing a charge of discrimination with a governmental agency or

cooperating with a governmental investigation. The FAA does not endorse the manipulation of public rights, by relegating all matters that arise during employment to the resolution of "individual" claims.

As well, judicial sanction of PAGA waivers would result in a form of federal commandeering, effectively requiring the State to invest additional taxpayer dollars to prosecute Labor Code violations through other measures (i.e., increasing LWDA's budget so it may hire more public officials to enforce the Labor Code in lieu of unpaid, contingency-incentivized private citizens and attorneys). If Viking gets its way, it will reverse the "tax for doing business in California" onto the State's citizens themselves.

Preemption is especially unwarranted here because the text of the parties' arbitration agreement does not cover disputes between the State and Viking. While PAGA claims are brought by aggrieved employees (following strict administrative exhaustion requirements), the State is the real party in interest. The parties' arbitration agreement is limited to disputes between Moriana and Viking that arose out of their employment contract. The agreement cannot be stretched to cover disputes arising out of or relating to "observations made" by Moriana while employed by Viking. *See, U.S. ex. rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 799 (9th Cir. 2017). Nor does the parties' arbitration agreement extend to the *State's* civil penalty claims against Viking, even though Moriana was the informant who reported Viking's alleged Labor Code violations to the government and subsequently received authority to

prosecute them on LWDA's behalf. *Id.* at 800 and n.3; see also*, Munro v. University of Southern California*, 896 F.3d 1088, 1092-94 (9th Cir. 2018).

The relentless battle over PAGA and increasing use of representative waivers by employers to dismantle California's sovereign right to exercise its police powers and enforce its Labor Code how it sees fit should not be waged in federal court at all. It "should be fought among the political branches" in California, and Viking and their employer amici "should not seek to amend the statute by appeal to the Judicial Branch." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2010) quoting *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 462 (2002). In respect of federalism and proper deference to California's sovereign or quasi-sovereign right to enforce its Labor Code, this Court should affirm the ruling of the California Court of Appeal.

## ARGUMENT

A federal statue like the FAA may not supersede the "historic police powers of the States" unless it is the "clear and manifest purpose of Congress." *Wyeth v. Levine,* 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And "[t]hat assumption applies with particular force" when implied preemption is being applied "in a field traditionally occupied by the States," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008), especially employment matters, *Curtis v. Irwin Industries, Inc.*, 913 F.3d 1146, 1152 (9th Cir. 2019).

## I. PAGA claims are administrative enforcement actions, and the FAA does not preempt California's sovereign right to enforce its Labor Code via delegated private proxies.

Moriana brought an action for civil penalties on the State's behalf in state court to enforce the Labor Code against Viking, her former employer. Invoking federal law, Viking insists that Moriana cannot bring suit in a private attorney general capacity in any forum because she clicked through a PAGA waiver that Viking nestled into an "arbitration agreement." See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

Just two years earlier, the California Supreme Court properly concluded that an employee's blanket waiver of the *State's* PAGA enforcement authority falls outside of the FAA's purview. *Iskanian,* 327 P.3d at 151. And to the extent such waivers implicate the FAA when employers strategically insert them into an unsuspecting employee's individual arbitration agreement, *Iskanian* further held that the FAA does not preempt the State's sovereign right to carry out its police powers and enforce its Labor Code as it sees fit. *Id.* at 152.

As the California Supreme Court recognized long before *Iskanian* (or *Concepcion* or *Epic*) was decided, a PAGA action to recover civil penalties is "'fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Arias*, 209 P.3d at 934; see also, *People v. Pacific Land Research Co.*, 569 P.2d 125, 129 (1977). The *Iskanian*

rule, prohibiting PAGA waivers, does not target private arbitration. California's anti-waiver rule furthers its sovereign authority as a state and promotes the public's longstanding interest in Labor Code enforcement, regardless of the forum where the enforcement is achieved.

### A. PAGA actions serve the public interest, not the individual interests of aggrieved employees.

It is true that PAGA law enforcement actions are not considered "*qui tam* for purposes of [establishing] Article III" standing for proxies seeking to litigate in a representative capacity on the State's behalf in federal court. *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 678 (9th Cir. 2021). But that observation does not undercut the lynchpin finding in *Kim, Iskanian*, and other cases that the State is *always* the real party in interest in a PAGA representative action. See, *Kim*, 459 P.3d at 1127; *Iskanian*, 327 P.3d at 148; *Canela*, 971 F.3d at 849, n.1; *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015).

Precedent unequivocally establishes that aggrieved employees and deputized proxies do not have (or own) an individual PAGA claim "because *every* PAGA action … is a representative action on behalf of the state. Plaintiffs may bring a PAGA claim *only* as the state's designated proxy." *Kim*, 459 P.3d at 1131; see also, *Canela*, 971 F.3d at 851, 856. The underlying injury and "sole purpose" that the State vindicates through a PAGA claim is only a sovereign one stemming from the violation of its wage and hour laws. *Iskanian*, 327 P.3d at 153. "But under Article III, an injury in law is not an

injury in fact." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2205 (2021).

Unlike a traditional *qui tam* action under the federal False Claims Act (FCA), 31 U.S.C. § 3729 et. seq., a PAGA proxy does not assert a claim for damages on the State's behalf for any *proprietary* injury that the State suffered. See*, Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (finding that a relator in a *qui tam* action under the FCA had Article III standing under a partial assignment of damages theory flowing from the government's *proprietary* injury from fraud; but rejecting the relator's claim to standing stemming from the "injury to its sovereignty arising from the violation of its laws" and the bounty "byproduct" interest that a relator possesses in the suit's successful outcome). Instead, the PAGA representative prosecutes a claim for civil penalties for the *sovereign* injury that the government sustained arising from the employer's violations of the Labor Code. See, *Saucillo*, 2022 WL 414692 at *4. PAGA is thus akin to a statutory *parens patriae* action, specific to California state courts, and to which "the constraints of Article III do not apply." See, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (noting that "the constraints of Article III do not apply to state courts."); *Nike, Inc.*, 539 U.S. at 661; *Magadia*, 999 F.3d at 674-75.

PAGA's text and legislative history underscore the public and sovereign interests that the statute serves. PAGA was enacted to "augment the limited enforcement capability" of the LWDA by "empowering employees to enforce the Labor Code as representatives

of the Agency." *Kim,* 459 P.3d at 1130. "By expanding the universe of those who might enforce the law, and the sanctions violators might be subject to, the Legislature sought to remediate present violations and deter future ones." *Williams v. Super. Ct.*, 398 P.3d 69, 79 (Cal. 2017).

True to its sovereign law enforcement purpose, PAGA's remedial scheme authorizes the imposition of civil penalties that are paid mostly to the State (the primary beneficiary of any PAGA claim), but not injunctive relief or individual damages to aggrieved employees. "Civil penalties are an interest of the state. Employees could not recover them until the PAGA authorized aggrieved employees to do so as agents of the state." *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019). Civil penalties are "*not* to redress employees' injuries." *Kim,* 459 P.3d at 1130; *Iskanian* 327 P.3d at 151 (PAGA suits do not seek "victim-specific relief;" they "enforce *the state's* interests in penalizing and deterring employers"). Partly for that reason, a PAGA representative, who "is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's 'compliance with regulatory law' (and, of course, to obtain some money…)" lacks federal constitutional standing. *TransUnion,* 141 S.Ct. at 2206 (citations omitted).

While the litigating proxy and other aggrieved employees receive a small portion of the State's civil penalty recovery if a PAGA prosecution is successful, they have no cognizable individual stake in the State's cause of action or in any portion of those contingency-based civil penalties. The Ninth Circuit recently

clarified that point post-*Magadia*, emphasizing that "PAGA is a delegation of California's power to enforce its labor laws to private parties." *Saucillo*, 2022 WL 414692 at *6. Allowing aggrieved employees to share in the State's penalty recovery, a "policy choice" by the California Legislature, does not establish any individual interest or property stake in the State's PAGA claim; there is no compensatory component to any PAGA action "because of any injury" to aggrieved employees. *Id*.

PAGA's statutory framework, which authorizes pursuit of civil penalties by proxies suffering no individual injury and even when the proxy's individual injuries were remedied by other means, confirms that the pro-rata byproduct penalty interest is payment for a service rendered *to the State*, not compensation for any injuries to aggrieved employees. *Kim*, 459 P.3d at 1133; Cal. Lab. Code § 2699(g)(1). Consequently, PAGA standing under state law (i.e., in the non-Article III sense) is unconnected to injury or redressability.

Properly examined, PAGA is a prosecutorial tool implemented by the California Legislature to "create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." *Brown v. Ralphs Grocery Co.,* 128 Cal.Rptr.3d 854, 862 (Ct. App. 2011). And it has proven to be an effective tool, which explains the dogged efforts of employers to effect its repeal through judicial fiat. But the State's reliance on aggrieved employees to prosecute its claims does not convert them into private claims for compensation for individual injuries.

### B. PAGA's public service incentive structure and minimal procedural controls following administrative exhaustion do not subject PAGA claims to FAA preemption.

*Magadia* was correct in finding that a PAGA proxy litigating in federal court does not satisfy traditional *qui tam* standing under Article III. But Petitioner and their amici widely miss the mark in citing *Magadia* to undercut *Iskanian* (which *Magadia* does not mention). There is no tension between the California Supreme Court's description of PAGA as a "form of *qui tam*" for implied preemption purposes, while *Magadia* disputes the *qui tam* label in the unrelated context of Article III standing. But whether PAGA is described as a "form of *qui tam*" or perhaps more aptly as a laboratory experiment in *parens patriae* lawmaking, the result is the same: the FAA does not preempt a state's police powers, especially without the slightest indication that Congress clearly intended that result.

**1.** No matter the judicial label attached, a PAGA plaintiff sues in a purely representative capacity as the "proxy or agent of the state's labor law enforcement agencies." *Iskanian*, 327 P.3d at 147. A PAGA action thus is not a multi-party dispute, as Petitioner contends. It is a bilateral dispute between "an employer and the *state*," rather than between the employer and the aggrieved employees arising out of their contractual relationship. *Id.* at 151 (emphasis in original).

As to *civil penalties* only, a judgment in a PAGA action binds the State, the deputized plaintiff-proxy,

and any aggrieved employees. But the *individual injury* claims of aggrieved employees for identical (or related) Labor Code violations are unaffected and not subject to claim or issue preclusion. *Arias*, 209 P.3d at 934. Hence, the State is always the real party in interest to (and primary beneficiary of) any PAGA action. *Kim*, 459 P.3d at 1127.

Because the individual claims of aggrieved employees are not involved, PAGA actions do not invoke non-party due process requirements or complex procedures. That remains so whether the State's penalty claim is litigated in arbitration or in court. *Sakkab,* 803 F.3d at 436-37. While high financial stakes may be involved when the reported Labor Code violations are widespread, litigating a bilateral PAGA claim is procedurally straightforward, since there is no right to a jury trial in a PAGA action. *LaFace,* 2022 WL 414692 at *5. Moreover, because a PAGA action is concerned with determining the total number of Labor Code violations committed against the State during the one-year penalty limitations period, there is no concern that the factfinder, whether a court or an arbitrator, will be saddled with resolving unique, individualized defenses (i.e., waiver, release, unclean hands, etc.) that sometimes complicate and delay class action disputes for individualized damages. For those PAGA actions that present manageability issues, a private arbitrator, no less than a state court, has inherent authority to dismiss the claim on manageability grounds. *Wesson v. Staples the Off. Superstore, LLC*, 283 Cal.Rptr.3d 846, 859 (Ct. App. 2021).

Relatedly, because non-party aggrieved employees are not parties to the PAGA action and not officially notified of it, they may pursue their individual Labor Code claims for victim-specific relief regardless of a PAGA suit's outcome. Indeed, PAGA provides that employees – even the proxy bringing the State's claim -- 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); *ZB, N.A.*, 448 P.3d at 245. Here, too, this is because "PAGA plaintiffs stand in the shoes of the administrative agency and possess the same right and interest as it does. The nature of that right is administrative regulatory enforcement." *LaFace,* 2022 WL 414692 at *5.

That PAGA proxies bring suit in their own name does not alter the State's identity as the only real party in interest to *every* PAGA claim. *Kim*, 459 P.3d at 1127. PAGA authorizes a proxy to bring suit in her own name *after* administrative exhaustion requirements with LWDA are satisfied, without expressly identifying the administrative agency as the real party in interest. See, e.g., Cal. Lab. Code § 2699(g)(1) and Cal. Code Civ. Pro. § 367 ("Every action must be prosecuted in the name of the real party in interest, *except as otherwise provided by statute*); cf. Fed.R.Civ.P.17(a)(1).

**2.** The Ninth Circuit's narrow holding in *Magadia* that PAGA actions do not satisfy the *qui tam* exception to Article III standing does not render PAGA claims subject to FAA preemption, as Petitioner and their amici argue. As *Magadia* recognizes, PAGA is both like, and unlike, traditional *qui tam* actions. 999 F.3d

at 675-77. But the differences do not change the statutory foundation that is crucial to California's anti-waiver rule – a PAGA claim is a law enforcement mechanism to protect the public, not to benefit private parties. *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009).

PAGA "does not create property rights, or any other substantive rights" for aggrieved employees. *Id.* It is a procedural statute authorizing private citizens (injured or not) to seek civil penalties that a state agency otherwise would recover. Thus, aggrieved employees have no cognizable individual property interests, including any assignable interest, in the State's PAGA claim. *Id.* at 943-944.

Procedurally, "PAGA operates as an assignment from California" of the State's civil penalty claims to the deputized PAGA representative. *Magadia*, 999 F.3d at 675. This "permanent, *full* assignment" of the State's legal right in Labor Code enforcement, *id.* at 677, occurs "only after" (1) the proxy satisfies PAGA's notice requirements, and (2) LWDA indicates "it does not intend to investigate the alleged violation" or does not timely respond, Cal. Lab. Code §2699.3(a). The employee is deputized to serve as a LWDA proxy, authorized to prosecute the specific penalty claims identified in her written notice to the administrative agency, only after crossing this proxy demarcation line. *Iskanian*, 327 P.3d at 146-47.

The assignment of police power from the LWDA to the deputized aggrieved employee is a "*full* assignment" to control the penalty claims identified in the employee's written notice in subsequent litigation

(or in arbitration if the proxy and the employer so choose), but the proxy's prosecutorial authority is limited in scope to the specific facts and theories stated in the employee's notice. *Magadia*, 999 F.3d at 667. That is, a proxy's PAGA authority derives *solely* from her own written notice to LWDA and the proxy's informant reporter role as a witness to the Labor Code violations, which is independent of any contractual relationship with the proxy's employer or the existence of any unredressed injury from the violation(s) identified.

Of course, if the California Legislature wanted to expand the number of private citizens authorized to enforce the Labor Code on its behalf even further (for example by authorizing any licensed California attorney to bring suit rather than only aggrieved employees), it could deputize any private citizen to act in the LWDA's stead. *Kim*, 459 P.3d at 1130. That the California Legislature chose not to legislate in such sweeping fashion as a means to prevent private plaintiff abuse shows sensible restraint, rather than hostility toward arbitration.

*Before* becoming deputized to serve as a LWDA proxy, aggrieved employees have no legal right or interest in or ability to control the State's PAGA claim. This is because the assignment of the State's sovereign interest in labor code enforcement has not taken place (yet) and the aggrieved employees have other mechanisms to vindicate their individual rights under the Labor Code. *ZB, N.A.*, 448 P.3d at 244-45. The LWDA initially has sole authority to investigate and prosecute penalty claims, and LWDA maintains a

"right of first refusal" over them before assigning its prosecutorial authority to a PAGA representative proxy. *Magadia*, 999 F.3d at 677. If LWDA takes enforcement action, the employee cannot bring a separate PAGA claim. *Id*.

Despite surface similarities to traditional *qui tam* statutes, "PAGA differs in significant respects." *Magadia,* 999 F.3d at 676. These differences, coupled with precedent finding no Article III standing under comparable private attorney general schemes, undercut the *Magadia* plaintiff's Article III standing to bring his PAGA claim in federal court. Because "standing in federal court is a question of federal law, not state law," the PAGA meal-break claim was properly remanded to state court. *Id.* at 675, 678. *Magadia* has no bearing on FAA preemption.

### C. PAGA enforcement actions are fundamentally different from individual class actions.

*Magadia* rejected *Vermont Agency's qui tam* analysis as a basis for Article III standing in PAGA cases because of the "significant" and "atypical (if not wholly unique)" features of PAGA that distinguish it from traditional *qui tam* statutes. 999 F.3d at 676. Those same "atypical" features distinguish PAGA claims from a traditional Rule 23 class action. PAGA actions and Rule 23 class actions "are distinct, with different parties and procedures." *Saucillo*, 2022 WL 414692 at *5.

PAGA's atypical features diverge from Rule 23's quartet of due process-based requirements, as well as

Article III's triad requirements of injury-in-fact, causation, and redressability. Inconsistent with Rule 23 class action representative (and Article III standing) requirements, PAGA proxies (1) have no individual claims and cannot seek individual relief [*Canela*, 971 F.3d at 856]; (2) need not be injured because PAGA standing is based on violations, not injury [*Kim*, 459 P.3d at 1129]; (3) represent the LWDA's rights and seek only to vindicate the public interest, not private rights [*ZB*, 448 P.3d at 250-51]; (4) may receive a contingent fraction of civil penalties as an incentive payment, not as compensation for individualized damages or personal property rights [*Canela*, 971 F.3d at 856]; (5) must exhaust strict administrative exhaustion requirements under PAGA as a condition to receiving authority to act in a representative capacity on the State's behalf, Cal. Lab. Code § 2699.3(a)(1)(A), whereas a putative class action representative has no pre-suit exhaustion obligation under Rule 23; (6) are unaffected by res judicata after settlement/dismissal of related individual Labor Code claims [*Kim*, 459 P.3d at 1129-30]; (7) are not obligated to satisfy Rule 23 requirements of adequacy, typicality, commonality, and predominance; and, (8) have no due process limitations, no opt-out mechanism, no class certification obstacles, no formal notice requirements, and no fiduciary obligations to absent interested parties, while class action plaintiffs operate under all of those procedural and substantive constraints.

In all material respects, a PAGA action is "fundamentally different" than a class action. *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014). "In the end, Rule 23 and PAGA

are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief." *Id.* at 1124.

### D. California's sovereign interest in Labor Code enforcement must be respected in the absence of manifest, contrary Congressional intent.

Principles of federal-state comity dictate that "state laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest." *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1186 (9th Cir. 1998). Labor law enforcement measures are traditionally matters left to the state to regulate pursuant to its police powers. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (citation omitted)). And a state's authority over its own law enforcement methods, especially those exercised within its own borders, is central to state sovereignty. *Printz v. United States,* 521 U.S. 898, 928 (1997) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

It would be an affront to California's sovereign dignity if private parties could hinder the state's ability to enforce its Labor Code through the backdoor mechanism of an arbitration agreement (with a waiver

of the State's rights) to which the State did not consent. The offense is even more acute here because Moriana's PAGA action, brought on the state's behalf, merely seeks to enforce state law, not federal law. As the Fourth Circuit observed, concerning the improper removal of a *parens patriae* action from state court to federal court under CAFA's mass action provision, a determination that a "state was not entitled to pursue its action in its own courts" would "inappropriately transform what is a state matter into a [federal] case." *West Virginia ex. rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011). Sanctioning such behavior under the auspices of federal preemption would "trample the sovereign dignity of the State" that authorized a proxy to bring the civil enforcement claim on its behalf under state law in its own forum. *Id.*; see also, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 670-71 (9th Cir. 2012).

Comity concerns encourage federal courts to avoid undue interference with state activities and to promote "proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971). And "despite the variety of ... opportunities for federal preeminence," this Court has "never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654-55.

The question presented here is whether Congress intended the anomalous result of preempting California's anti-waiver rule, developed from statutes in California's inaugural civil code adopted in 1872.

State sovereignty and comity play a critical role in that analysis, as this Court has cited these considerations as bedrock principles that must be afforded considerable deference. See, *United States v. Locke*, 529 U.S. 89, 108 (2000) (finding that where Congress legislates "in a field which the States have traditionally occupied," the starting assumption is "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Medtronic, Inc.,* 518 U.S. at 485 ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (holding "a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act"). And those factors must take on heightened importance when the State is the real party in interest to, and primary beneficiary of, the law enforcement claim that is potentially subject to preemption.

Nothing in the FAA's text or its legislative history shows a clear and manifest intent to disable enforcement of one of California's police powers traditionally held by the State. Nor does the FAA's fundamental purpose promote the misuse of arbitration agreements to extinguish a party's substantive rights under state law. See, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

California's police powers would be supplanted and adversely affected by FAA preemption. PAGA's two primary objectives – enhancing labor law enforcement

and efficiently deploying taxpayer resources and unique incentives to address a problem that costs California billions of dollars each year -- address issues of great public concern. *Iskanian*, 327 P.3d at 145-46. Undoubtedly, FAA preemption of California's anti-waiver rule would violate comity and "disable one of the primary mechanisms for enforcing the Labor Code." *Id*. at 149.

## II. The writ of certiorari should be dismissed for having been improvidently granted.

Notwithstanding the FAA's embodiment of a "national policy favoring arbitration" [*Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 228 (2d Cir. 2016) (alterations in original)], "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (emphasis in original). The "interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).

One potentially dispositive question here is whether the State (the non-contracting real party in interest) is bound by the arbitration agreement and PAGA waiver. Under these circumstances, "[o]rdinary contract principles determine who is bound." *Fleetwood Enters., Inc. v. Gaskamp,* 280 F.3d 1069, 1073 (5th Cir. 2002). Given their equal footing, arbitration agreements should be interpreted like any other contract under state law.

The interpretation of PAGA, whether an underlying agreement to arbitrate exists between the real parties in interest, and the enforceability of PAGA waivers are questions of California state law, *U.S. Fid. & Guar. Co. v. Lee Investments LLC,* 641 F.3d 1126, 1133 (9th Cir.2011).

In the proceedings below, Viking overlooked two foundational state law issues in its challenge to the *Iskanian* rule on federal preemption grounds post-*Epic*: (1) whether an underlying agreement to arbitrate the dispute even exists, and (2) whether California Civil Code section 1542 provides an independent basis for invalidating Moriana's pre-dispute PAGA waiver.[3] Both issues are crucial.

*First*, the parties' arbitration agreement (DRP) does not cover disputes between the *State* and Viking; it only covers disputes "arising out of or relating to …[Moriana's] employment with [her] company." JA86. An "unremarkable textual analysis" of the DRP shows that it governs disputes between Moriana (but not the State) and Viking that arose out of their employment contract with one another, nothing more. See, *Welch*, 871 F.3d at 794.

*Welch* is instructive. It involved a comparable *qui tam* statutory scheme, the FCA, and a similar (but

---

[3] Section 1542 provides: "A general release does not extend to claims that the creditor or releasing party *does not know or suspect to exist in his or her favor at the time of executing the release* and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party." Cal. Civ. Code § 1542 (emphasis added).

broader) arbitration agreement between the relator and her employer. As here, the employer moved to compel arbitration because the relator/employee agreed to arbitrate disputes "*arising from, related to, or having any relationship or connection whatsoever with my … employment* or other association with the company." *Id.* (emphasis added). And since Welch only learned of the fraud through her employment, the defendant argued her FCA claim was subject to arbitration.

Despite sweeping language in three different arbitral clauses, the Ninth Circuit determined that the clauses did not cover the relator's representative action, even though the relator based her entire suit on information discovered while employed. *Id.* at 799-800 ("the fact that Welch observed the fraud while employed is immaterial" because the arbitral clauses could not be stretched to cover disputes "aris[ing] from observations made while employed").

The court emphasized that the government, not the relator, was the real party in interest to the representative FCA claim: "though the FCA grants the relator the right to bring a FCA claim on the government's behalf, an interest in the outcome of the lawsuit, and the right to conduct the action when the government declines to intervene, … the underlying fraud claims asserted in a FCA case belong to the government and not to the relator." *Id.* at 800. Consistent with analogous PAGA precedent in California, because the relator did not legally "own or possess" the FCA claims, the court found the representative claims to be non-arbitrable. *Id.*

The analysis in *Welch* applies with equal force to Moriana's narrower arbitration agreement with Viking. Thus, on general contract interpretation grounds alone, Moriana's representative PAGA claim should be found non-arbitrable too:

1. Moriana's PAGA claim is purely representative on behalf of the government, like the FCA claim in *Welch*.

2. As in *Welch*, the DRP clause "arising out of employment" does not stretch to cover disputes relating to "observations made" by Moriana "while employed" at Viking involving other aggrieved employees.

3. The DRP does not encompass any representative claims "belonging to" the *State,* the real party in interest to *every* PAGA claim under governing California law. Moriana's nominal party status as the proxy bringing suit does not make her an owner of the claim. See*, Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009) (aggrieved employees have no cognizable individual property interests, including any assignable interest, in the State's PAGA claim); *Munro*, 896 F.3d at 892 (a class action suit brought by plan participant-employees on behalf of an ERISA plan against its trustees was non-arbitrable, although nine putative class representatives had arbitration agreements with the employer, "[b]ecause the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the plans …")

4. Although Moriana was the informant who reported Viking's Labor Code violations to the government and was ultimately authorized to prosecute them on LWDA's behalf, Moriana is not the real party in interest to the PAGA claim.

*Second*, to the extent Moriana has any stake in the State's PAGA action once under her litigation control, she was not an aggrieved employee when she agreed to the DRP initially, and no record evidence exists that she was then aware of Viking's alleged Labor Code violations against any employee. Under California Civil Code section 1542, a waiver or release of claims that the releasing party does not know about, or suspect exist, or have reason to know exist, is ineffective.

Given the potentially dispositive questions whether an agreement to arbitrate the State's PAGA claim exists, especially considering the trial court's failure to consider whether Civil Code section 1542's ban on unknowing waivers should apply to Moriana's execution of the DRP, it is premature and inappropriate for this Court to decide whether *this* arbitration agreement (and PAGA waiver) is preempted by the FAA. The Court should dismiss certiorari for having been improvidently granted.

## III. Congress never intended for the FAA and private arbitration agreements to be used as a weapon against state law enforcement measures.

It is debatable whether the 1925 Congress intended for the FAA to apply in state court. See footnote 2 *supra*. It is far more doubtful that it envisioned private

parties weaponizing arbitration agreements to frustrate *state law* enforcement measures to immunize employers from civil punishment under a sovereign state's labor code by inserting *substantive* waiver terms into what were always thought to be "forum-selection" clauses. *Allied-Bruce*, 513 U.S. at 289 (Thomas, J., dissenting). "At the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanics for resolving the underlying disputes." *Id.* at 286.

The consequences of allowing private parties to circumvent innovative state law enforcement measures like PAGA through FAA preemption maneuvers would be dire and immediate. Two decades ago, pre-PAGA, evidence presented to the Legislature showed that California's underground economy was generating "a tax loss to the state of three to six billion dollars annually." *Iskanian*, 327 P.3d at 146. If Viking's effort to eviscerate PAGA enforcement succeeds, the tax losses in today's dollars will be many times higher. Compounding matters, if LWDA's army of unpaid (but contingency-incentivized) attorney generals are stripped of their badges, the State likely will be forced to divert taxpayer resources from other programs and priorities (or raise taxes) to fund new and untested Labor Code enforcement strategies to fill the PAGA void, increasing the overall costs and economic risks even more.

There would be devastating non-economic losses too. Labor Code violation rates presumably would skyrocket

to their pre-PAGA level. Beyond PAGA waivers, employers could freely use their superior bargaining power to frustrate law enforcement measures that rely on employee or insider participation by incorporating prospective waivers of whistleblower reporting activity affecting other employees in their "arbitration" agreements.

## CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

MARK F. HUMENIK
*Counsel of Record*
POLK KABAT, LLP
423 South Estate Drive
Orange, CA 92869
(949) 636-5754
mhumenik@polkkabat.com

*Counsel for Amicus Curiae, Tracy Chen*