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 ARBITRATION SCHOLAR IMRE S. SZALAI AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Imre Stephen Szalai is the Judge John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans College of Law, and he is also a senior fellow at the University of Missouri School of Law's Center for the Study of Dispute Resolution, where he teaches in Missouri's top-ranked program in the field of dispute resolution. Professor Szalai is a scholar and expert in the field of arbitration law, and he actively serves as a commercial arbitrator. He is the author of two books about the development and enactment of the Federal Arbitration Act (FAA): *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013), which uses previously untapped archival materials to set forth a comprehensive history of the enactment of the FAA and similar state arbitration statutes during the 1920s; and *An Annotated Legislative Record of the Federal Arbitration Act* (2020), which sets forth the full legislative history of the FAA, with detailed annotations and explanations. His scholarship has appeared in top journals of dispute resolution, and he maintains a blog focusing on arbitration law developments, www.arbitrationusa.com.

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[1] *Amicus curiae* files this brief in his individual capacity, not as a representative of the institutions with which he is affiliated, and no counsel for a party authored this brief in whole or in part. Also, no person or entity made a monetary contribution for the preparation or submission of this brief, except for Loyola University New Orleans, which has generously provided professorship funds for the printing and filing of this brief. Letters from both parties providing blanket consent for the filing of *amicus curiae* briefs are on file with the Clerk's office.

He has provided testimony to federal and state legislatures regarding arbitration laws, and Professor Szalai has also appeared in national and international media in connection with his research about arbitration. As an arbitrator and scholar in this field, he is regularly invited to speak domestically and abroad at conferences and symposia about arbitration law developments. He graduated from Yale University, and he received his law degree from Columbia University, where he was named a Harlan Fiske Stone Scholar.

Professor Szalai has dedicated his professional career to the study and use of arbitration as an effective, fair means to resolve disputes in appropriate circumstances. He believes that arbitration is an invaluable part of a well-functioning legal system in a free, democratic society, and arbitration law should be interpreted and applied to promote the equitable resolution of disputes. Professor Szalai is concerned that Petitioner's arguments misinterpret the FAA in a manner improperly expanding the FAA's scope and raising serious federalism problems, and Petitioner's arguments also threaten to undermine experimentation and innovation with dispute resolution. Professor Szalai respectfully submits this *amicus curiae* brief to assist the Court in considering the FAA's meaning, scope, and application in this case.

SUMMARY OF ARGUMENT

Because of constitutional concerns, the Court should hold that the FAA does not preempt enforcement of California's Private Attorneys General Act, or PAGA. The State of California enacted PAGA to provide for the collection of civil penalties for violations of California's Labor Code. Cal. Lab. Code § 2699. Representative PAGA claims may not be waived, and such claims may be heard in either arbitration or litigation. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). Interpreting the FAA to override PAGA raises serious federalism problems because each State has sovereign authority to design and control the enforcement of its own laws pursuant to its police powers. Furthermore, a fundamental component of a State's Tenth Amendment sovereignty is "a state government's responsibility to represent and be accountable to the citizens of the State." *New York v. United States*, 505 U.S. 144, 177 (1992). If Congress can easily override how States enforce rights within their police powers, if the FAA is held to preempt PAGA and limit the collection of penalties on behalf of the State, California would lose control and accountability over its own labor laws in this case. Such an intrusion on state sovereignty would also undermine experimentation and innovation regarding how each State may choose to enforce its own laws.

The contractual obligation to submit a dispute to an arbitrator for a binding, final resolution is protected by the FAA. However, an agreement to waive the collection of civil penalties, much like an agreement to

limit treble damages or an agreement to shorten the statute of limitations, is not really an arbitration agreement or protected by the FAA at all. These types of arrangements should not be viewed through the framework of the FAA, and applying the FAA's preemptive powers in such a manner as to override state policies regarding treble damages, statutes of limitations, or the collection of civil penalties would unconstitutionally encroach on state sovereignty and improperly expand the FAA's scope beyond arbitration and beyond its original intent.

Aside from the constitutional and federalism concerns, the FAA's text also demonstrates that the FAA does not govern in state court and should not block the enforcement of PAGA claims in this case. Petitioner relies on sections 2, 3, and 4 of the FAA for its arguments, and Petitioner acknowledges that these three provisions of the FAA work together to ensure the enforcement of arbitration agreements. Petitioner's Brief at 4. Similarly, this Court has recently acknowledged that these same provisions of the FAA, sections 2, 3, and 4, are "integral parts of a whole." *New Prime v. Oliveira*, 139 S. Ct. 532, 538 (2019) (citation omitted). Sections 3 and 4 contain exclusive references to the federal courts, federal jurisdiction, and federal procedure, and Petitioner conveniently overlooks these clear references in its brief. If section 2 is inseparable from sections 3 and 4 of the FAA, if these provisions are interlocking and operate together as a unit, then the

text of sections 3 and 4 demonstrates that section 2 is also applicable solely in federal court.

Furthermore, both the FAA's legislative history and the historical understanding of arbitration at the time of the FAA's enactment demonstrate that the FAA was never intended to override state sovereignty. The FAA should not preempt the enforcement of PAGA claims.

Finally, the Court's decision in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), all but resolves this case in favor of Respondent. This case involves the collection, on behalf of the State of California, of civil penalties that are mainly paid to the State's treasury for statutory violations. Cal. Lab. Code § 2699. Just like the E.E.O.C. was not a party to or bound by an arbitration agreement in *Waffle House*, the FAA cannot block California's enforcement of its own Labor Code because the sovereign State of California is not a party to the arbitration agreement in this case.

ARGUMENT

I. FAA Preemption Of PAGA Is Unconstitutional Because States Have Broad Powers To Design And Control The Enforcement Of State-Created Rights

This case raises constitutional problems, and *amicus curiae* respectfully asks the Court to consider this case through the lens of federalism. The State of California enacted PAGA to provide for the collection of

civil penalties for violations of California's Labor Code. Cal. Lab. Code § 2699. A waiver of representative PAGA claims is unenforceable under California law, and such claims may be heard in either arbitration or litigation. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 149 (Cal. 2014); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). As explained in more detail below, FAA preemption of California's PAGA would involve an unconstitutional intrusion on state sovereignty.

Neither Congress nor this Court can strip away the authority of a State to design and control the enforcement of state-created rights. *In re Tarble*, 80 U.S. (13 Wall.) 397, 407–08 (1871) ("How [the federal government's and state governments'] respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other."). FAA preemption of PAGA would erode California's ability to act as a sovereign State. In light of limited enforcement resources, the California legislature has made the policy choice to deter and penalize Labor Code violations by delegating enforcement to aggrieved employees, acting on behalf of the State, who can recover penalties through representative actions. Cal. Lab. Code § 2699. California is using its police powers to regulate primary conduct at the workplace, such as the requirement of meal and rest breaks, through the imposition of civil penalties recovered in these representative actions. The legislature of

California designed and adopted this particular method of enforcement as appropriate for the State's Labor Code, and how a State regulates the enforcement of its own laws is particularly within the power of each State. *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (how "rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control"). Whether this Court, Congress, or a State other than California approves of the wisdom of such representative claims is not at issue in this case. Instead, this case raises a fundamental question about whether Congress, through the FAA, can override how a State designs and implements its own labor laws.[2]

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[2] This case does not involve the enforcement of *federal* labor laws in state court. However, in such a situation, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citations and internal quotations omitted). Also, not at issue in this case is the separate *Erie* problem of how a federal court sitting in diversity should handle PAGA claims. *Compare Fields v. QSP, Inc.*, 2012 WL 2049528, at *5 (C.D. Cal. June 4, 2012) ("plaintiff must meet the requirements of Rule 23 [of the Federal Rules of Civil Procedure] to proceed with her PAGA claim" in federal court), *with Zayers v. Kiewit Infrastructure West Co.*, 2017 WL 7058141, at *8 (C.D. Cal. Nov. 9, 2017) (disagreeing with *Fields* case, which "fails to recognize the importance of the critical distinction between a class action and a PAGA action," and holding that PAGA actions in federal court are not "restricted by the procedural limitations of [Fed. R. Civ. P.] 23"); *see also Parker v. Cherne Contracting Corp.*, 2021 WL 5834227, at *6 n.1 (N.D. Cal. Dec. 9, 2021) (noting confusion regarding the applicability of Fed. R. Civ. P. 23 to PAGA claims in federal court).

The Court cannot interpret the FAA in a manner that overrides the U.S. Constitution and deprives States of their sovereign authority to exercise their police powers and enact and enforce their own labor laws. *Metropolitan 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)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (recognizing that since "the police power is controlled by 50 different States instead of one national sovereign," "smaller governments closer to the governed" generally exercise police powers and regulate "the facets of governing that touch on citizens' daily lives"). Preventing a State from exercising its police powers and collecting civil penalties for statutory labor code violations is highly intrusive to that State's sovereignty. Basic principles of federalism require that, assuming Congress has constitutional power to override a State's enforcement mechanism for the collection of such civil penalties, Congress "must make its intention to do so unmistakably clear in the language of the [federal] statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and internal quotations omitted). However, nothing in the text of the FAA makes it "unmistakably clear" that Congress intended to displace state sovereignty in this manner.[3] In fact, "[t]he FAA contains no express pre-emptive provision,

[3] As discussed in the next section of this brief, the text of the FAA's enforcement provisions relied on by Petitioner refers exclusively, and in an unmistakably clear manner, to federal courts, federal jurisdiction, and the Federal Rules of Civil Procedure.

nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). In light of these constitutional concerns regarding federal interference with state sovereignty, the Court should hold that the FAA does not preempt California's PAGA.

Consider how this case can undermine political accountability within our system of federalism. In this federalist system, where each State retains its own sovereignty, "[t]he Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting The Federalist No. 45 (James Madison)). The State of California is ultimately responsible for developing its own Labor Code and establishing how this state code is to be enforced. The people of California must be able to hold their own state representatives accountable for carrying out these state labor policies. However, if Congress can undermine how a State enforces rights within its police powers, if the FAA is held to preempt PAGA and limit the penalties that may be recovered on behalf of the State, California would lose control and accountability over its own labor laws in this case. *Cf. New York v. United States*, 505 U.S. 144, 177 (1992) ("a state government's responsibility to represent and be accountable to the citizens of the State" is a fundamental component of a State's Tenth Amendment

sovereignty); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) (Tenth Amendment helps promote accountability to the electorate).

Instead of permitting federal law to trump the sovereignty of States in an unconstitutional manner, this Court, as guardian of our system of federalism, should preserve the rule of law and the critical role of each State as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring, joined by O'Connor, J.) (citation omitted). Allowing each sovereign State the freedom to experiment with how its own state-created rights are enforced would help promote the values of federalism and spur innovation among the States to regulate dispute resolution in different, creative ways. Peter B. Rutledge, *Arbitration and the Constitution* 121 (2013) (sacrificing the uniformity value of broad FAA preemption would promote federalism values in connection with dispute resolution and the enforcement of rights).

One can argue that this case is not really about the enforcement of arbitration agreements at all, and *amicus curiae* is concerned that this case can be improperly used to expand the FAA's scope far beyond its original intent. Consider the following hypothetical problem. Suppose that a State, in the exercise of its police powers and to help effectuate the policies behind its labor laws, enacts laws providing the following: A) treble damages or punitive damages for labor law violations; and B) a five-year statute of limitations for labor law violations. Further suppose that any predispute, contractual waiver of such damages or

shortening of the statute of limitations is unenforceable under state law. In other words, a worker cannot waive such damages or the statute of limitations in connection with any type of proceeding, whether the proceeding is a judicial one in court or an arbitration proceeding. Arbitration agreements can still be fully enforceable for the resolution of such labor claims under the FAA. However, a party drafting an arbitration clause should not be able to hijack the preemptive powers of the FAA to override a State's policies regarding punitive or treble damages or the statute of limitations. The contractual obligation to submit a dispute to an arbitrator for a binding, final resolution is protected by the FAA. But agreements to limit treble damages, agreements to shorten the statute of limitations, or even agreements to waive the collection of civil penalties are not arbitration agreements at all. These types of arrangements should not be viewed through the framework of the FAA, and applying the expansive preemptive powers of the FAA in such a manner as to override these state policies regarding damages, statutes of limitations, or the collection of penalties would unconstitutionally encroach on state sovereignty and improperly expand the FAA's scope far beyond arbitration and the statute's original intent.

II. The Clear Text Of The FAA Demonstrates The FAA Does Not Govern This Case

Putting aside the problems concerning federalism and state sovereignty, this case can also be analyzed and resolved in favor of Respondent through a close

examination of the FAA's text. As explained below, the FAA's text demonstrates the statute was never intended to govern in state court.[4]

Petitioner's statement of the case opens with a discussion of sections 2, 3, and 4 of the FAA. Petitioner's Brief at 4. Petitioner accurately describes these three sections of the FAA as working together to ensure the enforcement of arbitration agreements. *Id.*

Recognizing the unitary, integrated nature of the FAA, the Court recently described these same provisions of the FAA, sections 2, 3, and 4, as "integral parts of a whole." *New Prime v. Oliveira*, 139 S. Ct. 532, 538 (2019) (citation omitted). In other words, section 2 of the FAA provides the core declaration that arbitration agreements are fully binding, and the remaining provisions of the FAA implement this core declaration. Sections 3 and 4 of the FAA refer exclusively to federal courts, and section 4 explicitly refers to federal subject matter jurisdiction under Title 28 of the United States Code and the Federal Rules of Civil Procedure.[5]

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[4] Although the Court has held in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA does apply in state court, *amicus curiae* respectfully submits that the Court's decision in *Southland* is fundamentally flawed and should be overruled. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*], since *Southland* will not become more correct over time. . . .").

[5] 9 U.S.C. § 3 (referring to "courts of the United States"); 9 U.S.C. § 4 (referring to the "United States district court" which has jurisdiction under Title 28 with respect to the underlying

Therefore, if the FAA's provisions are truly "integral parts of a whole," if section 2 is inseparable from sections 3 and 4 of the FAA, then the text of sections 3 and 4 – with their exclusive references to the federal courts, federal jurisdiction, and federal procedure – demonstrates that section 2 is also applicable solely in federal court.

When Petitioner cites sections 3 and 4 of the FAA in its brief, Petitioner conveniently omits the specific references to federal courts, federal jurisdiction, and federal procedures therein. Petitioner's Brief at 4, 19. Instead, when citing sections 3 and 4 of the FAA, Petitioner refers broadly to "courts," ignoring the limitations in the text of the statute, as if to suggest that these FAA provisions apply expansively in all courts, both state and federal. Petitioner's Brief at 4, 19. Petitioner's entire preemption argument collapses when one realizes that the FAA, according to its text, is not applicable in state courts. The FAA, which is a fully integrated, unitary statute covering the different stages of arbitration, was drafted and intended to apply only in the federal courts.[6]

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dispute to be arbitrated; a party may demand a jury trial "in the manner provided by the Federal Rules of Civil Procedure").

[6] If *Southland* is correct and the FAA is truly a substantive law enacted by Congress (but it's not), the FAA would automatically give rise to federal question jurisdiction under 28 U.S.C. § 1331. However, the express requirement in section 4 of having an independent basis for subject matter jurisdiction under Title 28 does not make any sense if the FAA is really a substantive law triggering federal question jurisdiction. According to the Court, this lack of automatic federal question jurisdiction arising from

III. The Historical Understanding Of Arbitration Law And The FAA's Legislative History Demonstrate That The FAA Was Never Intended To Override State Sovereignty

Interpreting the FAA so that the FAA does not intrude on state sovereignty is fully consistent with the governing, universal understanding of arbitration law at the time of the FAA's enactment: arbitration law is purely procedural law and the law of the forum. H.R. Rep. No. 96, 68th Cong. 1 (1924) ("The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought, and not one of substantive law to be determined by the law of the forum in which the contract is made."). As thoroughly demonstrated by the late-Professor Ian Macneil in his groundbreaking book regarding the FAA, Congress passed the FAA in 1925 as a procedural statute applicable solely in the federal courts. *See generally* Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* (1992); *see also* H.R. Rep. No. 96, 68th Cong. 1 (1924) ("Before [arbitration] contracts could be enforced in the Federal courts, . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."). The exclusively federal nature

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the FAA is somehow an "anomaly," which the Court has never fully reconciled or explained. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The only valid explanation for this "anomaly" is that the FAA is a procedural statute designed solely for federal courts.

of the FAA was also recognized during legislative hearings:

> Nor can it be said that the Congress of the United States, directing its own courts . . . would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement [of arbitration agreements] relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced. . . . *There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect.*

Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary, 68th Cong. 39-40 (1924) (emphasis added). The FAA was never intended to govern in state courts.

Applying the FAA to override state sovereignty creates an ongoing, "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes," and *Southland* should be overruled. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting); *see also Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting, joined by Rehnquist, J.) ("Congress intended to require federal, not state, courts to respect arbitration agreements."). *Amicus curiae* respectfully asks the Court to hold that the FAA

does not preempt California's PAGA because the FAA does not control in state court.

Stare decisis should not prevent the Court from overruling *Southland*, which has unconstitutionally eroded state sovereignty for decades. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling the infamous *Swift* case, which unconstitutionally permitted federal intrusion on state sovereignty for almost a century). Furthermore, overruling *Southland* would not necessarily disturb commercial expectations. Many States have enacted laws patterned after the FAA, and such States will continue to enforce arbitration agreements even if *Southland* is overruled. *See*, *e.g.*, *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 303 (6th Cir. 2008) ("Michigan's arbitration law is almost identical to the FAA in all relevant respects."); *Peters v. Pillsbury Winthrop Shaw Pitman, LLP*, 2011 WL 5304627, at *1 (Conn. Super. Ct. Oct. 17, 2011) ("federal and Connecticut state law on arbitration are similarly in concert"). Additionally, even under the existing law of *Southland*, business interests should already be accustomed to uncertainty and conflicting decisions regarding the enforcement of an arbitration clause. *Compare Figueroa v. THI of New Mexico*, 306 P.3d 480 (N.M. Ct. App. 2012) (invalidating arbitration clause in nursing home agreement), *with THI of New Mexico v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (enforcing the identical arbitration clause); *compare also Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002) (invalidating arbitration clause in employment contract), *with Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (enforcing the identical

arbitration clause). And if a sovereign State determines that arbitration agreements should not be enforceable, such is the nature of our system of federalism; each State should have the right to decide on its own how it will regulate arbitration agreements. H.R. Rep. No. 96, 68th Cong. 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought. . . ."). For several reasons, *stare decisis* should not block this Court from overruling *Southland.*[7]

IV. The FAA Cannot Block The State Of California's Enforcement Of Its Own Labor Code Because The State Of California Is Not A Party To The Arbitration Agreement

The representative actions for civil penalties allowed under PAGA are brought on behalf of the State of California, with a majority of the recovered penalties

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[7] Although the Court has improperly treated the FAA as substantive law in *Southland*, the Court in several other cases has repeatedly recognized the true procedural nature of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[A] party [in arbitration] does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("[an arbitration] agreement *only* determines the choice of forum") (emphasis added); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting, joined by Scalia, J.) ("An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes."). Overruling *Southland* is consistent with this line of authority treating the FAA as procedural law.

going to the State. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). One can conceptualize the real party in interest here as the State of California, which can typically act through an executive officer such as the State's attorney general or an executive branch agency such as the California Labor & Workforce Development Agency. Petitioner's arguments are in effect trying to block a State's executive branch agency or executive officials from engaging in enforcement actions of state labor law. *Contreras v. Superior Court*, 275 Cal. Rptr. 3d 741, 746 (Cal. Ct. App. 2021) ("Every PAGA claim is a dispute between an employer and the *state*." (emphasis in original) (internal quotations and citation omitted)).

The Court's decision in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), all but resolves the current case in favor of Respondent. The current case does not involve an adjudication of the substantive contractual rights or contractual obligations of a worker or private party; such a dispute can generally be subject to a broad, pre-dispute arbitration clause. Instead, this case involves the collection, on behalf of the State of California, of civil penalties that are mainly paid to the State's treasury for violations of statutory duties,[8] such

[8] The FAA should not even cover statutory disputes; instead, the FAA was designed to cover contractual, commercial disputes. The FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. California's Labor Code provides certain statutory protections, such as required meal and rest breaks for workers. *Perez v. DNC Parks & Resorts at Asilomar, Inc.*, 2022 WL 411422, at *4 (E.D. Cal. Feb. 10, 2022) ("California law

as mandatory meal and rest breaks. Cal. Lab. Code § 2699. In *Waffle House*, the E.E.O.C.'s action was brought on behalf of an individual worker,[9] and this Court still held that the arbitration agreement did not bar such an action by the E.E.O.C. *Waffle House*, 534 U.S. at 294. PAGA actions are instead brought on behalf of the State of California. *Iskanian*, 327 P.3d 129. Just like the E.E.O.C. was not a party to the arbitration agreement at issue in *Waffle House*, the State of

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requires an employer to provide its non-exempt employees with a thirty-minute meal period for every five hours of work." (citing Cal. Labor Code §§ 226.7, 512)). One's right to sue for state-mandated meal or rest breaks is not dependent upon a contract, and instead, such rights arise from and are guaranteed by California's Labor Code. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting, joined by Brennan, J.) ("The plain language of [the FAA] . . . does not encompass a claim arising under [statutory] law. . . . Nothing in the text of the [FAA], nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims."). Furthermore, historical, archival materials demonstrate that the FAA was never intended to govern employment contracts at all, and the Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), is incorrect. Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 191-92 (2013). However, even if *Circuit City* is correctly decided, Respondent may be covered by the FAA's transportation worker exemption since she is a sales representative for a cruise line, and she arguably plays a "necessary role in the free flow" of goods and passengers. *Circuit City*, 532 U.S. at 121. The Court is currently hearing a case involving the scope of the FAA's transportation worker exemption, *Southwest Airlines Co. v. Saxon*, No. 21-309, and in-house ticket sellers and baggage handlers for ships, railroads, and airlines may be exempted from the FAA.

[9] *Waffle House*, 534 U.S. at 300 ("The EEOC also admitted that it was 'bring[ing] this action on behalf of Eric Scott Baker[, the Waffle House employee].' ").

California is not a party to the contract between Petitioner and Respondent. The sovereign State of California never agreed to arbitrate its claims for civil penalties for statutory violations of the State's Labor Code.

CONCLUSION

To honor federalism and prevent the unconstitutional overriding of state sovereignty, and based on the FAA's text, its legislative history, its historical background, and the fact that California is not even a party to the arbitration agreement, *amicus curiae* respectfully requests the Court to hold that the FAA does not preempt California's PAGA. The Court should not allow the FAA to override California's legislative enactment of PAGA for the collection of civil penalties, control how the California judiciary must handle violations of the State's labor code, or obstruct the enforcement powers of California's executive branch. Such a displacement of a State's sovereignty would be breathtaking.

Respectfully submitted,

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