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, Second Appellate District

AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER IN SUPPORT OF PETITIONER

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I. AMICUS CURIAE'S REQUEST AND STATEMENT OF INTEREST[1]

Amicus Curiae Restaurant Law Center ("Law Center" or "Amicus") respectfully submits this Amicus Curiae Brief in support of Petitioner Viking River Cruises, Inc. ("Petitioner"). The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing approximately 15.3 million people across the Nation – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the Nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, with 47% of the industry's employees being minorities, compared to 36% across the rest of the economy. Further, 40% of restaurant businesses are primarily owned by minorities, compared to 29% of business across the rest of the United States economy. Supporting these businesses is Amicus's primary purpose.

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[1] No counsel for a party to this matter authored any portion of this brief or made a monetary contribution to fund the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing.

Pursuant to Rules 37.2(a) and 37.3(a) Amicus received permission from Petitioner and Respondent to submit a brief in this matter because decisions preventing parties from entering into enforceable bi-lateral arbitration agreements of claims pursuant to California's Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq*. ("PAGA"), threaten to undermine the Court's rulings in *AT&T Mobility, LLC v. Concepcion,* 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).[2] Amicus's members have learned through experience that even small issues that commonly arise in day-to-day interactions with the workforce are exploited by some employees through a PAGA action, even when many of those same employees have agreed to arbitrate their claims. Even unfounded accusations threaten these businesses with, at worst, their very survival, and at best, tens or hundreds of thousands of dollars in legal fees. Hence, Amicus and their members have a vital interest in these proceedings.

II. SUMMARY OF ARGUMENT

In 2003 the Legislature created the California Private Attorneys General Act ("PAGA"), ostensibly to

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[2] Petitioner and Respondent each provided blanket consent for amicus briefs in this matter. Blanket Consent Filed by Petitioner (January 4, 2022); Blanket Consent Filed by Respondent (January 13, 2022).

give employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California. The Legislature's goal was to encourage compliance with the state's labor code. In 2014, after the Court's decision in *Concepcion* and before the Court's decision in *Epic Systems*, the California Supreme Court issued its decision in *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). This decision held that despite the Federal Arbitration Act ("FAA") and the strong national public policy in favor of arbitration, that bi-lateral arbitration agreements were unenforceable when applied to PAGA claims. *Iskanian* created a back door to be opened as a work around the central holdings in Concepcion and Epic Systems. Since that time, PAGA has been abused to avoid bi-lateral arbitration agreements that were agreed to by the very "representative plaintiffs" that are suing under PAGA.

Some employers and employees have long agreed to private arbitration to resolve their disputes. Employers and employees will decide to enter into these agreements for diverse reasons, including costs, risks, and delay associated with class action procedures. This Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) recognized and enhanced those agreements. *Concepcion* and *Epic* were concerned that courts, a non-party to the private agreement between an employer and employee, may disregard or attempt to reshape bilateral arbitration agreements without the parties' consent. *Epic*, 138

S.Ct. at 1623. Therefore, the Court specifically prohibited others from doing so. Notwithstanding, the California Supreme Court built a back door into court to preclude private arbitration and in support of the fiction PAGA matters have become: seemingly laudatory actions by the state despite being litigated by the same people who are parties to an arbitration agreement and yet seek to enforce the Labor Code through their individual actions.

The decision in *Iskanian* has resulted in PAGA used thousands of times to avoid arbitration agreements and generate fees for the plaintiffs' bar. This scheme undermines the purpose of *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). At its core, *Iskanian* ignores the idea that you find a plaintiff as they are, *i.e.* a party to a private agreement to arbitrate their claims. To this point, where a PAGA plaintiff is fictionally deputized by the state to pursue penalties, their credibility, past criminal history involving truthfulness, performance on the witness stand, and poor memory all follow the PAGA plaintiff through the door and into the courtroom. We find them as they are and the "state's" interest rises or falls with them. However, the *Iskanian* rule, selectively applies this basic truth, holding that the only thing that does not follow the plaintiff into the courtroom is their private agreement to utilize arbitration rather than court to seek enforcement of the labor code. In developing this scheme, the state and the plaintiff's attorneys should find the plaintiff as they are. After all, they are being deputized by the state to pursue a PAGA action after they have already entered into an arbitration agreement. Simply put, if they entered

into a bilateral arbitration agreement, then the matter should go to binding arbitration. If they did not enter into such an agreement, the PAGA matter would proceed in court.

In addition to undermining the Court's ruling in *Epic Systems*, *Iskanian* ignores the fiction that modern day PAGA proceedings have become, while enriching private attorneys and representative employees with billions of dollars. As explained more fully *infra*, since 2016, California's Labor Workforce Development Agency ("LDWA"), receives an estimated 15 PAGA notices every day. Yet for the three most recent fiscal years, the LWDA has managed to administer and decide a paltry 12 PAGA cases. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. In three years the LDWA has managed to bring less cases pursuant to PAGA than the number of notices from private attorneys the LDWA receives on any given day. In reality, once a representative plaintiff is anointed as a stand in for California's Attorney General due to the LWDA's largescale inaction, the plaintiff can ignore her own previous arbitration agreement and pursue multiple violations, some of which she did not even personally suffer. These proceedings skirt the strong public policy of this Court in favor of enforcing bi-lateral agreements to have disputes resolved through the

streamlined process of arbitration, all at great cost to California's employers. Since 2013, it is estimated that this fiction has cost California employers between $1,424,984,340 and $10,000,000,000.

This issue is of utmost importance to restaurants and other foodservice employers in California. These employers that employ approximately 10% of the nation's workforce are seeing an explosion of PAGA representative claims specifically because *Iskanian* opened a back door to skirt *Epic Systems* and evade agreements to arbitrate. This Court should firmly and swiftly shut this back door for good so that *Epic* and the FAA retain their purpose favoring arbitration.

III. ARGUMENT

A. History of California's Private Attorneys General Act

In 2003, the Legislature created PAGA to give injured employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California for the employer's alleged violations of labor laws and regulations governing employers. The Legislature's purpose in enacting the PAGA in 2004 was two-fold. To address inadequacies in labor law enforcement, the statute enacted civil penalties to the many Labor Code provisions that previously carried criminal, but not civil, penalties. ASSEMBLY FLOOR, FLOOR ANALYSIS of SB 796, at 3 (Aug. 27, 2003).

Second, due to a shortage of government resources to pursue enforcement, the statute authorized aggrieved employees to seek monetary awards on a representative basis on behalf of themselves and other past or present employees of that employer. *Id.*

Shortly after its enactment, PAGA was significantly amended by SB 1809 to enact specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties. Cal. Lab. Code § 2699.3. SB 1809 also required courts to review and approve any penalties sought by a proposed settlement agreement thereby expanding judicial review of PAGA claims. Cal. Lab. Code § 2699(l)(2). In addition, the bill authorized courts to award a lesser amount of penalties under certain circumstances. *Id.* Last, SB 1809 implemented the penalty formula providing that 75% be provided to the Labor and Workforce Development Agency ("LWDA") and 25% to the aggrieved employee. *Id.* § 2699(i). Pursuant to the existing statutory scheme, PAGA does not create a new substantive right. *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.,* 209 P.3d 937, 943 (Cal. 2009). Instead, it provides civil penalties for Labor Code violations that did not previously authorize such penalties. *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019).

Accordingly, PAGA is "a procedural statute" that allows an employee to pursue civil penalties on

behalf of herself and others for violations of California's Labor Code where the state labor law enforcement agency has specifically declined to do so. *Amalgamated Transit Union, Loc. 1756*, 209 P.3d at 943 (Cal. 2009). Once the state has relegated control of the claim, PAGA alternatively authorizes an employee to pursue such penalties if she is "aggrieved." Cal. Lab. Code § 2699(a). An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." *Id.* § 2699(c).

Provided the employee alleges she was "affected by at least one Labor Code violation," she may seek civil penalties on behalf of herself and others for not only that violation but also for all Labor Code violations committed by that employer, even if different from the violation allegedly affecting her. *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502, 504 (Ct. App. 2018). Thus, an employee bringing a PAGA action may seek civil penalties both for Labor Code violations she experienced and distinct violations against other current or former employees of the same employer. *See* Cal. Lab. Code § 2699(a).

Indeed, an employee need only allege, not prove, that she was subjected to "at least one unlawful practice" before she can serve as a PAGA representative seeking civil penalties for all Labor Code violations committed by the employer "even if

[she] did not personally experience each and every alleged violation" other employees endured. *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020) Consequently, PAGA actions are expansive, more sweeping, and less representative than class actions where a plaintiff must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. *Id.*

The only other prerequisite before bringing an action for civil penalties is that an employee must give written notice of the alleged Labor Code violations to the employer and the State's LWDA, including the facts and theories supporting the violations. Cal. Lab. Code § 2699.3(a). If the agency notifies the employee that it does not intend to investigate or fails to respond within 65 days, the employee may bring a civil action. *Id.* § 2699.3(a)(2)(A). An employee may also commence a civil action if the agency investigates but decides not to issue a citation or fails to act within the prescribed time period. *Id.* § 2699.3(a)(2)(B).

For each alleged violation of the California Labor Code, penalties are assessed against an employer on a per pay period basis for each aggrieved employee affected. Cal. Lab. Code § 2699(f)(2). Unless the Labor Code provision specifically provides for a penalty, PAGA assesses default penalties against an employer of $100 per employee per pay period for the initial violation, and $200 per employee per pay period for each subsequent violation. *Id.* Civil penalties recovered under PAGA are split with 25% paid to the

employees and 75% paid to the State. *Id.* § 2699(i). A prevailing employee is also entitled to recover an award of reasonable attorney's fees and costs. *Id.* § 2699(g)(1). While an aggrieved employee purportedly brings an action on behalf of the State, the employee controls the litigation from inception to conclusion and is bound by any judgment.

B. *Iskanian's* Creation of a Back Door to Avoid Arbitration Agreements

The California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* 327 P.3d 129 (Cal. 2014) established that an agreement requiring an employee to waive the right to bring representative PAGA actions and to arbitrate all claims individually is against public policy and is not preempted by the FAA. In *Iskanian*, the employee sought to bring a class action and representative lawsuit on behalf of himself and other employees based on the employer's alleged failure to properly compensate employees for overtime worked, provide meal and rest periods, reimburse business expenses, provide accurate and complete wage statements, timely pay final wages, and related claims. However, the employee entered into a pre-dispute arbitration agreement with the employer wherein he agreed to waive the right to class and representative proceedings.

In one breath, the California Supreme Court recognized the front door to invalidating the pre-

dispute arbitration agreement was closed tight. Relying on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California Supreme Court was forced to abrogate its holding in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) which deemed many class-action waivers in employment contracts unenforceable. *See Iskanian*, 327 P.3d at 133-37. The court acknowledged that the FAA preempted the *Gentry* rule pursuant to *Concepcion*. *Id.* at 135-37. Accordingly, the class-action waiver in the subject arbitration agreement was valid and the employee was required to arbitrate his individual claims.

Looking for a work around *Concepcion*, the court then held an agreement to waive the right to bring a PAGA action is contrary to public policy and unenforceable. 327 P.3d at 149. The court reasoned such an agreement is against public policy because permitting an employee to waive PAGA claims would "disable one of the primary mechanisms for enforcing the Labor Code." *Id*. Of course, this ignores the fact that the California Labor Code is agnostic regarding what mechanisms are used for enforcement. The court ignored the fact that the Labor Code can be enforced through individual actions in arbitration and arbitration agreements were not seeking to take away anyone's rights to be paid properly under the state's wage and hour rules. In addition, the court ignored the reality that not everyone has arbitration agreements and PAGA matters would continue

through those that had not entered into a bi-lateral arbitration agreement.

The court then emphasized that the FAA's goal of promoting arbitration as a means of private dispute resolution "does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf." *Id.* at 133. In fact, because "a PAGA action is a dispute between an employer and the state," the court claimed it is not a private dispute and thus falls outside the FAA's coverage.

In support, the court relied on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) where this Court held that the U.S. Equal Employment Opportunity Commission ("EEOC") was not bound by the employee's arbitration agreement when suing in its name but on the employee's behalf. This Court reasoned that the EEOC was not constrained by the arbitration agreement because "the EEOC was not a proxy for the individual employee, [] the EEOC could prosecute the action without the employee's consent, and [] the employee did not exercise control over the litigation." 534 U.S. at 291.

Here, the court ignores how *Waffle House* is plainly distinguishable: the Plaintiff in a PAGA case is the same employee that would sue as a Complainant in an arbitration. While Plaintiff's counsel in a PAGA matter may treat the case as if they

were an independent decision maker such as the EEOC, they are not. The Plaintiff is in charge of the matter and indeed is suing in his or her own name. These matters are not "EEOC vs. ABC" employer. They are not even the "State of California v. XYZ" employer. Rather they are a private litigant and her attorney, seeking the very items of recovery that she has previously agreed to seek in arbitration. She is seeking to prove the same violations she would seek to prove in arbitration. Despite this reality, the California Supreme Court created a fictitious rationale to fit their desired result; to create a back door around *Concepcion* and hold on to the remnants of their prior decision in *Gentry*.

C. *Epic Systems* Establishes A Strong Basis For Enforcing All Arbitration Agreements After *Iskanian* and *Waffle House*

A few years after *Iskanian*, this Court examined whether employees should "always be permitted to bring" representative-type claims, regardless of an alternative agreement with their employer. *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1619 (2018). In *Epic*, employees signed an arbitration agreement with their employers that specified individualized arbitration with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.* at 1619-20. The employees argued contractual provisions requiring individualized

arbitration rather than class/collective proceedings violated the National Labor Relations Act ("NLRA"), and such illegality served as grounds for revoking the contract. *Id*. at 1622.

This Court concluded that an employee cannot strategically maneuver around their individual arbitration agreement and the FAA simply by asserting claims *on behalf of others*. 138 S.Ct. at 1619-32. In fact, this Court stated, "The parties…contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized *rather than class or collective action procedures. And this much the [FAA] seems to protect pretty absolutely*." *Id.* at 1621 (emphasis added). This Court proclaimed that the FAA's savings clause provided no safe harbor when the employees objected to their arbitration agreements "precisely because they require individualized arbitration proceedings instead of class or collective ones," instead of arguing the agreements were procured by "fraud, duress or in some other unconscionable way that would render *any* contract unenforceable." *Id*. at 1622.

In doing so, this Court reaffirmed that the FAA requires that courts "rigorously" enforce arbitration agreements according to their terms, even including terms for individualized proceedings. 138 S.Ct. at 1619-21. This Court also reaffirmed *Concepcion*'s "*essential* insight" that "courts may not allow a

contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties' consent." *Id.* at 1623 (emphasis added). This Court aptly cautioned that courts "must be alert to new devices and formulas" that aim to interfere with arbitration's essential attributes. *Id.* PAGA, and the post-*Epic* cases ignoring this Court's *Epic* holding by using *Iskanian* to invalidate representative waivers do just that.

D. *Post-Epic* Decisions Upholding *Iskanian* Improperly Analogize PAGA to Governmental Qui Tam Actions

Allowing state courts like California to utilize the PAGA fiction as a semantic "device" to interfere with arbitration's essential attributes by circumventing the FAA to avoid the *Epic* ruling undermines this Court's mandate. *See Epic*, 138 S.Ct. at 1623.

Iskanian and its post-*Epic* progeny continue to prohibit PAGA waivers, in part, based on their determination that PAGA is akin to "governmental" qui tam actions brought "on behalf of the state," and thus waiving them contravenes public policy. *Iskanian*, 327 P.3d at 148, 150-151; *Correia v. NB Baker Electric, Inc.*, 244 Cal.Rptr.3d 177, 187-188 (Cal. Ct. App. 2019); *Zakaryan v. The Men's Wearhouse, Inc.*, 245 Cal.Rptr.3d 333, 340 (Cal. Ct. App. 2019),*disapproved on other grounds* by *ZB, N.A.*

v. Superior Ct., 448 P.3d 239, 250 (Cal. 2019); *ZB,* 448 P.3d at 243; *Collie v. Icee Co.*, 266 Cal.Rptr.3d 145, 147-149 (Cal. Ct. App. 2020); *Provost v. YourMechanic, Inc.*, 269 Cal.Rptr.3d 903, 908 (Cal. Ct. App. 2020) ; *Olson v. Lyft, Inc.*, 270 Cal.Rptr.3d 739, 744 (Cal. Ct. App. 2020) ; *Contreras v. Superior Court of Los Angeles County*, 275 Cal.Rptr.3d 741, 750 (Cal. Ct. App. 2021). This semantic distinction ignores the purpose and plain language of PAGA. It also ignores the practical reality of what PAGA matters have become. *See* Section III.E., *infra.*

While the California Supreme Court has categorized PAGA as "a type of qui tam action," the Ninth Circuit said courts, "must look beyond the mere label attached…and scrutinize the nature of the claim itself. *Magadia v. Wal-Mart Associates, Inc.*, No. 19-16184, 2021 WL 2176584, at *5 (9th Cir. May 28, 2021). PAGA is the antithesis of qui tam and has "many" inconsistent features. *Id.* (PAGA's features departed from the traditional criteria of qui tam statutes). In fact, "PAGA differs in significant respects from traditional *qui tam* statutes." *Id. at *6.* Central to the comparison is the fact that qui tam actions remedy a government injury, whereas PAGA actions protect employees. *See, e.g. People ex rel. Allstate Insurance Co. v. Weitzman*, 132 Cal.Rptr.2d 165, 190 (Cal. Ct. App. 2003)(qui tam actions are to prosecute fraudulent claims against the government); *Caliber Bodyworks, Inc. v. Superior Court*, 36 Cal.Rptr.3d 31, 37-38 (Cal. Ct. App. 2005) *disapproved on other*

grounds in *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243 (Cal. 2019)(PAGA is necessary to achieve compliance with state laws). The government is the "direct victim" in a qui tam action, while the employee is the "aggrieved" party in a PAGA action. *See, e.g. Weitzman,* 132 Cal.Rptr.2d at 186, 190; Cal. Labor Code, § 2699(a).

Qui tam actions also involve heavy government oversight that is notably lacking with PAGA. For example, a state law qui tam plaintiff must disclose "all material evidence" when serving the complaint. Cal. Gov't. Code, § 12652(c)(3). A PAGA plaintiff need only provide written notice of alleged violations, but no "material evidence." Cal. Lab. Code, § 2699.3(a)(1)(A). The government must intervene or notify the court that it declines to intervene in a qui tam action. 31 U.S.C. § 3730(b)(4); Cal. Gov't. Code, §§ 12652(c)(6), (7)(D), (8)(D). PAGA does not mandate that the LWDA intervene or respond to a written notice of claims. Cal. Lab. Code, § 2699.3(a)(2)(A). Even if the government initially declines to intervene in a qui tam action, it can later do so. 31 U.S.C. § 3730(c)(3); Cal. Gov't. Code, § 12652(f)(2). PAGA does not provide the LWDA the right to later intervene. Cal. Lab. Code, § 2699 *et seq*. A qui tam action can only be dismissed with written consent from the court and prosecuting authority. 31 U.S.C. § 3730(b)(1); Cal. Gov't. Code, § 12652(c)(1). PAGA does not require that the LWDA consent to dismissal or settlement, and only confers *courts* the authority to "intervene" to

review and approve PAGA settlements. Cal. Lab. Code, § 2699(e)(1).

Further, PAGA claims are not brought only on behalf of the state. PAGA claims are explicitly brought on behalf of the individual employee initiating the action and/or other aggrieved individual employees who could financially benefit from the suit. Cal. Lab. Code, §§ 2699(a) ("any provision of this code…may…be recovered through a civil action brought by an aggrieved employee *on behalf of himself or herself and other current or former employees*…") (emphasis added), 2699(f) (setting a $100 or $200 penalty "for each aggrieved employee per pay period"), 2699(g)(1) ("an aggrieved employee may recover the civil penalty…in a civil action…filed *on behalf of himself or herself and any other current or former employees against whom one or more of the alleged violations was committed*") (emphasis added). PAGA awards 25% of the penalties directly to aggrieved employees – not the state. Cal. Lab. Code, § 2699(i). Since PAGA actions are not like qui tam ones, *Iskanian* and its post-*Epic* progeny's reasoning for excepting PAGA from the FAA is flawed.

1. PAGA is More Like A Class Action Than A Qui Tam Action and Is Thus Encompassed By *Epic*

Concepcion and *Epic* allow employees to waive class and collective rights. 563 U.S. 333; 138 S.Ct.

1612. *Iskanian* semantically carves out a PAGA waiver exception from FAA preemption by claiming PAGA actions are like qui tam actions. As discussed, they are fundamentally different. In reality, a PAGA lawsuit is much more like a class action and is thus subject to *Epic*'s control.

Both class actions and PAGA are equitable in nature. Both allow an individual to bring an action on behalf of others. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Arias v. Superior Court*, 209 P.3d 923, 933-934 (Cal. 2009). Both are, or can, require that the state be notified prior to filing. *Harris v. County of Orange*, 682 F.3d 1126, 1136 (9th Cir. 2012) (class action plaintiff was required to exhaust administrative remedies by notifying the government prior to filing discrimination claim); Cal. Lab. Code, § 2699.3(a)(1) ("the aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer…"). Both class and PAGA named plaintiffs receive an incentive or enhancement payment. *See, e.g. Clark v. American Residential Servs. LLC*, 96 Cal.Rptr.3d 441, 455 (Cal. Ct. App. 2009) (class action named plaintiff is entitled to an "incentive or enhancement award"); Cal. Lab. Code, § 2699(i) (25% of the recovery goes to the aggrieved employees). In both, the incentive/enhancement award is meant to reward the individual employee for bringing the lawsuit. *See, e.g., Clark*, 96 Cal.Rptr.3d at 455 (incentive award is to

induce the plaintiff to file a class action); *Dunlap v. Superior Court*, 47 Cal.Rptr.3d 614, 617-618 (Cal. Ct. App. 2006) (PAGA was adopted to enhance the enforcement abilities of the Labor Commissioner). Both reward plaintiffs with attorneys' fees. *See, e.g. Garabedian v. Los Angeles Cellular Telephone Co.*, 12 Cal.Rptr.3d 737, 742 (Cal. Ct. App. 2004) (attorneys' fees should be fair in a class action); Cal. Lab. Code, § 2699(g)(1) (prevailing employee is entitled to attorneys' fees). Both class and PAGA settlements require court approval. Cal. R. Ct. 3.769(a); Cal. Lab. Code, § 2699(l)(2).

Practically, plaintiffs and their attorneys litigate class actions in much the same way as they do a PAGA action. The typical case will start with a Complaint, sometimes with both the class and PAGA claims together. Other times, the class action will be filed first because the LDWA administrative prerequisite has not yet been met. The original complaint will then be amended to add the PAGA claim to the class action complaint. Plaintiffs' counsel will then send a common set of discovery requesting the same policies, time records, and payroll records for both the class action and PAGA cause of action. The plaintiffs' counsel will further demand the names, addresses, and other contact information of all the employer's current and former employees for use in both the class and PAGA claims. In many cases, many employees will be both putative class members and putative PAGA members. Ultimately, plaintiffs'

attorneys seek to demonstrate violations of the same labor code provisions, during the same pay period, and even down to the same day to recover under both the Class and PAGA claims.

By way of example, let us assume an employee, Jane Smith, files a complaint on January 1, 2022 with both class claims and PAGA claims. Let us further assume she was employed from January 1, 2021 to December 31, 2021. In her complaint, Ms. Smith claims various sections of California's Labor Code were violated because she was not paid for all her time worked and was not provided meal and rest periods. Through those allegations she seeks to represent a class and PAGA representative group, consisting of all current and former employees of that employer.

Here, Ms. Smith would be the primary witness in both the class and PAGA claims. As the case proceeded, she would be seeking to prove that on any given day during her employment, she worked off the clock and missed her meal and/or rest periods pursuant to California's Labor Code. If she could prove for instance, that on December 29, 2021 she was instructed by her employer to work off the clock and not take her meal period that day due to press of business, those same facts would be used to substantiate her individual claims under the Labor Code, as well as her class and PAGA claims that the employer had a practice of working employees off the clock and instructing them to miss their meal periods.

There would be no difference between the facts used to prove these various claims, making the litigating of PAGA claims indistinguishable from the individual or class claims. Yet, California court cling to the ruling in *Iskanian* to try and forge nearly identical claims to be litigated in two different forums; one in arbitration and one in court.

When scrutinized, the alleged differences between PAGA and class actions that *Iskanian* and its post-*Epic* progeny claim excepts it from FAA preemption are virtually nonexistent. As such, *Iskanian* and post-*Epic* cases holding otherwise are wrong.

2. *Post-Epic* Cases Upholding *Iskanian* Were Wrongly Decided

Correia v. NB Baker Electric, Inc. is a prime example of how California continues to get it wrong. In *Correia*, a California Court of Appeal reasoned that *Iskanian*'s PAGA waiver ban violated public policy and was not preempted by the FAA because PAGA is a "governmental claim," and *Epic* did not address that issue. *Correia*, 244 Cal.Rptr.3d 177, 187-188 (Cal. Ct. App. 2019). Since then, California courts continue to incorrectly adopt the same reasoning, highlighting the need for this Court to intervene. *Zakaryan*, 245 Cal.Rptr.3d at 340, *disapproved on other grounds* by *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019); *ZB*, 448 P.3d at 243; *Collie*, 266 Cal.Rptr.3d at 147-

149; *Provost*, 269 Cal.Rptr.3d at 908; *Olson*, 270 Cal.Rptr.3d at 744; *Contreras*, 275 Cal.Rptr.3d at 750.

Epic did address the broader question of whether employees and employers can agree that all disputes between them will be arbitrated, and the FAA mandates that arbitration agreements be enforced according to their terms. 138 S.Ct. at 1619. However, *Correia* stubbornly distinguished *Epic* by concluding it "did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA or consider the implications of a complete ban on a state law enforcement action." *Correia*, 244 Cal.Rptr.3d at 188. The Court in *Correia* seems to be incorrectly implying that it is this Court's responsibility to go through each specific law, throughout the country, and strike them by name whenever presented with an issue such as this.

Similarly, the *Collie* court found the employee signed an arbitration agreement in his individual capacity, that the state had not yet deputized him to act at the time, and therefore he could not contractually agree to arbitration (or, by implication, to waive certain claims) on behalf of the state. *Collie*, 266 Cal.Rptr.3d at 148. This turns the issue on its head. If the State, through its statutory scheme seems fit to deputize someone to act on their behalf, then they are in fact deputizing them with all the pros and cons they may have as an individual litigant. If they have previously signed an arbitration agreement, they

are being deputized with that reality. If they were previously convicted of a crime involving honesty, they are being deputized with that reality. "Deputizing" someone under the passive LDWA prerequisite system does not cleanse a person of the reality they have lived up to that point.

Since *Iskanian*, California courts continue to ignore the fact that an arbitration agreement with a PAGA wavier only precludes the employee who signed it from serving as the PAGA representative. The LWDA does not lose the claim and can pursue it itself or via another employee who did not sign an arbitration agreement, signed a non-representative waiver arbitration agreement, or opted out of a representative waiver. California's post-*Epic* cases upholding *Iskanian* fail to recognize that the FAA "absolutely" protects an employer and employee's contractual agreement to arbitrate individual claims and waive claims on behalf of others. As such, reversal from this Court is warranted.

E. PAGA's Fiction

The court in *Iskanian* conveniently ignored this Court's suggestion in *Waffle House* that the arbitration agreement may have constrained the EEOC if the signatory employee whose rights the EEOC sought to vindicate could exercise some control over the litigation. *Waffle House*, 534 U.S. at 291. A plaintiff in a PAGA matter has significant control over

the matter. Indeed, they decide how the matter proceeds through discovery, whether to resolve the matter through an alternative dispute resolution process, or whether the matter proceeds to trial. Instead of recognizing this reality, the court in *Iskanian* compounded its flawed argument by stating that nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of an action brought by "an employee bound by an arbitration agreement bringing suit on behalf of the government to obtain remedies other than victim-specific relief, i.e., civil penalties paid *largely* into the state treasury." *Iskanian*, 173 Cal.Rptr.3d at 151.

In truth and practice, PAGA provides for vastly more relief than merely 25% of civil penalties recovered per representative action. Due in large part to *Iskanian*'s faulty holding in light of *Concepcion* and *Epic*, employees have a relatively clear path to filing claims in court. The only prerequisite is to give notice to the LWDA and await its decision to investigate or allow the claim to proceed in court. Cal. Lab. Code § 2699.3. However, in reality, the pre-litigation hurdle is much lower where a plaintiff's attorney files a one or two-page letter with little to no facts and simply waits for the requisite amount of time to expire without action by the LWDA. The LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analyst's Office stated that "LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since

PAGA was implemented." Legislative Analyst's Office, *The 2016-17 Budget: Labor Code Private Attorneys General Act Resources*, Budget and Policy Post (Mar. 25, 2016), https://lao.ca.gov/Publications/Report/3403.

Since 2016, the LWDA administered and decided only 12 PAGA cases from fiscal years 2016-2017 to 2019-2020. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. With an estimated 15 PAGA notices filed every day, the LWDA's action is paltry. Jathan Janove, *More California Employers Are Getting Hit With PAGA Claims*, Society for Human Resources Management (Mar. 26, 2019), https://bit.ly/3mapro.

As of 2016, over 30,000 PAGA lawsuits were filed due to the lack of agency enforcement. ASSEMBLY COMM. ON LAB. & EMP., ASSEMBLY ANALYSIS OF AB 2464, at 11 (May 4, 2016). A recently published report analyzing several public records requests indicates that an employer's average settlement payout is 41 percent more than cases pending before the LWDA, even though employees receive nearly twice as much money in the latter compared to the former. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. Despite the increased

settlement payouts for PAGA actions, the State of California receives an average of $27,000 less from PAGA actions prosecuted in court rather than those before the LWDA. *Id*. at 9. Cases also last approximately 220 more days in court than those retained by the LWDA. *Id*.

Since 2010, over 65,000 PAGA Notices have been filed with California's LWDA.[3] STATE OF CAL.

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[3] PAGA Notices filed with the LWDA by year:

2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
4,430	5,064	6,047	7,626	6,307	5,510	3,707
2017	**2018**	**2019**	**2020**	**2021**		
5,383	5,732	6,431	6,515	2,690		

STATE OF CAL. DEP'T OF FIN., BUDGET CHANGE PROPOSAL, Private Attorneys General Act (PAGA) Resources, 2016/17 Fiscal Year, at 1 (Jan. 7, 2016), http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf [hereinafter Brown 2016/17 Budget Proposal]; STATE OF CAL. DEP'T OF FIN., BUDGET CHANGE PROPOSAL, PAGA Unit Staffing Alignment, at 2 (May 10, 2019), https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf; CABIA Foundation, *California Private Attorneys General Act of 2004: Outcomes and Recommendations* 12 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf; *see also* California Department of Industrial Relations, Private Attorneys General Act (PAGA) Case Search, https://cadir.secure.force.com/PagaSearch/PAGASearch (last visited Feb. 7, 2022). And, since 2013 9,208 PAGA cases have been filed. *see also* "PAGA Cases in California by County," CABIA Foundation, https://cabiafoundation.org/paga-cases-in-california-by-county/.

DEP'T OF FIN., BUDGET CHANGE PROPOSAL, Private Attorneys General Act (PAGA) Resources, 2016/17 Fiscal Year 1 (Jan. 7, 2016), http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf [hereinafter Brown 2016/17 Budget Proposal]; STATE OF CAL. DEP'T OF FIN., BUDGET CHANGE PROPOSAL, PAGA Unit Staffing Alignment 2 (May 10, 2019), https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf; "PAGA Cases in California by County," CABIA Foundation, https://cabiafoundation.org/paga-cases-in-california-by-county/. The average settlement paid by California employers to resolve PAGA lawsuits since 2013 is $1,231,620 (exclusive of any attorneys' fees or litigation costs). CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 10 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf.[4] Accordingly, California employers have paid at least $1,424,984,340 to resolve PAGA lawsuits since 2013 (and most likely substantially more as dozens upon dozens of notices were resolved before a lawsuit was filed). *Id.* If one

[4] The average settlement is only based on the 1,157 settlements published since 2013. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 10 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf

were to apply the average settlement amount to even half of the PAGA lawsuits filed since 2013 California employers have incurred losses of over $10,000,000,000 to settle PAGA lawsuits in the past eight years alone.[5]

The hospitality industry has been hit especially hard by PAGA lawsuits. For example, during Fiscal Year 2016-2017, 16.1% of the PAGA cases filed in courts throughout California targeted restaurants and other hospitality related entities, which translates into over $500,000,000 in potential settlement costs (exclusive of attorneys' fees and litigation costs) just in 2016. Brown 2016/17 Budget Proposal, *supra* at Attachment II.

Certainly, PAGA was enacted to reduce the administrative burden of enforcement by deputizing employees to pursue civil penalties on behalf of the State. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 796, at 3 (Aug. 27, 2003). Nonetheless, *Iskanian* and its progeny effectively created a mechanism by which

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[5] The actual cost to employers to resolve PAGA lawsuits in California is potentially much higher given that often times the PAGA portion of a settlement is miniscule compared to the total settlement amount. For example, in *Viceral v. Mistras Group, Inc.*, No. 15-cv-02198-EMC, 2017 WL 661352 (N.D. Cal. Feb. 17, 2017), the Court approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000.

employees skirt their contractual obligations. Consequently, PAGA as originated is an ineffective farce. The LWDA is once again ill-equipped to investigate the plethora of claims within timeframes proscribed. Cases amassed in court resolve for considerably less amounts paid to the State and aggrieved employees, yet they prolong ultimate resolution, increase attorney involvement and fees, and reduce recovery for workers. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 1-4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. As this Court cautioned in *Concepcion*, the *Iskanian* rule effectively "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," by making PAGA representative actions "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348.

1. *Post-Epic* Cases Cannot Escape FAA Preemption On The Basis of California Public Policy

Iskanian and its post-*Epic* progeny semantically preclude PAGA waivers by strategically characterizing them as "state" actions for which waiver would contravene public policy by frustrating PAGA's objectives and precluding the PAGA action in any forum. *Iskanian*, 327 P.3d at 149; *Gonzalez v. Emeritus Corporation et al.*, 407 F.Supp.3d 862 (N.D.

Cal. 2012); *Correia*, 244 Cal.Rptr.3d at 188; *Zakaryan*, 245 Cal.Rptr.3d 340, *disapproved on other grounds* by *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019); *ZB,* 448 P.3d at 243; *Collie*, 266 Cal.Rptr.3d at 147-149; *Provost*, 269 Cal.Rptr.3d at 908; *Olson,* 270 Cal.Rptr.3d at 744 ; *Contreras*, 275 Cal.Rptr.3d at 750. In doing so, these cases come into direct conflict with this Court's controlling precedent that states "cannot require an FAA-inconsistent procedure, even if "desirable for unrelated reasons" and this Court's finding that the FAA preempts state laws discriminating against arbitration. *Concepcion*, 563 U.S. at 351; *Kindred Nursing Centers L.P. v. Clark*, 137 S.Ct. 1421 (2017). In *Kindred Nursing*, this Court found a Kentucky state law requiring a specific statement allowing a general power of attorney to delegate the right to enter into an arbitration agreement violated the FAA because "[s]uch a rule is too tailor-made to arbitration agreements – subjecting them, by virtue of their defining trait, to uncommon barriers – to survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred Nursing Centers L.P. v. Clark*, 137 S.Ct. at 1427. *Iskanian* and its post-*Epic* progeny do the same and, therefore, fall victim to *Epic*.

Further, enforcing an employee's PAGA waiver does not fully waive the underlying PAGA claim in any forum as *Iskanian* concluded; rather, it simply precludes a specific employee from serving as the "proxy or agent" of the state for PAGA purposes.

Iskanian, 327 P.3d at 133; *Correia*, 244 Cal.Rptr.3d at 188. Since "the state is the owner of the claim and the real party in interest," the LWDA still owns the claim and can pursue it via other avenues. *See id.* at 189-190. Further, any other employee who did not sign an arbitration agreement, signed a non-representative waiver agreement, or opted out of a representative waiver could serve as the state's "proxy or agent" for PAGA purposes. *See id.* at 188. Ironically, while *Iskanian* concluded depriving an employee of the option to bring a PAGA claim contravened public policy, it ignored that all other aggrieved employees are precluded from doing so (and are bound by a judgment in that action with no control over the strategy or litigation) once another employee brings a PAGA suit against their employer. *Iskanian*, 327 P.3d at 147.

Iskanian ignores the practical idea that you take a plaintiff as you find them. Therefore, if the state is deputizing someone, they take them as they are, *i.e.* either with or without an arbitration agreement, credibility issues, or provable violations of the California Labor Code. Enforcing individual arbitration agreements with PAGA waivers does not implicate "the state's interest in penalizing and deterring employers who violate California's labor laws" as *Iskanian* described. *Iskanian*, 327 P.3d at 152. Rather, the state simply needs to either prosecute the claim itself or find a proper PAGA representative who did not sign an arbitration agreement, signed an

arbitration agreement without a representative waiver, or opted out of a representative waiver to do so.

In fact, using state public policy to target arbitration "in a fashion that disfavors" or interferes with its "fundamental attributes" is precisely the back door that this Court intended to foreclose with *Concepcion* and *Epic*. *Concepcion*, 563 U.S. at 341; *Epic*, 138 S. Ct. at 1622. Nevertheless, California courts continue to thwart the FAA's overarching purpose to allow parties to opt into "efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344-45. Specifically, California has fashioned a judicial anomaly antithetical to traditional bilateral arbitration where "parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Id.* Instead, under *Iskanian*, plaintiffs who agreed to engage in bilateral arbitration pursuant to enforceable terms of a contract they freely entered into have simply altered their pleadings to replace "class action" with "PAGA action" and proceed in court reaping the benefits of class actions and greater without the limitations of Rule 23 or the FAA.

The practical effect of this work around is plainly evident in the 6,504 PAGA notices filed with the LWDA in 2021 alone. *See* State of California

Department of Industrial Relations, https://cadir.secure.force.com/PagaSearch/ (last visited Feb. 7, 2022). Those notices, which notably have increased almost ten-fold since 2005, heavily targeted employers in the restaurant industry. *See id*. Over 300 notices were filed against businesses with obvious names in food and drink service, but with many more filed against obscure entities of the same industry. *See id*. With 503 notices already filed in January 2022, and nearly 18 notices filed per day in 2021, even the recently published statistic of 15 PAGA notices filed per day has been and will continue to be eclipsed and magnified with each day that *Iskanian* survives. *See id.*; CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. Unless this Court bridles the defiance to arbitration that *Iskanian* supports, the restaurant industry is one instrumental subset of employers who will continue to be inundated by PAGA notices, resulting PAGA actions in court, and the often-unavoidable settlements chosen over the "small chance of a devastating loss." *Concepcion*, 563 U.S. at 350.

2. Permitting the Door to Court to Remain Open for PAGA-Like Matters Will Further Undermine the FAA, *Concepcion*, and *Epic Systems*

Iskanian's faulty holding and the back door it created to evade contractual obligations of private parties and undermining *Concepcion* and *Epic* may no longer be California's problem alone. With the spread of PAGA-like legislation to other states, including Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, the Court's precedent and irrefutable federal policy favoring arbitration is threatened beyond the previous geographical confines of California. Jamie Gross, *PAGA Pains Soon Might Not Just Be for California Employers*, FISHER PHILLIPS (Sept. 8, 2021), https://www.fisherphillips.com/news-insights/paga-pains-california-employers.html.

While the proposed legislation in those states maintained PAGA's basic framework of allowing aggrieved employees to bring representative lawsuits for civil penalties on behalf of themselves and others, several states made alterations broadening the California model in varied respects. For example, Maine's bill titled "An Act of Enhanced Enforcement of Employment Law," which was passed but then vetoed by the Governor, expanded who would have standing to bring private enforcement actions in the

name of the state and the types of laws those actions applied to. Maine, as well as the legislation in New York and Vermont, purported to allow employees and unions or advocacy groups to bring these representative actions. *Id.* In addition to deputizing a larger class of persons, legislation in Maine, Vermont, and Washington all proposed the application of PAGA-like procedures to include violations of their anti-discrimination and wage and hour labor laws. *Id.*

Certainly, if such legislation was passed and survived veto, the courts of those states would inevitably apply authority from California courts to argue that waivers of those representative claims in arbitration agreements were unenforceable and against public policy. Because discrimination claims are nearly always subject to mandatory arbitration pursuant to a pre-dispute agreement between the employee and the employer, such a result could entirely erode the use of arbitration in employment disputes in at least 40% of employers in certain states and 60.1 million workers nationwide. *See*, Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

Further still, proposed legislation in these states also seeks to adjust the penalty formula in its

representative actions to provide, in some cases, 40% of the penalties recovered to remit to individuals and organizations. Jon Janes, *et al.*, *PAGA Claims: A Growing Threat for Employers*, WOODRUFF SAWYER (Oct. 6, 2021), https://woodruffsawyer.com/do-notebook/paga-claims-growing-employer-threat/#:~:text=Maine%3A%20On%20June%2018th%2C%202021,it%20vetoed%20by%20the%20governor. While not only serving a devastating blow to employers by denying the benefit of their bargains, the potential results of these proposals in other states would nullify this Court's and Congress' intent to insulate bilateral arbitration from third party interference and protect contractual rights of private parties absolutely.

The issue before the Court is specifically meant to address the incorrect decision in *Iskanian* in light of *Concepcion* and *Epic Systems*. However, we urge the Court to act definitively and broadly to prevent more states from seeking to interfere or reshape traditional bi-lateral arbitration agreements.

IV. CONCLUSION

For all of the reasons discussed in Viking Cruises' Answering Brief and above, Amicus respectfully requests that the Court reject *Iskanian*'s creation of a back door to avoid bilateral arbitration agreements that would otherwise be enforceable

under this Court's holding in *Epic* and the FAA and reverse.

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