No. 20-1573

In The Supreme Court of the United States

VIKING RIVER CRUISES, INC.,

Petitioner,

v.

ANGIE MORIANA,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal

BRIEF OF *AMICUS CURIAE* NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id*.

In order to be considered for election the Academy's rules require a substantial record of successful arbitral practice. Consequently, only the most experienced, ethical, and well-respected arbitrators are elected to membership. Such is the Academy's concern for strict neutrality that its members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and even from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 500 U.S. and

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[1] Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a) and 37.3(a), responding to a timely request, the parties have provided written consent to the filing of this brief.

Canadian members. In sum, the Academy has a rich repository of impartial arbitral experience on which to draw.

In keeping with its educational mission the Academy has appeared before this court as *amicus curiae* in those cases where the Academy believed it might assist the Court by drawing on its experience to provide a richer understanding of the context in which labor or employment arbitration features.[2] This case concerns the body of law the Court has generated governing employment arbitration under the Federal Arbitration Act (FAA). The members of the Academy are enmeshed in the workings of arbitral systems under collective bargaining agreements and under individual employment contracts governed by the FAA. The Academy brings that experience to the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Epic Sys. Corp*. v. *Lewis*, ___ U.S. ___, 138 S.Ct. 1612 (2018), the Court considered the enforceability of

[2] Of labor arbitration, under agreement with exclusive employee representatives, *e.g. Eastern Associated Coal Corp*. v. *United Mine Workers*, 531 U.S. 57 (2000), *14 Penn Plaza, LLC* v. *Pyett*, 556 U.S. 247 (2009), under agreement with non-majority employee representative, *e.g. Mulhall* v. *Unite Here Local 355*, 571 U.S. 83 (2013) (writ dismissed), under agreement for non-unionized employees, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001) and *Epic Sys. Corp.* v. *Lewis*, ___ U.S. ___, 138 S.Ct. 1612 (2018). The Academy appears as *amicus* in the three arbitration cases the Court has decided to hear this term.

employment contracts that substituted individual arbitration for judicial adjudication to resolve aggrieved employees' claims that their workplace rights had been violated. Viking River Cruises' Dispute Resolution Protocol (DRP) goes one step further. By prohibiting all judicial adjudication and further prohibiting any "representative or private attorney general action" in arbitration, the petitioner prohibits its employees from pursuing Labor Code Private Attorney General (PAGA) claims, Cal. Lab. Code § 2699, in any forum because PAGA claims may only be prosecuted on a representative basis.

The Academy appears as *amicus curiae* here to advise the Court on the basis of its historical and contemporaneous experience with labor and employment arbitration. That experience demonstrates not only that representative PAGA actions are in all respects consistent with the fundamental attributes of arbitration as currently understood, but that representative arbitration was a well-accepted feature of arbitration in 1925 when Congress enacted the Federal Arbitration Act (FAA), and was understood to be bilateral in nature.

Amicus Academy will first explore the form of a bilateral arbitration at the time the FAA was enacted. It will then explore the substance of bilaterality in terms of those attributes the Court has specifically identified as key: expedition, flexibility, and informality. The record demonstrates that including PAGA penalties as a remedy for California Labor Code violations in arbitration is consistent in all respects with the form

and substance of a bilateral arbitration as it existed in 1925 and as labor arbitration is practiced today.

ARGUMENT

I. The Arbitration of PAGA Penalties Is Consistent with the FAA

This Court has held that arbitration can be a forum for resolving the merits of employee statutory claims without sacrificing substantive rights. The arbitration contract merely substitutes a different forum to hear the statutory claim; the arbitrator has all the remedial power a court would have. *Gilmer* v. *Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991).

The California Labor Code provides that an aggrieved employee "may recover the civil remedy" of monetary penalties set forth in the Code. Cal. Lab. Code § 2699. An employee aggrieved by an employer's failure to comply with Labor Code obligations who timely notifies the state and pays the statutory fee is entitled to seek an award of the statutory penalty: $100 for the initial violation and $200 per pay period for each additional violation, of which 75 percent goes to the state for Labor Code enforcement and education and 25 percent goes to the aggrieved employees. *Gilmer* and its progeny teach that an employee should be able to pursue that remedy in arbitration. Yet, the DRP precludes PAGA plaintiffs like Ms. Moriana from pursuing PAGA penalties in any forum, including arbitration. In that sense, the employer's agreement is

akin to one that precludes statutory attorney fees in an age discrimination case, or punitive damages, injunctive relief, or any other remedy provided by statute enacted to implement fundamental public policy.[3]

The present dispute centers on Ms. Moriana's ability to secure the PAGA penalties provided by law as measured by the number of employee pay periods in which the alleged violations are established. The argument that she may not secure those penalties rests on the proposition that allowing her to seek those penalties in a representative arbitration would change the nature of the arbitration. Either it would not be bilateral in *form*; that is, the kind of arbitration the FAA embraces because that involves only one party in contention with another. Or, while remaining bilateral in form, it would lack the *substantive attributes* of the kind of arbitration the FAA embraces due to the loss of informality, expedition, and flexibility the resolution of these additional penalty claims entail. As the Academy will show, in both form and substance the arbitration of all PAGA penalties is consistent with what the FAA envisions.

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[3] Provision for attorney fees is part of the statutory design for private enforcement to achieve a public purpose. *See generally* Sean Farhang, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010). A penalty is a means of achieving compliance. *Id*. The Fair Labor Standards Act, for example, allows the Department of Labor to secure a penalty not to exceed $1,100 for each willful violation of minimum wage and overtime law. 29 U.S.C. § 216(e)(2).

A. A Bilateral Arbitration is One Brought by a Single Party Irrespective of Whether the Facts Involve Third Parties or the Remedies Sought Benefit Them

In order to decide whether limits placed on arbitration are consistent the FAA, the Court has looked to what it described as the "fundamental attributes" of arbitration. *American Express Co.* v. *Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304, 2312 (2013), *Epic Sys. Corp.* v. *Lewis*, 570 U.S. 228, 238 (2018). In the context of consumer transactions, the Court concluded that a "class action" process, akin to Rule 23 of the Federal Rules of Civil Procedure, was contrary to the FAA paradigm of "bilateral arbitration." In such a "class arbitration," in which absent class members have the due process right to notice, to opt out, and to object to any settlement, an arbitrator "must first decide . . . whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). For the Court, these Rule 23-like procedures are antithetical to the advantages of bilateral arbitration – informality, expedition, and flexibility – that were fundamental to the FAA at the time it was enacted. The Court went on to emphasize that a Rule 23-like "class arbitration" was "not even envisioned by Congress when it passed the FAA in 1925." *Id*. at 349.

As the Court had earlier explained, an action by a group of named employees under the Fair Labor Standards Act of 1938 differs from a Rule 23-like class

action. *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989). Nevertheless, because a group proceeding is one in which the claims of the "different [e]mployees [to] be heard" are presented in one proceeding, that proceeding would not be bilateral and could be excluded by an employer's arbitration policy. *Epic Sys. Corp.*, *supra*, 138 S.Ct. at 1620.

This case concerns neither a Rule 23-like class action nor an action bought by a group of named employees. It involves only one employee seeking statutory penalties based on the employer's violation of statutory rights that further important public policies. The other employees are not participants in this proceeding, have no due process rights or interests, and are "not to be heard in it" within the meaning of *Epic Sys., supra*. Thus the question is whether such a proceeding, between one employee and her employer – on its face a bilateral arbitration – becomes a multilateral class or group action not contemplated by the FAA because the available civil penalty remedy may be calculated based on the scope of the employer's workplace violations.

The text of the FAA says nothing about "bilateral" arbitration. Nor does it place any limits on what types of claims are appropriate for arbitration. Accordingly, the Court has been guided by what Congress had before it when it contemplated arbitration at the time,[4]

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[4] The Court has recognized how sparse the legislative history is, *AT&T Mobility, LLC*, *supra* at n. 5 at 346, which scholarship on the Act confirms, Matthew Finkin, "*Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical*

by what would have been in Congress' contemplation in 1925; for example, to the absence of Rule 23 class actions at that time. The Court took the same approach in addressing the exemption of "workers' contracts" from the Act. The Court reasoned that at the time Congress would have seen that "seamen, railroad employees" and like workers had no need of an arbitration statute because arbitration had already been or soon would be provided for them. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121 (2001). The Court concluded that the statutory availability of arbitration for these workers provided the rationale for Congress to exclude transportation workers, but only transportation workers, from the FAA. *Id*. So, too, in *New Prime Inc.* v. *Oliviera*, ___ U.S. ___, 139 S.Ct. 532 (2019), the Court was guided by the common usage of the time to decide the FAA's coverage in excluding an interstate trucker from the Act, even if legally categorized as an independent contractor.

Analysis thus turns to what Congress saw concerning the nature of arbitration as presented in the Congressional hearings and as understood by the community that sought the enactment of the FAA. The record shows that Congress was urged to act by those engaged in commercial disputes, as the captions to the hearings make clear: *Sales and Contracts to Sell in International and Foreign Commerce, and Federal Commercial Arbitration*, Hearings before the Committee of the Judiciary on S.4213 and S.4214, 67th Cong., 4th

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Clarification, 17 Berkeley J. Employment & Lab. L. 282, n. 61 at 295 (1996).

sess. (January 31, 1923) and *Arbitration of Interstate Commercial Disputes*, Joint Hearings before the Subcommittee of the Judiciary, 68th Cong., 1st sess. on S.1005 and H.R. 646 (January 9, 1924). The law was pressed in particular by the New York bar, a center of commercial transactions, endorsed by Secretary of Commerce Herbert Hoover, and supported vigorously by mercantile interests and trade groups – especially growers and packers of farm products.[5] In commercial circles, arbitration was used to resolve disputes between merchants and "held under the auspices of trade associations or mercantile exchanges or as the result of standard provisions for arbitration in form contracts," most often for sales. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 Wash. U.L.Q. 193, 213-214

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[5] By a letter dated October 15, 1921, James B. Stafford, Secretary Hoover's assistant, called for a conference on the subject for November 15, 1921, to be addressed by the Secretary. The idea was recommended by the California Fruit Growers Association and the National League of Commission Merchants. Those attending were to be executives of,

> the different trade organizations in the marketing of farm, fruit, vegetables and dairy products, to consider and define recommendations to be submitted to the Department of Commerce, showing whereby it can assist in making the system of arbitration in trade disputes, more universal, effective, efficient, expeditious and economical.

Letter from James B. Stafford, Assistant to Secretary Hoover, to trade executives (Oct. 15, 1921) (*quoted in* Finkin, *Worker's Contracts*, *supra* at 296).

(1956) (studying the pattern of arbitrated commercial disputes up to 1919).

A number of organizations – chambers of commerce, mercantile exchanges, wholesalers and jobbers – supported the law in the hearings, including growers and packers of fruits and vegetables which, important for purposes here, included agricultural cooperatives that, as we shall see, necessarily proceeded to resolve commercial disputes on a representative basis. Some of these have ceased to exist or had merged a hundred years on, but, at a minimum, the following agricultural cooperatives lobbied on the record for the law:[6]

- American Fruit Growers (which later became Blue Goose Growers)
- California Peach & Fig Growers
- Federated Fruit and Vegetable Growers (identified in 1924 hearing as "cooperative non-profit")
- Sun-Maid Raisin Growers (currently listed as an active farmers' cooperative)
- Yakima Fruit Growers Association (now part of Sunkist Growers Cooperative).

These agricultural cooperatives (co-ops) represented their member growers. They packed and distributed their members' products under marketing

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[6] Appreciation is expressed to Barbara Kaplan of the Albert E. Jenner, Jr. Memorial Law Library of the University of Illinois College of Law for tracking the status of the agricultural organizations appearing in the hearings on the FAA.

agreements. The agreements took one of two forms: the "agency" form by which the co-op became the agent of the individual grower-member in selling the produce produced on the grower's account; or, the "purchase and sale" form with the co-op purchasing the produce from the member-grower and re-selling it on its own account. 16A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8287 (Sept. 2011) ("Marketing Agreements"). Under either form of marketing agreement, the co-op, as agent of the growers or as purchaser of the growers' produce, was composed of the member-growers who "have an interest in the assets and accumulated surplus of the association." *Id*. at § 8286. ("Relationship between association and members; members' interests, rights and liabilities").

In the 1920s, these and other co-ops sought a federal law enabling them to obtain judicial enforcement of their agreements to arbitrate disputes with purchasers involving, for example, the merchantability, grade and quality of what they sold. If the contested sale had been made by the co-op under an "agency" marketing agreement, the co-op would be the representative of the member-grower and the proceeds of a successful arbitration would inure to the benefit of the grower, a third party to the arbitration. This typical representative arbitration would be expressly banned under Viking River Cruises' DRP.

If, instead, the contested sale had been made by the co-op under a "purchase and sale" marketing agreement, the co-op would not be a representative of the grower, but the proceeds of a successful arbitration

would still be for the benefit of all the member-growers as part of the association's accumulated surplus; that is, what the co-op secured in the arbitration would be for the benefit of third parties to the arbitration. There can be no doubt that Congress meant for arbitration conducted under these types of agreements to be covered by the FAA even though they were without any question "representative" arbitral proceedings.

Accordingly, analysis turns from commerce to employment. To determine the nature of an employment arbitration under the FAA one should, again, look to the nature of arbitration in the working world at the time the FAA was passed; that is, what Congress saw apart from transportation workers to whom Congress gave separate treatment because of the statutory systems of arbitration available to them. What Congress saw is that voluntary arbitration had been a feature of unionized workplaces for decades, first for the determination of what employee wages, hours, and working conditions would be, but later, and important for purposes here, for the resolution of disputes over whether the terms to which unions and employers had agreed were being observed. *See generally* Margaret Schaffer, THE LABOR CONTRACT FROM INDIVIDUAL TO COLLECTIVE BARGAINING (1907) (setting out the texts of numerous such agreements in a variety of industries). *See also* U.S. Dept. of Labor, CONCILIATION AND ARBITRATION ON THE BUILDING TRADES OF GREATER NEW YORK, BLS Bull. No. 124 (June 18, 1913). This included arbitration to ensure that the wages and hours of workers – in groups as well as individually – adhered to the

contract. Numerous arbitrations concerned claims that wages were below union scale or not paid at all. *Id*. at p. 24. For group wage claims, the facts governing the payments to each of these employees would be presented to the arbitrator or arbitral body and the result, if successful, would inure to them.

Arbitration of this kind had long been used in the building trades, cigar making, glass and pottery production, but "it was the apparel industries – clothing, millinery, hosiery, etc. – which proved to be the great testing laboratory for private labor arbitration" at the time. R.W. Fleming, THE LABOR ARBITRATION PROCESS 6 (1965). The most prominent was the New York City "Protocol of Peace" negotiated by Louis Brandeis in 1910 that set the pattern widely followed elsewhere, notably in Chicago where "the Hart, Schaffner & Marx agreement, signed . . . in 1911, proved both successful and enduring." *Id.* at 8. This effort was widely publicized and studied. U.S. Dept. of Labor, CONCILIATION, ARBITRATION, AND SANITATION IN THE DRESS AND WAIST INDUSTRY OF NEW YORK CITY, BLS Bull. No. 145 (April 10, 1914).

In a number of major cities, agreements with apparel manufacturers and trade unions provided for unions to present grievances in arbitration claiming violations common to a group of workers and seeking remedies for those represented – a process that foreshadows contemporary large scale representational

labor arbitration.[7] *See* Section II, *supra*; and Julius Henry Cohen, LAW AND ORDER IN INDUSTRY: FIVE YEARS' EXPERIENCE (1916), reporting *inter alia* Arbitration Board Chairman Brandeis' decision of January 12, 1915, detailing the "grievances of the Union" laid before the Board. *Id*. at 258, 259. These included, for example, a complaint that an employer "frequently compelled the workers [plural] to work on Saturday after 1 p.m.," BLS Bull. No. 145, *supra* at 105, that a whole group of workers had been discharged for union activity, Julius Henry Cohen, LAW AND ORDER IN INDUSTRY, *supra* at 183-84, and that a whole group of workers were wrongly discharged for being underage. William Leiserson, *Constitutional Government in American Industries*, 12 Am. Econ. Rev. 56, 70 (1922) (culling from a mimeographed digest of a thousand decisions in the men's clothing industry in Chicago), and a good deal more.

In sum: bilateral arbitrations between agricultural cooperatives and purchasers, in which the co-ops

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[7] In 1930, an observer noted the proliferation of "company unions" created by employers and that some of these representation plans made provision for arbitration. Carter Goodrich, *Arbitration, Industrial* in 2 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 153 (Edwin Seligman & Alvin Johnson eds., 1930). In order to deter unionization some of these arbitration rules prohibited the presentation of group claims. Eliot Cohen, THE YELLOW DOG CONTRACT 62 (1932) and Joel Seidman, THE YELLOW DOG CONTRACT 58 (1932). In the event, employees made scant recourse to them. Goodrich, *supra* at 153: "so far there is little evidence that if these provisions have been used in practice." Company-dominated representation plans were rendered unlawful in 1935. 29 U.S.C. § 158(a)(2).

represented – directly or indirectly – their grower members with sums secured for them were regular and familiar means of resolving disputes when the FAA was enacted. So, too, were bilateral arbitrations between unions and employers in which the unions represented their members and in which group claims were remedied when Congress passed the FAA.

B. The Arbitration of PAGA Penalties Retains All the Expedition, Informality, and Flexibility Contemplated by the FAA

Section I(A), *supra*, explored commercial and labor arbitration at the time Congress enacted the FAA. Agricultural co-ops and labor unions were parties to arbitration contracts acting in a representative capacity to present relevant facts and to secure remedies for third parties, their members. These were bilateral arbitrations; the third parties were not parties to the arbitration. This is indistinguishable from an arbitration in which PAGA penalties are sought.

Analysis turns to the alternative argument: that though bilateral in form, arbitration by a single party who seeks penalties calculated based on the number of pay period violations committed against the larger workforce loses all the swiftness, flexibility, and informality the Court has said characterizes the FAA's conception of arbitration.

The flaw in this argument is not a matter of theory; it is a matter of fact. The facts here are in

abundance, grounded in the contemporary practice of labor arbitration, and they refute the claim. The facts are set out below.

II. Labor Arbitration, A Model of Expedition, Informality, and Flexibility, Regularly Remedies Wrongs to Third Parties on Facts Specific to Them

The Court has emphasized the "fundamental attributes" of arbitration as conceived by the FAA: its "'simplicity, informality, and expedition.'" *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009) (reference omitted). The observation was made in a case concerning the ADEA claim of night watchmen reassigned to other work under a collective bargaining agreement. As the Court recognized, labor arbitration has long been looked to as a model of expedition, flexibility, and informality: the timing and location of the hearing is consensual, the latter usually located near the work site to accommodate the availability of witnesses; the parties need not be represented by legal counsel and often are not; there need be no stenographic record; the rules of evidence need not be applied; there need be no written opinion.

Some further aspects of labor arbitration bear emphasis. Absent a rare contractual provision to the contrary, the party to the proceeding is the union, not the employees whose grievances may have led to it. Robert A. Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY § 23.10 at pp. 890-91 (2013) ("Proper

Parties"). Absent a contractual prohibition, a union can arbitrate a contractual violation even if no affected employee has grieved. Elkouri & Elkouri, HOW LABOR ARBITRATION WORKS Ch. 5.5.B, n. 88 at pp. 5-20 (Kenneth May ed., 8th ed. 2016) (citing awards).

It is important to point out that the unionized workers in *Pyett* were in the same situation in relation to the union in arbitration as employees in general are to an aggrieved employee's claim for PAGA penalties, save that, in the PAGA case, the scope of the remedy is all that is involved. Unlike a labor arbitration, in an arbitration seeking PAGA penalties the fact, not the dimensions, of the wage and hour violation is placed in issue; no relief other than those penalties could be sought. An action seeking PAGA civil penalties is separate and apart from an action seeking to remedy the underlying violations in which backpay or other individually tailored relief is available.

Moreover, in the unionized setting, the union appears in a representative role not because each of the workers has consented to be represented, but because federal law makes the union their representative irrespective of their choice if a majority of their coworkers wish that to be so. Similarly, PAGA gives the aggrieved employee the capacity to seek penalties irrespective of any other employee's participation or consent. Functionally, the two situations are indistinguishable: agency, the capacity to act for others, is in each a consequence of law.

This aspect of the case is one that bears emphasis. We have already seen that, in labor arbitration in the formative period of the FAA, unions regularly brought what under Viking River Cruises' DRP would be considered a "representational" arbitration. A "representational" labor arbitration is decidedly *not* a Rule 23-like class action, subject to exacting pre-conditions; and it is decidedly *not* a § 216(b) collective action under the Fair Labor Standards Act as no individuals are named parties to "be heard" within the meaning of *Epic Sys. Corp*. v. *Lewis*, *supra*, at 1620. In contrast, in a "representational" labor grievance a union claims that a group of workers has suffered in common a violation of a contract term or a statutory protection incorporated into the agreement; the affected employees are not parties to the proceeding nor have they necessarily initiated it. National Academy of Arbitrators, THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS § 10.30 (Theodore St. Antoine, Gen. Ed., 2d ed. 2005).

Arbitration of this nature is quite common and includes, as one might expect, allegations of wage and hour claims that echo wage and hour law, notably, for example, the failure to pay at the overtime rate on which there are multiple arbitral awards.[8] This

[8] *E.g.*, *Hanson Aggregates Midwest, Inc*., 2003 LA Supp. 110236 (Skulina, Arb. 2003) (a grievance for all workers on the third shift); *GAF Materials Corp*., 2004 LA Supp. 101044 (Sargent, Arb. 2004) (a "grievance on behalf of all employees affected by the overtime violation"); *Green Specialty Care Center*, 126 LA 1517 (Dean, Arb. 2009) a grievance on availability of overtime for a group); *Cascade Steel Rolling Mills, Inc.*, 2003 LA Supp. 110598

example can be played out across a variety of contractual violations that echo parallel provisions of wage and hour law on which the record of arbitral consideration is rich. It should suffice merely to note a few: a representational arbitration "for all employees regarding the nonpayment of extra driving time from an employee's home to the Company's branch office," *ADT, LLC*, 133 LA 1821 (Felice, Arb. 2014); a grievance "on behalf of 'all affected employees'" for payment for check-in/check-out time, *First Student, Inc*., 131 LA 736 (Landau, Arb. 2013); a claim that an entire shift of workers had not been paid for meal breaks, *West Penn Power Co.*, 92-2 ARB. ¶8315 (Kindig, Arb. 1991) or denied paid lunch time, *The Dial Corp*., 90-2 ARB ¶8417 (Pribble, Arb. 1988); and a good deal more.

Such representational arbitration entails no loss in the fundamental attributes of bilateral arbitration the Court has identified with labor arbitration. Petitioner demurs on three closely connected grounds: (1) that bilateral representation arbitration is ill suited to "undertake factual and legal assessments for hundreds of absent [meaning non-participant] employees," Brief for the Petitioner at 27; (2) that in contrast to entertaining violations of "hundreds of different employees," in "bilateral arbitration discovery is relatively simple because the employee has access to her own employment records," not those of others, *id*. at 28; and (3) the seeking of penalties for "trivial Labor Code foot-faults like not including the start day for the pay

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(Lumbley, Arb. 2003) (a grievance on a group's entitlement to overtime pay).

period" evidences an expansion well beyond a bilateral arbitration, *id*. at 30.

All of these arguments could equally be directed to representational labor arbitration, yet all would fail. First, as to entertaining facts specific to numerous employees, we have already seen unions efficiently represent the grievances of hundreds, even thousands of employees in a single arbitration, employees who may not even have grieved the action arbitrated and in which the remedy, unlike a PAGA civil penalty claim, may have to be tailored individually according to the wrong the arbitrator finds to have occurred.[9] Such representational labor arbitration has had a deep history before the Court: in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), arbitration was compelled over the layoff of dozens of shipyard workers (on remand the union prevailed, *Warrior & Gulf Nav. Co*., 36 LA 694 (Holly, Arb. 1961); in *Steelworkers v. Enterprise Wheel*, 363 U.S. 593 (1960), the arbitrator's remedy, including back pay and the reinstatement of employees who were fired as a group was affirmed; in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543

[9] Group claims have been heard in labor arbitration in cases where facts specific to individuals could bear upon the finding of a violation or on the remedy; *e.g.* that a test for promotion has a disparate impact on women and minorities, *Toledo Edison Co*., 105 LA 167 (Curry, Arb. 1995); that the disallowance of religious exemption from Sunday work violated Title VII of the Civil Rights Act, *Avis Rent-a-Car Sys*., 107 LA 197 (Shanker, Arb. 1996); that the requirement of a commercial driver's license discriminated against older workers, *The Lion, Inc*., 109 LA 19 (Kaplan, Arb. 1997).

(1964), arbitration was compelled to determine the union's right to pursue rights vested for dozens of employees under a collective bargaining agreement after a company merger with successor employer; and in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1977), arbitration was compelled to determine the right of the entire complement of employees to severance pay. *See e.g. Alcan Packaging Co.* v. *Graphic Communications Conference*, 729 F.3d 839 (8th Cir. 2013), for an arbitration on the applicability of severance pay for the workforces at three plants in two states.

Second, as to the burden of discovery, unions, as representative of all the employees in a bargaining unit are entitled as a matter of course to any information in the employer's possession that is relevant to its role in grievance processing whether or not a grievance has actually been filed. *NLRB* v. *Acme Indus. Co.*, 385 U.S. 431 (1967). The duty to disclose all employee records, not only a grievant's, far exceeds what would have to be disclosed in order to seek PAGA civil penalties,[10] but labor law practitioners have not found this

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[10] Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY, *supra* § 20.5 at p. 651 (references omitted):

> The employer clearly must furnish information as to wage rates and classifications, merit pay increases, the costs of a welfare benefit plan . . . information regarding overtime hours worked by unit employees, their marital status, surveys and studies relating to wages or other working conditions, company practices regarding probationary employees, layoffs resulting from subcontracting, and seniority lists [and a good deal more].

longstanding legal obligation to be burdensome. Robert Gorman & Matthew Finkin, LABOR LAW, *supra* at §20.4 ("Advocate Practice Points" at pp. 649-650).

The petitioner's third argument, to the nature of PAGA penalties, is arresting. By trivializing the wrongs to be penalized – as mere technical "foot-faults" – the petitioner diverts the Court from considering the significance of what is actually at stake. The Nation as a whole, California not excluded, suffers not from mere technical glitches, "foot-faults" in wage recording, but from the risk of widespread, systematic wage theft. David Cooper & Teresa Kroeger, *Employers Steal Billions From Workers' Paychecks Each Year*, Economic Policy Institute Report (May 10, 2017). These are not only one-off acts of opportunism by fly-by-night contractors. These can be part of established business models: the payment of subminimum wages, the underpayment of overtime, and the nonpayment of agreed-on compensation levels and a good deal more which has been documented in great detail, for example, in Chicago by Marc Doussard, DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET (2013). Underpayment can even be the product of the manipulation of technologically sophisticated methods of time-keeping and recording. *See e.g.*, Elizabeth Tippett, Charlotte Alexander & Zev Eigen, *When Timekeeping Software Undermines Compliance*, 19 Yale L.J. & Tech. 1 (2017).

Receipt of timely and accurate pay records is one way employees can know whether they are being victimized. The start date for an employee's pay period,

one of the petitioner's examples of a trivial claim, can be crucial to the computation of work week hours and so for whether overtime pay is due. In fact, unions have felt the need to arbitrate just such cases: in *Caterpillar Inc.*, 126 LA 554 (Goldstein Arb. 2009), the arbitrator was presented with a union claim about the employer's failure to distribute work stubs to the workforce; in *Tropicana Foods*, 90-1 ARB ¶8250 (Staudubar, Arb. 1990), the arbitrator was presented with a union's claim that the employer did not furnish "each employee with a weekly wage statement" accounting for all hours, wages, and deductions; in *Allied Waste, Inc.*, 2005 LA Supp. 111592 (Goldberg, Arb. 2005), the arbitrator heard a union claim "on behalf of all affected employees" that paychecks were not issued to the workforce on a weekly basis.

In all of these, the arbitrator was called on to decide for all affected employees – including those "employed in different capacities," Brief of the Petitioner at 27 – whether the obligation to provide timely and accurate pay stubs and to transmit them as the collective agreement required had been observed. The fact a determination for the entire workforce would be made did not deprive the proceeding of any of the attributes of a bilaterality that *14 Penn Plaza* Court rightly attributed to labor arbitration.[11]

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[11] The only difference between the two is remedial. Were a labor arbitrator to find the employer had not timely transmitted the wage records the award would be declaratory, ordering compliance in future. In the arbitration of PAGA civil penalties the arbitrator need only apply the scheduled penalties against the

Against the facts there is no valid argument. The fact is that the submission of claims by a single representative in arbitration of violations of protective provision applicable to a number of workers entails no diminution in the expedition, flexibility, and informality of a bilateral arbitration. The historical record is simply too extensive and rich for there to be any doubt.

CONCLUSION

The question presented is:

> Whether the Federal Arbitration Act requires the enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA?

If the Court is guided here, as it has in other FAA cases, by what Congress saw and sought at the time it

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number of violations; but, the bulk of the sums awarded would go to the state to enforce the law and, critically, better to educate the workforce about their rights.

enacted the FAA, in form and substance, the answer to the question has to be "No."

Respectfully submitted,

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