No. 20-1573

In the

Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF THE CALIFORNIA BUSINESS AND INDUSTRIAL ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The California Business & Industrial Alliance ("CABIA") is a trade group focused exclusively on fixing the abuses of the California Private Attorneys General Act ("PAGA"). CABIA pursues this mission through promoting original research and engaging in public advocacy and litigation. Original research includes a groundbreaking study authored by former senior California labor officials showing how PAGA's promotion of court action over agency adjudication serves the plaintiffs' bar over everyone else: PAGA litigation delays recoveries and results in aggrieved workers getting less and employers paying more as compared to state administrative proceedings.

CABIA submits this amicus brief to highlight just how harmful PAGA has been to employers and employees alike and to expand on how the California Supreme Court's holding that PAGA "assigns" state claims to "aggrieved" employees is an artifice foreclosed by the plain terms of the Federal Arbitration Act ("FAA").

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or their counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION

Like *Concepcion*, this case arises from California's ongoing efforts to avoid the straightforward import of § 2 of the FAA on arbitration contracts. And like that earlier case, California is wrong. Unlike *Concepcion*, however, California has taken a new position that the statutory device it has enacted—PAGA, Cal. Lab. Code § 2698 *et seq.*—creates a cause of action for civil penalties that "lies outside the FAA's coverage" altogether "because it is not a dispute between an employer and an employee arising out of their contractual relationship," but a "dispute between an employer and the *state*"—"a type of *qui tam* action." *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 382, 386 (2014).

This argument rests on a flawed premise. PAGA's denomination of the recovery for the "aggrieved employees" as a "civil penalty" does not transform this money judgment into a public and "non victim-specific" form of relief. *Id.*, at 386. On the contrary, it is only because they are victims—"aggrieved employees"—that PAGA plaintiffs get any relief at all. Cal. Lab. Code § 2699(a).

As this Court explained more than one hundred years ago: "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." *Huntington* v. *Attrill*, 146 U.S. 657, 667 (1892).

> Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law, where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.'

Ibid. (citations omitted). Again, this is precisely the situation "aggrieved employees" find themselves in in PAGA suits—they receive a money penalty because they are "the party grieved."

Iskanian's conclusion that a PAGA suit "is not a dispute between an employer and an employee arising out of their contractual relationship," 59 Cal. 4th 386, thus cannot stand. As that court itself recognized: "pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature." *Id.*, at 387–88. "Under *Concepcion,* such an action could not be maintained in the face of a class waiver." *Id.*, at 388.

STATEMENT

A. PAGA's Origins

PAGA was enacted in 2004. It was created in response to long-standing dissatisfaction with the California Division of Labor Standards Enforcement's ("DLSE") administrative process responding to violations of California's byzantine Labor Code. PAGA sought to supplement the state's administrative enforcement actions and allow aggrieved employees to recover through the courts.

PAGA provides that, whenever the California Labor Code creates a civil penalty that may be assessed and collected by California's Labor and Workforce Development Agency ("LWDA"), those penalties "may, as an alternative, be recovered through a civil action brought by an aggrieved employee *on behalf of himself or herself* and other current or former employees." Cal. Lab. Code, § 2699(a) (emphasis added). Through this process, a single employee can bring representative claims on behalf of hundreds or even thousands of other "aggrieved employees" while avoiding the hurdles of class certification, which is not required under the statute.

Before bringing a PAGA action, the employee must provide notice to both LWDA and the employer. *Id.*, § 2699.3. This pre-filing notice gives LWDA an opportunity to investigate the claim and issue a citation (which would foreclose a private action), and for some violations allows the employer an opportunity to cure the violation. After notification, LWDA has 65 days (expanded from 33 days in 2016 by SB 836) to notify parties of its intent to investigate violations. *Id.*, § 2699.3(a)(2).

When the LWDA declines to take a case—as it does nearly all the time, retaining only 31 cases out around 9,000 notices filed between FY2017 and FY2018—the aggrieved employee is then free to bring a civil suit against their employer. While the government has a residual interest in the outcome—seventy-five percent of the civil penalties recovered go to LWDA; twenty-five percent go to the aggrieved employee, *id.*, § 2699(i)—the aggrieved employee is in the driver's seat. After filing, the LWDA cannot direct the

litigation or seek to dismiss the action and any settlement is subject only to the court's approval. *Id.*, § 2699(*l*).

B. The PAGA Explosion

At its inception, PAGA was only one option among many and was not often used—who wants to pay the state seventy-five percent of the judgment for the privilege of bringing a class action? In 2005, for example, only 700 PAGA cases were filed. Instead, many employee–employer claims were handled through class-wide arbitration, contractual waivers of which were disallowed as contrary to public policy under California law.

This changed in 2011, with this Court's decision in *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333 (2011). There, this Court held that the FAA preempts California state law and permits businesses with class action waivers to require claims to be brought only in bilateral arbitrations. The result was a "tsunami" wiping out potential class action claims whenever parties had entered into bilateral arbitration agreements. Jean Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012). The class action doors were shut.

A few years later, in *Iskanian*, however, the California Supreme Court opened a window. 59 Cal.4th 348. The Court reasoned that a PAGA dispute was not a private dispute between a plaintiff and her employer, but instead was actually a *qui tam* suit: "the real party in interest" was "the *state*," not the "aggrieved employee" listed as the plaintiff or any other "aggrieved employees" she represented. And because California doesn't sign class arbitration agreements,

the court concluded that PAGA suits could go forward unaffected by the FAA. The case below is just a continuation of *Iskanian,* though California now has even less excuse for getting it wrong after this Court's holding in *Epic Systems Corp.* v. *Lewis.* 138 S.Ct. 612 (2018).

Now, with other avenues blocked, the employment class action industry has funneled much of its efforts to PAGA suits, and PAGA litigation has exploded. The number of PAGA cases has grown nearly every year since, with a staggering 6,942 notices filed in FY2019, nearly ten times as many as in 2005. See Christine Baker & Len Welsh, *California Private Attorney General Act of 2004: Outcomes and Recommendations* (Oct. 2021), https://bit.ly/3gmwJ06.

C. PAGA's Harmful Effects on California's Employers and Employees

PAGA has been a boon—not for employees or employers—but for the plaintiff's bar. After *Iskanian*, PAGA became the last remaining route to avoid class or representative waivers contained in employee arbitration agreements. Like class actions, PAGA cases create potential large-scale exposure and expense for employers because the representative mechanism raises total award amounts and potential attorneys' fees (which on average make up 33% of the payment made by employers). *Ibid.* With nearly 7,000 PAGA notices filed last year and an average total settlement of $1.1M for PAGA suits, PAGA is lucrative for the attorneys—who receive an average of $372,000 in attorney fees per lawsuit. *Ibid.*

Unfortunately, what is profitable for entrepreneurial lawyers has not been nearly as beneficial to

the employees they represent. Available data show that the average payment a worker receives from the rare PAGA dispute decided administratively and in house by the LWDA is 4.5 times greater than for a PAGA case filed with a court—$5,700 from an LWDA case, versus $1,300 from a court case. Baker & Welsh, *supra*. And those who litigate get this money slower: workers wait on average twelve months for their awards from LWDA cases, and twenty-three months for their awards from court cases. *Ibid.*; see also *PAGA Cases in California by County*, CABIA (Dec. 1, 2021), https://cabiafoundation.org/paga-cases-in-california-by-county/ (PAGA suits take on average 183 days longer than LWDA-resolved disputes).

At the same time, employers are hurt. Despite workers receiving higher awards from LWDA cases, employers pay out 29% less per award, on average $790,000 per LWDA case and $1.1 million per PAGA court case. *Ibid.*

SUMMARY OF ARGUMENT

1. PAGA suits are prosecuted by "aggrieved employees" on behalf of themselves and others "aggrieved" by the same employer. Contrary to *Iskanaian*, describing the money award given to such "aggrieved employees" as "civil penalties" and requiring additional payment to the state does not transform PAGA judgments into a public and "non victim-specific" form of relief. As this Court noted well over a century ago in *Huntington*, it is well established that a "penalty" paid to a private party "grieved" by the defendant's actions is a private remedy. *Iskanain*'s conclusion that PAGA suits are *solely* disputes between the state and employers thus rests on a faulty premise.

Respondent agreed to arbitrate "any dispute" arising out of her employment with Petitioner, expressly noting that this included any claim she might want to bring under PAGA. In this suit, she is seeking a "victim-specific" remedy arising out of her employment. Because she agreed not to bring such claims in court but only through bilateral arbitration, she must abide by the terms of her agreement.

2. This is the second time in the last decade or so that this Court has had to consider an attempt by California to avoid the plain terms of § 2 of the FAA. This Court should speak clearly in reversing this latest artifice to ensure that it is also the last. PAGA is even more destructive than the class and representative actions at issue in *Concepcion* and *Epic*. As this Court has noted, the FAA stands athwart this kind of innovation, ensuring that parties are able enter into contracts that require bilateral arbitration when they conclude that doing so is in their best interests, as both parties in this suit voluntarily did when Respondent accepted employment with Petitioner and opted into a bilateral arbitration agreement.

ARGUMENT

I. PAGA Suits Fall Comfortably Within the Category of Claims Subject to the FAA.

A. *Iskanian*'s Holding

Iskanian's core holding is that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." *Iskanian*, 59 Cal. 4th at 386. It bases this on two assertions.

First, it concludes that PAGA suits are a form of *qui tam* because "an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Id.*, at 387 (quoting *Arias* v. *Superior Ct.*, 46 Cal. 4th 969, 986 (2009)). According to the court, PAGA suits should thus be understood as being brought "on behalf of the government to obtain remedies other than victim-specific relief, *i.e.*, civil penalties paid largely into the state treasury." *Id.*, at 386.

Second, *Iskanian* holds that *qui tam* suits are not subject to the FAA because such suits are not "dispute[s] between an employer and an employee arising out of their contractual relationship," but are in reality "dispute[s] between an employer and the *state*," which is not a party to the arbitration agreement. *Ibid.*

As explained below, the first conclusion is clearly wrong and the second is dubious and of no relevance here.

B. PAGA Suits Involve Both Public and Private Interests.

Iskanian rests on a false dichotomy, incorrectly assuming that public and private interests (and public and private remedies) are mutually exclusive. They are not. As this Court noted well over a century ago, both penal (*i.e.*, public) and remedial (*i.e.*, private) interests can—and often do—co-exist in the same kinds of lawsuits. See *Huntington*, 146 U.S. at 667; *accord United States* v. *NEC Corp.*, 11 F.3d 136, 137 n.1 (11th Cir. 1993), *as amended* (Jan. 12, 1994) ("statute can be remedial as to one party, yet penal as to another"). So, for example,

> A statute giving the right to recover back money lost at gaming and, if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer.

Huntington, 146 U.S. at 667 (collecting cases). As this indicates, the situation of the party bringing the suit and the relief sought must be considered in determining whether the underlying interest is public or private.

The problem with *Iskanian* is that it assumed that, because civil penalties paid to the government in government enforcement actions are "designed to protect the public" rather than private interests, that the same holds true for the civil penalties paid to PAGA plaintiffs. Not so. "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." *Id.*, at 667–68. Unlike typical *qui tam* suits, where the plaintiff's interest is solely derived from the government's assignment to him or her of part of the ultimate *government* penalty recovery, a PAGA plaintiff must be an "aggrieved employee" in order to bring suit and does so, not on behalf of the government, but on "behalf of himself or herself and other current or former employees." Cal. Lab. Code, § 2699(a). The ultimate money recovery to the litigant and those she represents is of course still described as a "civil penalty," but it is a penalty awarded that compensates the "aggrieved employee" for his or

her injuries, much the same way that statutory damages do. In this, PAGA is like

> a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, [which] has been held to be 'not like a penal law, where a punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.' Lake v. Smith, 1 Bos. & P. (N. R.) 174, 179, 180; Wilkinson v. Colley, 5 Burrows 2694, 2698.

Huntington, 146 U.S. at 667–68.

Where PAGA differs, of course, from these older models is that it also awards seventy-five percent of the total civil penalty to the state. But this division of the penalty between the state and private "aggrieved employees" does not make the state the sole "party in interest" to the exclusion of those "employees"; nor does it relegate "aggrieved employees" to the status of "informers" or *qui tam* bounty hunters. On the contrary, by splitting the penalties between the state and the "aggrieved employees," PAGA creates a "reverse *qui tam*"—the private plaintiff gets to bring a class action on behalf of herself and others, and the state gets to take a bounty even though the underlying conduct did not inflict pocketbook harm to it.

And while the penalty award may be said to serve the public interest generally by punishing illegal labor practices, PAGA suits are thus fundamentally about redressing the injuries of the "aggrieved employee" who brings the suit as well as any other "aggrieved employees" he or she represents. As Judge Bumatay has noted, "PAGA explicitly involves the interests of

others besides California." *Magadia* v. *Wal-Mart Assocs., Inc.*, 999 F.3d 668, 676 (9th Cir. 2021) (citations omitted).

There are rare situations where courts must decide whether the private or public purpose of a particular claim is more significant—for example, when considering whether a deceased person's cause of action survives his or her death. See, *e.g.*, *Parchman* v. *SLM Corp.*, 896 F.3d 728, 738 (6th Cir. 2018) ("remedial claims—*i.e.,* claims to compensate the plaintiff—survive a party's death, whereas punitive claims—*i.e.,* claims to punish the defendant—do not." (internal quotation marks omitted)). But deciding whether the FAA applies is not such a situation as it is indisputable under *Huntington* that there are private interests in play, and the reason the plaintiff is bringing suit is to obtain redress for her particular injuries and those of the other "aggrieved employees" she represents.

Further, unlike the situation in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), PAGA suits do not present a situation where the government is bringing the lawsuit in its own name but with the purpose of vindicating a private or "victim-specific" interest. Indeed, this case presents almost the exact converse of that situation. Like the aggrieved employee in *Waffle House*, the government in a PAGA suit stands to get a recovery if the named plaintiff prevails. But it is that plaintiff—and not the government—that is "in command of the process" and "the master of [her] own case." *Id.*, at 280. In fact, unlike aggrieved employees in EEOC suits, the government does not even have the ability to intervene in a PAGA action. *Compare* 42 U.S.C. § 2000e–5(f)(1) *with* Cal. Lab. Code § 2699(*l*).

As Petitioner rightly points out, Pet. Br. at 39, the existence of significant public interests in a dispute is irrelevant to whether the FAA applies. For example, while this Court has noted the similarity of antitrust actions to "private attorney-general" claims, it is well established that antitrust plaintiffs who entered into arbitration agreements are subject to the requirements of FAA. See *Am. Exp. Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 238 (2013). Similarly, agreements to arbitrate claims for punitive damages are fully enforceable, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995), despite the universally acknowledged public interest that punitive damages serve, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003).[2]

In any event, a PAGA plaintiff's private interests predominate for at least three reasons.

First, California law provides that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. Civ. Proc. Code § 367. Here, that means that the "real part[ies] in interest" are the named plaintiff—the "aggrieved employee"—as well as any other "aggrieved employees" the named plaintiff represents under the express terms of the statute. Notably, PAGA

[2] As Petitioner rightly notes, several states have laws requiring a portion of any punitive damages award to be given over to the state. See Alaska Stat. §09.17.020(j); Ga. Code Ann. §51-12-5.1(e)(2); 735 Ill. Comp. Stat. Ann. 5/2-1207; Ind. Code Ann. §34-51-3-6(c); Iowa Code Ann. §668A.1(2)(b); Or. Rev. Stat. Ann. §31.735(1); Utah Code Ann. §78B-8-201(3)(a). To our knowledge no court has held that such a law allows a party to avoid the plain terms of an arbitration agreement.

does not say or even imply that the "aggrieved employee" is acting on behalf of the state. And unlike other state-law *qui tam* actions, PAGA does not require the plaintiff to style his or her complaint as relator, informer, or *qui tam* plaintiff. *Cf.* Cal. Gov't Code § 12652 ("the person bringing the action [under the California False Claims Act] shall be referred to as the qui tam plaintiff.").

Second, this formal reality is reflected in the way PAGA suits actually work. As already noted, the government's position in a PAGA suit is the mirror image of the situation in *Waffle House*. This is very different from "a traditional qui tam action," which "acts only as 'a partial assignment' of the Government's claim," preserving the government's ultimate control over the case. *Wal-Mart*, 999 F.3d at 677; 31 U.S.C. § 3730(b)–(f). As Judge Bumatay has explained, if one insists on viewing PAGA through the lens of *qui tam*, then it

> represents a permanent, *full* assignment of California's interest to the aggrieved employee. True enough, PAGA gives California the right of first refusal in a PAGA action. An aggrieved employee can only sue if California declines to investigate or penalize an alleged violation; and California's issuance of a citation precludes any employees from bringing a PAGA action for the same violation. But once California elects not to issue a citation, the State has no authority under PAGA to intervene in a case brought by an aggrieved employee. PAGA thus lacks the "procedural controls" necessary to ensure that California—not the aggrieved employee (the named party in PAGA suits)—retains "substantial authority" over the case.

Wal-Mart, 999 F.3d at 677 (internal citations omitted). Indeed, the state is powerless to prevent a PAGA plaintiff from settling a claim on unfavorable terms or abandoning it entirely.

Third, allowing the government to nullify arbitration agreements by injecting its own interest into a dispute would undermine the purposes of the FAA. *Iskanian*'s interpretation of PAGA is exactly the kind of "reshap[ing]" of "traditional individualized arbitration" that *Concepcion* and *Epic* forbid. *Epic*, 138 S. Ct. at 1623. "Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." *Ibid.*

As CABIA has chronicled at length, the experience of California businesses post-*Iskanian* has shown that PAGA's ascendence as the last remaining such "device[]" in the state has dramatically reduced the benefits of arbitration, replacing them with a novel "reverse *qui tam*" that has cost employers and employees "much time and effort," and has "introduce[d] new risks and costs for both sides." *Ibid.*; see Baker & Welsh, *supra.*

C. While Private *Qui Tam* Plaintiffs Are Likely Bound By Their Arbitration Agreements, the Question is Not Presented Here.

Petitioner correctly notes that the effect of a traditional *qui tam* plaintiff's agreement to arbitrate claims it is prosecuting as a bounty hunter on behalf

of the government is unsettled. Pet. Br. 41. Under the logic of *Waffle House*, the government could not be required to arbitrate the matter itself without its consent. Absent government intervention, however, the private relator is (largely) in control of the case and makes myriad decisions that affect how he or she may seek to prosecute the matter. An agreement by the relator to arbitrate (if not overridden by the government) is presumably one of these kinds of decisions.

There is no need to wade into this question, however. The bottom line is this: Respondent agreed that she would arbitrate "any dispute" arising out of her employment, including any claim under PAGA. This suit involves her interests and arises from her employment. That is all there is to it. As this Court has noted, "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotation marks omitted). Here the terms are unequivocal: Respondent must pursue her claims through bilateral arbitration.

II. This Court Should Speak Clearly on the Scope of FAA Preemption.

Unless corrected in clearest terms, California's attempts to avoid the FAA will continue to take on new and ever more creative forms, causing continued harm to employers and employees in the state in addition to the serious negative consequences they have already sustained. As noted at the outset, compared to the (rarely used) state administrative process, PAGA suits are time consuming, ineffective, and result in higher costs for employers and lower recoveries

for employees. Baker & Welsh, *supra.* This system provides corporate welfare for the plaintiffs' bar, but it fails everyone else.

As Congress recognized, by contrast, arbitration serves the interests of all sides in achieving efficient and fair outcomes. *Epic*, 138 S. Ct. at 1621 ("[I]n Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved."). Unless stopped by this Court, California will continue its crusade in favor of class-action style employment litigation. This Court should therefore speak directly to this issue in rejecting California's legal justifications for exempting PAGA from the FAA so that there will be no future attempts to avoid the plain terms of that statute.

CONCLUSION

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

February 7, 2022 Respectfully submitted,

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