No. 20-1573

In the
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

The Civil Justice Association of California (CJAC) welcomes the opportunity to address as *amicus curiae*[1] the issue this case presents—whether the Federal Arbitration Act (FAA)[2] requires enforcement of a bilateral arbitration agreement between employer and employee providing that the employee cannot raise representative claims, including under California's statutory Private Attorney General Act (PAGA).[3]

CJAC is a 44-year-old nonprofit organization whose members are businesses, professional associations and financial institutions. CJAC's principal purpose is to educate the public about ways to make more fair, certain and efficient laws that determine who gets paid, how much, and by whom when the conduct of some occasions harm to others.

Private contractual arbitration of employment disputes comports with CJAC's purpose because it provides "lower costs" and "greater efficiency and speed" than court litigation. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (*Stolt-Nielsen*). Accordingly, CJAC participates as

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[1] Counsel of record for the parties have provided blanket consent for the submission of *amici* briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *amicus* or its members (and Viking River Cruises, Inc. is not a member) made a monetary contribution to the preparation or submission of this brief.

[2] 9 U.S.C. § 2.

[3] Cal. Labor Code § 2698 et seq.

amicus curiae in cases defining the scope and application of the FAA to bilateral pre-dispute arbitration contracts when state law erects unlawful barriers to that practice.[4]

CJAC's members employ tens of thousands of people in California and hundreds of thousands nationally in the manufacture of products and the provision of services. Most CJAC members have chosen, as have many employers throughout the country,[5] to resolve disputes with their employees over employment matters, including wage and hour issues, through contractual arbitration.

CJAC sets great store on the FAA and the consistent line of this Court's opinions upholding that statute's broad preemptive sweep requiring that agreements to decide disputes by arbitration be placed on an "equal footing" with other contracts and enforced accordingly. The decision here, however, thwarts contractual arbitration by applying the state's *Iskanian* rule (named after California's supreme court opinion expounding the rule) to void such agreements when a

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[4] See, *e.g.*, *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014); *Sanchez v. Valencia Holding Co., LLC,* 61 Cal.4th 899 (2015); and *Saheli v. White Memorial Medical Center*, 21 Cal.App.5th 308 (2018).

[5] According to one study, approximately 55% of the workforce, or 60 million employees, are covered by employment arbitration agreements. Alexander J.S. Colvin, *Economic Policy Institute* (Sept. 27, 2017), available at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

party asserts representative claims on behalf of other employees under California's PAGA.

PAGA constitutes a major obstacle to voluntary employment arbitration contracts because it conflicts with the FAA and controlling precedents of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a fundamental legal question: what happens when the "irresistible force" of the FAA "meets the immovable object" of California's PAGA? A long and consistent line of opinions from this Court answer soundly that the FAA trumps a state statute's public policy when it undermines the FAA's preemptive protection of individual arbitration agreements. "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (*Epic Systems*).

Here, respondent signed an arbitration agreement with her employer [petitioner] expressly waiving her right to bring, hear, or arbitrate any dispute [with the employer] as [a purported member of any] class, collective, representative or private attorney general action." JA 89-90. She was also given the opportunity to "opt-out" of this waiver in the employment agreement but declined to do so. JA 90. Nonetheless, she filed a "representative" PAGA court action as an "aggrieved employee"against her employer for wage claims, and the trial and appellate courts followed

Iskanian's end-run around the FAA to uphold her right to do so.

As a matter of public policy debate, these conflicting approaches – *viz*., agreeing to waive representative claims in arbitration agreements yet filing those same claims in court – appear as classic paradoxes, Catch-22's of arbitral jurisprudence; but in both song and law the answer is clear—"something's gotta give."[6] When, as here, the force of the FAA is propelled by the power of the Supremacy Clause (U.S. Const., Art. 6, cl. 2) and fueled by a copious, consistent line of Court opinions striking down laws that impede individualized agreements to arbitrate, that "give" means *Iskanian*'s "non-waivability" doctrine for PAGA claims must bow to the FAA's broad preemptive sweep. Substantive federal law for enforcing individual arbitration agreements according to their terms prevails over California's PAGA command that employees cannot waive their rights to pursue "representative" court claims.

Simply put, California cannot do what *Iskanian* and the trial and appellate courts did here and enforce PAGA as a "rule . . . declar[ing] individualized arbitration proceedings off limits." This would allow the state to "reshape traditional individualized

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[6] Johnny Mercer, *Something's Gotta Give* (1954), written for and first performed by Fred Astaire in the 1955 musical film *Daddy Long Legs* and later made popular in a recording by Frank Sinatra. "When an irresistible force such as you/ Meets an old immovable object like me/You bet just as sure as you live/Something's gotta give/Something's gotta give." Frank Sinatra, *Come Dance With Me!* (1959).

arbitration" in violation of the FAA. *Epic Systems, supra*, 138 S. Ct. at 1623. The FAA protects "pretty absolutely" agreements calling for "one-on-one arbitration" using "individualized . . . procedures." *Id.* at 1619.

Iskanian, the principal authority upon which the respondent and California courts rely, holds contrary to *Epic Systems* and other opinions of this Court, that PAGA claims cannot be compelled to arbitration. Why? Ostensibly because "regardless of whether an individual PAGA cause of action is cognizable, a PAGA claimant's request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer." Pet. App. 6. In other words, *Iskanian* dictates, and the appellate court in this case accordingly holds, that despite respondent's agreement to waive her representative PAGA claim and proceed solely to decide her individual PAGA claim against her employer by arbitration, she may still litigate her individual claim and representative PAGA claims on behalf of all other employees, even those who have Labor Code violations not applicable to her.

Because PAGA allows an "aggrieved employee" to obtain penalties on behalf of all employees for Labor Code violations committed by that employer, this has resulted in multi-million dollar payouts. A claim for statutory penalties applied, for example, when an employer violated the "suitable seating" requirement of Wage Order No. 7-2001, which is covered by California

Labor Code section 1198.[7] Violation of this provision wrested a settlement for $65 million against Walmart in 2018, out of which the state got $33 million and Walmart's 99,000 employees divided up $10.7 million ($108 for each employee), leaving $21.3 million for plaintiffs' attorneys and their litigation costs.[8] Safeway settled a "suitable seating" PAGA lawsuit for $12 million, of which the 30,000 employees got to share $1.875 million ($62.50 per employee) while the plaintiff attorneys received $4.4 million.[9]

Iskanian's holding has been echoed by other appellate opinions. See, *e.g.*, *Correia v. NB Baker Elec., Inc.*, 32 Cal.App.5th 602 (2019); *Kim v. Reins International California, Inc.*, 9 Cal.5th 73 (2020) (a PAGA plaintiff's settlement of individual claims still leaves him free to prosecute his representative PAGA

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[7] *Bright v. 99¢ Only Stores,* 189 Cal.App.4th 1472, 1478 (2010); *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal.App.4th 210, 222-223 (2010). The Wage Order on "seats" provides that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats . . .." Wage Order No. 7-2001, ¶ 14. While these lawsuits were "class actions" that *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (*Concepcion*) and *Epic Systems* now clearly foreclose, *Iskanian* permits plaintiffs to ignore the bilateral arbitration agreements they sign and "replace the words 'class action' in their pleadings with 'PAGA action' and litigate in court as if *Concepcion* and *Epic Systems* never happened." Pet. Merits Brief, p. 43.

[8] Bob Egelko, *Union-Backed Law Reaps Payments for California Employees – State Gets a Cut, Too*, *SAN FRANCISCO CHRONICLE*, Feb. 11, 2020.

[9] *Id.*

claims on behalf of other employees). These holdings hostile to arbitration, however, ignore well-settled law. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our [federal] Constitution provided [in the supremacy clause] that the federal law must prevail. [Citation.]" *Free v. Bland*, 369 U.S. 663, 666 (1962).

What matters most in determining the constitutionality of *Iskanian*'s non-waivability rule is whether it comports with the language of the FAA and bedrock principles set forth by this Court's opinions. The *Iskanian* rule runs afoul of the FAA's well-established arbitral precepts, permitting PAGA to perversely override the FAA's requirement that individual arbitration agreements be enforced according to their terms to protect the "fundamental attribute of arbitration" – its individualized nature. *Epic Systems*, *supra*, 138 S. Ct. at 1622.

ARGUMENT

I. THE FAA'S MANDATE THAT INDIVIDUAL ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS PREEMPTS CALIFORNIA'S *ISKANIAN* RULE THAT BARS ENFORCEMENT OF SUCH AGREEMENTS WHEN PROSECUTED UNDER THE STATE'S PAGA.

The FAA's plain text and the long line of U.S. Supreme Court opinions interpreting and applying it combine to compel a clear conclusion—PAGA's non-waivable representative action under *Iskanian* conflicts

with and violates the FAA's broad preemptive sweep allowing parties to waive those actions and decide their disputes by contractual arbitration. The FAA displaces the PAGA's non-waivable representative action, not the other way around.

A. The Text of the FAA Clearly States that it Applies to <u>all</u> Arbitration Agreements Unless Expressly Exempted by the FAA or other Federal Law.

We begin at the beginning, "away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning"[10]—the text of the FAA.

The FAA states that a "written provision" in "a contract evidencing a transaction involving commerce" that agrees to "settle by arbitration" . . . "a controversy . . . arising out of" that "contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This statutory language is plain and unambiguous. It says what it means and means what it says, a "prosaic notion . . . based on our abiding conviction th[at] communication suffers when language says what it does not mean." *Rose v. Superior Court*, 81 Cal.App.4th 564, 570 (2000). A fair reading of the

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[10] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (concurring opinion by Gorsuch, J.).

FAA's text encompasses and applies to the arbitration contract in this case. Numerous California court decisions, however – dictated by *Iskanian* – seize upon the final 17 words of section 2 of the FAA, its savings clause, to assert that the arbitration contract is at odds with "grounds" that "exist at law or in equity for the revocation of any contract." The "ground" arguably violated by the arbitration contract is the "public policy" animating the PAGA—that "requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to 'public policy.' " *Iskanian*, *supra*, 59 Cal.4th at 360.

But this is not a ground applicable to contracts generally; it is instead specifically tailored to prohibit bilateral arbitration of representative employee claims for statutory penalties.

1. Contrary to *Iskanian*, the FAA makes no distinction between the arbitration of ordinary commercial disputes and disputes between the government and private individuals.

According to *Iskanian*, one source for this implicit public policy principle supposedly derives from a purported distinction between contractual arbitration for ordinary commercial disputes and disputes between the government and private individuals. "[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. It is a dispute between an employer and the *state,* which alleges directly or through its agents—either the

[state's assigned administrative agency] or aggrieved employees—that the employer has violated the Labor Code." *Iskanian*, *supra*, at 386-387 (emphasis original).

But *Iskanian*'s spin, echoed by the California courts in this case, does not wash. The touchstone for FAA coverage is a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. (Respondent does not dispute that the arbitration contract here qualifies as "involving commerce.") No distinction is made or implied by the FAA's text between arbitration contracts where one party, either directly or as the real party in interest, is the government and arbitration agreements where both parties are private. The natural, sensible reading of section 2 is that the FAA's scope applies to *any* contract for arbitration "evidencing a transaction involving commerce," regardless of the nature of the parties or the dispute to be arbitrated. Unless another provision of the FAA (see 9 U.S.C. § 1 excluding certain contracts involving transportation workers from the FAA) or other federal statutes expressly provide that the FAA does *not* apply to arbitration contracts, it applies. While Congress has exempted various claims from the FAA, none are state claims like the PAGA that are based on a state's "public policy."[11]

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[11] See, *e.g.*, Motor Vehicles Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2001) (prohibiting motor vehicle manufacturers, importers, and distributors from requiring arbitration under their franchise agreements); Dep't of Def. Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 § 8102(a)(1)-(2) (2011) (prohibiting government contractors from requiring arbitration of Title VII claims or tort claims arising from a sexual assault or harassment); and John Warner Nat'l Def.

When reading and applying the FAA, a court should not add or delete words from it to clarify its meaning, or draw distinctions the statute does not expressly make. "[O]ur problem is to construe what Congress has written. Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). "[T]here is no warrant for seeking refined arguments to show that the statute does not mean what it says." *United States v. Wurzbach*, 280 U.S. 396, 398 (1930) (per Holmes, J.). "[I]t is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law." Laurence H. Tribe, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 66 (1997) (emphasis original).

2. The legislative history of the FAA does not alter the meaning of its textual language.

Resort to isolated testimony from the sparse legislative history surrounding the FAA does not permit rewriting its meaning contrary to its literal language. *Iskanian*, however, seeks to bolster its concocted out-of-thin-air distinction between private contracts and those where the state is a party by citation to the testimony of two witnesses when the FAA was pending before a congressional committee.

Authorization Act, 10 U.S.C. § 987(e)(3) (2012) (making it unlawful for a consumer creditor to require an active duty service member, her spouse, child, or dependent to submit to arbitration a claim involving the extension of consumer credit).

Iskanian, *supra*, 59 Cal.4th at 385. One witness, a principal drafter of the FAA, reportedly stated the FAA's "primary object was the settlement of ordinary commercial disputes." *Id.* Yet, he did not testify that the FAA exempted from arbitration disputes where the government was the real party in interest.

"[L]egislative history is not the law. 'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute 'we do not inquire what the legislature meant; we ask only what the statute means.' " *Epic Systems, supra*, 138 S. Ct. at 1631, quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 396, 397 (1951). "[A] law is the best expositor of itself." *Pennington v. Coxe*, 2 Cranch 33, 6 U.S. 33, 53 (1804) (per Marshall, C.J.).

Iskanian trumpets there is "no indication [from the legislative history] that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals." 59 Cal.4th at 385. Neither is there any indication that it was *not* intended to cover such disputes. To infer from a sliver of legislative testimony that the plain language of the FAA does not apply when the government is a party is illogical and of no import in discerning the meaning of the FAA's actual text. Congressional "silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Rusello v. United States*, 464 U.S. 16, 21 (1983), quoting *Richards v. United States*, 369 U.S. 1, 9 (1962). "[W]e have frequently cautioned that it is at best treacherous to find in congressional silence . . . the adoption of a controlling

rule of law." *United States v. Well*, 519 U.S. 482, 496 (1997).

B. The Purpose of the FAA is to Enforce Bilateral Arbitration Contracts According to their Terms, and Representative PAGA Claims Violate that Objective.

The "FAA's central purpose is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen, supra*, 559 U.S. at 664. "We recognize that in its usual acceptation the term ["arbitration"] indicates a proceeding based entirely on the consent of the parties." *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas,* 267 U.S. 552, 564 (1925). Although courts may accomplish that end by relying on state contract principles, state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. *Concepcion*, *supra*, 563 U.S. at 352 (internal quotation marks omitted).

Congress enacted the FAA to replace the longstanding judicial hostility to arbitration that existed at common law with a national policy favoring arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). That national policy "appli[es] in state as well as federal courts" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. The FAA's displacement of conflicting state law has been repeatedly reaffirmed. See, *e.g.*, *Buckeye CheckCashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

When, as here, state law prohibits the arbitration of a particular type of claim, such as a PAGA claim, the FAA displaces the conflicting rule. *Concepcion*, 563 U.S. at 343. This ensures that courts enforce arbitration agreements according to the FAA and the terms of the agreements rather than state law. "FAA § 2 declares a national policy favoring arbitration when the parties contract for that mode of dispute resolution. That national policy applies in state as well as federal courts and forecloses state legislative attempts to undercut the enforceability of arbitration agreements." *Preston v. Ferrer*, 552 U.S. 346, 354 (2008) (citations omitted).

Arbitration under the FAA "is a matter of consent" and "parties are generally free to structure their arbitration agreements as they see fit." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*, 489 U.S. 468, 479 (1989). "[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010).

The parties to this agreement could have consented to allow representative PAGA claims to be decided by arbitration or in court, but they did not. If there is any disagreement between the parties as to the textual import of the arbitration agreement, then the presumption favors arbitration and the ordinary rule that ambiguity in contracts should be construed against the drafter has no force. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). Instead, the parties here agreed that respondent waived any

statutory right she had to bring her representative PAGA claim against defendant in any forum, and the only disagreement is whether that waiver is entitled to enforcement.

Respondent's consent to waive her PAGA representative claim was not due to duress, fraud or circumstances making the contract unconscionable; and she has not asserted any such grounds. A contract to arbitrate employment disputes does not run afoul of traditional contract defenses merely because it is adhesive. "[T]he times in which consumer [and employment] contracts [are] anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346-347. And an arbitration agreement is not "unconscionable" or "illegal" when, as here, the drafter of the contract presents an opportunity to opt-out of it. *Kilgore v. KeyBank Nat. Ass'n.*, 718 F.3d 1198, 1199 (9th Cir. 2002) (finding no procedural unconscionability due to opt-out provision); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002)(same); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002) (same).

1. *Iskanian*'s public policy exception to bilateral arbitration for representative PAGA claims violates the FAA.

Iskanian pays lip service to the FAA's broad preemptive sweep while creating a PAGA exception to it based on state public policy. "[A]n arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to *public policy*." 59 Cal.4th at 360; italics added. But this is

precisely what the FAA prohibits a state from doing. "If § 2 [of the FAA] means anything, it is that courts cannot refuse to enforce arbitration agreements because of a *state public policy against arbitration*, even if the policy nominally applies to 'any contract.' " *Concepcion*, 563 U.S. at 352-353; italics added.

Section 2 of the FAA "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under our precedent, this means the savings clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic Systems*, 138 S. Ct. at 1622, omitting internal quotation marks from *Concepcion* and *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017) (*Kindred Nursing*).

In *Kindred Nursing*, the Court explained that "in *Concepcion* . . . we described a hypothetical state law declaring unenforceable any contract that disallowed an ultimate disposition of a dispute by a jury. Such a law might avoid referring to arbitration by name; but still, . . . it would rely on the uniqueness of an agreement to arbitrate as its basis—and thereby violate the FAA." *Kindred Nursing*, 137 S. Ct. at 1426.

The "fundamental attributes of arbitration" are "its speed and simplicity and inexpensiveness" as compared to litigation. *Epic Systems*, 138 S. Ct. at 1623. Parties "may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." *Concepcion*, 563 U.S. at 344. Waivers for class and representative

claims are copacetic in arbitration agreements because each of these actions necessarily sacrifices "the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id*.

Indeed, "representative" actions frustrate and interfere with individual arbitration even more than "class actions." All class actions are representative actions, though not all representative actions are class actions. Still, PAGA suits are representative actions in nature and seemingly parallel the class action model. See Matthew M. Sonne & Kevin P. Jackson, Sheppard Mullin Richter & Hampton, *Towards a "Manageability" Standard in PAGA Discovery*, Ass'n of Business Trial Lawyers Rep., Vol. XVI, No.3 (Summer 2014). The key features of "class" and "representative" actions are the same: employees sue their employers on behalf of themselves and others similarly situated. However, "PAGA representative actions are not required to meet class action requirements. Thus, PAGA potentially functions as a 'back-door' route to a class action lawsuit, which greatly increases the potential liability for an employer-defendant" like petitioner. Matthew J. Goodman (Comment), *The Private Attorney General Act: How to Manage the Unmanageable*, 56 SANTA CLARA L. REV. 413, 420 (2016).

In both representative and class actions, "the potential recovery is greater . . . than it would be if the plaintiff sought only individual relief." *Miranda v. Anderson Enterprises, Inc*., 241 Cal.App.4th 196, 200 (2015). PAGA statutory penalties are generally "one

hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." See *Iskanian*, *supra*, 59 Cal.4th at 384.

The PAGA's unwaivable representative action vitiates a key attribute of arbitration by allowing discovery as to Labor Code violations for *all* employees. *Huff v. Securitas Security Services USA, Inc.*, 23 Cal.App.5th 745, 750 (2018). And "manageability" problems are often present in PAGA representative actions, making individual arbitration sanctioned by the FAA a "favored" means for dispute resolution over representative PAGA claims. See, *e.g.*, Goodman, *supra*, 56 *SANTA CLARA L. REV.* at 437, 443.

State law cannot prohibit waiver of a representative action in the face of the FAA for this would make arbitration "wind up looking like the litigation it was meant to displace." *Id.* And *Iskanian*'s refuge under the rationale that a waiver of the representative PAGA claim is "illegal" and unenforceable cannot succeed because it "impermissibly disfavors arbitration." *Epic Systems*, 138 S. Ct. at 1623.

2. *Iskanian*'s distinction between pre-dispute and post-dispute arbitration agreements makes no sense.

Iskanian undercuts its own holding that a PAGA representative action by an "aggrieved employee" cannot be waived by qualifying that principle to allow waivers depending on *when* they are made. "[I]t is contrary to public policy for an employment agreement

to eliminate this [representative action] choice altogether by requiring employees to waive the right to bring a PAGA action *before* any dispute arises." *Iskanian*, 59 Cal.4th at 383; italics added.

But if a representative action waiver is against public policy when made *before* a dispute arises, how and why does it become magically compatible with public policy when made *after* a dispute arises? *Iskanian* does not explain the reasoning behind this distinction other than to cite *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 103 (2000) and add a bracketed assertion that "[waivers freely made *after* a dispute has arisen are not necessarily contrary to public policy]." *Iskanian*, 59 Cal.4th at 383; italics added.

Iskanian's public policy distinction for permissible as opposed to "illegal" waivers based on the "timing" of their assertion in relation to the making of the agreement does not rest on any articulated legal principle so much as it evinces an attempted "'work-around' of [High Court] precedent upholding mandatory arbitration procedures." Stephanie Greene & Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements – #Timesup on Workers' Rights,* 15 STAN. J. CIV. RTS. & CIV. LIBERTIES 43, 83 (2019).

This "work-around" of arbitration contracts for PAGA representative claims is based on the fallacious notion that a pre-dispute arbitration agreement is "forced and unfair" while a post-dispute arbitration agreement is okay. But all arbitration agreements to have come before the Court that amicus discusses here

are pre-dispute agreements; and all cited opinions that involve state statutes or state public policy that impede enforcement of individual arbitration agreements have been swept into the FAA's preemptive ditch.

For example, in *Kindred Nursing*, *supra*, 137 S. Ct. 1421, the Court reversed a decision by the Kentucky Supreme Court that invalidated a power of attorney binding the plaintiffs to an arbitration agreement because it did not specifically waive the plaintiffs' right to trial by jury, a "sacred" and "inviolate" right secured them by the state's constitution. To form such a contract, the court said, the representative must possess specific authority to "waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury." *Extendcare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 327 (2015).

This Court, however, citing the FAA and *Concepcion,* explained the Kentucky Supreme Court's ruling was unconstitutional because it was really "a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing*, 137 S. Ct. at 1427. And it does not matter, the Court hammered home, whether the charged illegality was in the making or the enforcement of the arbitration agreement. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made. Precedent confirms that point." *Id*. at 1428.

What the Kentucky Supreme Court ruled in *Kindred* is no different from what *Iskanian* and the trial and appellate courts did here. All violated the FAA by impeding "the ability of [parties] to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Id.* at 1429.

Concepcion underscores that a waiver in an arbitration agreement can completely extinguish a state's conferral of statutory or constitutional rights. In discussing the scope of the FAA's protective ambit for arbitration agreements that waive state laws and their underlying public policies inimical to individualized arbitration, *Concepcion* describes a hypothetical state law declaring unenforceable any contract that "disallow[ed] an ultimate disposition [of a dispute] by a jury." 563 U.S. at 342. To further highlight this principle, *Concepcion* cited another "obvious illustration" of a case finding "unconscionable or unenforceable [or illegal] . . . as *against public policy* . . . arbitration agreements that fail to provide for judicially monitored discovery," that "fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)." *Concepcion*, 563 U.S. at 341-342; italics added.

Concepcion warned, prescient as to PAGA, that these examples were "not fanciful, since the judicial hostility towards arbitration that prompted the FAA ha[s] manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Id.* Nonetheless, *Concepcion* clarifies that no court may

"rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be [illegal], for this would enable the court to effect what . . . the state legislature cannot." *Id.* at 341, quoting *Perry v. Thomas,* 482 U.S. 483, 493, n. 9.

Epic Systems reinforces why *Iskanian* contravenes the FAA. *Epic* describes *Concepcion* as "readily acknowledging" that "the defense of unconscionability, [like the state defense of "illegality" for contracts against public policy asserted here and in *Iskanian*], formally applie[s] in both the litigation and the arbitration context." *Epic Systems*, 138 S. Ct. at 1622. But that defense still fails "because it interfere[s] with a fundamental attribute of arbitration . . . by effectively permitting any [aggrieved employee] in arbitration to demand [representative] proceedings despite the traditionally individualized and informal nature of arbitration." *Id*. at 1622-1623.

3. Vindication of an important *state* statutory right cannot obviate bilateral contractual arbitration.

Iskanian also holds that the PAGA's representative action cannot be waived because to do so would thwart the "vindication" of an important statutory right. The "sole purpose" of "California's public policy prohibiting waiver of PAGA claims," we are told, is to "*vindicate* the [state's] interest in enforcing the Labor Code." *Iskanian*, 59 Cal.4th at 388; italics added. See also *Williams v. Superior Court,* 3 Cal.5th 531, 548 (2017).

But "vindication" of statutory rights only counts under the FAA for federal, not state, laws. *American*

Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013), teaches that a class action waiver is enforceable even though it violates a "vindication" rationale based on a state "unconscionability" rule. *Id.* at 235-239. Justice Kagan dissented in *Amex* but clarified, consistent with the majority opinion, that the effective vindication doctrine is confined to federal, not state law, claims. A state law invalidating an arbitration agreement, she spells out, "may not thwart federal law, irrespective of exactly how it does so," and the effective vindication principle must be reconciled with the FAA and "all the rest of *federal* law." 570 U.S. at 240; italics added. "Our effective-vindication rule comes into play *only* when the FAA is alleged to conflict with another *federal* law . . .." *Id.* at 252; italics added. "We have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal law; any effective-vindication exception that might possibly exist would "come into play only when the FAA is alleged to conflict with another federal law." *Ibid.*

C. The PAGA is Not a Qui Tam Action.

Iskanian notes that a PAGA claim is "a type of qui tam action." *Iskanian*, *supra*, at 382. Specifically, it analogizes the PAGA to the federal False Claims Act (FCA; 31 U.S.C. § 3730). *Id.* at 311-312. This assertion supposedly propels PAGA claims outside the ambit of bilateral arbitration for employee-employer disputes involving state labor code violations. But significant reasons undercut *Iskanian's* purported analogy to excise PAGA from the protective umbrella of the FAA

for contractual arbitration of employee disputes with their employers.

First, the underlying assumption of *Iskanian's* analogy is that FCA qui tam actions are not subject to FAA arbitration. Federal courts are, however, not in accord on this point. Compare, *e.g.*, *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 794 (9th Cir. 2017) *with United States v. Bankers Ins.* Co., 245 F.3d 315, 325 (4th Cir. 2001). Even assuming that the FCA and the FAA are inconsistent and that, therefore, FCA claims cannot be arbitrated, this does not mean a state statute like PAGA falls outside the FAA. After all, if "vindication" of statutory rights only counts under the FAA for federal, not state, laws, assignment of the state's interest to individual plaintiff's would logically differ from the federal government's assignment of its rights. See discussion *ante* at pp. 22-23.

Second, the FCA requires control by the federal government over the relator in prosecuting its assigned interest to a private party in contrast to PAGA suits. Under the FCA, the federal government is authorized to take over control of the case from the relator at any time, to seek and obtain a stay of the relator's discovery attempts, and to dismiss or settle the suit over the objections of the relator. Pet. Merits Brief, p. 41. By contrast, a PAGA claim is entirely under the control of the plaintiff who brings it. The state agency responsible for administering PAGA can, of course, bring an action directly against an employer for violating the state's labor code, but once a private plaintiff initiates a PAGA suit, that agency is powerless to intervene, stay

discovery, or affect the dismissal or settlement of the action.

A "PAGA [claim] represents a permanent, full assignment of California's interest to the aggrieved employee," while qui tam claims under the FCA involve a partial assignment; PAGA also "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." *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 677 (9th Cir. 2021).[12] "PAGA prevents California from intervening in a suit brought by the aggrieved employee, yet still binds the State to whatever judgment results. [¶]A complete assignment to this degree—an anomaly among modern qui tam statutes—undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees." *Id.*

Third, *Iskanian's* reference to *Equal Opportunity Commission v. Waffle House Inc.*, 534 U.S. 279 (2002) does not help, but goes against its assertion that PAGA claims are essentially qui tam actions. *Iskanian*, 59 Cal.4th at 386. *Waffle House* holds that the EEOC can bring suit under its own name and is not bound by an arbitration agreement between the employee and

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[12] *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal.5th 924, 930 (2021), decided after *Magadia* and contrary to one of its major holdings, held that even though a plaintiff's "individual [PAGA] claim may be time barred does not nullify the alleged Labor Code violations nor strip [plaintiff] of . . . standing to pursue PAGA remedies."

employer. That conclusion, however, hinged on the reality of fact and law that the EEOC, in contrast to the state administrative agency for PAGA, is "the master of its own case."*Id.* at 290-91. Here, the respondent completely controls her PAGA litigation "without governmental supervision." *Iskanian*, 59 Cal.4th at 389-390. See discussion in Pet. Merits Brief, pp. 37-39. This removal of PAGA claims from agency supervision reinforces the viability of employee waivers of same in lieu of signed bilateral arbitration contracts. *Cf.*, Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 *DEPAUL L. REV.* 357, 400 (2020).

Iskanian's labeling of PAGA as a qui tam action, then – a shaky linchpin to its rationale for exempting PAGA claims from employee waivers in favor of bilateral arbitration – is akin to calling a tail a leg. "If you call a tail a leg, went the riddle attributed to Lincoln, how many legs has a dog. The answer: four, 'because calling a tail a leg doesn't make it a leg." William Safire, *Essay; Calling a Tail a Leg*, *NEW YORK TIMES*, Feb. 22, 1993, Section A, p. 17.

CONCLUSION

The arbitration agreement here should be enforced according to its terms. This is the central purpose of the FAA and the result flowing from its broad preemptive sweep as limned by consistent opinions of this Court. State public policy underlying the PAGA's non-waivable representative action is an impediment to the strong, substantive national policy favoring the enforcement of bilateral arbitration contracts. California's public policy interest in vindicating PAGA's representative action requirement must yield to the

FAA's protection of arbitration agreements. PAGA, as interpreted by *Iskanian* and as applied by the courts below, squarely conflicts with the FAA.

For all of these reasons, the Court should reverse.

Respectfully submitted,

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