No. 20-1573

In the
Supreme Court of the United States

VIKING RIVER CRUISES, INC.
Petitioner,

v.

ANGIE MORIANA,
Respondent.

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

AMICUS CURIAE BRIEF OF RESTAURANT LAW CENTER IN SUPPORT OF PETITIONER VIKING RIVER CRUISES, INC.

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

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

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Pursuant to Supreme Court Rule 37.6, Amicus makes the following disclosure: No counsel for a party to this matter authored any portion of this brief or made a monetary contribution to fund the preparation or submission of this brief.

economy. Supporting these businesses is Amicus's primary purpose.

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

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[2] Petitioner provided blanket consent for amicus briefs in this matter. Blanket Consent Filed by Petitioner (May 25, 2021). On June 4, 2021, pursuant to Supreme Court Rules 37.2(a) and 37.3(a) Amicus provided notice to the Parties that they intended to submit a brief and requested permission from Respondent to do so in this matter. On June 4, 2021, Respondent graciously approved Amicus's filing of a brief.

Amicus and their members have a vital interest in these proceedings.

II. SUMMARY OF ARGUMENT

In 2003 the Legislature created the California Private Attorneys General Act (PAGA), ostensibly to give employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California. The Legislature's goal was to encourage compliance with the state's labor code. In 2014 the California Supreme Court issued its decision in *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). This decision held that despite the Federal Arbitration Act ("FAA") and the strong national public policy in favor of arbitration, that bi-lateral arbitration agreements were unenforceable when applied to PAGA claims. *Iskanian* has caused PAGA to be abused by opening up a back door to avoid bi-lateral arbitration agreements.

Employers and employees have long agreed to private arbitration as a means to resolve their disputes. Employers and employees will decide to enter into these agreements for diverse reasons, including costs, risks, and delay associated with class action procedures. This Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) recognized and enhanced those agreements. The decision in *Iskanian* has resulted in PAGA being used as a back door to avoid arbitration agreements and

generate fees for the plaintiffs' bar. Interestingly, *Iskanian* has been abused by the plaintiffs' bar to invalidate private agreements of employees that have not even been deputized by the State of California. This scheme undermines the purpose of *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). At its core, *Iskanian* ignores the idea that you find a plaintiff as they are, *i.e.* a party to a private agreement to arbitrate their claims.

In addition to undermining the Court's ruling in *Epic Systems*, *Iskanian* ignores the fiction that modern day PAGA proceedings have become, while enriching private attorneys and representative employees with billions of dollars. As explained more fully *infra*, since 2016, California's Labor Workforce Development Agency ("LDWA"), receives an estimated 15 PAGA notices every day. Yet for the three most recent fiscal years, the LWDA has managed to administer and decide a paltry 12 PAGA cases. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. In three years the LDWA has managed to bring less cases pursuant to PAGA than the number of notices from private attorneys the LDWA receives on any given day. In reality, once a representative plaintiff is anointed as a stand in for California's Attorney General due to the LWDA's largescale inaction, the plaintiff can ignore her own

previous arbitration agreement and pursue multiple violations, some of which she did not even personally suffer. These proceedings skirt the strong public policy of this Court in favor of enforcing bi-lateral agreements to have disputes resolved through the streamlined process of arbitration, all at great cost to California's employers. Since 2013, it is estimated that this fiction has cost California employers between $1,424,984,340 and $10,000,000,000.

This issue is of utmost importance to restaurants and other foodservice employers in California. These employers that make up about 10% of the nation's workforce are seeing an explosion of PAGA representative claims specifically because *Iskanian* opened a back door to skirt *Epic Systems* and evade agreements to arbitrate. This Court's review is necessary to ensure that the back door is closed for good and *Epic* and the FAA retain their purpose favoring arbitration.

III. ARGUMENT

A. History of California's Private Attorneys General Act

In 2003, the Legislature created the California Private Attorneys General Act ("PAGA") to give injured employees the ability to pursue penalties on behalf of similarly aggrieved employees and the State of California for the employer's alleged violations of labor laws and regulations governing employers. The

Legislature's purpose in enacting the PAGA in 2004 was two-fold. To address inadequacies in labor law enforcement, the statute enacted civil penalties to the many Labor Code provisions that previously carried criminal, but not civil, penalties. ASSEMBLY FLOOR, FLOOR ANALYSIS of SB 796, at 3 (Aug. 27, 2003). Second, due to a shortage of government resources to pursue enforcement, the statute authorized aggrieved employees to seek monetary awards on a representative basis on behalf of themselves and other past or present employees of that employer. *Id*.

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

Code violations that did not previously authorize such penalties. *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019).

As such, PAGA is a "procedural statute" allowing an aggrieved employee to recover civil penalties for violations of California's Labor Code where the state labor law enforcement agency declines to do so. *Amalgamated Transit Union, Loc. 1756*, 209 P. 3d at 943; Cal. Lab. Code § 2699(a). Thus, an employee has no right to pursue statutory penalties on behalf of the state unless she is "aggrieved." Cal. Lab. Code § 2699(a). An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."

Once this necessary predicate is satisfied, the aggrieved employee may seek civil penalties for Labor Code violations committed against her and on behalf of other current or former employees for the same or similar violations. Cal. Lab. Code § 2699(a). If the employee alleges that she was "affected by at least one Labor Code violation," she may also seek penalties on a representative basis for additional Labor Code violations that affected others with the same employer. *Huff v. Securitas Sec. Servs. USA, Inc.*, 233 Cal.Rptr.3d 502, 504 (Cal. Ct. App. 2018).

Before bringing an action for civil penalties, an employee must give written notice of the alleged

Labor Code violations to the employer and the State's LWDA, including the facts and theories supporting the violations. Cal. Lab. Code § 2699.3(a). If the agency notifies the employee that it does not intend to investigate or fails to respond within 65 days, the employee may bring a civil action. *Id.* § 2699.3(a)(2)(A). An employee may also commence a civil action if the agency investigates but decides not to issue a citation or fails to act within the prescribed time period. *Id.* § 2699.3(a)(2)(B).

For each alleged violation of the California Labor Code, penalties are assessed against an employer on a per pay period basis for each aggrieved employee affected. Cal. Lab. Code § 2699(f)(2). Unless the Labor Code provision specifically provides for a penalty, PAGA assesses default penalties against an employer of $100 per employee per pay period for the initial violation, and $200 per employee per pay period for each subsequent violation. *Id.* Civil penalties recovered under PAGA are split with 25% paid to the employees and 75% paid to the State. *Id.* § 2699(i). A prevailing employee is also entitled to recover an award of reasonable attorney's fees and costs. *Id.* § 2699(g)(1). While an aggrieved employee purportedly brings an action on behalf of the State, the employee controls the litigation from inception to conclusion and is bound by any judgment.

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

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

Relying on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the California Supreme Court first abrogated its holding in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) which deemed many class-action waivers in employment contracts unenforceable. *See Iskanian*, 327 P.3d at 133-37. The court acknowledged that the FAA preempted the *Gentry* rule pursuant to *Concepcion*. *Id.* at 135-37. Accordingly, the class-action waiver in the subject

arbitration agreement was valid and the employee was required to arbitrate his individual claims.

Nonetheless, the court held an agreement to waive the right to bring a PAGA action is contrary to public policy and unenforceable. 327 P.3d at 149. The court reasoned such an agreement is against public policy because permitting an employee to waive PAGA claims would "disable one of the primary mechanisms for enforcing the Labor Code." *Id*. The court then emphasized that the FAA's goal of promoting arbitration as a means of private dispute resolution "does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf." *Id.* at 133. In fact, because "a PAGA action is a dispute between an employer and the state," the court claimed it is not a private dispute and thus falls outside the FAA's coverage.

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

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

A few years after *Iskanian*, this Court examined whether employees should "always be permitted to bring" representative-type claims, regardless of an alternative agreement with their employer. *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1619 (2018). In *Epic*, employees signed an arbitration agreement with their employers that specified individualized arbitration with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id*. at 1619-20. The employees argued contractual provisions requiring individualized arbitration rather than class/collective proceedings violated the National Labor Relations Act ("NLRA"), and that illegality served as grounds for revoking the contract. *Id*. at 1622.

This Court concluded that an employee cannot strategically maneuver around their individual arbitration agreement and the FAA simply by asserting claims *on behalf of others*. 138 S.Ct. at 1619-32. In fact, this Court stated, "The parties…contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized *rather than class or collective action procedures. And this much the [FAA]*

seems to protect pretty absolutely." *Id.* at 1621 (emphasis added).

In doing so, this Court reaffirmed that the FAA requires that courts "rigorously" enforce arbitration agreements according to their terms, even including terms for individualized proceedings. 138 S.Ct. at 1619-21. This Court also reaffirmed *Concepcion*'s "*essential* insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties' consent." *Id*. at 1623 (emphasis added). This Court aptly cautioned that courts "must be alert to new devices and formulas" that aim to interfere with arbitration's essential attributes. *Id.* PAGA, and the post-*Epic* cases ignoring this Court's *Epic* holding by using *Iskanian* to invalidate representative waivers do just that.

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

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

Iskanian and its post-*Epic* progeny continue to prohibit PAGA waivers, in part, based on their determination that PAGA is akin to "governmental" qui tam actions brought "on behalf of the state," and thus waiving them contravenes public policy. *Iskanian*, 327 P.3d at 148, 150-151; *Correia v. NB Baker Electric, Inc.*, 244 Cal.Rptr.3d 177, 187-188 (Cal. Ct. App. 2019); *Zakaryan v. The Men's Wearhouse, Inc.*, 245 Cal.Rptr.3d 333, 340 (Cal. Ct. App. 2019),*disapproved on other grounds* by *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019); *ZB,* 448 P.3d at 243; *Collie v. Icee Co.*, 266 Cal.Rptr.3d 145, 147-149 (Cal. Ct. App. 2020); *Provost v. YourMechanic, Inc.*, 269 Cal.Rptr.3d 903, 908 (Cal. Ct. App. 2020) ; *Olson v. Lyft, Inc.*, 270 Cal.Rptr.3d 739, 744 (Cal. Ct. App. 2020) ; *Contreras v. Superior Court of Los Angeles County*, 275 Cal.Rptr.3d 741, 750 (Cal. Ct. App. 2021). This semantic distinction ignores the purpose and plain language of PAGA.

While the California Supreme Court has categorized PAGA as "a type of qui tam action," the Ninth Circuit said courts, "must look beyond the mere label attached…and scrutinize the nature of the claim itself. *Magadia v. Wal-Mart Associates, Inc.*, No. 19-16184, 2021 WL 2176584, at *5 (9th Cir. May 28, 2021). PAGA is the antithesis of qui tam and has "many" inconsistent features. *Id.* (PAGA's features departed from the traditional criteria of qui tam statutes). In fact, "PAGA differs in significant respects from traditional *qui tam* statutes." *Id. at *6.* Qui tam

actions remedy a government injury, whereas PAGA actions protect employees. *See, e.g. People ex rel. Allstate Insurance Co. v. Weitzman*, 132 Cal.Rptr.2d 165, 190 (Cal. Ct. App. 2003)(qui tam actions are to prosecute fraudulent claims against the government); *Caliber Bodyworks, Inc. v. Superior Court*, 36 Cal.Rptr.3d 31, 37-38 (Cal. Ct. App. 2005) *disapproved on other grounds* in *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243 (Cal. 2019)(PAGA is necessary to achieve compliance with state laws). The government is the "direct victim" in a qui tam action, while the employee is the "aggrieved" party in a PAGA action. *See, e.g. Weitzman,* 132 Cal.Rptr.2d at 186, 190; Cal. Labor Code, § 2699(a).

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

not provide the LWDA the right to later intervene. Cal. Lab. Code, § 2699 *et seq*. A qui tam action can only be dismissed with written consent from the court and prosecuting authority. 31 U.S.C. § 3730(b)(1); Cal. Gov't. Code, § 12652(c)(1). PAGA does not require that the LWDA consent to dismissal or settlement, and only confers *courts* the authority to "intervene" to review and approve PAGA settlements. Cal. Lab. Code, § 2699(1)(2).

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

E. PAGA's Fiction

The court in *Iskanian* conveniently ignored this Court's suggestion in *Waffle House* that the arbitration agreement may have constrained the EEOC if the signatory employee whose rights the EEOC sought to vindicate could exercise some control over the litigation. *Waffle House*. 534 U.S. at 291. Instead, the court in *Iskanian* compounded its flawed argument by stating that nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of an action brought by "an employee bound by an arbitration agreement bringing suit on behalf of the government to obtain remedies other than victim-specific relief, i.e., civil penalties paid *largely* into the state treasury." *Iskanian*, 173 Cal.Rptr.3d at 151.

In truth and practice, PAGA provides for vastly more relief than merely 25% of civil penalties recovered per representative action. Due in large part to *Iskanian*'s faulty holding in light of *Concepcion* and *Epic*, employees have a relatively clear path to filing claims in court. The only prerequisite is to give notice to the LWDA and await its decision to investigate or allow the claim to proceed in court. Cal. Lab. Code § 2699.3. However, the LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analyst's Office stated that "LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented." Legislative Analyst's Office, *The 2016-*

17 Budget: Labor Code Private Attorneys General Act Resources, Budget and Policy Post (Mar. 25, 2016), https://lao.ca.gov/Publications/Report/3403.

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

As of 2016, over 30,000 PAGA lawsuits were filed due to the lack of agency enforcement. ASSEMBLY COMM. ON LAB. & EMP., ASSEMBLY ANALYSIS OF AB 2464, at 11 (May 4, 2016). A recently published report analyzing several public records requests indicates that an employer's average settlement payout is 41 percent more than cases pending before the LWDA, even though employees receive nearly twice as much money in the latter compared to the former. CABIA Foundation, *California Private Attorneys General Act of 2004 Outcomes and Recommendations* 4 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. Despite the increased settlement payouts for PAGA actions, the State of California receives an average of $27,000 less from

PAGA actions prosecuted in court rather than those before the LWDA. *Id*. at 9. Cases also last approximately 220 more days in court than those retained by the LWDA. *Id*.

Since 2010, over 65,000 PAGA Notices have been filed with California's LWDA[3] and over 9,000 PAGA lawsuits have been filed in California since 2013. STATE OF CAL. DEP'T OF FIN., BUDGET

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

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

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

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

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

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

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

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

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[5] The actual cost to employers to resolve PAGA lawsuits in California is potentially much higher given that often times the PAGA portion of a settlement is miniscule compared to the total settlement amount. For example, in *Viceral v. Mistras Group, Inc.*, No. l5-cv-02198-EMC, 2017 WL 661352 (N.D. Cal. Feb. 17, 2017), the Court approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000.

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

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

Concepcion and *Epic* allow employees to waive class and collective rights. 563 U.S. 333; 138 S.Ct. 1612. *Iskanian* semantically carves out a PAGA waiver exception from FAA preemption by claiming PAGA actions are like qui tam actions. As discussed, they are fundamentally different. In reality, PAGA is much more like a class action and is thus subject to *Epic*'s control.

Both class actions and PAGA are equitable in nature. Both allow an individual to bring an action on behalf of others. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Arias v. Superior Court*, 209 P.3d 923, 933-934 (Cal. 2009). Both are, or can, require that the state be notified prior to filing. *Harris v. County of Orange*, 682 F.3d 1126, 1136 (9th Cir. 2012) (class action plaintiff was required to exhaust administrative remedies by notifying the government prior to filing discrimination claim); Cal. Lab. Code, § 2699.3(a)(1) ("the aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer…"). Both class and PAGA named plaintiffs receive a premium payment. *See, e.g. Clark v. American Residential Servs. LLC*, 96 Cal.Rptr.3d 441, 455 (Cal. Ct. App. 2009) (class action named plaintiff is entitled to an "incentive or enhancement award"); Cal. Lab. Code, § 2699(i) (25% of the recovery goes to the aggrieved employees). In both, the incentive/enhancement award is meant to enhance compliance with the law. *See, e.g., Clark*, 96 Cal.Rptr.3d at 455 (incentive award is to induce the plaintiff to file a class action); *Dunlap v. Superior Court*, 47 Cal.Rptr.3d 614, 617-618 (Cal. Ct. App. 2006) (PAGA was adopted to enhance the enforcement abilities of the Labor Commissioner). Both reward plaintiffs with attorneys' fees. *See, e.g. Garabedian v. Los Angeles Cellular Telephone Co.*, 12 Cal.Rptr.3d 737, 742 (Cal. Ct. App.

2004) (attorneys' fees should be fair in a class action); Cal. Lab. Code, § 2699(g)(1) (prevailing employee is entitled to attorneys' fees). Both class and PAGA settlements require court approval. Cal. R. Ct. 3.769(a); Cal. Lab. Code, § 2699(1).

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

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

Iskanian and its post-*Epic* progeny semantically preclude PAGA waivers by strategically characterizing them as "state" actions for which waiver would contravene public policy by frustrating PAGA's objectives and precluding the PAGA action in any forum. *Iskanian*, 327 P.3d at 149; *Gonzalez v. Emeritus Corporation et al.*, 407 F.Supp.3d 862 (N.D. Cal. 2012); *Correia*, 244 Cal.Rptr.3d at 188; *Zakaryan*, 245 Cal.Rptr.3d 340, *disapproved on other grounds* by *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019); *ZB,* 448 P.3d at 243; *Collie*, 266 Cal.Rptr.3d at 147-149; *Provost*, 269 Cal.Rptr.3d at 908; *Olson,* 270 Cal.Rptr.3d at 744 ; *Contreras*, 275 Cal.Rptr.3d at 750. In doing so, these cases ignore this Court's controlling

precedent that states "cannot require an FAA-inconsistent procedure, even if "desirable for unrelated reasons" and this Court's finding that the FAA preempts state laws discriminating against arbitration. *Concepcion*, 563 U.S. at 351; *Kindred Nursing Centers L.P. v. Clark*, 137 S.Ct. 1421 (2017). In *Kindred Nursing*, this Court found a Kentucky state law requiring a specific statement allowing a general power of attorney to delegate the right to enter into an arbitration agreement violated the FAA because "[s]uch a rule is too tailor-made to arbitration agreements – subjecting them, by virtue of their defining trait, to uncommon barriers – to survive the FAA's edict against singling out those contracts for disfavored treatment." 137 S.Ct. at 1427. *Iskanian* and its post-*Epic* progeny do the same and, therefore, fall victim to *Epic*.

Further, enforcing an employee's PAGA waiver does not fully waive the underlying PAGA claim in any forum as *Iskanian* concluded; rather, it simply precludes a specific employee from serving as the "proxy or agent" of the state for PAGA purposes. *Iskanian*, 327 P.3d at 133; *Correia*, 244 Cal.Rptr.3d at 188. Since "the state is the owner of the claim and the real party in interest," the LWDA still owns the claim and can pursue it via other avenues. *See id.* at 189-190. Further, any other employee who did not sign an arbitration agreement, signed a non-representative waiver agreement, or opted out of a representative waiver could serve as the state's "proxy or agent" for

PAGA purposes. *See id.* at 188. Ironically, while *Iskanian* concluded depriving an employee of the option to bring a PAGA claim contravened public policy, it ignored that all other aggrieved employees are precluded from doing so (and are bound by a judgment in that action with no control over the strategy or litigation) once another employee brings a PAGA suit against their employer. *Iskanian*, 327 P.3d at 147.

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

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

Correia v. NB Baker Electric, Inc. is a prime example of how California continues to get it wrong. In *Correia*, a California Court of Appeal reasoned that *Iskanian*'s PAGA waiver ban violated public policy and was not preempted by the FAA because PAGA is a "governmental claim," and *Epic* did not address that issue. 244 Cal.Rptr.3d 177, 187-188 (Cal. Ct. App. 2019). Since then, California courts continue to incorrectly adopt the same reasoning, highlighting the need for this Court to intervene. *Zakaryan*, 245 Cal.Rptr.3d at 340, *disapproved on other grounds* by *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250 (Cal. 2019); *ZB*, 448 P.3d at 243; *Collie*, 266 Cal.Rptr.3d at 147-149; *Provost*, 269 Cal.Rptr.3d at 908; *Olson*, 270 Cal.Rptr.3d at 744; *Contreras*, 275 Cal.Rptr.3d at 750.

Epic did address the broader question of whether employees and employers can agree that all disputes between them will be arbitrated, and the FAA mandates that arbitration agreements be enforced according to their terms. 138 S.Ct. at 1619. Further, *Correia* distinguished *Epic* by concluding it "did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA or consider the implications of a complete ban on a state law enforcement action." *Correia*, 244 Cal.Rptr.3d at 188. Similarly, the *Collie* court found the employee signed an arbitration agreement in his

individual capacity, that the state had not yet deputized him to act at the time, and therefore he could not contractually agree to arbitration (or, by implication, to waive certain claims) on behalf of the state. 266 Cal.Rptr.3d at 148.

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

IV. CONCLUSION

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

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Respectfully submitted,

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