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 AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law.

Established in 1977, Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See About ALF*, Atlantic Legal Found., https://atlanticlegal.org/about/ (last visited Feb. 1, 2022).

WLF and ALF regularly appear as amici curiae in this Court to support the rights of parties to enter into binding arbitration agreements as an expedient, inexpensive, and efficient alternative to civil

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[1] No party's counsel authored this amicus brief in whole or in part. No one, other than WLF, ALF, or their counsel contributed money to prepare or submit this brief. All parties have filed blanket consents to the filing of amicus briefs.

litigation. *See, e.g.*, Brief of Amici Curiae Atlantic Legal Foundation & Washington Legal Foundation in Support of Petitioner, *Coverall N. Am., Inc. v. Rivas*, No. 21-268 (U.S. Nov. 17, 2021), *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). Both amici have addressed in particular the hostility of California courts to the Federal Arbitration Act (FAA) and the enforceability of arbitration agreements. And WLF's publishing arm often produces articles and other educational materials on arbitration. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Setting the Record Straight About the Benefits of Pre-Dispute Arbitration*, WLF Legal Backgrounder (June 7, 2019), https://www.wlf.org/wp-content/uploads/2019/06/060-72019SchwartzAppel_LB.pdf.

The FAA requires courts to enforce arbitration agreements strictly according to their terms. This case is the latest in a long line of decisions from California refusing to follow the FAA's directive requiring arbitration agreements to be enforced as written. The California Court of Appeal declined to enforce a representative-action waiver in the parties' arbitration agreement based on *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). *Iskanian* held that representative claims under California's Private Attorneys General Act (PAGA) are exempt from the FAA because they are qui tam actions in which plaintiffs pursue public (not individual) claims for relief. And since that court held the FAA did not apply to PAGA claims, it refused to enforce a PAGA representative-action waiver in a company's arbitration agreement. In other words, by repackaging a

class or collective action as a representative action under PAGA, California courts have evaded this Court's precedent in *Epic* and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which require the enforcement of an arbitration agreement's representative-action waiver. The California Court of Appeal's refusal to apply the FAA flouts the Supremacy Clause and is preempted.

The FAA "establish[ed] a uniform federal law over contracts which fall within its scope." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). WLF and ALF seek uniform application of the FAA nationwide to ensure that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, individually, and cost-effectively. The decision below thwarts these goals. Amici have a significant interest in establishing that *Iskanian*'s rule prohibiting the enforcement of an arbitration provision's PAGA representative-action waiver is preempted by the FAA, much as the FAA has negated many other rules evincing California's deep hostility to arbitration.

SUMMARY OF ARGUMENT

Workers and companies often agree to arbitrate their disputes. Their arbitration agreements often include provisions requiring bilateral arbitration and foreclosing representative claims. *See, e.g.*, *Epic*, 138 S. Ct. at 1619–20. The FAA requires courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619.

California courts have chafed at this mandate and developed numerous devices to avoid it. *See, e.g.*, *Concepcion*, 563 U.S. at 342. Those devices include rules frustrating the enforcement of provisions requiring individualized arbitration proceedings.

In *Concepcion*, this Court struck down a California Supreme Court rule that had rendered class-action waivers in arbitration agreements unenforceable, holding that when parties agree to resolve disputes by individualized arbitration, those agreements are enforceable under the FAA and contrary state laws are preempted. *Id.* at 338, 340–41, 344–52.

Undeterred, California courts have circumvented *Concepcion* by allowing workers to pursue representative PAGA claims. PAGA "authorizes an employee who has been the subject of particular Labor Code violations to file a representative action on behalf of himself or herself and other aggrieved employees." *Williams v. Superior Ct.*, 398 P.3d 69, 74 (Cal. 2017). This aggrieved employee is empowered to "obtain civil penalties, which are then shared between the affected employees and the state." *Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 378 n.5 (Cal. 2017). In *Iskanian*, the California Supreme Court refused to enforce provisions requiring individual arbitration (thereby waiving representative PAGA claims) because they violate California's public policy. This so-called "*Iskanian* rule" did not offend the FAA, the court decided, because the FAA applies to *private* disputes while PAGA claims are qui tam actions in which individual workers pursue *public* claims for relief. California courts therefore deem PAGA claims to be

"nonarbitrable." *Brooks v. AmeriHome Mortg. Co.*, 260 Cal. Rptr. 3d 428, 432 (Ct. App. 2020).

The FAA is nearly a dead letter in California wage-and-hour cases because a plaintiff "may always sidestep an arbitration agreement simply by filing a PAGA claim." *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 58 & n.1 (9th Cir. 2021) (Bumatay, J., concurring), *petition for cert. filed*, 2021 WL 3772913 (U.S. Aug. 20, 2021) (No. 21-268). Since the *Iskanian* rule "clearly ... runs afoul of the FAA and must be preempted," *id.* at 59, this Court should say so now to stop this end-run around the FAA in its tracks.

Iskanian's reasoning depends on labeling a PAGA claim as a qui tam claim. But States may not evade the Constitution through labels: courts look beyond labels to assess how state laws operate in practice to determine whether they violate the Constitution. This rule applies with full force here since the Supremacy Clause requires state courts to abide by the FAA's mandate to enforce arbitration provisions as written. A practical assessment reveals that PAGA actions do not operate as qui tam claims because, unlike traditional qui tam claims, they vest the named plaintiff with virtually exclusive control over the litigation and seek to vindicate the interests of *both* the government *and* aggrieved workers. In short, PAGA actions operate as little more than *private* representative claims. This Court should therefore hold that, for arbitration agreements governed by the FAA, state and federal courts must enforce PAGA representative-action waivers just as they must enforce class-action and collective-action waivers in any other private dispute.

Moreover, even if this Court were to treat PAGA claims as exclusively governmental claims, this Court's precedent still requires the enforcement of PAGA representative-action waivers, for three reasons. First, in *Epic*, this Court applied the FAA to a *federal* government enforcement action brought by the National Labor Relations Board to enforce its own public rights, for which no private right of action existed. The FAA must equally apply to *state* government actions via the Supremacy Clause. Second, the FAA applies to qui tam claims because they belong in part to plaintiffs asserting them on the government's behalf. This ownership interest suffices to allow plaintiffs to bind the government to their arbitration agreements. Third, in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002), this Court indicated that the FAA should apply to governmental claims where the litigation is controlled by a private individual who agreed to arbitration. That is the case here. An employee who brings a PAGA claim enjoys almost complete control over the litigation, displacing the government as master of the case.

For these reasons, this Court should reverse the California Court of Appeal's decision and hold that the FAA preempts *Iskanian*'s PAGA rule, requiring the enforcement of PAGA representative-action waivers in arbitration agreements as written.

ARGUMENT

I. THE FAA PREEMPTS THE *ISKANIAN* RULE'S PROHIBITION AGAINST PAGA REPRESENTATIVE-ACTION WAIVERS.

Despite this Court's precedent interpreting the FAA, pockets of "judicial antagonism toward arbitration" remain, and some courts have devised rules hostile to "individualized arbitration proceedings." *Epic*, 138 S. Ct. at 1623.

California courts serially thwart the enforcement of arbitration agreements. *E.g.*, *Concepcion*, 563 U.S. at 341–42. Again and again—in a line of cases stretching back decades, *e.g.*, *Perry v. Thomas*, 482 U.S. 483 (1987); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Concepcion*, 563 U.S. 333; *DIRECTV,* 577 U.S. 47; *Epic*, 138 S. Ct. 1612; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)—this Court has rebuffed rules adopted by courts in California that impede arbitration or otherwise frustrate the FAA's objectives.

The *Iskanian* rule, which prohibits enforcement of an arbitration agreement's PAGA representative-action waiver, is just such a device. The rule cannot be squared with this Court's precedent construing the FAA, which requires enforcement of arbitration agreements as written, including their representative-action waivers.

The FAA requires courts to enforce agreements to arbitrate statutory claims, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), including statutory wage-related claims, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991);

Perry, 482 U.S. at 486, 491. And the FAA "direct[s] [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic*, 138 S. Ct. at 1621. That mandate includes "rigorously" enforcing "terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Id.* (citation omitted).

Consistent with this mandate, the Court in *Concepcion* held that the FAA requires enforcement of representative-action waivers in arbitration agreements. 563 U.S. at 340–52. The Court reaffirmed *Concepcion*'s rule after *Iskanian*, holding that courts must enforce arbitration provisions requiring "individualized proceedings." *Epic*, 138 S. Ct. at 1619; *see id.* at 1621–23. After *Epic*, the Court again emphasized that parties cannot be compelled to forgo "the 'traditional individualized arbitration' envisioned by the FAA" by being forced to submit to representative proceedings, and held that arbitration agreements must instead be enforced "'according to their terms.'" *Lamps Plus,* 139 S. Ct. at 1412, 1415.

The *Iskanian* rule conflicts with *Concepcion*, *Epic*, and *Lamps Plus*. *Iskanian* refused to enforce as written a provision in an arbitration agreement in which all parties "agree[d] that class action and representative action procedures shall not be asserted." 327 P.3d at 133. The plaintiff there filed a PAGA lawsuit in court. The California Supreme Court held that arbitration provisions requiring individuals to "give up the right to bring representative PAGA actions in any forum" were "contrary to [California] public policy" and therefore unenforceable. *Id.*

Iskanian thus adopted the very rule the FAA preempts: a rule refusing to enforce as written arbitration provisions requiring solely individualized proceedings, consistent with the traditional form of bilateral arbitration envisioned by the FAA. *See, e.g.*, *Rivas*, 842 F. App'x at 59 (Bumatay, J., concurring) (explaining that *Iskanian*'s rule "clearly" interferes with "parties' choice to engage in individual, bilateral arbitration" and therefore "runs afoul of the FAA and must be preempted"); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 442 (9th Cir. 2015) (N.R. Smith, J., dissenting) (explaining that *Iskanian*'s rule "prohibits representative action waivers in arbitration agreements" and is therefore indistinguishable from rule preempted in *Concepcion*).

Indeed, since PAGA actions closely resemble class actions, the *Iskanian* rule flouts the FAA's mandate no less than the rules held preempted in *Concepcion*, *Epic*, and *Lamps Plus*. The plaintiff in a PAGA action is a representative who has been "subjected to at least one unlawful employment practice," *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020), and is authorized to pursue relief "for violations involving employees other than the PAGA litigant herself," *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243–44 (Cal. 2019). Thus, PAGA actions, like class actions, "allow an individual (who can normally only raise his or her own individual claims) to bring an action on behalf of other people or entities." *Sakkab*, 803 F.3d at 442–43 (N.R. Smith, J., dissenting). This plaintiff can seek the same broad representative discovery authorized by class action procedures. *Williams*, 398 P.3d at 74, 78, 81.

PAGA actions thus entail all the burdens and potential abuses of collective litigation that class actions bring, but without the basic due process safeguards built into the class action mechanism. A PAGA judgment "is binding not only on the named employee plaintiff" but also on "any aggrieved employee not a party to the proceeding." *Arias v. Superior Ct.*, 209 P.3d 923, 933 (Cal. 2009). Yet the plaintiff need neither notify the non-party workers of the PAGA suit nor allow them to opt out. *Turrieta v. Lyft, Inc.*, 284 Cal. Rptr. 3d 767, 781 (Ct. App. 2021), *petition for review granted*, 2022 WL 57711 (Cal. Jan. 5, 2022) (No. S271721); *see also Arias*, 209 P.3d at 926, 934. Other due process protections inherent in class actions are absent too. *See Arias*, 209 P.3d at 926, 932–34; Fed. R. Civ. P. 23. For example, while class representatives must demonstrate their claims are typical of those of absent members, *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 31 (Cal. 2000), PAGA plaintiffs face no such typicality requirement and can represent employees who have not experienced the same violations as the plaintiffs, *see Huff v. Securitas Sec. Servs.*, 233 Cal. Rptr. 3d 502, 509–510 (Ct. App. 2018).

II. CALIFORNIA COURTS CANNOT EVADE THE FAA'S MANDATE BY LABELING PAGA ACTIONS AS QUI TAM ACTIONS BECAUSE PAGA CLAIMS ARE NOT GOVERNMENTAL CLAIMS.

In *Iskanian*, the California Supreme Court held that the FAA does not apply to PAGA claims, offering two related justifications. 327 P.3d at 133, 147–53. Neither justification holds water.

First, believing that "the FAA aims to ensure an efficient forum for the resolution of *private* disputes," the court distinguished *private* claims (subject to the FAA) from *public* claims (not subject to the FAA). *Id.* at 149–50. Second, the court characterized a PAGA claim as "fundamentally a law enforcement action designed to protect the public"—"a type of *qui tam* action"—that was therefore "unwaivable." *Id.* at 147–48, 151 (citations omitted). In the court's view, "a PAGA action is a dispute between an employer and the state." *Id.* at 149.

Applying this rationale, subsequent California cases have distinguished *Epic* and *Concepcion* as applying only to private class and collective claims, not to "a governmental claim" under PAGA. *E.g.*, *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 185, 187–88 (Ct. App. 2019).

Viking River is understandably dubious that *Iskanian* properly characterized PAGA as creating a claim belonging exclusively to the State. (Opening Br. 40–43.) Viking River is correct. This Court should hold that the FAA applies to PAGA claims despite the "qui tam" label the California Supreme Court affixes to them.

States cannot circumvent the Constitution through mere labels, *NAACP v. Button*, 371 U.S. 415, 429 (1963), and courts therefore look behind labels to see how state measures operate in practice when determining whether those measures violate the Constitution, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443–44 (1940). "[T]he descriptive pigeon-hole into which a state court" places a state measure "is of no

moment in determining the constitutional significance" of the measure. *Id.* at 443.

Dodging constitutional scrutiny through artful labeling is no more persuasive in this context. State courts must abide by the FAA, which is "'the supreme Law of the Land,' U.S. Const., [a]rt. VI, cl. 2." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (per curiam). Thus, "under the Supremacy Clause," any state law that conflicts with the FAA "must give way." *Perry*, 482 U.S. at 491; *accord Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam). Since whether a state law can thwart the enforcement of an arbitration provision to which the FAA applies is a question of constitutional significance, state courts may not evade the FAA by the labels they place on state-law claims.

What's more, California's label is wrong. PAGA claims do not function in practice as qui tam claims. So *Iskanian*'s device for evading the FAA fails on its own terms.

Iskanian equated PAGA claims with federal qui tam claims under the False Claims Act (FCA). *Iskanian*, 327 P.3d at 148. The individual asserting an FCA claim on the federal government's behalf is called a "relator." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 929, 932 (2009). The FCA assigns part of the government's claim to this relator, making the relator an interested party with a right to pursue the claim. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000). Even so, the government "may take complete control of the case if it wishes." *Magadia v. Wal-Mart Assocs.,*

Inc., 999 F.3d 668, 678 (9th Cir. 2021) (citation omitted). "Under the FCA, for instance, the federal government can intervene in a suit, can settle over the objections of the relator, and must give its consent before a relator can have the case dismissed." *Id.* "These 'significant procedural controls' ensure that the government maintains 'substantial authority over the action,'" retaining "a significant role in the way the action is conducted." *Id.* (citation omitted).

California's False Claims Act (CFCA)—the state's counterpart to the FCA, *State v. Pac. Bell Tel. Co.*, 48 Cal. Rptr. 3d 427, 431 (Ct. App. 2006)—operates similarly. The CFCA authorizes relators to prosecute qui tam claims. *State ex rel. Bartlett v. Miller*, 197 Cal. Rptr. 3d 673, 678 (Ct. App. 2016). This relator must "notify the Attorney General and disclose all pertinent information about the lawsuit in his or her possession." *Id.* "After investigation the State or political subdivision may elect to intervene in the *qui tam* action and assume control of the lawsuit." *Id.* "If there is no intervention, the *qui tam* plaintiff may prosecute the action for, and in the name of, the State or the relevant political subdivision." *Id.* The CFCA also "allows the state or political subdivision to intervene in an action with which it initially declined to proceed, if the interests of the state or political subdivision are not being adequately represented by the *qui tam* plaintiff." *Hobbs v. Verizon Cal.*, No. B228482, 2011 WL 2937148, at *4 (Cal. Ct. App. July 19, 2011). These protections vest the State and its political subdivisions with the same type of substantial control over CFCA qui tam actions as the federal government possesses over FCA claims.

PAGA does *not* operate in this fashion. *Magadia*, 999 F.3d at 677. Once the State declines to act in the short time window before a PAGA action is filed, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Id.* "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." *Id.*

PAGA also diverges from qui tam statutes in another significant respect. It "creat[es] an interest in penalties, not only for California and the plaintiff employee, but for nonparty employees as well.'" *Id.* at 676. This feature "is atypical (if not wholly unique) for *qui tam* statutes." *Id.* "For example, none of the other modern *qui tam* statutes" that this Court has mentioned "authorize suits on behalf of non-parties or involve payments to non-parties." *Id.* at 676 n.5 (citing *Vt. Agency*, 529 U.S. at 769 n.1). Thus, "[w]hile California may be a 'real party in interest'" in a PAGA action, the PAGA claim "also implicates the interests of other third parties." *Id.* at 677.

This feature "conflicts with *qui tam*'s underlying assignment theory—that the real interest is the government's, which the government assigns to a private citizen to prosecute on its behalf." *Id.* at 676. It thereby "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.* at 677.

PAGA therefore departs sharply from traditional qui tam statutes like the FCA. *Id.* at 678. Given

these critical differences between PAGA claims and qui tam claims, the Ninth Circuit has held that uninjured named plaintiffs pursuing PAGA claims in federal court cannot satisfy constitutional standing requirements under this Court's *Vermont Agency* decision, notwithstanding *Iskanian*'s qui tam label. *Id.* at 674–78.[2] Other circuit courts "have likewise concluded that comparable statutes are not *qui tam* [statutes] for purposes" of constitutional standing requirements, particularly because they did not provide the government with the procedural safeguards necessary to control the action. *Id.* at 678 (collecting cases).

Simply put, "[b]ecause an aggrieved employee pursues the PAGA action in his own name, exercises complete control over the lawsuit, and is not restrained by any provision of the PAGA statute from settling or disposing of the claim as he sees fit," a PAGA representative action "is much more akin to a private action between private parties in which the State has a beneficial interest." *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1082–83 (N.D. Cal. 2015), *abrogated by Sakkab*, 803 F.3d at 433. "As a dispute that is, at its core, between private parties, the terms of their arbitration agreement control" under the FAA. *Id.* at 1083.

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[2] In a similar vein, the Ninth Circuit has also concluded that a federal statutory exception to the automatic bankruptcy stay provision—specifically, an exception for claims by governmental units—does not apply to a representative PAGA claim because the named plaintiff's claim "remains under his control." *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1059, 1060–62 (9th Cir. 2017).

For these reasons, this Court should hold that, for purposes of the FAA, PAGA claims are private representative actions rather than qui tam claims brought on behalf of the government. This Court should therefore apply *Concepcion* and its progeny to conclude that the FAA requires courts to enforce PAGA representative-action waivers in arbitration agreements just as the FAA requires courts to enforce class-action and collective-action waivers in any private disputes involving representative claims.

This is so despite the California Supreme Court's insistence that PAGA creates a "public" claim. *Iskanian*, 327 P.3d at 150–51. This Court has repeatedly applied the FAA to statutory claims involving so-called public rights.

For example, this Court has applied the FAA to wage-and-hour claims brought under the federal Fair Labor Standards Act and California labor laws. *See Epic*, 138 S. Ct. at 1619–20. All of those claims involve "public" rights. *See, e.g., Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082–83 (9th Cir. 2007) ("[E]mployment rights under the FLSA and California's Labor Code are 'public rights'."), *overruled on another ground as recognized by Ferguson v. Corinthian Coll., Inc.*, 733 F.3d 928, 933–37 (9th Cir. 2013) (holding that this Court's precedent overruled *Davis*'s erroneous view that FAA did not require arbitration of claims involving public rights). Similarly, this Court has held that "[t]he Sherman Act, the Securities Exchange Act of 1934, [the Racketeer Influenced and Corrupt Organizations Act], and the Securities Act of 1933 all are designed to advance important public policies," yet even so "claims under those statutes are

appropriate for arbitration" under the FAA. *Gilmer*, 500 U.S. at 28. Likewise, the Court has held that the FAA requires the arbitration of claims brought under the Age Discrimination in Employment Act, *id.* at 26–28, even though that statute affords public rights, *e.g.*, *Davis*, 485 F.3d at 1082.

This Court's precedent requires courts to apply the FAA to claims asserting public rights. That PAGA claims purportedly involve public rights therefore cannot displace the preemptive mandate of the FAA.

III. THE FAA APPLIES TO PAGA CLAIMS EVEN IF THEY ARE GOVERNMENTAL CLAIMS.

A. Governmental claims are subject to the FAA under *Epic*.

Even if—indulging *Iskanian*'s fiction—PAGA claims are governmental claims, the FAA's preemptive mandate still applies. This is so because, under *Epic*, the FAA applies to governmental claims.

Epic consolidated and resolved three separate cases. In resolving one of these cases, *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), this Court affirmed the Fifth Circuit's application of the FAA to a government enforcement action akin to a PAGA claim. *See Epic*, 138 S. Ct. at 1632.

Murphy Oil was a government enforcement action brought by the National Labor Relations Board; it was not initiated by a private employee as an individual or class action. The Board's General Counsel issued an administrative complaint accusing an

employer of violating the National Labor Relations Act (NLRA) by requiring employees to agree to individual arbitration of any employment disputes. *Murphy Oil*, 808 F.3d at 1016. The General Counsel pursued NLRA claims only the government could prosecute—statutory public rights to collective action that are "enforced one way: by the Board, through its processes." *Murphy Oil USA, Inc.*, 361 N.L.R.B. 774, 774–75, 780–82 (2014).

Applying the NLRA, the Board ruled that the employer had committed unfair labor practices by inducing employees to waive representative proceedings through its arbitration agreements. *See id.* Nothing in the FAA compelled a contrary conclusion, the Board asserted, because the General Counsel sought to vindicate rights "enforced solely by the Board—there is no private right of action under the [NLRA]." *Id.* at 781–82. After all, the NLRA "vindicates public, not private rights." *Gurley v. Hunt*, 287 F.3d 728, 732 (8th Cir. 2002). Thus, the Board's determination that the FAA yields to the NLRA rested on the perceived difference between claims belonging to the government and claims belonging to private plaintiffs. *See Murphy Oil*, 361 N.L.R.B. at 779, 781–82.

But the Fifth Circuit applied the FAA and reversed in part. *Murphy Oil*, 808 F.3d at 1015. In construing the FAA and NLRA harmoniously—to "have 'equal importance in our review' of employment arbitration contracts"—the Fifth Circuit unmistakably applied the FAA to a government-initiated enforcement action. *Id.*

In *Epic*, this Court affirmed the Fifth Circuit's *Murphy Oil* decision, 138 S. Ct. at 1632, thereby joining the Fifth Circuit in rejecting the Board's analysis. In refusing to abide by the FAA's mandate because no private right of action was implicated, *Murphy Oil*, 361 N.L.R.B. at 781–82, the Board had fastened onto an irrelevant distinction between public and private claims. That same distinction persuaded the California Supreme Court to exempt PAGA claims from the FAA's scope in *Iskanian*. Thus, the reasoning on which *Iskanian* and its progeny relied cannot be squared with *Epic*.

It is true that *Murphy Oil* concerned claims belonging to the *federal* government, while *Iskanian* insists that PAGA claims belong to a *state* government. But this distinction cannot support an argument that state claims evade FAA scrutiny while federal claims do not. *Epic* affirmed the application of the FAA to an enforcement action brought by the *federal* government, so the Supremacy Clause dictates that the FAA must apply with equal force to enforcement actions brought on behalf of a *state* government. *See supra* p. 12; *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting) ("We have no earthly interest (quite the contrary) in vindicating [preempted state] law.").

Nor does it make a difference that *Murphy Oil* was an enforcement action brought by the government itself rather than a qui tam action brought by a proxy on behalf of the government. Given that *Epic* affirmed *Murphy Oil*'s application of the FAA to an enforcement action commenced by the government

itself, the FAA must likewise apply where a proxy sues on the government's behalf.

B. Even absent *Epic,* the FAA covers qui tam claims because they belong to the relator, who can bind the government to arbitration of those claims.

If anything, the very nature of a qui tam claim confirms that the named plaintiff asserting such a claim on the government's behalf binds the government to an arbitration provision to which the plaintiff previously agreed before becoming the relator.

The relator "is the party" in a qui tam action. *Eisenstein*, 556 U.S. at 932. In contrast, though the federal government is a "'real party in interest,'" it is not automatically *a* "party." *Id.* at 934 (citation omitted). Absent intervention by the government, the relator is the sole "party." *Id.* at 932–34 (citation omitted). In other words, by partially assigning its claim to the relator, the government makes the relator the sole interested party pursuing the claim. *Vt. Agency*, 529 U.S. at 773–74.

Due to this partial assignment, the government and relator are "both real parties in interest." *Eisenstein*, 556 U.S. at 934 (citation omitted). Where parties pursue assigned claims, they are asserting "legal rights of their own." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008) (emphasis omitted). Thus, the qui tam claim belongs to both the relator and the government. *See, e.g.*, *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161,

1167 (10th Cir. 2009) ("The portion of the [FCA] claim assigned to the relator, namely the amount the relator is entitled to recover in a successful action, belongs to the relator to a sufficient degree" to allow defendant to enforce the release of the FCA qui tam claim to which relator agreed before filing the claim.). In sum, because the qui tam claim "both assigns the Government's injury in fact [to the relator] (*Sprint*) and turns the relator into a real party in interest (*Eisenstein*), the relator must also own the claim" and therefore, under this Court's precedent, "employers can compel relators to arbitrate the qui tam claims" since "those claims belong to relators as 'partial assignees.'" Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 Pepp. Disp. Resol. L.J. 203, 227–29 (2015).

Relators who have agreed to arbitration can therefore be compelled to arbitrate their qui tam claims. *E.g.*, *United States ex rel. Hicks v. Evercare Hosp.*, No. 12-cv-887, 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015) (compelling arbitration of qui tam claim); *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 12-cv-63, 2013 WL 394875, at *6–8 (S.D. Ohio Jan. 31, 2013) (same); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 325 (4th Cir. 2001) ("Statutory civil claims are subject to the arbitration process," and there is "no valid basis for placing the FCA claim in a different category."). Thus, individual workers asserting PAGA claims can bind the State to the arbitration agreements they entered into when they first started working for the company. *Valdez v. Terminix Int'l Co. Ltd.*, 681 F. App'x 592, 594 (9th Cir. 2017).

California courts disagree. Insisting that the State is the sole real party in interest in a PAGA action, *e.g.*, *Correia*, 244 Cal. Rptr. 3d at 179, 189–91, they reason that a PAGA claim belongs only to the government and that "[t]here is no individual component to a PAGA action," *Kim*, 459 P.3d at 1131.

But this view collides with the nature of a qui tam action, in which *both* the relator *and* the government are real parties in interest. *See Eisenstein*, 556 U.S. at 932–34. California courts cannot have it both ways: they cannot (1) insist that PAGA claims fall outside the FAA's scope because they are qui tam claims (where the government and relator *both* have an ownership interest in the claim) while (2) at the same time refusing to treat PAGA claims like qui tam claims by deeming the government the sole real party in interest.

Either PAGA claims *are not* truly qui tam claims, in which case the California Supreme Court cannot evade the FAA's application to PAGA claims based on their supposed qui tam nature, or PAGA claims *are* qui tam claims that relators may agree to address through arbitration due to their ownership interest in the claims. Either way, the FAA requires enforcement of the PAGA representative-action waiver in the named plaintiff's arbitration agreement.

C. Regardless, the FAA still applies because the named plaintiffs control the prosecution of the claims.

There is an independent reason why the FAA applies to PAGA claims, even if they are governmental claims: the virtually exclusive control over the litigation that PAGA grants to named plaintiffs.

This Court has indicated that the FAA applies to a governmental claim where the litigation of that claim can be "dictated" by a private individual who agreed to arbitration and the government is not "the master of its own case." *Waffle House*, 534 U.S. at 280, 291. That aptly describes a PAGA claim. The named plaintiff in a PAGA lawsuit wields almost complete control over the litigation—far more than an FCA relator. PAGA "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*, 999 F.3d at 677. Once the named plaintiff commences the PAGA action, "the State has no authority under PAGA to intervene in a case brought by an aggrieved employee." *Id.* In short, the State "does not have supervisorial authority over the employee in the [PAGA] litigation"—rather, at most, the government "must be provided with prior notice of any proposed [PAGA] settlement, and the [trial] court must approve the final settlement." *Correia*, 244 Cal. Rptr. 3d at 184. It makes no sense to say named plaintiffs exercise virtually exclusive control over the litigation of PAGA claims yet cannot elect to include PAGA claims in arbitration agreements governed by the FAA.

The California Supreme Court maintained that *Waffle House* is distinguishable because it "involved a suit by the government seeking to obtain victim-specific relief on behalf of an employee bound by the arbitration agreement," while a named plaintiff who brings a PAGA claim seeks "to obtain remedies other than victim-specific relief, i.e., civil penalties paid largely into the state treasury." *Iskanian*, 327 P.3d at 151. This view ignores *Waffle House*'s caveat—the FAA may have applied to bar the EEOC's claim based on the employee's arbitration agreement had the employee possessed the authority to control the EEOC's case, *see Waffle House*, 534 U.S. at 291. That is precisely the type of unfettered control PAGA plaintiffs possess.

Iskanian implied that, had *Waffle House* not been distinguishable on this erroneous rationale, it might compel the conclusion that the FAA precludes altogether the arbitration of PAGA claims because they are governmental claims. *See* 327 P.3d at 150–51. This view is wrong. *Waffle House* merely held that the FAA did not bar a court action commenced by the government where the statutory scheme vested the government with complete control over the lawsuit. 534 U.S. at 282, 290–96; *see also id.* at 298 (emphasizing EEOC's "exclusive authority over the choice of forum and the prayer for relief once a charge has been filed"); *Preston*, 552 U.S. at 359 (explaining that *Waffle House* "addressed the role of an agency" that "pursu[ed] an enforcement action in its own name"). *Waffle House* did not say that the FAA would not apply if a private employee, rather than the

government, was the master of the lawsuit and had agreed to arbitrate.

That is the case with PAGA. A PAGA claim is commenced not by a governmental agency but by a private plaintiff—here, the very person who expressly agreed to bilateral arbitration instead of representative court proceedings—whom PAGA vests with virtually complete control over the litigation. (Opening Br. 37–39.) Under *Waffle House*, this is the type of claim that can be barred by a representative-action waiver in an arbitration agreement enforceable under the FAA. *See* 534 U.S. at 291–292.

IV. THE FAA'S SAVING CLAUSE DOES NOT PREVENT THE FAA FROM PREEMPTING *ISKANIAN*'S PAGA RULE.

Unlike California state courts, the Ninth Circuit does not hold that the FAA is inapplicable to PAGA claims. *See, e.g.*, *Sakkab*, 803 F.3d at 434. But the Ninth Circuit has followed *Iskanian* for a different reason: *Iskanian*'s prohibition against representative-action waivers is supposedly a generally applicable contract defense, which the FAA saves from preemption. *Id.* at 432–40. That rationale is wrong under this Court's precedent.

First, while the FAA's saving clause "allows courts to refuse to enforce arbitration agreements" based on "generally applicable contract defenses," *Epic*, 138 S. Ct. at 1622 (citations omitted), that clause cannot save the *Iskanian* rule from preemption because *Iskanian* is expressly founded on California's "public policy" against provisions requiring individual

arbitration that waive representative PAGA claims, 327 P.3d at 133, and is therefore not a generally-applicable contract defense. The FAA does not preserve from preemption state or federal rules that invalidate arbitration provisions for policy reasons. *See, e.g.*, *Epic*, 138 S. Ct. at 1622, 1632 (holding that arbitration agreements requiring individual arbitration had to be enforced according to their terms regardless of any federal public policy vindicating federal labor laws); *Marmet Health*, 565 U.S. at 533–34 (vacating decision holding arbitration agreement unenforceable based on state public policy). "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms," and courts are "not free to substitute [their] preferred economic policies for those chosen by the people's representatives." *Epic*, 138 S. Ct. at 1619, 1632.

Second, even contract defenses that purportedly have general applicability are preempted by the FAA when, in reality, such defenses "derive their meaning from the fact that an agreement to arbitrate is at issue" or "prohibit[ ] outright the arbitration of a particular type of claim." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339, 341); *see id.* ("The [FAA] also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."). The *Iskanian* rule falls afoul of both these strictures. It prohibits outright the arbitration of an entire category of claims: "a PAGA claim lies outside the FAA's coverage," *Iskanian*, 327 P.3d at 386, so California courts consider it "nonarbitrable,"

Brooks, 260 Cal. Rptr. 3d at 432. Consequently, California courts allow plaintiffs asserting wage-and-hour claims to circumvent an arbitration agreement simply by filing a PAGA claim. *See Rivas*, 842 F. App'x at 58 & n.1 (Bumatay, J., concurring). And the *Iskanian* rule is "the type of defense that targets an arbitration agreement '*just because it requires bilateral arbitration*,' which the Court held doesn't survive the FAA." *Id.* at 59 (quoting *Epic*, 138 S. Ct. at 1623).

Third, the FAA preempts even generally applicable state laws that "interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. In *Concepcion*, this Court held that California's rule frustrating the enforceability of class-action waivers in arbitration agreements did just that (and was therefore preempted by the FAA). There, a state rule requiring a switch from bilateral arbitration to class proceedings made "the process slower, more costly, and more likely to generate procedural morass," called for "procedural formality," and "greatly increase[d] risks to defendants." *Id.* at 348–50. The *Iskanian* rule invalidating PAGA representative-action waivers does the same thing, and that rule is also preempted by the FAA.

For example, the *Iskanian* rule makes the litigation process slower and more costly. Plaintiffs asserting representative PAGA claims can seek to recover penalties for thousands—or even hundreds of thousands—of individuals. *See, e.g.*, *Turrieta*, 284 Cal. Rptr. 3d at 771–72 (affirming PAGA settlement for group estimated "to include a maximum of 565,000 individuals"). "A PAGA action may thus cover a vast

number of employees, each of whom may have markedly different experiences relevant to the alleged violations." *Wesson v. Staples the Off. Superstore, LLC*, 283 Cal. Rptr. 3d 846, 859 (Ct. App. 2021). Since "a PAGA claim can cover disparate groups of employees and involve different kinds of violations raising distinct questions," PAGA actions are exceedingly complex. *Id.* at 860. Unsurprisingly, PAGA claims are "substantially slower" and "substantially more costly" to litigate than to individually arbitrate. *Sakkab*, 803 F.3d at 445 (N.R. Smith, J., dissenting); *see, e.g.*, *Espinoza v. Hepta Run, Inc.*, No. B306292, 2022 WL 167770, at *1–2, *2 n.4 (Cal. Ct. App. Jan. 19, 2022) (describing procedural case history reflecting that representative PAGA claim took more than two years to proceed to trial); *Wesson*, 283 Cal. Rptr. 3d at 854 (explaining that trial court had estimated plaintiff's PAGA claim would require a "trial lasting more than four years"); *Driscoll v. Granite Rock Co.*, No. 1-08-CV-103426, 2011 WL 10366147 (Cal. Super. Ct. Sept. 20, 2011) (entering defense judgment on PAGA claim that took nearly four years to proceed to a bench trial lasting 14 days and involving 55 witnesses and 285 exhibits).

Representative PAGA proceedings in court also involve higher stakes and higher risks than bilateral arbitration. As with class claims, penalties sought in representative PAGA proceedings routinely run into the millions—even *billions*—of dollars. *See, e.g.*, *Turrieta*, 284 Cal. Rptr. 3d at 771–72, 775 n.7 (affirming approval of $15 million PAGA settlement, over objections of plaintiffs from other PAGA cases who claimed *billions* of dollars in PAGA penalties).

Furthermore, representative PAGA proceedings in court involve far more procedural formality than individual arbitration. PAGA discovery can extend "as broadly as class action discovery has been extended"; the California Supreme Court has rebuffed efforts to cabin the "broad discovery" authorized for PAGA claims. *Williams*, 398 P.3d at 74, 78, 81. The parties in a PAGA case would, "at a minimum," need "costly and time-consuming" discovery "into how many employees may have suffered violations and how many times such violations occurred." *Teimouri v. Macy's, Inc.*, No. D060696, 2013 WL 2006815, at *17 (Cal. Ct. App. May 14, 2013).

Likewise, representative PAGA proceedings in court often devolve into a procedural morass. "[D]etermining whether the employer committed Labor Code violations with respect to each employee" implicated by a PAGA claim "may raise practical difficulties and may prove to be unmanageable." *Wesson*, 283 Cal. Rptr. 3d at 859. "Indeed, PAGA claims may well present more significant manageability concerns than those involved in class actions." *Id.* at 859–60.

These same considerations led this Court to conclude in *Concepcion* that a state-law rule barring class-action waivers was preempted by the FAA. *See* 563 U.S. at 348–50. Thus, the FAA preempts the *Iskanian* rule because it "burdens arbitration in the same three ways identified in *Concepcion*." *Sakkab*, 804 F.3d at 444 (N.R. Smith, J., dissenting).

V. RESPONDENT'S CONCERNS ABOUT THE WAIVER OF REPRESENTATIVE PAGA CLAIMS CANNOT RENDER THE FAA INAPPLICABLE.

Respondent has argued that the FAA cannot require enforcement of PAGA representative-action waivers because the FAA "does not provide for enforcement of agreements that claims cannot be pursued at all" (Opp'n 17) and the enforcement of such a waiver would effectively prevent the State from asserting such a claim (Opp'n 19). According to Respondent, enforcing such waivers would improperly allow "defendants to excuse themselves from liability . . . ." (Opp'n 17.) Respondent contends this Court's precedent bars such a result (Opp'n 17–19) because *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), said: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

This argument relies on a mistaken premise. The enforcement of a PAGA representative-action waiver waives no one's substantive rights nor otherwise insulates the defendant from liability.

PAGA "is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." *Amalgamated Transit Union, Loc. 1756 v. Superior Ct.*, 209 P.3d 937, 943 (Cal. 2009). As a result, "[p]reventing a plaintiff from using this [PAGA]

procedure has no effect on the state's property rights" in civil penalties. *Wesson*, 283 Cal. Rptr. 3d at 860 n.14. "[T]he State remains entitled to recover civil penalties for any Labor Code violations by the employer, subject to the applicable statute of limitations." *Id.*[3]

PAGA civil penalties may also be sought by a different PAGA proxy (a fellow aggrieved worker) who did not consent to arbitration. *See Sakkab*, 803 F.3d at 449 (N.R. Smith, J., dissenting) (explaining that "any employee not subject to an arbitration agreement waiving such [representative PAGA] actions is free to bring a PAGA claim," and that nothing prevents the State "from raising the labor violations on its own").

In any event, even if PAGA representative-action waivers did waive substantive state rights (which is not the case), this Court's precedent would not prevent the FAA from requiring the enforcement of such waivers. The passage Respondent cherry-picks from

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[3] This is not merely a theoretical proposition, as recent litigation in California against Uber Technologies shows. Drivers who agreed to individual arbitration brought representative PAGA claims in court against Uber, alleging that Uber misclassified them as independent contractors in violation of California law. *E.g.*, *Gregg v. Uber Techs., Inc.*, No. B302925, 2021 WL 1561297, at *1–2 (Cal. Ct. App. Apr. 21, 2021), *petition for cert. filed*, 2021 WL 4353008 (U.S. Sept. 21, 2021) (No. 21-453). Even so, California's Attorney General and Labor Commissioner are also suing Uber based on the same misclassification theory. *See, e.g.*, *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 302 (Ct. App. 2020); Complaint, *Garcia-Brower v. Uber Techs., Inc.*, No. RG20070283 (Cal. Super. Ct. Aug. 5, 2020), 2020 WL 4729151.

Mitsubishi Motors was dicta suggesting a willingness to invalidate an arbitration agreement that operates as a prospective waiver of a party's right to pursue *federal* statutory remedies—dicta that has since become known as the "'effective-vindication' exception" to the FAA. *Am. Express*, 570 U.S. at 235–36. But this Court has never applied this dicta to invalidate any arbitration agreements. *Id.* Moreover, this theoretical exception would apply solely to waivers of "a *federal* statutory right." *Id.* at 235 (emphasis added); *see id.* at 252 (Kagan, J., dissenting) (acknowledging that federal courts have "no earthly interest (quite the contrary) in vindicating [state] law" since the "effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law").

Thus, "if a state law violates or frustrates the FAA, the state law must give way, even if such a decision prevents the state's interest from being vindicated." *Sakkab*, 803 F.3d at 449 (N.R. Smith, J., dissenting); *see id.* at 433 n.9 (majority opinion) (rejecting contention that effective-vindication exception invalidates PAGA representative-action waivers, because this exception "does not extend to state statutes" (citation omitted)). The State cannot, as a matter of its own public policy, override the FAA's mandate by dictating that any *particular* aggrieved employee may invoke PAGA's representative-action procedure. *Id.* at 449–50 (N.R. Smith, J., dissenting). It violates the FAA for California to adopt rules and procedures favoring one or more plaintiffs by enabling them to exploit PAGA's representative-action procedure after they have entered into arbitration agreements waiving the right to do so. *See Epic*, 138 S. Ct.

at 1621 (holding that FAA "seems to protect pretty absolutely" arbitration agreements providing for individualized rather than representative procedures).

CONCLUSION

This Court should reverse the decision of the California Court of Appeal.

Respectfully submitted,

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