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, Second Appellate District

BRIEF OF *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAWYERS' ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, AND NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici California Employment Lawyers' Association, National Employment Law Project, and National Employment Lawyers' Association are nonprofit organizations that seek to protect the rights of workers under state and federal labor and employment laws. *Amici* have an interest in the outcome of this case based on their experience advocating for and enforcing employment protections for workers in California which requires that sufficient public law enforcement mechanisms exist alongside private enforcement to deter employer violations of labor and workplace laws.

Amici write not to repeat arguments made by the parties, or other *amici*, but to discuss the background and policy goals of California's Private Attorneys General Act ("PAGA"), which, in our experience advocating for California workers, has significantly increased the capacity of state labor and employment enforcement regulators to collect civil penalties that primarily benefit the state and encourage employer compliance with the law.[1]

[1] All parties have consented to the filing of this brief. In addition, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief, as provided in Rule 37.3(a) and 37.6.

SUMMARY OF THE ARGUMENT

The California Legislature passed PAGA in 2003 as a law enforcement tool in recognition that state enforcement agencies were failing to adequately enforce labor protections for workers due to severe budgetary and staffing constraints. PAGA deputizes "aggrieved employees" to serve as agents of the state by authorizing them to seek civil penalties on the state's behalf. PAGA is an exercise of the state's police power to protect workers within the state and is not a means of enforcing the private rights of employees under their contracts with employers or under the California Labor Code. The state retains primacy over the action and recovers nearly all of the proceeds. For these and other reasons, PAGA conforms to the traditional requirements of a *qui tam* action and is unlike private class action suits and the types of claims that this Court has previously ruled fall within the coverage of the Federal Arbitration Act ("FAA"). PAGA is not an end run around arbitration and was not enacted with the intent to circumvent *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which was decided well after PAGA became the law. Because the FAA was never intended to preempt the states' law enforcement functions or their authority to determine how to structure their law enforcement authority, the Court should affirm the denial of Petitioner's motion to compel arbitration.

ARGUMENT

I. PAGA Is a Law Enforcement Tool and Not a Means to Avoid Arbitration.

PAGA was not enacted to avoid arbitration or out of hostility to arbitration. To the contrary, PAGA was enacted in 2003 as a law enforcement tool and falls well within the state's traditional police power to enforce labor protections for workers within the state. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Met. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985). "Moreover, how a state government chooses to structure *its own* law enforcement authority lies at the heart of state sovereignty." *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 152 (Cal. 2014) (citing *Printz v. United States*, 521 U.S. 898, 928 (1997)).

Under this Court's jurisprudence, "[i]n preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 567 U.S. 387, 400 (2012) (internal quotation marks omitted). There is no indication that Congress had "the clear and manifest purpose" of superseding the states' law enforcement authority to prosecute labor violations when it enacted the FAA. Thus, the Court must assume that the FAA did not preempt California's exercise of such authority in PAGA.

A. PAGA's Purpose Is to Augment California's Limited Enforcement Capacity.

"The Legislature's sole purpose in enacting PAGA was 'to augment the limited enforcement capability of the [Labor Workforce Development Agency] by empowering employees to enforce the Labor Code as representatives of the Agency." *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020). "[T]here was a shortage of government resources to pursue enforcement." *Iskanian*, 327 P.3d at 146. The ramifications of this shortage were discussed in PAGA's legislative history. For example, despite evidence of tens of thousands of serious and ongoing wage violations by garment industry employers in Los Angeles alone, state authorities were issuing fewer than 100 wage citations per year *for all industries throughout the state*. In addition, California's "underground economy," comprised of businesses operating outside of the state's licensing and tax requirements due to underenforcement of those laws, was costing the state three to six billion dollars a year in lost tax revenue.[2]

In the late 1990s and early 2000s, California's enforcement agencies were responsible for protecting the legal rights of over 17 million workers and regulating 800,000 private establishments, in addition to all of the public sector workplaces in the state. Despite this,

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[2] *See* Assembly Comm. on Lab. and Emp., Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended July 2, 2003, p.3, available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_796_cfa_20030708_130803_asm_comm.html (last visited Mar. 2, 2022).

"the resources available to the labor enforcement divisions remain[ed] below the levels of the mid-1980s."[3] Staffing levels at the agencies charged with enforcing workplace rights decreased during that same period, although California's workforce grew by 48 percent.[4]

Because of this staffing and underenforcement crisis, California's enforcement agencies were also unable to ensure that many worker protections that were only enforceable by those agencies, or by prosecutors—including statutory health and safety protections—were adequately enforced; workers had no independent ability to enforce these laws. *See Iskanian*, 59 Cal.4th at 379 (noting that one of PAGA's chief concerns was that "many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors" and that PAGA addressed the lack of criminal enforcement by adopting civil penalties, including new penalties, "significant enough to deter violations") (quoting Sen. Judiciary Comm., Analysis of Sen. Bill No. 796 (Reg. Sess. 2003-2004) as amended Apr. 22, 2003, p.5) (internal quotation marks omitted); Cal. Lab. Code § 2699(f).

The legislature recognized that in many cases, "the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties" which was not feasible in the face of declining staffing levels that were not keeping pace with California's growing economy. Sen. Bill 796, sec. 1(b)-(c).

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[3] *Id*. at p.4.

[4] *Id*.

PAGA addressed the state's severe budgetary shortfall and underenforcement crisis by allowing employees to file civil actions in the name of the state to recover civil penalties for violations of the Labor Code, thus expanding California's enforcement capacity.

B. The State Retains Primacy Over PAGA Enforcement Efforts and Is the Primary Beneficiary.

Although PAGA authorizes "aggrieved employees" to recover civil penalties on the state's behalf, "[a] PAGA claim is legally and conceptually different from an employee's own suit for damages and statutory penalties." *Kim*, 459 P.3d at 1127. Rather, as discussed below, a PAGA action is a type of *qui tam* suit because the state retains primacy and is the primary beneficiary of the action.[5]

First, PAGA did not create new monetary remedies for employees but instead provided the state with an alternative vehicle for collecting civil penalties that were previously enforceable only by state labor law enforcement agencies (known as the Labor Workforce

[5] A similar model is used by the federal government to enforce the False Claims Act, with the majority of revenue recovered under that statute originating from claims brought by private parties. *See*, *e.g.*, U.S. Dep't of Justice, "Justice Department Recovers Over $2.2 Billion from False Claim Act Cases in Fiscal Year 2020," Jan. 14, 2021 ("Of the $2.2 billion in settlements and judgments reported by the government in fiscal year 2020, over $1.6 billion arose from lawsuits filed under the *qui tam* provisions of the False Claims Act."), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 (last visited Mar. 2, 2022).

Development Agency ("LWDA")). A PAGA action "is fundamentally a law enforcement action" designed to protect the public and not to benefit private parties. *Arias v. Super. Ct.*, 209 P.3d 923, 933-34 (Cal. 2009) (internal quotation marks omitted). Civil penalties are not based on the individual damages suffered by employees. Rather, PAGA sets a penalty range within which courts have discretion to fix a penalty for all aggrieved employees for each pay period. *See* Cal. Lab. Code § 2699(e)(1)-(2), (f). This reflects PAGA's intention to promote compliance by employers rather than compensate employees by making them whole. *Arias*, 209 P.3d at 934. Likewise, recoveries are principally for the state and only secondarily for employees. Seventy-five percent of the penalties are remitted to the LWDA with the remainder shared among all aggrieved employees. Cal. Lab. Code § 2699(i). As a result, in most cases, individual employees' recoveries are extremely modest in comparison to the benefits to the state.

Second, aggrieved employees may only bring a suit if the LWDA declines to do so. Cal. Lab. Code § 2699(h). Employees wishing to file a case must meet specific procedural and administrative exhaustion requirements, including providing notice of the claims to the LWDA so that the state can decide whether to investigate the claims itself. Cal. Lab. Code § 2699.3(a)(1)(A)-(B). The LWDA may investigate or prosecute the alleged violations, or, alternatively, give notice of its intent not to investigate or cite the employer. Cal. Lab. Code § 2699.3(a)(2)(A)-(B). In addition, any proposed settlement of PAGA claims must be submitted to the

LWDA at the same time that it is submitted to the court for its review and approval. Cal. Lab. Code § 2699(l)(2). Thus, the state retains primacy over whether to deputize an employee to bring the suit and whether to approve the resolution of a suit that an employee has brought.

Finally, PAGA does not displace the litigation or arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, it directly enforces the state's interest in penalizing and deterring employers who violate California's labor laws. *Iskanian*, 327 P.3d at 151-53. The California Labor Code contains numerous separate provisions that enable employees to recover damages for actual losses incurred. *Kim*, 459 P.3d at 1126. PAGA encourages employer compliance not just with traditional protections enforceable by employees, such as minimum wage and overtime requirements, but other types of protections that have a significant impact on workers but do not necessarily result in economic loss. *See*, *e.g.*, *Green et al. v. Bank of Am. N.A., et al.*, 11-CV-04571, Dkt. No. 85 (C.D. Cal. Nov. 4, 2016) ($15 million PAGA settlement alleging bank has an obligation to provide tellers with seating rather than requiring them to stand for the duration of their shifts); *Sargent v. Bd. of Trustees of Cal. State Univ.*, 276 Cal. Rptr. 3d 1, 5-6 (Cal. Ct. App. 2021) (PAGA action involving violations of California's workplace health and safety OSHA law).

The revenue stream generated by PAGA actions has augmented the state's enforcement capacity. Between

2016 and 2019, the state collected an average of $42 million each year in civil penalties and filing fees, which is statutorily allocated to support increased education and employer compliance efforts.[6] These revenues have supported multi-lingual media campaigns educating the public about wage theft and other labor violations, increased staffing levels to root out employer misclassification, unfair competition, and the resulting economic losses for public coffers, and other innovative compliance initiatives.[7]

CONCLUSION

PAGA is an example of California's exercise of its traditional police power to enforce employment protections within the state. PAGA does not supplant private enforcement of employment obligations by employees and employers in litigation or in arbitration and does not reflect hostility toward arbitration in particular. The FAA was not intended to supplant the states' law enforcement efforts, including through actions like PAGA.

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[6] Rachel Deutsch, Rey Fuentes, Tia Koonse, *California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations*, Feb. 2020, pp.8-9, https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf (last visited Mar. 2, 2022).

[7] *Id*.

Accordingly, for the foregoing reasons, the Court should affirm the denial of Petitioner's motion to compel arbitration.

Dated: March 9, 2022

Respectfully submitted,

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