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The PAGA Problem: Conflict Between California Employment Policy and Federal Arbitration Act Expansion

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THE PAGA PROBLEM: CONFLICT BETWEEN CALIFORNIA EMPLOYMENT POLICY AND FEDERAL ARBITRATION ACT EXPANSION

Scot Gauffeny*

In June 2022, the U.S. Supreme Court handed down its decision in Viking River Cruises v. Moriana. This controversial opinion sought to resolve ongoing tension between the Federal Arbitration Act (FAA) and California's Private Attorneys General Act (PAGA) by overturning California precedent dating back to 2014. In keeping with its decades-long crusade to strengthen the FAA, the Supreme Court removed the primary procedural mechanism through which putative PAGA plaintiffs could avoid mandatory arbitration of their claims, instead requiring aggrieved employees to sever their "individual" PAGA claims from the claims of their "similarly aggrieved" co-workers. Those opposed to PAGA viewed this development as a much-needed reprieve from a seemingly relentless onslaught of litigation targeted against employers, while proponents of the statute criticized the opinion as undermining PAGA's important public policy objectives. Ultimately, rather than providing clarity to the adjudication of PAGA claims subject to arbitration agreements, the time since the Viking River Cruises ruling has seen California courts wrestle with the circuitous and in some instances incorrectly cited language of the nation's highest court.

Notably, Justice Sonia Sotomayor included a concurring opinion in Viking River Cruises, leaving the door open for California to further modify PAGA in the event the Supreme Court's reasoning proved faulty. Emboldened by Justice Sotomayor's concurrence, this Note seeks a permanent resolution to the ever-contentious story of PAGA by offering a potential mechanism through which California might modify enforcement of the statute and achieve the state's public policy objectives while avoiding further FAA preemption.

* J.D. Candidate, May 2024, LMU Loyola Law School, Los Angeles; B.S., Rutgers University, October 2015. Thank you to everyone at the *Loyola of Los Angeles Law Review*, and to Zachary Gidding for sparking my interest in this topic and assisting with substantive research. I would also like to thank my friends and family for their unyielding support. Finally, a special thank you to Professor Stephanie Der for so generously donating her time and experience. Your tireless work behind the scenes made everything possible.

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The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

– Chief Justice Charles E. Hughes¹

The authority and only authority is the State, and if that be so, the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.

– Justice Oliver Wendell Holmes²

INTRODUCTION

On June 16, 2022, in the case of *Viking River Cruises v. Moriana*,³ the U.S. Supreme Court overturned a well-established California Supreme Court rule preventing the pre-dispute waiver of representative claims under California’s Private Attorneys General Act of 2004 (PAGA).⁴ Acknowledging the contentiousness of this decision, Justice Sonia Sotomayor included with *Viking River Cruises* a concurring opinion that signaled for California’s legislature or judiciary to respond in the event either branch had qualms about the Court’s interpretation of state law.⁵ California’s Supreme Court directly responded one year later with *Adolph v. Uber Technologies, Inc.*⁶ The message was clear: California does not intend to give up on PAGA anytime soon, and it appears that, at least as far as the state judiciary is concerned, the U.S. Supreme Court’s understanding of state law was indeed mistaken.

But is this latest move by California an exercise in futility? Although the state’s highest court ultimately devised a way to partially

1. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

2. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (Holmes, J., dissenting).

3. 142 S. Ct. 1906 (2022).

4. *See* CAL. LAB. CODE § 2698 (2004). This Note refers to the Private Attorneys General Act by its commonly used name: PAGA.

5. *Viking River Cruises*, 142 S. Ct. at 1925–26 (Sotomayor, J., concurring).

6. 532 P.3d 682 (Cal. 2023).

insulate PAGA's collective action mechanism from outside interference, the U.S. Supreme Court has demonstrated a strong inclination to undo state-led efforts to curb the Federal Arbitration Act (FAA).⁷ The aim of this Note is to propose a solution to the ongoing tension surrounding PAGA that avoids FAA preemption and preserves PAGA in its intended public policy role as a valued mechanism for enforcing California's Labor Code.

Part I of this Note briefly explains arbitration and the FAA, highlights the circumstances leading up to, and the legislature's intent behind, enacting PAGA, and describes how California courts approached PAGA claims prior to *Viking River Cruises*. Part II details the procedural history of *Viking River Cruises* before launching into an analysis of the June 16, 2022, U.S. Supreme Court decision. Part III explores California jurisprudence in the time since the Court handed down its ruling. Then, Part IV endeavors to explain the myriad ways arbitrating employment disputes conflicts with PAGA's objectives, critiques the U.S. Supreme Court's unilateral expansion of the FAA, and highlights potential pitfalls California must consider should it wish to undo *Viking River Cruises* without triggering FAA preemption. Finally, Part V explores methods California might consider to properly address the *Viking River Cruises* holding to ensure the policy goals of PAGA continue to be met.

I. BACKGROUND

A. Why Mandatory Arbitration Matters

Arbitration is a contractual method of alternative dispute resolution wherein disputing parties resolve their differences outside of court.⁸ Significantly, a decision reached via arbitral proceeding formally resolves a party's claims and thus precludes that party from raising the issue in a traditional court setting.⁹ Though comparable to litigating a dispute in court, arbitration is generally considered more expedient and less expensive due to lax procedural standards, including limited forms of discovery and a constrained right to appeal the judgment.¹⁰

7. See *infra* Section IV.C; see, e.g., *Viking River Cruises*, 142 S. Ct. 1906 (2022).

8. See 1 DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* §§ 1:1–1:2 (3d ed. 2023).

9. *Id.* § 1:1.

10. *Id.* § 1:4.

Notably, arbitration was not always so commonplace as it is today.¹¹ Congress passed the FAA in 1925 “in response to judicial hostility to arbitration.”¹² At the time of enactment, the FAA was not intended to cover agreements where one party often has significantly less bargaining power than the other,¹³ but to facilitate the resolution of commercial disputes between similarly situated merchants.¹⁴ Contrary to legislative intent, since the 1980s the Supreme Court has steadily broadened the FAA’s reach while curtailing state-level efforts to insulate individuals from what many perceive as an unfair alternative to traditional judicial proceedings.¹⁵ Due to the Court’s efforts, the FAA today represents a “national policy favoring arbitration.”¹⁶

Consequently, it is now commonplace for employers to present prospective employees with clauses mandating arbitration of nearly all

In reviewing an arbitration award, a court is precluded from considering the factual or legal issues that were by voluntary agreement made the subject of arbitration. An arbitrator’s decision will be upheld, unless it is completely irrational or constitutes a manifest disregard of the law. Any reasonable doubt must be resolved in favor of enforcing the award. According to the U.S. Supreme Court, as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, the fact that a court is convinced the arbitrator committed serious error does not suffice to overturn the arbitrator’s decision.

Id. § 1:1.

11. ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/FR9Q-7U3R>].

12. *Viking River Cruises*, 142 S. Ct. at 1917.

13. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 n.9 (1967)); *see also infra* Section IV.B.

14. *Lamps Plus*, 139 S. Ct. at 1420 (Ginsburg, J., dissenting) (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting) (“Congress enacted the Federal Arbitration Act (FAA) in 1925 ‘to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes.”)).

15. *See generally* Chamber of Com. of U.S. v. Bonta, 62 F.4th 473, 478 n.1 (9th Cir. 2023) (providing a list of California-specific FAA preemption rulings); *see also* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights* (Econ. Pol’y Inst., Briefing Paper No. 414, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [perma.cc/PPF2-HYPT]. For example, in *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the U.S. Supreme Court held the FAA preempted a Montana law requiring arbitration clauses in consumer contracts be presented in reasonably sized text on the agreement’s first page, reasoning such requirements overly restricted arbitration. Stone & Colvin, *supra*, at 9. The Court also invalidated a California law prohibiting class action waivers in consumer contracts due to FAA preemption in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Stone & Colvin, *supra*, at 10. In fact, a California law aimed at prohibiting mandatory arbitration clauses in employment contracts was abrogated in the wake of *Viking River Cruises*. *See infra* Section III.A.; Chamber of Com. of U.S. v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023).

16. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration”); *see also infra* Section IV.C.

disputes arising from the employment relationship¹⁷ while waiving the right to raise class or collective actions.¹⁸ Many such actions are worth less than the fees necessary to arbitrate them individually, so waiving the right to bring class or collective action can effectively render certain claims economically infeasible to pursue.¹⁹ Nonetheless, the Supreme Court has staunchly upheld arbitral class waivers, reasoning: “[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”²⁰

B. When the FAA Applies

Because *Viking River Cruises* only applies to arbitration agreements governed by the FAA,²¹ it is important to understand where the statute does and does not apply. U.S. Supreme Court case law shows that the FAA applies where: (1) the transaction involves commerce;²² and (2) the agreement in question is legally enforceable in contract law.²³

Firstly, the U.S. Supreme Court has interpreted “transaction[s] involving commerce” liberally, construing it to encompass the full extent of the U.S. Constitution’s Commerce Clause.²⁴ The Court has additionally adopted a “commerce in fact” test: so long as a transaction

17. “In March 2022, Congress enacted a law that precludes employers from requiring employees to arbitrate disputes related to sexual assault or harassment.” Deborah A. Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, A.B.A. (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/ [https://perma.cc/HJQ6-YDQT].

18. Stone & Colvin, *supra* note 15; *see also* Chamber of Com. of U.S. v. Becerra, 438 F. Supp. 3d 1078, 1098 (E.D. Cal. 2020) (noting that “67.4% of all California employers mandate arbitration of employment disputes” (citing GIDEON L. BAUM, SENATE RULES COMM., OFF. OF SENATE FLOOR ANALYSES, THIRD READING OF AB 51, at 5 (2019))).

19. Sam Mellins, *How Corporate America’s Favorite Legal Trick Is Backfiring*, LEVER (May. 27, 2022), <https://www.levernews.com/how-corporate-americas-favorite-legal-trick-is-backfiring/> [https://perma.cc/KUM7-M545]; *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2904 (2015) (“[P]rivate enforcement of small-value claims depends on collective, rather than individual, action.”).

20. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

21. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1919, 1925 (2022).

22. 9 U.S.C. § 2.

23. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

24. Amy Semmel, *Third-Party Discovery in Arbitration: Be Careful What You Ask For*, DAILY J. (June 18, 2021) <https://www.dailyjournal.com/mcle/982-third-party-discovery-in-arbitration-be-careful-what-you-ask-for> [perma.cc/JJ3C-TDA5].

actually involves interstate commerce, the FAA controls.²⁵ Accordingly, under such a broad construction most transactions are beholden to the FAA by default.²⁶ For example, the FAA has been applied to an agreement where materials used by a contractor to repair houses originated outside of the state where the contracted activity was to be performed,²⁷ applied to debt restructuring contracts executed within a state by residents of that same state,²⁸ applied where one party's business interests extended into multiple states,²⁹ and used to displace state law where it would generally prohibit arbitration.³⁰

Assuming a contract is found to involve interstate commerce, an otherwise enforceable arbitration agreement may still be invalidated upon the finding of a defense to contract formation, such as unconscionability.³¹ However, States cannot hold a contract fair and enforceable as written and simultaneously invalidate an arbitration clause therein because to do so would treat arbitration agreements unfairly.³² Notably, this “unequal footing” principle applies both to mechanisms that blatantly discriminate against arbitration and “any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.”³³ In plain terms, states may not simply sidle around

25. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

26. *See Semmel, supra* note 24 (citing *Allied-Bruce Terminix Cos.*, 513 U.S. at 281).

27. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281–82; *see also Basura v. U.S. Home Corp.*, 120 Cal. Rptr. 2d 328, 334 (Ct. App. 2002) (finding interstate commerce where building materials “were manufactured and/or produced in states outside California . . .”). *But see Woolls v. Superior Ct.*, 25 Cal. Rptr. 3d 426, 439 (Ct. App. 2005) (finding the FAA did not apply because the defendant offered no proof of interstate commerce).

28. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53, 57–58 (2003) (finding interstate commerce in part because banking has important interstate attributes).

29. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 282; *Basura*, 120 Cal. Rptr. 2d at 334; *Citizens Bank*, 539 U.S. at 57.

30. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

31. *AT&T Mobility*, 563 U.S. at 339. The FAA includes a savings clause which states that arbitration agreements under the statute “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

32. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (“What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause. . . . [T]hat kind of policy would place arbitration clauses on an unequal ‘footing.’”); *see also AT&T Mobility*, 563 U.S. at 339 (“This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”)).

33. *Chamber of Com. of U.S. v. Bonta*, 13 F.4th 766, 775 (9th Cir. 2021), *aff’d on reh’g*, 62 F.4th 473 (9th Cir. 2023) (citing *Kindred Nursing Ctrs Ltd., P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017)).

the FAA; any method of avoiding the statute's purview must encompass *all* forms of contractual agreement, not just arbitration clauses.

Finally, because arbitration agreements are ultimately viewed as a matter of contract law,³⁴ explicit consent to govern an agreement under a ruleset other than the FAA may successfully avoid preemption.³⁵ Conversely, absent an express indication of the parties' intent to utilize an alternative ruleset, the FAA presumptively applies to arbitration clauses.³⁶ So the FAA applies to contracts where parties expressly agree to be governed by it and to any agreements involving interstate commerce (which appears to encompass most contracts), provided that some defense to the contract's formation does not apply.

C. PAGA Overview

Enacted by California's legislature in 2004, PAGA provides that, where a Labor Code violation calls for collection of civil penalties by the Labor and Workforce Development Agency (LWDA), an "aggrieved employee"³⁷ may instead recover the penalty through a civil action on behalf of themselves, other employees, and the state.³⁸ Practically speaking, PAGA permits employees to sue their employers as "private attorneys general" for various Labor Code violations.³⁹ Because the aggrieved employees are acting to enforce the Labor Code on behalf of the state, PAGA has a stringent notice requirement intended to give the LWDA an opportunity to enforce and litigate

34. *Volt Info. Scis.*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.")

35. *See* *Cronus Invs., Inc. v. Concierge Servs.*, 107 P.3d 217, 219 (Cal. 2005) (finding the FAA does not preempt where two parties consent to enforcing an agreement under California law).

36. "Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis.*, 489 U.S. at 479 (citation omitted). In *Volt Information Sciences*, the Court affirmed an appellate decision to enforce the parties' arbitration agreement under California's rules of arbitration because "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

37. The California Labor Code defines an aggrieved employee as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." CAL. LAB. CODE § 2699(c) (2016).

38. *Id.* § 2699(a); Robert K. Carrol & Noah M. Woo, *In an 8 to 1 US Supreme Court Decision, Employers with California Operations May Now Compel PAGA Claims to Arbitration*, ARENTFOX SCHIFF (July 1, 2022), <https://www.afslaw.com/perspectives/alerts/8-1-us-supreme-court-decision-employers-california-operations-may-now-compel> [<https://perma.cc/K9SA-3BQS>].

39. *See* Carrol & Woo, *supra* note 38.

alleged violations as it sees fit.⁴⁰ It is only once the LWDA elects not to investigate an alleged violation that a PAGA plaintiff may commence litigating the action civilly.⁴¹ PAGA remains unique to California—though some states have discussed introducing similar legislation, there is no analogous statute in any other state’s labor code.⁴²

1. Policy Justifications and Legislative Intent

PAGA’s sponsors cited two major considerations in its drafting: (1) the lack of an adequate civil mechanism through which to enforce the California Labor Code; and (2) an “inability to enforce labor laws effectively” due to insufficient staffing and woefully inadequate allocation of budgetary resources.⁴³

a. Justifying a civil remedy for Labor Code violations

Prior to PAGA’s inception, many California Labor Code provisions were exclusively enforceable as criminal misdemeanors.⁴⁴ Because district attorneys typically focus their attention on public priorities like violent crime, defiance of the Labor Code would often go unchecked.⁴⁵ Consequently, PAGA’s framers intended to protect California’s workforce by creating a novel law enforcement action aimed at penalizing employers for flouting the Labor Code.⁴⁶ Recognizing PAGA’s roots in criminal law, the bill’s sponsors emphasized their intent not to benefit those raising the claim, but rather the general

40. Brief for California as Amicus Curiae in Support of Respondent at 4, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (No. 20-1573); CAL. LAB. CODE § 2699.3(a) (2016).

41. CAL. LAB. CODE § 2699.3(a)(2) (2016).

42. See Ashley Hoffman, *Private Attorneys General Act*, CAL. CHAMBER COM. (Jan. 2022), <https://advocacy.calchamber.com/wp-content/uploads/2022/02/2022-Business-Issues-Labor-and-Employment-Private-Attorneys-General-Act.pdf> [<https://perma.cc/6MXY-HYTS>]; Charles Thompson et al., *Employers Must Brace for PAGA-like Bills Across the US*, LAW360 (June 18, 2021), <https://www.law360.com/employment-authority/articles/1395480/employers-must-brace-for-paga-like-bills-across-us> [<https://perma.cc/Q97G-9BWY>]; Carrol & Woo, *supra* note 38.

43. *Employment: Hearing on S.B. 796 Before the Assemb. Comm. on Lab. & Emp.*, 2002–2003 Leg., Reg. Sess. 4–5 (Cal. 2003) (statement of Paul Koretz, Chair, Assemb. Comm. on Lab. & Emp.); see also *Zackaria v. Wal-Mart Stores, Inc.*, 142 F. Supp. 3d 949, 959 (C.D. Cal. 2015) (“The purpose of PAGA ‘is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.’” (quoting *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C 08-2073, 2010 WL 1340777, at *3–4 (N.D. Cal. Apr. 2, 2010))).

44. *Employment: Hearing on S.B. 796*, *supra* note 43, at 4.

45. *Id.*

46. See *Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 3d 539, 556 (Ct. App. 2009).

public.⁴⁷ Accordingly, 75 percent of civil penalties awarded under PAGA claims are allocated to the state to fund Labor Code enforcement initiatives,⁴⁸ while 25 percent are awarded to the aggrieved employees.⁴⁹

*b. California lacks the resources to enforce
Labor Code violations*

Although it may sound extreme to bestow prosecutorial power normally reserved for the state upon everyday employees, scrutiny of California's labor market at the turn of the century elucidates the Legislature's reasoning for doing so. The decade prior to PAGA's codification saw state labor law enforcement agencies decline such that they were unlikely to keep up with labor market growth and development.⁵⁰ A 2001 hearing of the Assembly Committee on Labor and Employment found that California's Department of Industrial Relations (DIR), "the largest state labor law enforcement organization in the country," failed to adequately police labor law violations despite its \$42 million budget for the 2001–2002 fiscal year.⁵¹ The DIR's subsequent failure to enforce Labor Code violations against so-called "underground" employers further compounded the issue by causing an estimated \$3–6 billion in tax losses annually.⁵² To put in perspective just how ineffective DIR enforcement measures were, the U.S. Department of Labor estimated that Los Angeles's garment industry alone supported "over 33,000 serious and ongoing wage violations by [its] . . . employers, but that DIR was issuing fewer than 100 wage citations per year for *all industries* throughout the state."⁵³ This staggeringly inefficient usage of state funding by labor law enforcement

47. *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1127 (Cal. 2020) (citing *Arias v. Superior Ct.*, 209 P.3d 923, 934 (Cal. 2009); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 862 (Ct. App. 2011)).

48. Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 4 ("PAGA actions pursued by employees supplement the State's direct enforcement mechanisms. And civil penalties paid by labor-law violators help to fund the LWDA's oversight, education, and enforcement work.").

49. CAL. LAB. CODE § 2699(i) (2016).

50. *Employment: Hearing on S.B. 796*, *supra* note 43, at 3; *see also id.* at 4 (noting that "between 1980 and 2000 California's workforce grew 48 percent," but the budgets of corresponding agencies did not keep pace, even decreasing in some instances).

51. *Id.* at 3.

52. *Id.* ("Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually.").

53. *Id.* (emphasis added).

agencies in conjunction with overwhelmingly widespread violation of Labor Code provisions made the need for drastic changes clear. As a result, “[t]he Legislature chose ‘to deputize and incentivize employees’ because they are ‘uniquely positioned to detect and prosecute [California Labor Code] violations.’”⁵⁴

c. Initial resistance to PAGA resulted in an important alteration to its statutory text

Notably, in its initial drafts, PAGA did not include a definition of “aggrieved employee.”⁵⁵ Due to frequent abuse of a comparable unfair competition law provision by “private attorneys general,” advocates for employer’s rights insisted on “add[ing] the definition of ‘aggrieved employee’ that now appears in section 2699(c)” of the PAGA statute.⁵⁶ Although PAGA has proved itself a valuable enforcement tool for California employees, the abundance of claims now filed under the statute indicates the concern expressed by early employer advocates regarding potential abuse was at least partially justified.⁵⁷

2. How PAGA Operates

To begin, PAGA plays a crucial role in upholding California’s stated policy of “vigorously enforc[ing] minimum labor standards.”⁵⁸ Vigorous enforcement in turn prevents employees from working in unlawful substandard conditions, ensures employees will be properly compensated for their work, and insulates law-abiding employers from the adverse effects of those who would otherwise gain a competitive advantage through flouting the Labor Code.⁵⁹

Although ensuring fair compensation for employees is a vital consideration, it is equally important to make sure they are treated with

54. Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 7 (quoting *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 154 (Cal. 2014)).

55. *Kim v. Reins Int’l Cal., Inc.*, 459 P.3d 1123, 1133 (Cal. 2020).

56. *Id.*; see also CAL. LAB. CODE § 2699(c) (2016) (defining “aggrieved employee” as any person employed by the alleged violator and against whom an alleged violation occurred).

57. Consider that the number of PAGA suits filed annually has increased more than tenfold since 2004. Hoffman, *supra* note 42, at 95; see also Jason C. Ross & Keith E. Smith, *Arbitrability of PAGA Cases Before US Supreme Court*, WOOD SMITH HENNING BERMAN, <https://www.wshb.com/experience-arbitrability-of-paga-cases-before-us-supreme-court> [<https://perma.cc/G3H9-29QD>] (“For instance, in 2005, 700 PAGA cases were filed. Yet, by 2020, it was up to 6,000 cases per year statewide.”).

58. See Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 1 (citing CAL. LAB. CODE § 90.5).

59. *Id.*

dignity and respect by punishing those employers who perpetuate an unhealthy or unsafe work environment. Accordingly, PAGA also covers portions of the California Labor Code intended to protect employees from adverse working conditions rather than financial harm.⁶⁰ As previously touched upon, “[PAGA] plays a particularly important role in ensuring the fair and legal treatment of some of the State’s most vulnerable workers, including those in the agricultural, garment, and front-line service industries.”⁶¹

To encourage compliance with the Labor Code, PAGA often imposes significant financial penalties upon employers.⁶² The statute provides: “[A]t the time of the alleged violation . . . the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.”⁶³ Per the statutory language, multiple Labor Code violations may be combined under a single claim, a practice sometimes referred to as “stacking.”⁶⁴ It is easy to deduce that this practice can lead to penalties ranging in the millions of dollars for larger businesses.⁶⁵ Yet, small

60. Brief for California Employment Lawyers’ Association et al. as Amici Curiae in Support of Respondent at 8, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (No. 20-1573) (citing Motion to Dismiss, *Green v. Bank of Am. N.A.*, No. 11-CV-04571-PA (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 Trs. of Cal. State Univ.*, 61 Cal. App. 5th 658, 664–66 (Ct. App. 2021) (PAGA action involving violations of California’s workplace health and safety OSHA law).

61. Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 1.

62. See *Kim v. Reins Int’l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020) (“[C]ivil penalties recovered on the state’s behalf are intended to ‘remediate present violations and deter future ones.’”); Brief for Employers Group as Amicus Curiae in Support of Petitioner at 5, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (No. 20-1573) (asserting “PAGA claims seeking millions of dollars in penalties have skyrocketed in the wake of *Iskanian*”).

63. CAL. LAB. CODE § 2699(f)(2) (2016).

64. See *Hoffman*, *supra* note 42; *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, at 1915 (2022) (“Individually, these penalties are modest; but given PAGA’s additive dimension, low-value claims may easily be welded together into high-value suits.”); see also *The Viking River Decision: A Win, and a Big Opportunity, for Employers Regarding Arbitration Agreements*, HOPKINS CARLY, <https://www.hopkinscarley.com/blog/client-alerts-blogs-updates/employment-law-client-alerts/the-viking-river-decision-a-win-and-a-big-opportunity-for-employers-regarding-arbitration-agreements> [https://perma.cc/X7CL-JZR9] (highlighting that “[a]n employee who alleges meal period violations occurring once per week for a year among a team of 100 employees” might potentially “assert a claim seeking over \$1,000,000 against the employer (100 employees x \$100 per initial violation during the first week, plus 100 employees x \$200 per subsequent violation x 51 subsequent weeks), plus legal fees”).

65. Brief for Employers Group as Amicus Curiae in Support of Petitioner, *supra* note 62, at 28–29 (“Hundreds of reported cases have invoked PAGA seeking millions of dollars in recoveries.” (citing Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 451 (2018))).

business owners are often the most adversely affected, as they simply lack the financial resources to withstand protracted litigation.⁶⁶ It should be noted, however, that PAGA plaintiffs rarely recover the maximum possible award.⁶⁷

Perhaps the most valid point raised by PAGA's detractors is that it often appears plaintiff's attorneys, not the state, are the primary beneficiaries of PAGA suits. For example, because 75 percent of any PAGA award goes to the state, many settlement agreements are conditioned on allocating a nominal percentage of the total settlement amount to any attendant PAGA claims.⁶⁸ These agreements instead apportion a majority of the settlement to attorneys, their clients, and other aggrieved employees.⁶⁹ The reality is that, absent the inclusion of a PAGA claim, many plaintiff's attorneys might lack the leverage necessary to negotiate a substantial settlement figure.⁷⁰ Furthermore, attorneys representing PAGA plaintiffs generally take one-third of their client's total recovery, leading to scenarios in which those representing the aggrieved employees in a collective action recover

66. See Hoffman, *supra* note 42 (“[T]hreatened penalties and inability to obtain insurance coverage to fight PAGA claims force employers to either settle the case or risk hundreds of thousands of dollars, if not millions, litigating the case on the merits.”); see also Brief for Employers Group as Amicus Curiae in Support of Petitioner, *supra* note 62, at 29 (“California Assembly Member and small business owner Shannon Grove was subject to a PAGA suit claiming \$30 million in penalties, which she ultimately settled for just under half a million dollars.”); Ken Monroe, *Opinion, Frivolous PAGA Lawsuits Are Making Some Lawyers Rich, but They Aren't Helping Workers or Employers*, L.A. TIMES (Dec. 6, 2018, 3:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html> [<https://perma.cc/45NE-UJW3>] (“[W]e were hit with a PAGA lawsuit. . . . Like virtually all companies that find themselves the target of a PAGA or class-action lawsuit, we negotiated a settlement rather than take the risk of losing in court and facing the onerous maximum penalties prescribed by the law.”).

67. See Gregory W. Knopp & Jonathan P. Slowick, *Recent PAGA Settlement Demonstrates Why PAGA Cases Are Typically Worth Far Less Than the Maximum Theoretical Recovery*, JD SUPRA (Jan. 21, 2022) <https://www.jdsupra.com/legalnews/recent-paga-settlement-demonstrates-why-3954954/> [<https://perma.cc/YH44-9FLC>] (discussing the L.A. Superior Court's tentative ruling in *Reyes v. Kellermeyer Bergensons Services LLC et al.*, No. BC680525, 2022 Cal. Super. LEXIS 96753 (Jan. 19, 2022), and listing reasons why the maximum award in a PAGA suit is rarely reached: (1) “[T]here do not appear to be any known court decisions authorizing stacking”; (2) “maximum exposure assume[s] that the court could award heightened penalties for ‘subsequent’ violations,” which precedent shows is only possible if “the Labor Commissioner has previously cited [the] employer for the violation”; (3) “if the claims are not susceptible of common proof,” practical problems faced by the plaintiff in gathering many individual employees to testify and prove multiple violations; (4) “[i]f the claims could only be proven by a fact-intensive, employee-by-employee analysis, the court is authorized to limit the claims to a manageable scope or strike them entirely”; (5) “even if liability is proven, courts have broad discretion to award any amount of penalty up to the maximum”).

68. See Hoffman, *supra* note 42.

69. *Id.*

70. *Id.*

significantly more money than the individuals whose injury gives rise to the suit.⁷¹ Outcomes of this nature do not appear to aid the general public, thus subverting the legislature's intent.

However, this is merely a cost of doing business. The money directed to state coffers through PAGA claims is ultimately used to improve California's ability to enforce its Labor Code autonomously.⁷² In recent years, the state has collected an estimated \$42 million annually through PAGA proceedings; money which has been statutorily allocated to address the same concerns that prompted lawmakers to enact PAGA in the first place.⁷³ For example, the revenue PAGA generates has largely gone toward staffing state enforcement agencies like the LWDA and educating the general public, particularly non-English speaking employees, about their rights under the Labor Code.⁷⁴

In short, it is easy to understand why PAGA is such a ferociously debated issue. Yet, one thing is certain—precedent in the years since PAGA's implementation highlights that California considers the statute's public policy benefits to heavily outweigh the potential harm it causes to employers.

D. California Precedent Before Viking River Cruises

1. The 2014 Decision *Iskanian v. CLS Transportation Los Angeles, LLC* Held PAGA Claims Are Not Preempted by the FAA

Prior to *Viking River Cruises*, the arbitrability of PAGA claims was primarily dictated by *Iskanian v. CLS Transportation Los Angeles, LLC*.⁷⁵ In *Iskanian*, the California Supreme Court concluded that

71. *Id.* (“For example, in *Price v. Uber Technologies, Inc.*, the plaintiff’s attorneys were awarded \$2.325 million, while the average Uber driver was awarded \$1.08.”); *see also* Monroe, *supra* note 66 (“[T]he attorneys received 35% of the settlement, the state got 2%, the mediator got 2% and the disgruntled former employee got \$7,500. The 300 employees that made up the class action each received between \$23 and a few thousand dollars.”).

72. Brief for California Employment Lawyers’ Association et al., *supra* note 60, at 8–9 (citing RACHEL DEUTSCH ET AL., CALIFORNIA’S HERO LABOR LAW: THE PRIVATE ATTORNEYS GENERAL ACT FIGHTS WAGE THEFT AND RECOVERS MILLIONS FROM LAWBREAKING CORPORATIONS 8–9 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf [<https://perma.cc/4R44-W78N>]).

73. *Id.*

74. *Id.* at 9 (“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.”).

75. 327 P.3d 129 (Cal. 2014); *see PAGA Standing Allows a Plaintiff to Have One Foot in a Compelled Individual Arbitration and One Foot in a Representative Court Action*, BAKERHOSTETLER (July 18, 2023), <https://www.bakerlaw.com/insights/paga-standing-allows-a>

aggrieved employees cannot be compelled to arbitrate their PAGA claims, even when faced with an otherwise enforceable arbitration agreement, because: (1) PAGA actions are a species of *qui tam* action; (2) California statutory authority precludes compelling arbitration of PAGA claims as a matter of public policy; and (3) PAGA is not preempted by the FAA.⁷⁶

The *Iskanian* court began by recognizing that representative PAGA actions are a species of *qui tam* action,⁷⁷ a statutory action permitting private individuals “to sue for a penalty, part of which the government or some specified public institution will receive.”⁷⁸ The court noted the only distinguishable difference between the two is that, rather than limiting penalty apportionment to the state and plaintiff, PAGA penalties are also awarded to every employee impacted by the Labor Code violation.⁷⁹

Second, the court analyzed California Civil Code section 1668, which states “[a]greements whose object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced,”⁸⁰ and section 3513, which states “a law established for a public reason cannot be contravened by a private agreement.”⁸¹ The court thus concluded the right of an employee to bring a PAGA action cannot be waived under existing statutory authority.⁸² To rule otherwise would invalidate one of California’s chief Labor Code enforcement mechanisms and serve to absolve employers of responsibility for illegal practices.⁸³ Consequently, the court deemed arbitration clauses that waive an employee’s right to bring

-plaintiff-to-have-one-foot-in-a-compelled-individual-arbitration-and-one-foot-in-a-representative-court-action/ [https://perma.cc/P398-4TC5].

76. See generally *Iskanian*, 327 P.3d at 148–53 (discussing the Court’s reasoning as to why arbitration of PAGA claims cannot be compelled).

77. *Id.* at 148.

78. *People v. Weitzman (ex rel. Allstate Ins. Co.)*, 132 Cal. Rptr. 2d 165, 167 (Ct. App. 2003) (citing BLACK’S LAW DICTIONARY (7th ed. 1999)); *Iskanian*, 327 P.3d at 148 (“Traditionally, the requirements for . . . a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.” (citing *Sanders v. Pac. Gas & Elec.*, 126 Cal. Rptr. 415, 421 (Ct. App. 1975))).

79. *Iskanian*, 327 P.3d at 148.

80. *Id.* at 148 (alteration in original) (quoting *In re Marriage of Fell*, 65 Cal. Rptr. 2d 522, 527 (Ct. App. 1997)); see CAL. CIV. CODE § 1668 (2021).

81. *Iskanian*, 327 P.3d at 148 (citing CAL. CIV. CODE § 3513 (2021); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 680 (Cal. 2000)).

82. *Id.*

83. *Id.* at 149.

representative PAGA claims before a dispute has arisen violative of public policy and thus unenforceable as a matter of California law.⁸⁴

Finally, California's highest court scrutinized whether existing U.S. Supreme Court precedent supporting the FAA might preempt its *Iskanian* ruling. Notably, the U.S. Supreme Court had previously held that a state law may be preempted if it obstructs the FAA from accomplishing its objectives⁸⁵ and that the FAA may apply to statutory claims where the parties have signed an arbitration agreement.⁸⁶ Through *Iskanian*, the California Supreme Court sidled its way around this precedent by leaning on the FAA's legislative history—chiefly that “the FAA's primary object was the settlement of ordinary commercial disputes,” and “[t]here is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals.”⁸⁷ To this second point, the court concluded any intent to limit the scope of qui tam actions would have been reflected in the FAA's legislative history because qui tam actions existed at the time of its enactment.⁸⁸ As a result, the court found prohibiting waiver of collective PAGA claims did not hamper the FAA's objectives because the FAA is concerned with facilitating the resolution of private disputes, whereas PAGA claims are between an employer and a state enforcement agency (the LWDA).⁸⁹

Importantly, the California Supreme Court specified:

Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other.

84. *Id.*

85. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

86. *Iskanian*, 327 P.3d at 150.

87. *Id.*

88. *Id.* (stating “although qui tam citizen actions on behalf of the government were well established at the time the FAA was enacted, there is no mention of such actions in the legislative history and no indication that the FAA was concerned with limiting their scope,” and noting that “class arbitration was not envisioned by the Congress that enacted the FAA” (citations omitted) (citing *AT&T Mobility LLC*, 563 U.S. at 349)).

89. *Id.* at 149–50 (“[T]he United States Supreme Court's FAA jurisprudence . . . consists [almost] entirely of disputes involving the parties' *own* rights and obligations, not the rights of a public enforcement agency.”); see *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Notably, the Supreme Court found no preemption in the lone case dealing with the FAA's effect on a public enforcement agency because the plaintiff government agency was not a party to the arbitration agreement, was not standing in for the individual employee, and could litigate the claims without employee consent—in fact, the employee had no control over the litigation at all. See *id.* at 293–94.

Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws.⁹⁰

In other words, “every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee . . . or as to other employees as well, is a representative action on behalf of the state.”⁹¹ This distinction would prove contentious when *Viking River Cruises* was passed down.⁹²

2. The 2020 Decision *Kim v. Reins* Held Plaintiffs Have Broad Standing to Bring PAGA Claims

Perhaps one of the most intriguing features of PAGA is its unusually broad standing requirement, a peculiarity best showcased by the California Supreme Court's decision in *Kim v. Reins*.⁹³ In *Kim*, the trial court applied *Iskanian* to determine a plaintiff's PAGA claim was non-arbitrable and not subject to waiver under the parties' otherwise enforceable arbitration agreement.⁹⁴ The trial court then ordered the parties to arbitrate any non-PAGA claims, staying *Kim's* PAGA claim pending the arbitration's result.⁹⁵ Before the arbitrator issued a decision, the parties settled *Kim's* “individual claims,” leaving only the PAGA claim unresolved.⁹⁶ The trial court then dismissed the PAGA claim, reasoning that settlement dispelled *Kim's* “aggrieved employee” status because his harms had been fully remedied.⁹⁷ The appellate court affirmed.⁹⁸

90. *Iskanian*, 327 P.3d at 152.

91. *Id.* at 151.

92. The *Iskanian* court also advanced an argument that its decision implicated the states' historic police power. 327 P.3d at 152 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.” (citing *Metro. Life Ins. v. Massachusetts*, 471 U.S. 724, 756 (1985))). Citing U.S. Supreme Court precedent, California's Supreme Court reasoned “how a state government chooses to structure *its own* law enforcement authority lies at the heart of state sovereignty.” *Id.* (citing *Printz v. United States*, 521 U.S. 898, 928 (1997)). It also stated that constitutionally protected police powers may not be superseded absent “clear and manifest” congressional intent. *Id.* (citing *Arizona v. United States*, 567 U.S. 517, 531 (2012)). Applying the FAA, California's Supreme Court could find no evidence suggesting Congress intended to impede a state's ability to augment its law enforcement faculties through a statute like PAGA. *Id.* However, the *Viking River Cruises* majority ultimately did not discuss this issue. See *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

93. 459 P.3d 1123 (Cal. 2020).

94. *Id.* at 1127–28.

95. *Id.* at 1128.

96. *Id.*

97. *Id.*

98. *Id.*

California's Supreme Court disagreed with the lower court rulings, instead finding the plaintiff retained his standing as an aggrieved employee despite settling his individual claims with the defendant.⁹⁹ In reaching its decision, the court analyzed the text of California Labor Code section 2699(c).¹⁰⁰ The statute specifies an employee may bring a suit both on her own behalf and on behalf of other aggrieved employees.¹⁰¹ There are only two requirements to render someone "aggrieved": the individual must have been "employed by the alleged violator" and must have personally suffered "one or more of the alleged [Labor Code] violations."¹⁰² Accordingly, the court noted PAGA does not premise standing on whether a plaintiff suffered economic injury.¹⁰³ More importantly, it determined standing under PAGA is not even conditioned on one's own injury.¹⁰⁴ Rather, irrespective of whether an employee's own claims have been redressed, the employee need only have suffered a single Labor Code violation to commence a collective PAGA action encompassing *all* Labor Code violations allegedly committed by the employer.¹⁰⁵ Practically speaking (and according to the legislature's intent), this makes standing for PAGA plaintiffs exceptionally broad.¹⁰⁶

So, civil penalties are not contingent on the presence of an injury because they exist purely as a deterrent, punitive measure.¹⁰⁷ Resultingly, even if an employee suffers no cognizable injury, employers may find themselves subject to civil penalties for committing a wrongful act.¹⁰⁸ *Kim* formalized the idea that settlement of a PAGA

99. *Id.* at 1133.

100. *Id.* at 1127.

101. CAL. LAB. CODE § 2699(a) (2016); *see also Kim*, 459 P.3d at 1127 ("Only an aggrieved employee has PAGA standing.").

102. *Kim*, 459 P.3d at 1127; CAL. LAB. CODE § 2699(c) (2016).

103. *Kim*, 459 P.3d at 1129 (reasoning California Labor Code section 2699(c) "does not require the employee to claim that *any* economic injury resulted from the alleged violations"); *see also id.* at 1133 (PAGA standing is not "dependent on the existence of an unredressed injury, or the maintenance of a separate, unresolved claim. Such a condition would have severely curtailed PAGA's availability to police Labor Code violations because, as noted, many provisions do not create private rights of action or require an allegation of quantifiable injury.").

104. *Id.* at 1130.

105. *See id.*

106. *Id.* at 1133 ("[T]rue to PAGA's remedial purpose, the Legislature conferred fairly broad standing on all plaintiffs who were employed by the violator and subjected to at least one alleged violation. [A] narrower construction would thwart the Legislature's clear intent to deputize employees to pursue sanctions on the state's behalf.").

107. *Id.* at 1130 ("Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct." (citing *Raines v. Coastal Pac. Food Distribs.*, 234 Cal. Rptr. 3d 1, 12 (Ct. App. 2018))).

108. *Id.* (quoting *Raines*, 234 Cal. Rptr. 3d at 12).

plaintiff's individual claims does not "unaggrieve" the plaintiff with respect to PAGA standing; rather, *Kim*'s holding obligated plaintiffs to maintain collective PAGA claims on behalf of the other "aggrieved" employees.¹⁰⁹ This precedent would prove vital to California courts after *Viking River Cruises* overturned *Iskanian*.

II. VIKING RIVER CRUISES V. MORIANA

In the wake of *Iskanian*, it became nearly impossible for an employer to compel arbitration of PAGA actions because California courts adamantly refused to enforce PAGA waivers.¹¹⁰ By framing PAGA claims as public causes of action pitting employers against the state,¹¹¹ California jurisprudence successfully circumvented both the FAA and the U.S. Supreme Court for a time. However, after eight years of relative stability,¹¹² the Court decided in *Viking River Cruises* to overrule *Iskanian*, expand the FAA's purview, and permit the federal statute to impose itself upon California employment law once more.¹¹³

A. Factual Background and Lower Court Rulings

Angie Moriana worked for Viking River Cruises ("Viking River") as a sales representative.¹¹⁴ As a condition of her employment with the company, Moriana was required to sign an arbitration agreement.¹¹⁵ In doing so, she agreed to send *any* disputes resulting from the employment relationship to arbitration.¹¹⁶ Notably, the mandatory arbitration clause contained a waiver precluding the parties from

109. *See id.* at 1129; *see also* *Zuniga v. Alexandria Care Ctr., LLC*, 282 Cal. Rptr. 3d 564, 573 (Ct. App. 2021) (stating that a plaintiff retains standing as an aggrieved employee despite settlement of individual claims); *Johnson v. Maxim Healthcare Servs., Inc.*, 66 Cal. App. 5th 924, 930 (Ct. App. 2021) (holding plaintiff's PAGA claim being barred by time "[did] not nullify the alleged Labor Code violations nor strip Johnson of her standing to pursue PAGA remedies").

110. *See Kim*, 459 P.3d at 1132 ("Appellate courts have rejected efforts to split PAGA claims into individual and representative components."); *see, e.g., Zakaryan v. Men's Wearhouse, Inc.*, 245 Cal. Rptr. 3d 333, 340 (Ct. App. 2019) ("Splitting a PAGA claim into two claims . . . runs afoul of the primary rights doctrine because it impermissibly divides a single primary right."); *Ross & Smith*, *supra* note 57.

111. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 151 (Cal. 2014).

112. *Id.* at 129; *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1906 (2022). *Iskanian* was decided June 23, 2014, and *Viking River Cruises* overturned it June 15, 2022.

113. *Viking River Cruises*, 142 S. Ct. at 1924–25.

114. *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508, at *1 (Cal. Ct. App. Sept. 18, 2020).

115. *See id.*

116. *Viking River Cruises*, 142 S. Ct. at 1915–16.

arbitrating “a class, collective, or representative PAGA action.”¹¹⁷ Additionally, the arbitration agreement contained a severability clause providing that any PAGA action, collective or otherwise, would presumptively be litigated in court should the class waiver be invalidated.¹¹⁸ However, the severability clause also specified any portions of the class waiver remaining valid would be subject to arbitration.¹¹⁹

At the conclusion of her employment with Viking River, Moriana sued in the Superior Court of Los Angeles County, alleging numerous Labor Code violations under a single PAGA claim “on behalf of the state and all other similarly . . . aggrieved employees.”¹²⁰ The trial court denied Viking River’s motion to compel arbitration of Moriana’s PAGA claim due to *Iskanian*’s prohibition on PAGA waivers.¹²¹ Viking River appealed on the basis that the U.S. Supreme Court’s 2018 decision *Epic Systems Corp. v. Lewis*¹²² overruled the precedent set by California’s Supreme Court in *Iskanian*.¹²³

In *Epic Systems*, the U.S. Supreme Court recognized that, prior to the FAA’s passing, courts frequently expressed animosity toward arbitration under the guise of public policy.¹²⁴ The *Epic Systems* ruling warned courts to look out for judicial devices that discriminate against arbitral forums unfairly and further held that any rule attempting to prohibit individualized arbitration is unacceptable.¹²⁵ PAGA, Viking River argued, is one such “judicially constructed device” designed to “disfavor[] valid contracts requiring individualized arbitration proceedings.”¹²⁶

And yet, even in the wake of *Epic Systems*, under *Iskanian* California courts would not let PAGA claims proceed to arbitration in the presence of an otherwise valid private agreement.¹²⁷ Resultingly, on appeal California’s Second District Court of Appeal affirmed the trial court’s ruling, rejecting Viking River’s contention that *Epic Systems*

117. *Id.* at 1916.

118. *Id.*

119. *Id.*

120. *Moriana*, 2020 WL 5584508, at *1.

121. *See id.*

122. 138 S. Ct. 1612 (2018).

123. *Moriana*, 2020 WL 5584508, at *1 (citing *Epic Sys. Corp.*, 138 S. Ct. at 1620).

124. *Id.* (“[I]nitial judicial antagonism toward arbitration ‘manifested itself in a great variety of devices and formulas declaring arbitration against public policy.’” (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1623)).

125. *See id.* (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1623).

126. *Id.* at *2.

127. *See id.*

applies to PAGA claims.¹²⁸ The individualized arbitration setting envisioned by *Epic Systems*, the Second District suggested, is readily distinguishable with respect to PAGA claims because the “real party in interest” for a PAGA claim is the state.¹²⁹ Owing to this distinction, the court favored *Iskanian*’s characterization of predispute PAGA waivers as an attempt by employers to dodge liability for violating the Labor Code.¹³⁰

Viking River additionally tried to compel arbitration of Moriana’s individual PAGA claim.¹³¹ The appellate court thoroughly repudiated this endeavor.¹³² First, it articulated that, because PAGA representatives act in the stead of a state law enforcement agency, an individual PAGA claim does not exist.¹³³ Furthermore, the court invoked California precedent indicating “that a single representative claim cannot be split into arbitrable individual claims and nonarbitrable representative claims.”¹³⁴ Because Moriana raised her entire complaint under a single PAGA cause of action, the court found that she had only raised a representative claim and thus could not be compelled to arbitrate.¹³⁵

Unwilling to concede, Viking River sought review by the California Supreme Court.¹³⁶ But California’s highest court denied the request.¹³⁷ Undeterred, Viking River petitioned the U.S. Supreme Court, which granted certiorari to decide whether the FAA preempted *Iskanian*’s rule invalidating contractual waiver of the right to assert representative claims under PAGA.¹³⁸

128. *Id.*

129. *Id.* (quoting *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 243 (Cal.2019)).

130. *Id.*

131. *Id.*

132. *See id.* (“[T]here are no individual PAGA claims.”).

133. *See id.* (citing *ZB, N.A.*, 448 P.3d at 243).

134. *Id.*; *see* *Correia v. NB Baker Elec., Inc.*, 244 Cal. Rptr. 3d 177, 191–92 (Ct. App. 2019) (“*Iskanian*’s view of a PAGA representative action necessarily means that [PAGA] claim[s] cannot be compelled to arbitration based on an employee’s predispute arbitration agreement absent some evidence that the state consented to the waiver of the right to bring the PAGA claim in court.”); *Tanguilig v. Bloomingdale’s, Inc.*, 210 Cal. Rptr. 3d 352, 359–60 (Ct. App. 2016), *cert. granted*, 444 P.3d 85 (2019) (“[R]egardless of whether an individual PAGA cause of action is cognizable, a PAGA plaintiff’s request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer. This is because the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim.”).

135. *See Moriana*, 2020 WL 5584508, at *2.

136. *See Viking River Cruises v. Moriana*, PUB. CITIZEN, <https://www.citizen.org/litigation/viking-river-cruises-v-moriana> [<https://perma.cc/9YDL-J53G>].

137. *Id.*

138. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1910 (2022).

B. The U.S. Supreme Court Case

In a landmark 8-1 decision by Justice Alito, the U.S. Supreme Court held the FAA preempts *Iskanian*'s prohibition on separating PAGA claims into individual and non-individual components via an arbitration agreement.¹³⁹ *Iskanian*, the Court reasoned, undermined freedom of contract by removing the parties' ability to decide which issues to arbitrate and under what rules such arbitration will proceed.¹⁴⁰ Because arbitration requires consent, parties cannot be compelled to arbitrate a claim without a contractual basis for doing so.¹⁴¹ Under *Iskanian*, "[t]he only way for parties to agree to arbitrate one of an employee's PAGA claims [was] to also 'agree' to arbitrate all other PAGA claims in the same arbitral proceeding."¹⁴² In other words, *Iskanian*'s rule effectively backed parties into a corner—either arbitrate multiple claims not anticipated in the arbitration agreement, or forgo arbitration entirely.¹⁴³ This outcome, the Court held, violates the FAA.¹⁴⁴

In arguing its position, the Court took great pains to distinguish what it characterized as *Iskanian*'s "unfortunate" use of the word "representative" in two separate contexts.¹⁴⁵ On the one hand, "PAGA actions are 'representative' in that they are brought by employees acting as . . . agents . . . of the state."¹⁴⁶ On the other, PAGA claims are also representative when referencing California Labor Code violations suffered by other employees.¹⁴⁷ In an effort to promote clarity, the Court defined PAGA claims arising from violations suffered by the plaintiff personally as "individual" PAGA claims, and those arising from violations suffered by other employees as "representative" claims.¹⁴⁸ This distinction is salient, according to the Supreme Court, because "individual" claims arising from violations suffered by the plaintiff are severable from "representative" claims arising from violations

139. *Id.* at 1924.

140. *Id.* at 1923 (citing *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019)).

141. *Id.* (citing *Lamps Plus, Inc.*, 139 S. Ct. at 1416).

142. *Id.* at 1924.

143. *Id.*

144. *Id.*

145. *Id.* at 1916.

146. *Id.*

147. *Id.*

148. *Id.*

experienced by other employees, and accordingly they may be compelled to arbitration.¹⁴⁹

Applying this logic to Moriana's claims, the Supreme Court reversed the appellate court's decision.¹⁵⁰ Though the wholesale waiver of representative PAGA claims envisioned in *Viking River's* arbitration agreement remained invalid under the new rule, the severability clause provided that, so long as some part of the arbitration agreement remained valid, that portion would remain enforceable via arbitration.¹⁵¹ Accordingly, "Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim."¹⁵²

This left the Supreme Court with a conundrum: what should courts do with collective PAGA claims once a plaintiff has been compelled to arbitrate on an individual basis?¹⁵³ Analyzing PAGA's standing requirement, the Court reasoned: "[A] plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action."¹⁵⁴ The Court then cited *Kim*, proposing that once a PAGA plaintiff's individual claim is separated from the larger PAGA action, "the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit."¹⁵⁵ According to the Court, once a plaintiff is compelled to arbitrate individual PAGA claims, any remaining representative claims should be dismissed because there is no statutory standing upon which to maintain them in court.¹⁵⁶ In short, an enforceable arbitration agreement containing a class waiver allows employers to completely sidestep PAGA's collective enforcement mechanism.¹⁵⁷

In the space of twenty pages, The United States' highest court upended California employment law. In practice, the divide-and-conquer approach endorsed by the Supreme Court in *Viking River Cruises* acts as a de facto bar to raising PAGA claims whenever there is a valid agreement to arbitrate between an employer and employee.¹⁵⁸ This is

149. *See id.* at 1924–25.

150. *Id.* at 1925.

151. *Id.* at 1924–25.

152. *Id.* at 1925.

153. *Id.*

154. *Id.* (citing CAL. LAB. CODE § 2699(a), (c) (2016)).

155. *Id.* (citing *Kim v. Reins Int'l Cal. Inc.*, 459 P.3d 1123, 1133 (Cal. 2020)).

156. *Id.*

157. *See id.*

158. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2904 (2015) (noting that "overall,

because permitting a class or collective waiver often renders filing a claim economically infeasible for lone plaintiffs;¹⁵⁹ absent the ability to stack the claims of her fellow employees, a plaintiff's individual claims probably will not generate a penalty substantial enough to justify initiating a proceeding.¹⁶⁰ Thus, carrying on as the Supreme Court envisions would serve to completely undermine PAGA's public policy rationale and render the statute toothless except in the rare instance where a single employee has suffered so many Labor Code violations that the requisite investment of time and energy to litigate her claims is practicable.

C. *The Supreme Court Improperly Cited to Kim v. Reins*

With its citation to *Kim* in *Viking River Cruises*, the Supreme Court included a parenthetical, which reads: “‘PAGA’s standing requirement was meant to be a departure from the ‘general public’ . . . standing originally allowed’ under other California statutes.”¹⁶¹ Accordingly, the Court reasoned plaintiffs cannot maintain “non-individual [PAGA] claims in court” when an individual claim is compelled to arbitration.¹⁶² This interpretation of *Kim* is problematic because, read in context, the California Supreme Court proposed exactly the opposite conclusion:

It is apparent that PAGA’s standing requirement was meant to be a departure from the “general public” standing originally allowed under the UCL. However, . . . [n]othing in the legislative history suggests the Legislature intended to make PAGA standing dependent on the existence of an unre-dressed injury, or the maintenance of a separate, unresolved

relatively few individuals pursue [small-value] claims anywhere,” people “rarely thought they would themselves bring cases,” and that private enforcement of such claims “depends on collective, rather than individual, action”); *infra* footnotes 159–160 and accompanying text.

159. See Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1888 (2016) (“Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their ‘effective vindication.’”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting) (“If employers can stave off collective employment litigation . . . [e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries.”).

160. See Resnik, *supra* note 158, at 2904; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the [plaintiff] in litigation for the possibility of fees stemming from a \$30.22 claim?”).

161. *Viking River Cruises*, 142 S. Ct. at 1925 (alterations in original) (citing *Kim v. Reins Int’l Cal., Inc.*, 459 P.3d 1123, 1133 (Cal. 2020)).

162. *Id.*

claim. Such a condition would have severely curtailed PAGA's availability to police Labor Code violations because, as noted, many provisions do not create private rights of action or require an allegation of quantifiable injury. Instead, true to PAGA's remedial purpose, the Legislature conferred fairly broad standing on all plaintiffs who were employed by the violator and subjected to at least one alleged violation. [A] narrower construction would thwart the Legislature's clear intent to deputize employees to pursue sanctions on the state's behalf.¹⁶³

Whether the Supreme Court cherry-picked an argument to fit its desired outcome or simply misunderstood the case law, the result is the same. Its questionable interpretation of *Kim* created a headache for parties on both sides of the PAGA issue.¹⁶⁴ As discussed below, California courts continued relying on *Kim* to further develop PAGA in the wake of *Viking River Cruises*, and ultimately the U.S. Supreme Court's ruling prompted California's Supreme Court to design a sort of spiritual successor to *Iskanian* in the case *Adolph v. Uber Technologies, Inc.*¹⁶⁵ In all, it is impossible to know with certainty whether the U.S. Supreme Court will scrutinize *Adolph*'s holding in the future. However, it is exceedingly clear that California courts are determined to reinvigorate PAGA despite the U.S. Supreme Court's efforts to declaw it.¹⁶⁶

D. Justice Sotomayor's Concurring Opinion Left California a Way Out

Justice Sotomayor included a concurring opinion with *Viking River Cruises* in which she joined the majority in full.¹⁶⁷ In her words, the Court "makes clear that California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without assistance from private attorneys general."¹⁶⁸ Justice Sotomayor agreed with the Court that there is no "statutory standing" . . . to litigate [one's] 'non-individual' claims separately in state court" because PAGA's text does not expressly permit maintenance of non-

163. *Kim*, 459 P.3d at 1133 (emphasis added) (citations omitted).

164. See Carrol & Woo, *supra* note 38.

165. See *infra* Section III.D.

166. See *infra* Section III.B.

167. *Viking River Cruises*, 142 S. Ct. at 1925 (Sotomayor, J., concurring).

168. *Id.*

individual claims after an individual claim is sent to arbitration.¹⁶⁹ However, Justice Sotomayor concluded by encouraging California to respond to the Court's holding: "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits."¹⁷⁰

III. CALIFORNIA JURISPRUDENCE SINCE VIKING RIVER CRUISES

In the time since *Viking River Cruises* was decided, the Ninth Circuit has wholeheartedly embraced the U.S. Supreme Court's protective stance on arbitration, even going so far as to revisit its own rulings.¹⁷¹ However, rather than rolling over and accepting the federal judiciary's hamstringing of PAGA, California's courts have made good on Justice Sotomayor's invitation to weigh in on the Supreme Court's purportedly incorrect interpretation of state law.

A. *The Ninth Circuit Has Adopted a "Liberal Federal Policy Favoring Arbitration"*¹⁷²

Viking River Cruises directly resulted in the Ninth Circuit reversing itself on a previously decided matter. In 2020, California's legislature passed Assembly Bill 51 (A.B. 51), making it unlawful for employers to require that employees sign an arbitration agreement as a condition of employment.¹⁷³ The stated aim of the bill was to ensure agreements to waive statutory employment "rights, forums, and procedures" are entered by consent rather than coercion.¹⁷⁴ Almost immediately after A.B. 51 passed, the U.S. Chamber of Commerce sought a preliminary injunction in federal court to prevent its

169. *Id.*

170. *Id.* at 1925–26.

171. *See* Chamber of Com. of U.S. v. Bonta, 13 F.4th 766, 776 (9th Cir. 2021), *aff'd on reh'g*, 62 F.4th 473 (9th Cir. 2023).

172. *Bonta*, 62 F.4th at 487 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

173. Assemb. B. 51, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

174. *See id.* at § 1(a)–(b) ("The Legislature finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act . . . and the Labor Code;" and "It is the purpose of this act to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.").

enforcement, which was granted with respect to any arbitration agreements governed by the FAA.¹⁷⁵ To do otherwise, the district court reasoned, would violate the FAA on two grounds.¹⁷⁶ First, the bill would impose a higher consent requirement on arbitration agreements than other contracts, violating the “unequal footing” principle.¹⁷⁷ Second, it would interfere with the FAA’s aim to encourage arbitration by penalizing employers for seeking an arbitration agreement.¹⁷⁸

The State of California appealed to the Ninth Circuit, which reversed the district court ruling and removed the injunction in a split decision.¹⁷⁹ It found the FAA does not completely preempt A.B. 51 because the bill takes aim at conduct occurring before the existence of any agreement.¹⁸⁰ The Ninth Circuit did however find A.B. 51 is partially preempted because the FAA does not permit the imposition of sanctions for the mere act of entering an agreement to arbitrate.¹⁸¹

After the court handed down its ruling, the U.S. Chamber of Commerce filed a petition for a rehearing en banc that the Ninth Circuit deferred pending the result of *Viking River Cruises*.¹⁸² In the wake of the U.S. Supreme Court’s decision, the Ninth Circuit withdrew its initial ruling and granted a panel rehearing.¹⁸³ On February 15, 2023, the Ninth Circuit decided the FAA does, in fact, preempt A.B. 51.¹⁸⁴ In reaching its decision, the court found that “AB 51’s deterrence of an employer’s willingness to enter into an arbitration agreement is antithetical to the FAA’s ‘liberal federal policy favoring arbitration agreements.’”¹⁸⁵

175. Chamber of Com. of U.S. v. Becerra, 438 F. Supp. 3d 1078 (E.D. Cal. 2020).

176. *Id.* at 1100.

177. *Id.* at 1097.

178. *Id.* at 1100.

179. Chamber of Com. of U.S. v. Bonta, 13 F.4th 766, 781 (9th Cir. 2021), *aff’d on reh’g*, 62 F.4th 473 (9th Cir. 2023).

180. *Bonta*, 13 F.4th at 776; *see also* Robert Foster, *Ninth Circuit Grants Rehearing on California Law Banning Mandatory Employment Arbitration Agreements*, SHEPPARDMULLIN (Sept. 16, 2022), <https://www.laboremploymentlawblog.com/2022/09/articles/arbitration-agreements/ninth-circuit-grants-rehearing-on-california-law-banning-mandatory-employment-arbitration-agreements/> [<https://perma.cc/QR4Q-5NYG>] (“The majority concluded that because AB 51 addresses only ‘pre-agreement employer behavior’ . . . ‘the law does not invalidate or render unenforceable arbitration agreements covered by the FAA.’”).

181. *Bonta*, 13 F.4th at 781.

182. Foster, *supra* note 180.

183. *Id.*

184. Chamber of Com. of U.S. v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023).

185. *Id.* at 487 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

*B. California Courts Strengthened PAGA Standing
After Viking River Cruises*

Conversely, case law spawned by *Kim*'s precedent bolsters the argument that the Supreme Court misinterpreted California jurisprudence. For example, in *Zuniga v. Alexandria Care Center, LLC*,¹⁸⁶ California's Court of Appeal for the Second District ruled a plaintiff who settled her individual claims after being ordered to arbitration retained standing to maintain PAGA claims for the state, reasoning the "[plaintiff's] status was identical to *Kim*'s."¹⁸⁷ Similarly, in *Johnson v. Maxim Healthcare Services, Inc.*,¹⁸⁸ California's Court of Appeal for the Fourth District found *Kim* clearly articulated the statutory construction of PAGA conditions plaintiff standing on Labor Code violations rather than injury.¹⁸⁹ Thus, an employee subjected to a single unlawful practice may maintain the right to act as a PAGA representative "even if they did not personally experience each and every alleged violation."¹⁹⁰ Consequently, an employee whose individual claim is time-barred maintains standing to raise collective PAGA claims.¹⁹¹

Moreover, in the time after *Viking River Cruises* was passed down, California courts increasingly relied on *Kim* to insulate PAGA from mandatory arbitration. For example, in the July 2022 case *Howitson v. Evans Hotels, LLC*,¹⁹² California's Court of Appeal for the Fourth District decided claim preclusion does not apply to PAGA claims where a putative representative PAGA plaintiff had already settled her individual and class non-PAGA claims.¹⁹³ The court reasoned: "A PAGA claim is legally and conceptually different from an employee's own suit for damages and statutory penalties."¹⁹⁴ The harm alleged in an individual Labor Code claim is to the employee, whereas the harm alleged in a PAGA claim is to the state and general public.¹⁹⁵ A plaintiff is acting for her own personal benefit in the first instance,

186. 282 Cal. Rptr. 3d 564 (Ct. App. 2021).

187. *Id.* at 573.

188. 281 Cal. Rptr. 3d 478 (Ct. App. 2021)

189. *Id.* at 482.

190. *Id.* (quoting *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1129–30 (Cal. 2020)).

191. *Id.*

192. 297 Cal. Rptr. 3d 181 (Ct. App. 2022).

193. *Id.*

194. *Id.* at 191 (citing *Kim*, 459 P.3d at 1127).

195. *Id.*

so the state has no interest in the outcome of those non-PAGA actions and is not a party to them.¹⁹⁶

Similarly, in *Gavriiloglou v. Prime Healthcare Management, Inc.*¹⁹⁷ the Fourth District explained that issue preclusion does not apply where a plaintiff's individual claims have been compelled to arbitration but her PAGA claims have been stayed pending the result of arbitration.¹⁹⁸ The court determined *Viking River Cruises* does not actually recognize an individual PAGA claim, scathingly dismissing SCOTUS's reasoning as "mere wordplay" because "[w]hat the Supreme Court called, as shorthand, an 'individual PAGA claim' is not actually a PAGA claim at all. It would exist even if PAGA had never been enacted. It is what we are calling, more accurately, an individual Labor Code claim."¹⁹⁹

And California's Court of Appeal for the Fifth District took *Gavriiloglou* one step further in *Galarsa v. Dolgen California, LLC*,²⁰⁰ dividing PAGA claims into type "A" claims (suffered by the plaintiff directly) and type "O" claims (suffered by employees besides the plaintiff).²⁰¹ Type "A" claims are bound by *Viking River Cruises* and thus may be compelled to arbitration, whereas type "O" claims may be pursued in court once type "A" claims have been severed.²⁰² In reaching its conclusion, the court predicted California's Supreme Court will agree that Type "O" claims may be maintained separately from type "A" claims because "it is the interpretation of PAGA that best effectuates the statute's purpose, which is 'to ensure effective code enforcement.'"²⁰³

Most compelling of all, on March 7, 2023, in *Piplack v. In-N-Out Burgers*,²⁰⁴ California's Fourth District outright concluded *Viking River Cruises* and *Kim* cannot be reconciled.²⁰⁵ The court reasoned the two requirements for PAGA standing articulated in *Kim* remained wholly unaffected when an individual PAGA claim was severed and

196. *Id.* at 194.

197. 299 Cal. Rptr. 3d 34 (Ct. App. 2022).

198. *See id.*

199. *Id.* at 41.

200. 305 Cal. Rptr. 3d 15 (Ct. App. 2023).

201. *Id.* at 21–22.

202. *Id.*

203. *Id.* at 26 (quoting *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1131 (Cal. 2020)).

204. 305 Cal. Rptr. 3d 405 (Ct. App. 2023), *cert. granted*, 530 P.3d 350 (Cal. June 14, 2023).

205. *Id.* at 407.

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sent to arbitration.²⁰⁶ Recognizing it owed the U.S. Supreme Court “deep deference, even on questions of state law, where the California Supreme Court has final say,” the appellate court nonetheless decided that “absent some means of harmonizing *Viking* with *Kim*, we must follow *Kim*.”²⁰⁷ The court likened the present state of PAGA litigation as leaving courts “trapped between Scylla and Charybdis,” concluding its opinion with a plea to the legislature to resolve this complicated problem more definitively.²⁰⁸

C. PAGA Could Be Repealed in November 2024

In November 2024, PAGA may very well be repealed by a California ballot initiative called The Fair Pay and Employer Accountability Act.²⁰⁹ Among other things, the proposed law would permit double penalties for employers who willfully violate the California Labor Code and place the Labor Commissioner in charge of adjudicating wage claims.²¹⁰ Additionally, the law would “require[] the state to provide enough funding to the Labor Commissioner to fully carry out its new and existing responsibilities” and would cut plaintiff’s attorneys out entirely, promising to instead send 100 percent of penalty payments garnered by these claims to the employee.²¹¹ However, the proposed law would not permit workers to combine claims into a collective or class action.²¹² If passed, the increased cost to enforce state labor laws is predicted to exceed \$100 million annually.²¹³

Rather than solve the issues presented by PAGA, the Fair Pay and Employer Accountability Act will merely replace existing problems with new ones. The inability of an employee to file a class claim under this proposed law will force the Labor Commissioner to deal with a significantly inflated case load and will likely be a major contributor

206. *Id.* at 412 (“In short, paring away the plaintiff’s individual claims does not deprive the plaintiff of standing to pursue representative claims under PAGA, so long as the plaintiff was employed by the defendant and suffered one or more of the alleged violations.”).

207. *Id.* at 413.

208. *Id.* at 414.

209. See Tritia M. Murata & Jinny S. Hwang, *The California Supreme Court Clarifies PAGA Standing*, MORRISON FOERSTER (July 26, 2023) <https://elc.mofo.com/topics/the-california-supreme-court-clarifies-paga-standing> [<https://perma.cc/3NPF-TF6F>].

210. See LEGIS. ANALYST’S OFF., A.G. FILE NO. 2021-027, at 3 (2021).

211. *Id.*; see CalChamber, *Initiative to Stop Shakedown Lawsuits Gaining Momentum*, CAL. CHAMBER COM. (Feb. 7, 2022), <https://advocacy.calchamber.com/2022/02/07/initiative-to-stop-shakedown-lawsuits-gaining-momentum> [<https://perma.cc/6HVA-P673>].

212. LEGIS. ANALYST’S OFF., *supra* note 210, at 3 (“Workers could not combine their claims into a class action.”).

213. *Id.* at 4.

to the anticipated increase in funding costs.²¹⁴ And, the additional funding required to effectuate labor code enforcement under this scheme will most likely be displaced onto taxpayers.²¹⁵ Furthermore, the tens of millions of dollars PAGA nets for LWDA funding annually will be eliminated,²¹⁶ potentially chilling state-led efforts to educate at-risk workers about their rights.²¹⁷ In closing, California voters should carefully consider whether it makes sense to exchange known issues for a new set of untested, and potentially unforeseen, problems.

D. In Adolph v. Uber Technologies, Inc. the California Supreme Court Directly Addressed the Issue of PAGA Standing Raised by Viking River Cruises

Given the extensive case law aimed at addressing the issue of PAGA standing after *Viking River Cruises*, it appeared all but inevitable that the California Supreme Court would choose to weigh in on the matter. It came as little surprise then, when just over one month after *Viking River Cruises*, California's highest court granted review in *Adolph v. Uber Technologies, Inc.* to determine whether a plaintiff, once compelled to arbitrate her individual PAGA claims, maintains statutory standing to litigate non-individual PAGA claims in court.²¹⁸

On July 17, 2023, just over one year after *Viking River Cruises*, California's Supreme Court unanimously held: "compelling arbitration of individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA."²¹⁹ Reasoning "[states] are not bound by the high court's interpretation of California law," the court then resolved itself to ascertain how California's legislature intended to confer standing under PAGA.²²⁰

Relying on *Kim*, the court first determined "[t]he Legislature defined PAGA standing in terms of violations," which "[s]ettlement did

214. *Id.* at 3.

215. *Id.* at 3–4 ("These costs likely would be paid from increased state fees on businesses, which currently fund the Labor Commissioner, or from the state General Fund.").

216. *Id.* at 4 ("Under this measure, the state would no longer receive PAGA penalties, meaning the measure would result in reduced state revenue for labor law enforcement. This revenue reduction likely would be in the tens of millions of dollars annually."); *see supra* Section I.C.2.

217. *See supra* Section I.C.2.

218. *See Adolph v. Uber Tech., Inc.*, 532 P.3d 682, 686 (Cal. 2023).

219. *Id.* at 692.

220. *Id.* at 689.

not nullify.”²²¹ Because qualification as an “aggrieved” employee under the statute is premised solely on the suffering of a Labor Code violation, concurrently requiring the presence of an “unredressed injury . . . would be ‘at odds with the statutory definition.’”²²² Accordingly, arbitrating an individual PAGA claim does not negate that an employee has been aggrieved “any more than . . . the settlement of individual damages claims did in *Kim*.”²²³ So long as a plaintiff alleges she suffered Labor Code violations while employed, there is PAGA standing.²²⁴

The California Supreme Court next noted its decision comported with five appellate opinions decided in the time since *Viking River Cruises*.²²⁵ It posited the unanimity of California’s appellate courts on the matter of PAGA standing was unsurprising because the statute’s text, purpose, and legislative history readily supported a broad interpretation of the standing requirement.²²⁶ The court further opined narrowing PAGA standing would increase the cost of enforcing the Labor Code and reduce state revenue, thus hampering the statute’s ability to achieve its policy objectives.²²⁷

To conclude its opinion, the court assessed arguments made by both parties.²²⁸ First among these arguments was a proposed manner by which non-arbitrable collective PAGA claims may proceed after a plaintiff’s individual claims have been compelled to arbitration.²²⁹ Once an individual claim is sent to arbitration, a trial court has

221. *Id.* at 690 (alterations in original) (quoting *Kim v. Reins Int’l Cal., Inc.*, 459 P.3d 1123, 1129 (Cal. 2020)).

222. *Id.*

223. *Id.* at 691 (citing *Kim*, 459 P.3d at 1129).

224. *Id.*

225. *See id.* (“[A] plaintiff’s PAGA standing does not evaporate when an employer chooses to enforce an arbitration agreement.” (citing *Galarsa v. Dolgen Cal., LLC*, 88 Cal. App. 5th 639, 653 (Ct. App. 2023))); *Seifu v. Lyft, Inc.*, 306 Cal. Rptr. 3d 641, 643 (Ct. App. 2023) (“[A] plaintiff is not stripped of standing to pursue nonindividual PAGA claims simply because his or her individual PAGA claim is compelled to arbitration.”); *Piplack v. In-N-Out Burgers*, 305 Cal. Rptr. 3d 405, 412 (Ct. App. 2023), *cert. granted*, 530 P.3d 350 (Cal. 2023) (“[P]aring away the plaintiff’s individual claims does not deprive the plaintiff of standing to pursue representative claims under PAGA”); *Gregg v. Uber Techs., Inc.*, 306 Cal. Rptr. 3d 332, 335 (Ct. App. 2023), *rev’g* 530 P.3d 351 (Cal. 2023) (“[U]nder California law, Gregg is not stripped of standing to pursue his nonindividual claims in court simply because his individual claim must be arbitrated.”); *Nickson v. Shemran, Inc.*, 306 Cal. Rptr. 3d 835, 845 (Ct. App. 2023) (“Nickson has standing to litigate nonindividual PAGA claims in the superior court notwithstanding his agreement to arbitrate individual PAGA claims.”).

226. *Adolph*, 532 P.3d at 691.

227. *See id.* at 691–92.

228. *See id.* at 692–96.

229. *Id.* at 692.

discretion under the California Code of Civil Procedure “to stay the non-individual claims pending the outcome of the arbitration.”²³⁰ The court appeared to endorse the position that whether stayed non-individual PAGA claims can proceed in court depends on the arbitrator’s determination regarding whether the plaintiff was actually aggrieved.²³¹ In other words, standing to maintain non-individual PAGA claims is contingent on the plaintiff prevailing in arbitration.²³²

It would seem, for the time being, California’s judiciary has addressed the issues presented by *Viking River Cruises*. Now, whether an employee-plaintiff may maintain non-individual PAGA claims once any individual claims have been compelled to arbitration wholly depends on an arbitrator’s determination of “aggrievement.” For the reasons outlined below, this fix, although a step in the right direction, is incomplete.

IV. ANALYSIS

A. PAGA’s Objectives Are Fundamentally Incompatible with Mandatory Arbitration

The outcome of *Viking River Cruises* was not inevitable. It is merely the latest in a long line of cases through which the U.S. Supreme Court has bloated the FAA’s scope far beyond Congress’s original intent.²³³ The unfortunate side effect of the U.S. Supreme Court’s handiwork is California’s forced compliance with the FAA,²³⁴ often at

230. *Id.*; see also CAL. CIV. PROC. CODE § 1285 (2023).

231. *Adolph*, 532 P.3d at 692–93 (“If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and Adolph would continue to have standing to litigate his nonindividual claims. If the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing.”).

232. *See id.*

233. *See supra* Section I.A; *see also infra* note 234.

234. In expanding the FAA’s reach, SCOTUS has struck down many California laws and judicial mechanisms. *See, e.g.*, *Chamber of Com. of U.S. v. Bonta*, 62 F.4th 473, 478 n.1 (9th Cir. 2023) (listing several instances where the U.S. Supreme Court abrogated California legislation and jurisprudence: (1) *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), “holding that the FAA preempted a California rule that contract provisions disallowing class-wide arbitration are unconscionable”; (2) *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) “holding that the FAA preempted a California law giving a state agency primary jurisdiction over a dispute involving the California Talent Agency Act despite the parties’ agreement to arbitrate such disputes”; and (3) *Perry v. Thomas*, 482 U.S. 483, 484, 491 (1987) “holding that the FAA preempted a state statute permitting litigation of wage collection actions despite the existence of a private agreement to arbitrate”).

the expense of the state's most vulnerable workers.²³⁵ Indeed, scrutiny of the FAA's practical effect on employment litigation reveals that arbitration is at best incompatible with PAGA's stated objectives and at worst directly opposed to them.

To begin, proponents of arbitration often champion its heightened speed and efficiency as compared to traditional judicial forums.²³⁶ While it is impossible to deny the merits of speed and efficiency, when adjudicating a legal dispute, the most important consideration should be achieving a just result. To that point, arbitration's severely curtailed scope of discovery, combined with a general inability to appeal an arbitrator's decision,²³⁷ suggests justice is often sidelined in the interest of these other considerations.²³⁸ For example, the Ninth Circuit has joined a majority of federal jurisdictions in holding the statutory construction of FAA section 7 does not give arbitrators authority to compel document production from non-parties outside of a hearing.²³⁹ Adopting an overly literal interpretation of section 7's text is problematic because it renders all document discovery incidental to a witness's

235. See COLVIN, *supra* note 11, tbl.4 (providing as of 2018, 64.5 percent of employees making less than thirteen dollars per hour are subjected to mandatory arbitration in the United States); see also Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 1 (“[PAGA] plays a particularly important role in ensuring the fair and legal treatment of some of the State’s most vulnerable workers . . .”).

236. See *Why Arbitrate*, COLL. COM. ARBS., <https://www.ccarbitrators.org/why-arbitrate/> [<https://perma.cc/5P5F-J53Z>] (listing lower costs, flexibility, and shorter resolution time as benefits of arbitration).

237. Under the FAA, arbitration awards are only appealable if: (1) the award was the result of fraud or some other improper means; (2) “there was evident partiality or corruption”; (3) misconduct on behalf of the arbitrator resulted in prejudice to the rights of a party; or (4) “the arbitrators exceeded their powers” or failed to execute their powers properly, thus not making a final award. See 9 U.S.C. § 10(a)(1)–(4); see also Stone & Colvin, *supra* note 15 (noting the four exceptions above “ha[ve] been interpreted exceptionally narrowly”).

238. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690–91 (Cal. 2000). Although private arbitration might resolve disputes more cheaply and more quickly than court proceedings, private arbitration “may also become an instrument of injustice imposed on a ‘take it or leave it’ basis. The courts must . . . ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.” *Id.* It is also noteworthy that “[t]here is no provision for overturning an award based on errors of fact, contract interpretation, or law.” Stone & Colvin, *supra* note 15.

239. *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017) (noting that in section 7, “[t]he phrase ‘bring with them,’ referring to documents or other information, is used in conjunction with language granting an arbitrator the power to ‘summon . . . any person to attend before them,’” meaning that “any document productions ordered against third parties can happen only ‘before’ the arbitrator”); see also Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 DISP. RESOL. J. 36, 39 (2008) (“Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing.”).

ability to appear in-person.²⁴⁰ Further compounding the problem is that, absent an agreement to the contrary, beyond the exchanging of relevant documents and basic disclosure of party claims and defenses, additional discovery is often only permissible if the arbitrator believes there is a real need for it.²⁴¹ In the context of PAGA, the practical effect of limiting discovery is to disadvantage employees because employers usually possess the majority of documents and information pertinent to a case.²⁴²

Furthermore, a comparison of plaintiff outcomes in arbitration versus in traditional litigation shows the disadvantage is not theoretical with respect to employment disputes. A comprehensive analysis conducted by Cornell's School of Industrial and Labor Relations²⁴³ unearthed several concerning trends.²⁴⁴ Firstly, employee-plaintiffs tend to obtain favorable rulings in 62 percent of litigation proceedings, but in only 46 percent of mandatory arbitration proceedings.²⁴⁵ Exacerbating the issue, when employers utilize the same arbitrator across multiple proceedings they tend to win more often, suggesting arbitration may bestow a "repeat player" advantage employees are not privy to.²⁴⁶ Additionally, even when employees do obtain a favorable

240. Gabriel Herrmann, Note, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 798–99 (2003).

241. Moxley, *supra* note 239, at 38; *see also* Stone & Colvin, *supra* note 15 ("In certain types of cases, such as employment discrimination claims, it is practically impossible to win without the right to use extensive discovery to find out how others have been treated. In addition, while some arbitration agreements include due-process protections, others shorten statutes of limitations, alter the burdens of proof, limit the amount of time a party has to present his or her case, or otherwise impose constrictive procedural rules.").

242. *See Signing an Arbitration Agreement with Your Employer*, NOLO, <https://www.nolo.com/legal-encyclopedia/signing-arbitration-agreement-with-employer-30005.html> [<https://perma.cc/PQG5-BRUM>].

243. This study involved 1,256 plaintiff's attorneys, 31 percent of whom practice in California, and of whom 92 percent have "employment-related caseloads." It controlled for potential bias by "focus[ing] most of [its] primary data collection on objective characteristics of cases rather than the subjective evaluations of the attorneys" and by comparing mandatory arbitration and litigation "using questions where any biasing of the responses [is] likely to be similar across the two forums, so that the comparisons are less affected by this potential biasing." *See* ALEXANDER J.S. COLVIN & MARK D. GOUGH, ILR SCH., CORNELL UNIV., *COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES* 8–11 (2014), <https://ecommons.cornell.edu/server/api/core/bitstreams/3d914d56-1231-47d1-930a-2ce58da79d11/content> [<https://perma.cc/43ZR-QG75>].

244. *Id.* at 37.

245. *Id.* at 21 ("To further facilitate comparability cases involving class actions and employees as defendants were not included in this analysis. Arbitration cases proceeding under individually-negotiated or voluntary agreements were likewise excluded from the present analysis.").

246. Stone & Colvin, *supra* note 15; *see also* *Mercuro v. Superior Ct.*, 116 Cal. Rptr. 2d 671, 678–79 (Ct. App. 2002) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 687–90 (Cal. 2000) ("The fact an employer repeatedly appears before the same group of arbitrators

judgment in arbitration, their financial awards are often significantly reduced compared to employees who triumph in court, suggesting arbitrators are markedly more stingy than judicial officers when an employee prevails on the merits.²⁴⁷

Likewise, settlement amounts tend to be considerably smaller in employment disputes sent to arbitration.²⁴⁸ Overall, 29 percent of mandatory arbitration settlements range from \$1–\$25,000, compared to 18 percent in state court; similarly, 23 percent of arbitration settlements exceed \$100,000, compared to 38 percent in state court.²⁴⁹ In sum, employee-plaintiffs compelled to arbitration are less likely to receive favorable rulings, less likely to negotiate large settlements, and generally tend to receive lower awards when they are successful.²⁵⁰ Though not an absolute, “such uniform differences among multiple measures suggest[] mandatory arbitration provides inferior outcomes for employee-plaintiffs pursuing employment discrimination claims.”²⁵¹

Perhaps most concerning of all, the inferior outcomes experienced by employee-plaintiffs in arbitral proceedings can have far-reaching public policy ramifications. For example, lower damage awards may reduce the deterrent effect of employment law initiatives like PAGA.²⁵² To illustrate this point, recall that the divide-and-conquer approach envisioned in *Viking River Cruises* may render filing a PAGA claim unworkable where employers produce a valid arbitration agreement because, absent the ability to stack the claims of their fellow employees, the penalties accrued through a plaintiff’s individual claims are likely too insignificant to support a lawsuit.²⁵³

And mandatory arbitration is not a panacea to all that ails employers; on the contrary, it benefits some employers far more than

conveys distinct advantages . . . includ[ing] knowledge of the arbitrators’ temperaments, procedural preferences, styles and the like and the arbitrators’ cultivation of further business by taking a ‘split the difference’ approach to damages.”).

247. See COLVIN & GOUGH, *supra* note 243, at 22 (finding “successful employees receive on average \$362,390 in damages in mandatory arbitration compared to an average of \$676,688 in damages in litigation, and a median of \$174,000 in mandatory arbitration compared to \$225,000 in litigation,” and noting this data suggests the frequency with which large damage awards are granted is significantly smaller in arbitration than in court).

248. *Id.* at 24.

249. *Id.*

250. *Id.* at 25.

251. *Id.*

252. See *supra* Section I.C.2; COLVIN & GOUGH, *supra* note 243, at 22.

253. See *supra* Section II.B.

others.²⁵⁴ One of PAGA's stated benefits is the insulation of law-abiding employers from adverse market effects caused by those who gain a competitive advantage through flouting the Labor Code.²⁵⁵ Accordingly, upstanding business owners should be displeased with *Viking River Cruises* because the Supreme Court's ruling does little to address the increased burden PAGA places on them relative to their less scrupulous peers. Generally speaking, businesses may decide to willfully ignore the Labor Code if they determine it is cheaper to ignore regulations and simply pay out whatever legal penalties result on an individual basis if caught.²⁵⁶ Applied here, because *Viking River Cruises* permits arbitration agreements to remove the stacking mechanism otherwise available to plaintiffs under PAGA, the number of penalties levied against defendants will conceivably be reduced where parties have a valid agreement to arbitrate.

Ultimately, studies indicate that nationwide, low-wage workers are the most likely targets of wage-theft.²⁵⁷ Additionally, immigrants

254. *See supra* Section II.B. Limiting the scope of discovery may harm an employer's ability to both pursue and defend against a wide variety of claims.

[A]n employer seeking to prosecute a breach of loyalty or theft of trade secrets claim may need discovery from the new employer or customers. Employers may wish to subpoena records from prior employers to prove an after-acquired evidence defense. Breach of contract actions may require discovery from third parties Third-party discovery may be desirable in a multitude of other circumstances.

Semmel, *supra* note 24. Furthermore, large scale arbitration can result in massive fees for defendants. For example, a 2022 case involving Uber Eats saw the food delivery service seek a preliminary injunction to block roughly 31,000 concurrent arbitration demands amounting to nearly \$92 million in upfront fees. *See* Allison Frankel, *Uber Loses Appeal to Block \$92 Million in Mass Arbitration Fees*, REUTERS (Apr. 18, 2022), <https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18/> [<https://perma.cc/3F9T-PXGQ>]. The New York state appeals court denied the injunction, joining a multi-state trend exhibiting no sympathy for companies facing massive arbitration fees. Uber, the court opined, "made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers . . . [and the] fees are directly attributable to that decision." *Id.* The court accepted the American Arbitration Association's argument that it would be inequitable for Uber to "zealously uph[old] its own right to compel individual arbitration as long as it perceives the process to be in its interest" but then "avoid the consequences of its agreement" when it believes otherwise. *Id.* Uber's plight is but one instance in a growing trend where aggrieved consumers and employees file individual arbitration complaints en masse in an effort to hold companies accountable for alleged transgressions. *See* Mellins, *supra* note 19.

255. *See supra* Section I.C.2.

256. "Some companies are doing a cost-benefit analysis and realize it's cheaper to violate the law, even if you get caught." Alexia Fernández Campbell & Joe Yeraradi, *How Companies Rip Off Poor Employees—And Get Away with It*, ASSOCIATED PRESS (May 4, 2021, 1:00 PM), <https://apnews.com/article/how-companies-rip-off-poor-employees-6c5364b4f9c69d9bc1b0093519935a5a> [<https://perma.cc/U2V4-JPPU>]. For example, U.S. Labor Department data shows Circle-K repeatedly engages in wage theft with minimal repercussions. *See id.*

257. *See id.*

and employees of color are more likely than other groups to earn below the minimum wage.²⁵⁸ Considering the prevalence of mandatory arbitration clauses based on factors such as employee wage²⁵⁹ and employer size²⁶⁰ it becomes apparent that big businesses, and not local corner stores, are the main beneficiaries of *Viking River Cruises*. Meanwhile, vulnerable, low-wage workers are the most adversely affected by it. This result is entirely incongruous with PAGA's goals.²⁶¹

B. PAGA Plaintiffs and Employers Usually Have Unequal Bargaining Power

California has stated an interest in protecting the state's most vulnerable workers through PAGA. Yet, permitting severance of individual and representative PAGA claims in the name of "freedom to contract" fails to consider the socioeconomic realities driving low-wage employees' consent to arbitrate. For example, employers commonly offer arbitration agreements as adhesion contracts—that is, on a "take it or leave it" basis.²⁶² Proponents of arbitration argue an employee can simply refuse to work for such employers and take their labor elsewhere; however, in a job market where roughly 60 percent of employers condition employment on signing an arbitration clause,²⁶³ it is rarely so easy as that. Vulnerable, low-wage employees often are unable to turn down an offer of employment due to tenuous financial

258. *See id.*

259. *See* COLVIN, *supra* note 11, tbl.4.

260. *See id.* tbl.1.

261. *See supra* Section I.C.2. PAGA's goals include, but are not limited to, "vigorously enforce[ing] minimum labor standards" by "'ensur[ing] employees are not required or permitted to work under substandard unlawful conditions,' 'secur[ing] the payment of compensation,' and 'protect[ing] employers who comply with the law from those who attempt to gain a competitive advantage' by non-compliance." Brief for California as Amicus Curiae in Support of Respondent, *supra* note 40, at 1 (citing CAL. LAB. CODE § 90.5).

262. Kendra Robbins, *Ethical Issues in Employment Arbitration*, 34 GEO. L. REV. ETHICS 1261, 1270 (2005).

263. Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG L. (Oct. 28, 2021, 10:01 AM), <https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it> [<https://perma.cc/449G-R94J>] ("Nearly 54% of nonunion, private-sector employers have mandatory arbitration procedures, representing 60 million workers . . . Among companies with 1,000 or more employees, 65% have mandatory arbitration policies."); COLVIN, *supra* note 11 (finding that 53.9 percent of private-sector employers without union representation "have mandatory arbitration procedures," as do 65.1 percent of companies with 1,000 or more employees, and that among all employers that condition employment on signing an arbitration agreement, 30.1 percent "also include class action waivers in their procedures," with a larger proportion of these class waivers coming from large companies).

circumstances.²⁶⁴ It stands to reason employees who cannot afford to turn down a job offer also cannot afford to hire an attorney to review employee contracts or negotiate more favorable terms.²⁶⁵ All too often, the end result is that employees enter agreements favoring the employer out of necessity. It is not “take it or leave it,” but “consent or risk homelessness.”²⁶⁶

The drafters of the FAA were keenly aware of the power imbalance commonly present in employment relationships, but the safety measures they implemented to address this issue have been disregarded by the Court. The FAA’s sponsors expressly stated “[i]t creates no new legislation, grants no new rights, except a remedy to enforce an agreement in *commercial contracts* and in *admiralty contracts*.”²⁶⁷ Similarly, the legislative history shows supporters of the bill thoroughly considered the potentially adverse impact of mandatory arbitration on employment relationships. For example, at a senate hearing concerning the FAA an American Bar Association representative stated: “It is not intended that this shall be an act referring to labor disputes, at all.”²⁶⁸ Furthermore, one senator described the power imbalance inherent in many employment relationships:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. . . . It is the same with a good many contracts of employment. A man says, “These are our terms. All right, take it or leave it.” Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his

264. See Serah Hyde, *The Effects of the Rent Burden on Low Income Families*, U.S. BUREAU LAB. STAT. (Mar. 2018), <https://www.bls.gov/opub/mlr/2018/beyond-bls/the-effects-of-the-rent-burden-on-low-income-families.htm> (“The average family in the bottom quintile of the income distribution has less than \$500 left after paying rent, a monthly amount that must be allotted for essential necessities, such as food, clothing, health care, and transportation. For many families, rent is a financial burden that adversely affects their economic well-being, which is often tenuous at best, as an unexpected drop in income could easily lead to eviction.”); see also Campbell & Yeraradi, *supra* note 256 (“Workers will tolerate a lot more abuse right now because . . . they need to pay rent.”).

265. Robbins, *supra* note 262, at 1270–1271.

266. See *id.* (“Since an employer usually has significantly more resources and substantially higher bargaining power than their employees in bargaining for specific terms in an employment contract, employees often enter into contracts that significantly favor the employer in dispute resolution options, consider the employer’s own needs and motives over the best interests of the employee, and disproportionately disadvantage the employee.”); Hyde, *supra* note 264.

267. 65 CONG. REC. 1931 (1924) (emphasis added).

268. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W. H. H. Piatt, Chairman, ABA Comm. of Com., Trade, and Com. Law).

case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.²⁶⁹

To address these serious concerns, then Secretary of Commerce Herbert Hoover proposed a solution: “If objection appears to the inclusion of workers’ contracts in the law’s scheme, [the FAA] might be well amended by stating ‘but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.’”²⁷⁰ That the final version of the statute incorporated this suggestion *verbatim* tends to show these concerns were not only taken seriously, but wholeheartedly accounted for.²⁷¹ And yet, when the Supreme Court ultimately decided employment contracts fall within the FAA’s scope, it did not consider legislative intent at all.²⁷² In discounting the power imbalance between employers and individual employees,²⁷³ the Court has significantly undermined the ability of vulnerable employees to utilize mechanisms like PAGA to adequately protect themselves from workplace abuse.²⁷⁴

Unsurprisingly, in the years following the Supreme Court’s decision to apply the FAA to employment contracts, employer use of

269. *Id.* (statement of Sen. Walsh).

270. *Id.* at 14 (statement of Herbert Hoover, Sec’y of Comm.).

271. “[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1; *see also* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) (“In 1925, Congress passed the United States Arbitration Act . . . explicitly excluding ‘contracts of employment’ of workers engaged in interstate commerce from its scope. . . . I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.”).

272. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (“As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.”).

273. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 43 (1991) (Stevens, J., dissenting) (“Although I remain persuaded that it erred in doing so, the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other.”).

274. *See id.* The Supreme Court first applied the FAA to an employment dispute in 1991 but did not formally hold the statute broadly applicable to employment contracts until 2001. *See id.* at 40 (criticizing the majority’s holding that the FAA applies where an employee had an arbitration agreement “to arbitrate any ‘dispute, claim or controversy’ with his employer” through a third party agency with whom he was required to associate by his employer, but not with his employer directly); *Cir. City Stores*, 532 U.S. at 119 (“Section 1 exempts from the FAA only contracts of employment of transportation workers.”).

mandatory arbitration sharply increased.²⁷⁵ In 1992, approximately 2 percent of the nation's workforce was beholden to mandatory arbitration clauses.²⁷⁶ The national average now exceeds 50 percent.²⁷⁷ Alarming, California has a significantly higher incidence of mandatory employment arbitration than average, weighing in at 67.4 percent,²⁷⁸ which is likely due to California's notoriously employee-friendly employment laws.²⁷⁹ It should not be surprising that employers wish to shield themselves from liability in this manner; however, the epidemic of mandatory arbitration afflicting California's workforce only serves to highlight the importance of insulating certain employment causes of action, like PAGA, from forced arbitration.

*C. U.S. Supreme Court Precedent Favors Arbitration
at the Expense of Established Legal Principles*

The U.S. Supreme Court's consistent promotion of arbitration to adjudicate employment disputes has created numerous inconsistencies in the application of otherwise well-established legal principles. In doing so, "it has routinely deployed the [FAA] to deny to employees and consumers 'effective relief against powerful economic entities.'"²⁸⁰ To begin, the FAA's "unequal footing" principle was expressly described in a 1924 congressional hearing as putting arbitration contracts "upon the same footing as other contracts."²⁸¹ And yet, since the early 1980s the Court has ignored clear legislative instruction, instead divining that Congress intended section 2 of the FAA to declare a "national policy favoring arbitration."²⁸²

But the text of section 2 does not readily create an inference that Congress intended to favor arbitration clauses over other contractual

275. COLVIN, *supra* note 11 ("[M]andatory employment arbitration has continued to grow in extent and now, in over half of American workplaces, employees are subject to mandatory arbitration agreements that take away their right to bring claims against their employer in court.").

276. *Id.*

277. *Id.*

278. *Id.* at tbl.2.

279. *Id.*

280. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420 (2019) (Ginsberg, J., dissenting).

281. H.R. REP. NO. 68-96, at 1 (1924); *see also* *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

282. *See* *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added) (holding the FAA preempts matters of state law); *see also* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding federal courts should resolve doubts as to "the scope of arbitral issues" in favor of arbitration).

agreements.²⁸³ The statute’s text clearly articulates agreements to arbitrate are “enforceable, save upon such grounds that exist at law or in equity for the revocation of *any contract*.”²⁸⁴ Furthermore, Congressional sentiment surrounding the FAA’s enactment merely reflects a desire to combat judicial hostility toward arbitration.²⁸⁵ There is a considerable gulf between combatting judicial hostility to level the playing field on one hand, and displaying outright favoritism toward arbitration at the expense of established legal principles on the other.²⁸⁶ Considering statutory construction and legislative history, the FAA can be clearly interpreted: arbitration clauses should be held to the same standard as other contracts—no more, and no less.

And yet, the Supreme Court has since used the meaning it unilaterally ascribed to the FAA to hamper collective employee action. It has been well understood since the mid-2000s that class action plays a vital role in California Labor Code enforcement because it permits employees on the receiving end of related unlawful practices a relatively affordable way to rectify employment disputes.²⁸⁷ In response, the class waiver was conceived as a way for employers to prevent employees from banding together, an endeavor which the California Supreme Court decided to limit in certain instances.²⁸⁸ However, in *AT&T Mobility LLC v. Concepcion*,²⁸⁹ the U.S. Supreme Court held a California unconscionability standard that applied equally to all contracts, including those with arbitral class waivers, was preempted by the FAA.²⁹⁰ In so doing it made class actions “effectively unavailable against employers utilizing mandatory arbitration agreements

283. See 9 U.S.C. § 2.

284. *Id.* (emphasis added).

285. See *supra* Section I.A.

286. The Ninth Circuit has gone even further than the U.S. Supreme Court, declaring: “[T]he FAA’s purpose is to give preference (instead of mere equality) to arbitration provisions.” *Mortensen v. Bresnan Commes, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013).

287. *Gentry v. Superior Ct.*, 165 P.3d 556, 565 (Cal. 2007).

288. *Id.* at 563–64 (“We have not yet considered whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is ‘necessary to enable an employee to vindicate . . . unwaivable rights in an arbitration forum.’ We conclude that under some circumstances such a provision would lead to a de facto waiver and would impermissibly interfere with employees’ ability to vindicate unwaivable rights and to enforce the overtime laws.” (citation omitted)).

289. 563 U.S. 333 (2011).

290. *Id.* at 352. This decision came just one year after the U.S. Supreme Court expressly gave its blessing to arbitral class waivers. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (holding “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so”).

containing class action waivers.”²⁹¹ To reach its decision, the Court put little stock in the American Arbitration Association’s assertion that class arbitration is “a fair, balanced, and efficient means of resolving class disputes.”²⁹² Rather, the Court reasoned class arbitration would increase procedural complexity, denying benefits purportedly envisioned by the FAA and thus discriminating against arbitration.²⁹³ It further asserted that “individual, rather than class, arbitration is a ‘fundamental attribute[e]’ of arbitration,” but provided no basis for its claim.²⁹⁴ Instead, the Court inaccurately compared bilateral (individual) arbitration to class arbitration rather than appropriately comparing class arbitration and judicial class actions.²⁹⁵

Furthermore, in defending the FAA, the Court has on numerous occasions displaced federal laws, including established principles of contract law. For example, the Supreme Court has applied *contra proferentem* (a rule of contract law requiring ambiguities in contract language be interpreted against the drafter)²⁹⁶ inconsistently, applying it where doing so would expand the power of arbitrators but declining to do so where it would permit class arbitration and conflict with the Court’s personal policy preferences.²⁹⁷ Similarly, in *Epic Systems*, the Court ignored the traditional contract defense of illegality, holding the FAA preempts the National Labor Relations Act (NLRA), another federal statute, even though precedent indicated the NLRA, as the later enacted law, should control.²⁹⁸ More recently, the Court improperly

291. Piplack v. In-N-Out Burgers, 305 Cal. Rptr. 3d 405, 409 (Ct. App. 2023), *cert. granted*, 530 P.3d 350 (Cal. 2023).

292. *AT&T Mobility*, 563 U.S. at 361 (Breyer, J., dissenting) (quoting Brief for American Arbitration Association as Amicus Curiae in Support of Neither Party at 25, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (No. 08-1198)).

293. *See id.* at 347–50 (majority opinion).

294. *Id.* at 362 (Breyer, J., dissenting).

295. *Id.* at 363.

296. “Contra Proferentem is a Latin term which means ‘against the offeror.’ It refers to a standard in contract law which states that if a clause in a contract appears to be ambiguous, it should be interpreted against the interests of the person who insisted that the clause be included.” *Contra Proferentem Doctrine Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/c/contra-proferentem-doctrine/> [<https://perma.cc/K4AY-HQBR>].

297. *Compare Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–64 (1995) (interpreting ambiguous language in an arbitration agreement *against* the drafter where doing so would give more authority to arbitrators), *with Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1428 (2019) (Kagan, J., dissenting) (construing ambiguous language *in favor* of the drafting party because construing against the drafter would permit class arbitration). *See also id.* at 1418 n.5 (distinguishing the Court’s reasoning in *Lamps Plus* from that in *Mastrobuono*).

298. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1645–46 (2018) (Ginsburg, J., dissenting).

relied on *Kim* to overrule *Iskanian* and permit the severance of PAGA actions into individual and representative components.²⁹⁹

Justice Stevens once opined: “When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.”³⁰⁰ His words register as particularly prescient—in deciding PAGA claims may be severed and subjected to mandatory arbitration, the Court’s holding in *Viking River Cruises* applies the FAA to all three species of dispute.³⁰¹ Considering the Supreme Court’s track record as a whole, it seems, practically speaking, the Court has no qualms about ignoring the FAA’s mandate to hold arbitration clauses unenforceable where they conflict with applicable federal law or principles of contract law. This begs the question: If employee-plaintiffs may be forced out of traditional courtrooms through arbitral class waivers, and it is inappropriate for employees to act collectively in arbitration, when exactly *does* the Court consider it appropriate for employees to band together and take action against unscrupulous employers?

V. PROPOSED SOLUTIONS

All told, the FAA appears stronger than ever, so what more can California realistically do to insulate PAGA and pursue its public policy goals? The U.S. Supreme Court’s holdings regarding the FAA clearly indicate California must be exceedingly careful in any attempt to preserve PAGA’s efficacy as a tool for policing the California Labor Code. On the one hand, California’s judiciary has conjured up a direct response to *Viking River Cruises* in *Adolph*, which might provide some respite for PAGA plaintiffs. However, the fix forwarded by *Adolph* is not without flaws of its own, and, because the U.S. Supreme Court’s holding in *Epic Systems* clearly expresses disapproval of “judicial devices that would discriminate against arbitral forums unfairly,”³⁰² judicial remedies may be particularly vulnerable to overruling. On the other hand, if California is truly serious in its commitment

299. See *supra* Section II.C.

300. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting).

301. PAGA is a statutory cause of action, used to enforce the California Labor Code, and as previously discussed, there is typically unequal bargaining power between an employer and employee. See *supra* Sections I.C, IV.A.

302. See *supra* Section II.A.

to PAGA, a more conclusive option is for California's legislature to modify the statute's language to preserve its public policy objectives while comporting with the FAA. Fortunately, Justice Sotomayor's concurring opinion articulated precisely what California must remedy to return PAGA to a workable state.

A. *Adolph v. Uber Does Not Provide the Legislature with a Satisfactory Means of Modifying PAGA*

As previously discussed, in *Adolph* California's Supreme Court addressed *Viking River Cruises* by reading broad standing to maintain non-individual PAGA claims into the statute.³⁰³ However, the solution forwarded by the court is an imperfect one because, once an individual claim is sent to arbitration, whether any stayed non-individual PAGA claims can proceed in court depends on the arbitrator finding the plaintiff was actually an aggrieved employee under the statute.³⁰⁴ In other words, standing to maintain non-individual PAGA claims is contingent on the plaintiff prevailing in arbitration.³⁰⁵

Tying a PAGA plaintiff's standing to litigate non-individual claims to an arbitrator's determination of whether the plaintiff was "aggrieved" is problematic for a number of reasons. As discussed above, employee-plaintiffs are significantly disadvantaged when their claims are heard in an arbitral forum rather than a judicial setting.³⁰⁶ Furthermore, the complications associated with appealing arbitral decisions suggest that, where a plaintiff loses in arbitration due to a procedural error such as inadequate discovery, the non-individual claims are at serious risk of being unjustly irretrievably dismissed.³⁰⁷

Although this proposition leaves employee-plaintiffs in a better position than did *Viking River Cruises*, if the ultimate goal is to meet California's public policy objective of vigorously enforcing the Labor Code, *Adolph* falls short of the mark. Additionally, based on past conduct it is reasonable to assume the U.S. Supreme Court might

303. See *supra* Section III.D.

304. *Adolph v. Uber Tech. Inc.*, 532 P.3d 682, 692–93 (Cal. 2023) ("If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment, would be binding on the court, and Adolph would continue to have standing to litigate his non-individual claims. If the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing." (citation omitted)).

305. See *id.*

306. See *supra* Section IV.A.

307. See *supra* Section IV.A.

eventually weigh in on *Adolph*'s holding because, although less aggressive than *Iskanian*, California's highest court has arguably fashioned another judicially constructed mechanism designed to disfavor arbitration.³⁰⁸

B. Kim v. Reins Offers a Blueprint for Modifying PAGA that Comports with Legislative Intent

The body of California case law surrounding PAGA expresses a clear desire to enforce the California Legislature's will as a matter of public policy. However, history indicates that the U.S. Supreme Court will likely continue to fortify the FAA at the expense of state statutes like PAGA. Accordingly, Justice Sotomayor's *Viking River Cruises* concurrence should be followed rigidly. The solution least susceptible to preemption is modification of PAGA's text to confer statutory standing upon plaintiffs such that they may maintain non-individual claims separately from individual claims.³⁰⁹ If the state legislature is serious about preserving PAGA's policy goals it should consider drawing inspiration from California precedent to modify the statute's language, thus reducing the risk of preemption by federal law.

To accomplish this end, the legislature should look to the California Supreme Court's holding in *Kim* and broaden plaintiff standing to maintain PAGA claims. The *Kim* holding interpreted PAGA broadly, as a "narrower [statutory] construction would thwart the Legislature's clear intent to deputize employees to pursue sanctions on the state's behalf."³¹⁰ The court further held civil penalties are not contingent on the presence of an injury,³¹¹ ultimately concluding the resolution of a PAGA plaintiff's individual claims does not remove standing to pursue collective PAGA claims.³¹²

There are several ways the legislature might codify *Kim*. First, it could explicitly state that a PAGA plaintiff's claim is not dependent on suffering an injury, but instead relies only on whether the plaintiff

308. Murata & Hwang, *supra* note 209 ("The California Supreme Court's decision in *Adolph* is in tension with *Viking River*, suggesting that at some point down the road, the PAGA standing issue may end up back in front of the United States Supreme Court.")

309. See *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1925–26 (2022) (Sotomayor, J., concurring).

310. *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1133 (Cal. 2020).

311. *Id.* at 1130 (citing *Raines v. Coastal Pac. Food Distribs.*, 234 Cal. Rptr. 3d 1 (Ct. App. 2018)).

312. *Id.* at 1129 ("Reins's assertion that a PAGA plaintiff is no longer 'aggrieved' once individual claims are resolved is at odds with the Legislature's explicit definition.").

has actually been subjected to behavior violative of the California Labor Code. In this way the statutory language will enjoy a better-defined standing requirement. However, this modification echoes *Adolph*'s interpretation of *Kim* and fails to adequately shield collective claims raised under PAGA. Furthermore, it would still leave the door open for FAA preemption; it does not address the severability (or lack thereof) of individual and collective claims. As a result, an appropriately drafted arbitration clause could conceivably still nullify PAGA's claim joinder mechanism.

A more comprehensive alternative is to further broaden plaintiff standing requirements under the PAGA statute. The legislature could simply remove the requirement that an employee have been personally aggrieved at all, resulting in an exclusively collective mechanism through which to raise PAGA claims. This would certainly remedy the issue of severability, as there would no longer exist an individual claim to compel to an arbitral forum. However, this solution would embrace the "general public standing" PAGA's drafters wished to avoid.³¹³ Thus, it would likely expand PAGA standing too far and pave the way for widespread abuse of PAGA claims, unfairly burdening employers with an avalanche of litigation.

Striking the balance of these proposals, the legislature could simply add language to the statute clarifying that an allegedly aggrieved employee does not lose standing to maintain collective PAGA claims, even where their individual claims have already been addressed. In this way, California would comport with the holding of *Viking River Cruises* by not forcing employers into the "impermissible" position of either arbitrating claims they did not agree to arbitrate, or forgoing arbitration completely.³¹⁴ Additionally, it should correct the shortcomings of *Adolph*'s holding by no longer leaving the fate of a collective enforcement action in the hands of an arbitrator. Finally, this solution does not place agreements to arbitrate on "unequal footing" with other contracts; the parties will still receive the benefit of the agreed upon arbitration with respect to any individual PAGA claims, while the state remains able to pursue its public policy objectives and enforce the Labor Code.

313. *See id.* at 1133 ("It is apparent that PAGA's standing requirement was meant to be a departure from the 'general public' standing originally allowed under the UCL." (citations omitted)).

314. *Viking River Cruises*, 142 S. Ct. at 1918; *see supra* Section II.B.

CONCLUSION

Although PAGA is not without its flaws, California has demonstrated a strong desire to retain the statute on both financial and public policy grounds.³¹⁵ However, the U.S. Supreme Court has shown through steady expansion of the FAA's purview that it champions arbitration as a method of dispute resolution—irrespective of any power imbalance between the parties and contrary to congressional intent.³¹⁶ Because, statistically speaking, arbitration reduces the likelihood employees will prevail on California Labor Code claims against employers,³¹⁷ these two objectives may often conflict. Though employees experiencing a lower win rate than employers in a given forum is not inherently improper, the discrepancy in success rate between arbitration and traditional litigation in the employment context warrants concern with respect to considerations of fairness and justice. As a result, *Adolph* presents an incomplete solution to the issues presented by *Viking River Cruises*.

The *Viking River Cruises* decision shows that the U.S. Supreme Court is not content to leave California to its own devices. Now, judicially constructed solutions which attempt to navigate PAGA around the FAA have proved vulnerable to attack by the United States's highest court. In a worst-case scenario for California's judiciary, the back-and-forth between California's Supreme Court and the U.S. Supreme Court has the potential to continue in perpetuity, and in time *Adolph* could very well meet the same fate as *Iskanian*. Assuming PAGA survives the November 2024 vote to replace it with the Fair Pay and Employer Accountability Act, California's legislature should act to remedy the situation by utilizing *Kim* to craft a statutory fix that will achieve PAGA's policy objectives while adhering to federal law.

315. See *supra* Section I.C.1.

316. See *supra* notes 272–274 and accompanying text.

317. See *supra* Section IV.A.

