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Reawakening the Sleeping Giant: How Viking River Highlights the Obsolete Nature of Arbitrable California PAGA Suits

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REAWAKENING THE SLEEPING GIANT: HOW *VIKING RIVER* HIGHLIGHTS THE OBSOLETE NATURE OF ARBITRABLE CALIFORNIA PAGA SUITS

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INTRODUCTION

In January 2018, the Superior Court of Los Angeles County entered a $7.75 million settlement against Uber Technologies, Incorporated, for its alleged Labor Code violations affecting 1.5 million drivers.[1] Of that $7.75 million, the State of California received over $3.6 million and the drivers' attorneys recovered $2.3 million; the remainder was split among the drivers.[2] Ultimately, each driver took home only $1.08.[3] The uneven distribution of this award may seem unethical or arbitrary. Unfortunately for the drivers, it was not. Indeed, the individual allotment—0.000013935% of the total award to each driver—is precisely the distribution that California's Private Attorney General Act allows.[4]

The California Private Attorney General Act ("PAGA") deputizes private attorneys to remedy public harms—namely California Labor Code violations.[5] PAGA, which is meant to alleviate the burden on the State's precious legal resources, has survived heavy scrutiny from critics throughout its relatively brief lifetime.[6] The most technical of

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1. Tom Manzo, *Uber's PAGA Settlement Exposes Trial Attorneys' Scam*, TIMES OF SAN DIEGO: OP. (Feb. 19, 2018), https://timesofsandiego.com/opinion/2018/02/19/opinion-ubers-paga-settlement-exposes-trial-attorneys-scam/.

2. *Id.*

3. *Id.*

4. *See generally* CAL. LAB. CODE § 2699(g)(1) (West 2023).

5. LAB. §§ 2698–2699.8. PAGA is not to be confused with section 1021.5 of the California Civil Procedure Code, enacted in 1933 and known as the Private Attorney General Statute. Unlike PAGA, this statute allows fee recovery in any lawsuit "which has resulted in the enforcement of an important right affecting the public interest." CAL. CIV. PROC. CODE § 1021.5 (West 2023).

6. *See, e.g.*, Ashley Hoffman, *Private Attorneys General Act: Reform Needed to Curb Costly Litigation, Help Workers/Employers*, CAL. CHAMBER OF COM.: LAB. & EMP. (Jan. 2023), https://advocacy.calchamber.com/wp-content/uploads/2023/02/2023-Business-Issues-Labor-and-Employment-Private-Attorneys-General-Act.pdf; Cheryl Miller, *'Paga Is Broken': Critics Open New Fronts Against California's Key Labor and Wage Law*, THERECORDER (Apr. 14, 2022, 12:07 PM), https://www.law.com/therecorder/2022/04/14/paga-is-broken-critics-open-new-fronts-against-californias-key-labor-and-wage-law/?slreturn=20230126160805; Ivan Munoz, *Has Paga Met Its Final Match? Continued Expansion Of California's Private Attorney General Act Leads to Trade Group's Constitutional Challenge*, 60 SANTA CLARA L. REV. 397, 404–05 (2020); Jeffrey S. Sloan, *Employers' Group Sues California Claiming PAGA is Unconstitutional,* WORKPLACE LEGAL (Dec. 9, 2018),

these critiques has reemerged following the United States Supreme Court's decision in *Viking River Cruises, Incorporated v. Moriana*.[7] In *Viking River*, the Court held that the Federal Arbitration Act partially preempts a portion of the California law prohibiting the bifurcation of PAGA proceedings when heard in an arbitral forum.[8] In overturning an eight-year precedent, the *Viking River* holding has explicitly challenged the intersection between arbitration and joinder in the context of California employment law under PAGA.[9] Moreover, *Viking River* renders PAGA obsolete where employment disputes in California are subject to arbitration.

This Note critiques PAGA through the lens of *Viking River*.[10] Part I provides a legislative overview of PAGA, including the reasons for its enactment. It also explains and critiques the statute's joinder mechanisms that allow such perverse monetary incentives for plaintiffs' attorneys. Part II explores the historical background and policy underlying arbitration and the Federal Arbitration Act, and how arbitration intersected with PAGA. Part III discusses the two seminal cases on the issue at hand that illustrate the incompatibility of PAGA's joinder mechanism with the principles of private, individualized arbitration. Part IV discusses and critiques two existing solutions to a problem highlighted by the decision in *Viking River*—the State's need to protect and vindicate the rights of its labor force with underfunded prosecutorial agencies, and without mass PAGA arbitration. Finally, this Note proposes a new solution, premised on a tax expenditure, to prevent and remedy California Labor Code violations while protecting both employees and employers.

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https://workplacelegalpc.com/employers-group-claims-paga-unconstitutional/; *PAGA: A Call To Arms*, MORRISON FOERSTER: EMP. L. COMMENT. (Feb. 1, 2019), https://elc.mofo.com/topics/paga-a-call-to-arms.

7. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

8. *Id.* at 1923–25.

9. *Id. See generally* Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 382 (2014).

10. *Viking River*, 142 S. Ct. at 1910.

I. CALIFORNIA'S PRIVATE ATTORNEY GENERAL ACT: AN OVERVIEW

The Labor Code sets forth guidelines for employers' conduct and is intended to protect employees' labor rights.[11] Before 2004, the Labor and Workforce Development Agency ("LWDA") was California's main entity charged with prosecuting employers who violated provisions of the Labor Code.[12] The Labor Commissioner could bring punitive actions against employers and seek monetary penalties as a result of their Labor Code violations.[13] Monies obtained through LWDA actions were deposited into the State's General Fund to be used for public benefits, including health infrastructure and educational programming for employers.[14] This model, though well-intentioned, eventually proved inadequate for California's booming workforce.

When California's workforce grew by forty-eight percent from 1980 to 2000,[15] there became a need for more protections for those workers. In comparison, the budget for Labor Code enforcement agencies, like the LWDA, grew by only twenty-seven percent— almost half as much as the workforce whose rights it was meant to supervise.[16] California's exponentially-growing workforce, coupled with increased Labor Code violations, left the underfunded LWDA unable to effectively prosecute those violations.[17] Moreover, many Labor Code provisions were punishable only as criminal misdemeanors without sanctions, deterring District Attorneys from prosecuting

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11. Blake R. Bertagna, *PAGA: One Decade Later*, 39 EMP. REL. L. J. 44, 45 (2013).

12. *Id.*

13. *See, e.g.*, CAL. LAB. CODE §§ 210, 225.5 (West 2023) (including violations regarding timing and manner by which to pay wages, and withholding of wages); 1983 Cal. Stat. 4103–04; Bertagna, *supra* note 11, at 45.

14. *Iskanian*, 59 Cal. 4th at 378.

15. Max Birmingham, *Kalifornia: Exploring the Crossroads of the Federal Arbitration Act and the California Private Attorney General Act*, 29 WILLAMMETTE J. INT'L & DISP. RESOL. 268, 271 (2022).

16. *Id.*

17. Bertagna, *supra* note 11, at 45. Moreover, many Labor Code provisions were punishable only as criminal misdemeanors without sanctions, deterring District Attorneys from prosecuting those violations. *See Iskanian*, 59 Cal. 4th at 379. On balance, District Attorneys prosecuted violent crimes more than Labor Code violations. *Id.*

those violations. Consequently, there was an overall absence of monetary fines—civil or criminal—for employers who violated California Labor Code provisions.[18] This lack of accountability also contributed to an underregulated "underground economy"[19] that had, by then, already caused California to lose between three and six billion dollars annually in unrealized tax revenue.[20]

A. California Legislature Enacts the Private Attorney General Act

An underfunded LWDA that could not keep up with California's rapidly growing workforce was a problem. In *Arias v. Superior Court*, the California Supreme Court summarized the legislature's response:

> The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.[21]

Thus, in 2003, the California Legislature passed PAGA.[22] Legislative proponents of PAGA pointed to the sheer growth of the California workforce compared to the relatively slow growth of the budget provided to labor enforcement agencies.[23] Proponents also highlighted the comparably low number of Labor Code violations being prose-

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18. *Iskanian*, 59 Cal. 4th at 379.

19. *What is PAGA?*, CAL. BUS. & INDUS. ALL., https://cabia.org/what-is-paga/ (last visited Nov. 5, 2022) (discussing businesses that operate outside of tax and licensing requirements).

20. *The State of Labor Law in California: Hearing on S.B. 796 Before the S. Comm. on Lab. & Emp.*, 2003–04 Leg. Sess., 3–4 (Cal. 2003) [hereinafter *S.B. 796 Hearing*].

21. Arias v. Super. Ct., 46 Cal. 4th 969, 980 (2009).

22. CAL. LAB. CODE §§ 2698–2699.8 (West 2023).

23. Birmingham, *supra* note 15, at 269.

cuted by the LWDA.[24] These proponents promoted PAGA as a mechanism that would cure this deficiency[25] by deputizing individual employees as Private Attorney Generals, giving them authority to sue their employers for Labor Code violations and to collect civil penalties.[26] As such, the employees would not sue in their individual capacity, but "step[] into the shoes of the labor commissioner" and sue on behalf of the State.[27] Stated differently, PAGA would allow the LWDA to extend its prosecutorial powers by allowing suits to be executed by employees.[28]

Successful PAGA suits provide a default penalty of $100 per employee per pay period for the first alleged violation and $200 for any subsequent violations per employee per pay period.[29] Of the money recovered, the employee who brought the suit receives twenty-five percent while the State receives seventy-five percent. The attorneys who helped the plaintiff bring the suit receive statutory attorney's fees and costs.[30] The widespread manipulation of these provisions by the California Plaintiff's Bar has faced particular scrutiny by defense attorneys, employers, and businesses.[31]

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24. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 379 (2014).

25. Birmingham, *supra* note 15, at 269.

26. *See S.B. 796 Hearing*, *supra* note 20, at 5–6; LAB. § 2699(a); *see also Iskanian*, 59 Cal. 4th at 381 ("The civil penalties recovered on behalf of the state under PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities.").

27. Caroline Powell Donelan & Caitin Sanders, *"C" Is for Consent When it Comes to Arbitration in California: U.S. Supreme Court Holds that Representative Action Waivers are Enforceable to Compel "Individual" PAGA Claims to Arbitration,* JD SUPRA (June 24, 2022), https://www.jdsupra.com (type "C Is For Consent" in search bar at top right; then click article link); *see also S.B. 796 Hearing*, *supra* note 20, at 5–6; *Iskanian,* 59 Cal. 4th at 381.

28. Actions for civil penalties may be brought by "an aggrieved employee on behalf of himself or herself and other current or former employees . . . ." LAB. § 2699(a).

29. LAB. § 2699(f)(2); *see also* McKenzee D. McCammack, *PAGA is the New Qui Tam: Changing the Landscape of Employment Law in California*, 43 W. ST. L. REV. 199, 200–01 (2016).

30. McCammack, *supra* note 29, at 200–01.

31. *See, e.g.*, Tony Oncidi & Cole Lewis, *California Class Actions and PAGA ("Prettymuch All is Going to the Attorneys") Claims Continue to Overwhelm the State*, PROSKAUER.COM: CAL. EMP. L. UPDATE BLOG (Feb. 4, 2019), https://

B. The Common Criticism of PAGA's Exploitative Recovery Allotment

Since its enactment, critics of PAGA consistently point to the flaws in its justification.[32] Perhaps the greatest criticism concerns the disproportionate share of the recovery between the state, the attorneys, and the employees bringing the PAGA action. As noted above, the employee only receives twenty-five percent of any recovery—subject to statutory and attorney's fees.[33] This opens the door for immense exploitation by plaintiffs' attorneys, much like the $1.08 award for each Uber employee compared with the $2.3 million in attorneys' fees.[34]

PAGA's statutory mechanism of joinder may also facilitate exploitative attorneys fees. Joinder allows the principle "individual" plaintiff to bring, along with their own claim, a series of "representative" claims, which could include the claims of tens, hundreds, thou-

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www.proskauer.com/blog/california-class-actions-and-paga-prettymuch-all-is-going-to-the-attorneys-claims-continue-to-overwhelm-the-state-2019; Tony Oncidi & Dylan K. Tedford, *PAGA Has Failed Californians—Unless You're A Plaintiff's Lawyer That Is*, PROSKAUER.COM: CAL. EMP. L. UPDATE BLOG (Apr. 8, 2021), https://calemploymentlawupdate.proskauer.com/2021/04/paga-has-failed-californians-unless-youre-a-plaintiffs-lawyer-that-is/. *But see* Glenn A. Danas, *Employee Perspective: PAGA 15 Years Later*, 33 CAL. LAB. & EMP. L. REV. 4, 7 (2018–19) (internal citations omitted) ("[P]laintiff's attorneys use PAGA to 'extract billions of dollars in settlements.'").

32. One common critique is that plaintiffs can already seek redress for wage violations through the federal Fair Labor Standards Act, which provides comparable remedies including backpay, liquidated damages and reasonable attorneys' fees. *See* 29 U.S.C. § 216(b); *see generally* U.S. DEP'T LAB., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 14–15 (2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1282.pdf.

33. McCammack, *supra* note 29, at 200–01.

34. *See supra* Introduction; Manzo, *supra* note 1; *see also* McLeod v. Bank of Am., N.A., No. 16-cv-03294-EMC, 2018 WL 5982863, at *2 (N.D. Cal. Nov. 14, 2018) ($11 million settlement allocated $3.3 million to the attorneys); Lacy T. v. Oakland Raiders, No. A144707, 2016 WL 7217584, at *2 (Cal. Ct. App. Dec. 13, 2016) ($400,000 of $1.25 million-dollar judgment allocated to attorneys); Diamond Resorts Wage & Hour Cases, No. E071769, 2020 WL 4188098, at *4 (Cal. Ct. App. July 21, 2020) ($2.8 million settlement allocated $933,333 to attorneys).

sands, or even millions of other employees.[35] Plaintiffs' attorneys working on contingency bases are incentivized to take cases likely to yield a higher monetary recovery. Accordingly, some plaintiffs' attorneys have taken to "exploit[ing] glaring loopholes" of PAGA's joinder mechanism to maximize their fees.[36] The extravagant fees awards are made possible when attorneys join large numbers of "representative" claims to the main plaintiff's "individual" PAGA claim.

This joinder process is relatively simple because there is no requirement that PAGA plaintiffs actually suffer every violation they allege[37] Accordingly, there seems to be no practical end to the number of PAGA claims that can be filed or joined. PAGA lawsuits have increased more than 1,000% since its enactment in 2003.[38] Beginning in 2014, and every year since, the LWDA has received notice of approximately 4,000 PAGA cases per year.[39]

35. CAL. LAB. CODE §§ 2968–2699.8 (West 2023); *see also* Lauren Wong, *Arbitral Non-Consent Sails Off into the Sunset in Viking River Cruises, Inc. V. Moriana*, AM. BAR ASS'N (Aug. 24, 2022), https ://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-2022/arbitral-non-consent/ ("Accordingly, PAGA imbues employees with the authority to sue their employers on their own behalf and on behalf of other current or former employees. . . . PAGA also effectively provides for claim joinder. It allows an employee with statutory standing to seek any civil penalties th state can seek, including penalties for violations involving other employee.").

36. Birmingham, *supra* note 15, at 283; *see, e.g.*, Oncidi & Lewis, *supra* note 31.

37. *Hoffman*, *supra* note 6.

38. *Id.*; *see also* Kim v. Reins Int'l Cal., Inc., 9 Cal. 5th 73, 85 (2020) (citing LAB. § 2699(c)) ("The statutory language [in PAGA] reflects that the Legislature did not intend to link PAGA standing to the maintenance of individual claims when such claims have been alleged. An employee has PAGA standing if '*one or more* of the alleged violations was committed' against him. . . . Employees who were subjected to at least one unlawful practice have standing to serve as PAGA representatives even if they did not personally experience each and every alleged violation.") (emphasis in original); Munoz, *supra* note 6, at 411.

39. *Hoffman*, *supra* note 6.

II. ARBITRATION, THE F.A.A., AND PAGA

PAGA suits can join an immense number of claims together, facilitated by its simplified joinder procedure, which has few obvious obstacles. However, one procedural instrument significantly hinders PAGA's sweeping power: arbitration. California precedent originally cast doubt on arbitration's effectiveness at stymying representative PAGA claims.[40] This view was disrupted by the United States Supreme Court's decision in *Viking River Cruises, Incorporated v. Moriana*. There, the Court highlighted arbitration's powerful effect on rendering many PAGA cases practically unprofitable for plaintiffs' attorneys, a waste of court resources, and fruitless for those employees with "representative" claims.[41]

A. A Brief History of Arbitration and the Federal Arbitration Act

Arbitration is now well-defined.[42] In the context of modern employment contract dispute resolutions, arbitration is an out-of-court procedure wherein an employee and employer present their cases before a mutually selected and neutral arbitrator, who serves as a judge or referee.[43] After each party presents their cases, the arbitrator

40. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 379 (2014).

41. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924–25 (2022). In upholding the severability of the plaintiff's claim from that of the representative claims, the Court significantly thwarted the possibility of an attorney's fee award inclusive of money from numerous other employees. *Id.*

42. *See, e.g.*, Stockwell v. Equitable Fire & Marine Ins. Co., 25 P.2d 873, 875–76 (Cal. Ct. App. Dec. 4, 1933) ("Arbitration is the submission for determination of disputed matter to private unofficial persons selected in a manner provided by law or agreement of the parties."). *Cf.* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (defining contractual arbitration provisions as "a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute").

43. *Arbitration at Work*, LEGAL AID AT WORK, https://legalaidatwork.org/factsheet/arbitration-at-work/ (last visited Nov. 5, 2022); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (internal quotations and citations omitted) ("In individual arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). *But see* Jay Adkisson, *Is Arbitration Really In Your Best Interests?*, FORBES (Sept. 26, 2022), https://www.forbes.com/sites/jayadkisson/2022

chooses the prevailing party. The parties are bound by that decision, just as they would be by an opinion issued by a court.[44]

Arbitration was not always the standard mode of resolution for contract disputes. Inspired by the hostility of English courts towards arbitrating claims,[45] early United States courts employed special rules titled "the ouster and revocability doctrines."[46] These rules precluded parties from obtaining specific performance of contracts to arbitrate claims[47] and, thus, established a certain "judicial hostility" towards arbitration.[48] As a result, most disputes were adjudicated in a court-room, notwithstanding alternative means of resolution available or better-suited to their claim.[49]

In response to this hostile attitude towards arbitration, Congress enacted the Federal Arbitration Act ("F.A.A.") in 1947.[50] The F.A.A. withdrew states' power to require a judicial forum for the resolution of claims[51] and made arbitration provisions "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[52] Proponents of the F.A.A. recognized

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/09/26/is-arbitration-really-in-your-best-interests/?sh=1bdad9f66e10 (arguing that arbitration decisions are infererior because discovery and evidence may be absent from the process in addition to underqualified arbitrators).

44. *See* sources cited *supra* note 43.

45. S*ee, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (describing the 'ancient' history of English courts opposing anthing that deprived them of jurisdiction and how U.S. courts initially followed suit); Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 24 (1991) (recognizing a "longstanding judicial hostility to arbitration agreements" existing at English common law and adopted by U.S. courts).

46. David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363, 377 (2018).

47. *Id.*

48. *Id.*

49. *Id.*

50. Federal Arbitration Act (FAA) of 1947, 9 U.S.C. §§ 1–16.

51. Horton, *supra* note 46, at 377.

52. 9 U.S.C. § 2. This provision is also known as the "Saving Clause." Kacey L. Weddle, *Supreme Court Rules That Employee Class Action Waivers Are Valid*, AM. BAR. ASS'N: PRACTICE POINTS (June 21, 2018), https://www.americanbar.org /groups/litigation/committees/products-liability/practice/2018/supreme-court-rules-that-employee-class-action-waivers-are-valid/ ("The savings clause lets a court re-

that arbitration was cheaper and more efficient than formal contract dispute adjudications, and generally precluded appeals.[53] Early arbitration involved less discovery, motion practice, and other time-consuming aspects associated with litigation.[54] Accordingly, the F.A.A. was meant to avoid such "needless contention[s] . . . incidental to the atmosphere of trials in courts."[55]

B. Arbitration in the Context of Employment

At its inception, the F.A.A. explicitly excluded regulation of employment contracts for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[56] However, the Ninth Circuit Court of Appeals later held that section two of the F.A.A. exempted *all* employment contracts from the F.A.A.'s reach.[57]

In 1991, the Court upheld the enforceability of employment contract clauses mandating arbitration and of binding arbitration agreements arising therefrom.[58] Soon after, in 2001, the Court explicitly rejected the Ninth Circuit's interpretation of the F.A.A. in *Circuit City Stores v. Adams*. In *Circuit City Stores*, the Court held that the F.A.A. did indeed cover employment contracts,[59] and that such coverage was consistent[60] with the F.A.A.'s original legislative intent. More recently, in 2018, the Court held that employment agreements requiring individual, not collective, arbitration would be enforceable and would

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fuse to apply an arbitration agreement if there are any "grounds" that "exist at law or in equity for the revocation of any contract.").

53. Thomas J. Stipanowich, *Arbitration is the "New Litigation,"* 2010 U. ILL. L. REV. 1, 8 (2009).

54. *Id.*

55. *Id.* (quoting Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595, 614 n.44 (1928)).

56. 9 U.S.C. § 1.

57. Circuit City Stores v. Adams, 532 U.S. 105, 109–114 (2001).

58. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

59. *Circuit City Stores*, 532 U.S. at 119.

60. *Id.* at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

not violate employees' rights to engage in protected, concerted activity[61] under the National Labor Relations Act.[62]

Seeking to avoid the long and costly process of litigation and bolstered by judicial support of mandatory arbitration clauses in employment settings, employers have increasingly included arbitration clauses in their employment contracts.[63] At first glance, mandatory arbitration provisions appear to impose a sweeping hurdle on employees who want to litigate their claims in court. However, a key principle of arbitration is consent.[64] This primarily means two things: (1) employees' claims are subject to arbitration only if the employee has expressly consented to arbitration[65]; and (2) the parties will arbitrate only those issues that they have specifically agreed to submit to arbitration.[66] Futhermore, section two of the F.A.A. permits the invalidation of arbitration agreements under traditional contract remedies, including unconscionability or fraud.[67] State courts therefore retain the power to invalidate arbitration agreements on general contract grounds.[68] Moreover, the language in section two of the F.A.A. enforces arbitration as a matter of law.[69] Accordingly, the F.A.A. "preempts any state rule discriminating on its face against arbitra-

61. A protected, concerted activity is defined by the National Labor Relations Board as "when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment." *Employee Rights*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights (last visited Apr. 2, 2023). These include, for example, two or more employees addressing their employer regarding improvements to their pay. *Id.*

62. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (asking whether "employees and employers [should] be allowed to agree that any disputes between them will be resolved through one-on-one arbitration" and observing that "[a]s a matter of policy these questions are surely debatable[]").

63. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1 (Sept. 27, 2017), https://files.epi.org/pdf/135056.pdf.

64. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

65. *See* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1918 (2022); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686–87 (2010).

66. *First Options of Chi., Inc.*, 514 U.S. at 945.

67. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339–40 (2011).

68. Kindred Nursing Ctrs. L.P. v. Clark, 581 U.S. 246, 251 (2017).

69. 9 U.S.C. § 2.

tion—for example, a law 'prohibit[ing] outright the arbitration of a particular type of claim.'"[70]

C. PAGA's Statutory Joinder Mechanism

As previously discussed, the State is the real party in interest in a PAGA suit.[71] Accordingly, a PAGA suit is a type of *qui-tam* action,[72] where plaintiffs represent the Labor Commission as "agent[s] or prox[ies]" of the State of California.[73] PAGA's true power as a *qui tam* action, however, does not come from the plaintiff's individual claim or claims against their employer. Rather, it comes from joining representative claims of Labor Code violations committed by the plaintiff's employer against other alleged aggrieved employees.[74]

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70. *Kindred Nursing Ctrs. L.P.*, 581 U.S. at 251 (quoting *AT&T Mobility LLC*, 563 U.S. at 341).

71. *See generally* Kim v. Reins Int'l Cal., Inc., 9 Cal. 5th 73, 87 (2020) (quoting *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 387 (2014)) ("There is no individual component to a PAGA action."). While the State, the true party in interest of a PAGA, does not itself consent to a private arbitration agreement, the statute can be invoked only by the assertion of the rights of an individual plaintiff. If that plaintiff is subject to a binding arbitration agreement, then in a way, so is the State. *See* CAL. LAB. CODE § 2699 (West 2023).

72. Birmingham, *supra* note 15, at 281 (citing Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007)) (explaining the term *qui-tam* is abbreviated from the Latin phrase "*qui tam pro domino rege quam pro seipso in hac parte sequitur*" which means "he who prosecutes for himself as well as for the king"). *Qui-tam* actions have served as mechanisms, allowing private individuals to prosecute statutes intended for government enforcement for many years. They were commonplace in English law from the fourteenth until the nineteenth century, and the earliest *qui-tam* example dates back to 695 A.D., where the King of Kent prohibited citizens from working on the Sabbath. *See* McCammack, *supra* note 29, at 204 (citing THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (F.L. Attenborough ed. & trans., 1963)). This heritage, however, does not mean modern *qui-tam* actions always enjoy wide-scale adoption. *See, e.g.*, People ex. rel. Allstate Ins. Co. v. Weitzman, 107 Cal. App. 4th 534, 565–66 (2003) (holding that another California statute—the California False Claims Act—was intended to *limit* the availability of qui-tam actions in certain circumstances)).

73. Arias v. Super. Ct., 46 Cal. 4th 969, 986 (2009).

74. LAB. § 2968.

Most suits brought on behalf of a class of people require some sort of procedural certification.[75] For example, class action lawsuits in California generally require that a class be ascertainable and well-defined.[76] This determination turns on a variety of factors, including whether the representatives share a common question of law or fact, and whether the representatives will adequately represent the members of the class as a whole.[77] Similarly, among the factors considered in federal class action suits, there is a required showing of commonality and adequacy.[78]

PAGA actions, on the other hand, strategically evade this class certification requirement, despite their ability to adjudicate the claims of millions of employees at a time.[79] This ability to circumvent the class-certification process comes from PAGA's "built-in mechanism of claim joinder,"[80] which allows the main plaintiff to use their individual claim as the basis by which to join the claims of other alleged aggrieved employees, without a showing of adequacy or commonality.[81] Accordingly, this statutory joinder mechanism establishes standing for a great number of employees without having to certify a "class."

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75. *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Federal procedure has several prerequisites for maintaining a class action . . . .").

76. Hilary Hehman, Class Certification in California: Second Interim Report From The Study Of California Class Action Litigation 5 (Admin. Off. of the Cts., 2010), https://www.courts.ca.gov/documents/classaction-certification.pdf; *see also* CAL. CODE CIV. PROC. § 382 (West 2023).

77. Hehman, *supra* note 76, at 4.

78. *See* Adam Polk, *Class Actions 101: How to Obtain (of Defeat) Class Certification*, AM. BAR ASS'N (Oct. 22, 2019), https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2019/class-actions-101-how-to-obtain-certification/; *see also* FED. R. CIV. P. 23.

79. *See* discussion *supra* Section I; *see also* Arias v. Super. Ct., 46 Cal. 4th 969, 975 (2009) ("[A]n employee who, on behalf of himself and other employees, sues an employer under the unfair competition law . . . for Labor Code violations must satisfy class action requirements, *but [] those requirements need not be met when an employee's representative action against an employer is seeking civil penalties under the Labor Code Privat Attorneys General Act of 2004*[.]") (emphasis added).

80. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1932 (2022).

81. *Id.* at 1923 (noting that PAGA's "built-in mechanism of claim joinder . . . permits 'aggrieved employees' to use the Labor Code violations they personally suf-

The legitimacy of the joinder mechanism rests on the fact that PAGA actions are not class action suits. The Supreme Court has established that a PAGA action cannot be a class action because the representative claims are not "distinct claims belonging to distinct individuals," but rather "predicates for expanded liability under a single cause of action."[82] PAGA suits present one claim against the employer, brought on behalf of the State. PAGA suits are not comprised of multiple claims brought on behalf of each employee. Thus, there is no need to prove a commonality of law or fact with another claim or claims because the standing conferred on the individual claim inherently creates standing for all who are joined. The effect of joinder on standing under PAGA is frustrated when introduced into the arbitral forum—a problem not fully clarified until *Viking River*.[83]

III. EXPLORING THE CASE: BEFORE AND AFTER VIKING RIVER

The standing created by PAGA's joinder provision raised concerns about the potential for federal preemption of certain PAGA provisions. Generally, preemption is a legal principle drawn from the concepts of federalism—the balance between the state and federal legislatures.[84] The principle of preemption declares that when the two authorities are in conflict, the higher authority—here, federal law—will displace the lower authority—state law.[85] The F.A.A. is a federal law whereas PAGA is a state law. Originally, the California Supreme Court's ruling in *Iskanian* suggested that the F.A.A. preempted PAGA.[86] However, *Viking River* has highlighted the possibility of federal preemption in employment contract disputes.[87] This is of par-

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fered as a basis to join to the action *any* claims that could have ben raised by the State in an enforcement proceeding.") (emphasis added).

82. *Id.* at 1918.

83. *Id.* at 1910.

84. *Federalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/federalism (last visited Nov. 27, 2022).

85. *See generally* U.S. CONST. art. VI, § 2 (detailing the Supremacy Clause); *Preemption*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Nov. 15, 2022).

86. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 384 (2014).

87. *Viking River*, 142 S. Ct. at 1911.

amount consequence because so many California employers require arbitration.[88]

A. Iskanian, Eight Years of Precedent

Before *Viking River*, the seminal PAGA case was *Iskanian v. CLS Transportations Los Angeles, LLC*. There, the California Supreme Court held that the "F.A.A. [did] not preempt a state law that prohibit[ed] waiver of PAGA representative actions in an employment contract."[89] The plaintiff, a driver for CLS, had signed a "Proprietary Information and Arbitration Policy/Agreement" upon commencing his employment. The agreement required employees to resolve all employment-related claims against CLS in a neutral arbitration forum.[90] The agreement also contained a representative and class action waiver, essentially requiring the plaintiff to relinquish his right to bring any and all representative or class actions against CLS.[91]

Following a series of alleged Labor Code violations by CLS, the plaintiff filed a class action complaint for failure to provide meal and rest breaks, and final wages in a timely manner.[92] CLS asserted that, pursuant to their agreement, all the plaintiff's claims were subject to binding arbitration, which it then moved to compel.[93] The court agreed, and granted CLS' motion.[94] However, the California Supreme Court later held in *Gentry v. Superior Court* that class action waivers in employment arbitration agreements may be invalid in certain circumstances.[95] Accordingly, CLS voluntarily withdrew its motion to compel arbitration and the parties proceeded to litigate the case.[96] The plaintiff then amended his complaint to include individual and repre-

88. Colvin, *supra* note 63, at 8.
89. *Iskanian*, 59 Cal. 4th at 360.
90. *Id.*
91. *Id.* at 360–61.
92. *Id.* at 361.
93. *Id.*
94. *Id.*
95. *See* Gentry v. Super. Ct., 42 Cal. 4th 443, 463–44 (Cal. Ct. App. Aug. 30, 2007).
96. *Iskanian*, 59 Cal. 4th at 361.

sentative PAGA claims on behalf of the State, and sought civil penalties.[97]

During the pendency of the *Iskanian* litigation, the Court decided *AT&T Mobility LLC v. Concepcion*.[98] *Concepcion* invalidated a previous California decision restricting consumer class action waivers in arbitration agreements.[99] In response, CLS renewed its motion to compel arbitration and dismiss Iskanian's class claims, arguing that *Concepcion* invalidated *Gentry*.[100] The plaintiff argued that *Gentry* was not invalidated, and that CLS had waived its right to pursue arbitration when it withdrew its original motion to compel arbitration.[101] The trial court ruled for CLS, ordered the case into individual arbitration, and dismissed the class claims with prejudice.[102] On appeal, the court affirmed, holding that the F.A.A. precludes states from withdrawing claims from an arbitral forum and PAGA claims must be argued individually, not in a representative action, consistent with the terms in an arbitration agreement.[103] It also upheld the view that CLS had not waived its right to compel arbitration when it originally withdrew its motion.[104]

The California Supreme Court granted review of the case to explore whether the F.A.A. preempted California's rule regarding PAGA and arbitration.[105] The court first determined that, pursuant to public policy,[106] an employee's right to bring a representative PAGA claim is unwaiveable.[107] Nevertheless, while a waiver of representa-

97. *Id.*

98. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339–40 (2011).

99. Discover Bank v. Super. Ct., 36 Cal. 4th 148, 152 (Cal. Ct. App. June 27, 2005).

100. *Iskanian*, 59 Cal. 4th at 361.

101. *Id.*

102. *Id.*

103. *Id.* at 361–62.

104. *Id.* at 362.

105. *Id.*

106. *See* CAL. CIV. CODE § 3513 (West 2023) ("[A] law established for a public reason cannot be contravened by a private agreement.").

107. *See Iskanian*, 59 Cal. 4th at 383–84; *see also* CIV. § 1668 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent are, against the public policy of the law.").

tive PAGA claims is unenforceable, state law "may not be enforced if it is preempted by the F.A.A."[108] The court established that the California rule against PAGA waivers did not frustrate the objectives of the F.A.A.[109] The F.A.A. aimed to ensure efficient resolution of private disputes, while PAGA actions were between an employer and the California's LWDA.[110] Accordingly, the California law was not preempted by the F.A.A.[111] However, when the United States Supreme Court reviewed this finding in a similar case, it concluded that California's decision was based on a flawed analysis.

B. Viking River Establishes a New State of Law

Viking River Cruises ("Viking River"), a company offering international ocean and river cruises, employed Angie Moriana as a sales representative.[112] Moriana's employment contract contained a mandatory arbitration agreement that included two important provisions.[113] First, a class action waiver, through which Moriana's forfeited any right to bring an employment dispute as a "class, collective, or representative" action.[114] Second, a severability clause explained if the first waiver was found to be invalid, any "class, collective, or representative" PAGA dispute would be litigated in court and the remaining valid portions would be arbitrated.[115]

Alleging violations of two Labor Code sections,[116] Moriana filed a PAGA action against the cruise line in state court. Moriana asserted both an individual claim and representative claims, including a "wide

108. *Iskanian*, 59 Cal. 4th at 384.

109. *Id.*

110. *Id.* at 384–87.

111. *Id.* at 384 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339–40 (2011)) (emphasizing the proposition that a state law may be preempted when it "stands as an obstacle to the accomplishment of the F.A.A.'s objectives[]").

112. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1915–16 (2022).

113. *Id.* at 1916.

114. *Id.* at 1915–16.

115. *Id.* at 1916.

116. *See* CAL. LAB. CODE §§ 101–102 (West 2023) (providing the timing for final wage distribution).

array" of violations allegedly suffered by other employees.[117] In response, Viking River moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her representative claims.[118] The trial court denied Viking River's motion after applying a public policy justification from *Iskanian*; the intermediate court later affirmed on the same grounds.[119] Both courts held that categorical waivers of PAGA standing are inconsistent with California's employment policy.[120] Accordingly, PAGA claims must not be severed to create individual, arbitrable claims and representative, non-arbitrable claims.[121] More simply, the Court in *Iskanian* concluded that the individual plaintiff's PAGA claim, subject to arbitration per his employment agreement, could not be severed from the representative PAGA claims of other employees, whose arbitration was not agreed to in the representative employee's agreement.

The United States Supreme Court granted review to clarify whether the California law prohibiting the division of PAGA actions into constituent claims, pursuant to the severability clause in Moriana's waiver, was preempted by the F.A.A.[122] In its analysis, the Court readdressed *Iskanian*. Ultimately, the Court required the lower courts to treat the representative-action waiver in Moriana's employment contract as invalid "insofar as it was construed as a wholesale waiver of PAGA standing."[123] However, because of the severability clause in Moriana's contract, Viking River was entitled to enforce its arbitration agreement regarding Moriana's *individual* PAGA claim and to dismiss the *representative* claims for lack of standing. To the extent that PAGA had prohibited Viking River from arbitrating Mori-

117. *Viking River*, 142 S. Ct. at 1911 (describing that some of the alleged representative claims include meal and rest period violations as well as minimum wage violations).

118. *Id.*

119. *Id.* at 1916 (citing Iskanian, 59 Cal. 4th at 382) ("[P]re-dispute agreements to waive the right to bring 'representative' PAGA claims are invalid as a matter of public policy.").

120. *Id*.

121. *See Viking River*, 142 S. Ct. at 1916; *see also* Moriana v. Viking River Cruises, Inc., No. B297327, 2020 WL 5584508, at *2 (Cal. Ct. App. Sept. 18, 2020).

122. *Viking River*, 142 S. Ct. at 1917.

123. *Id.*

ana's individual claim and dismissing her representative claims, PAGA was preempted by the F.A.A.[124]

In explaining its contrary holding to *Iskanian*, the Court first discussed how consent underpins arbitration.[125] The F.A.A. exhibits a policy-based inclination towards arbitration in support of judicial economy. Therefore, when parties agree to arbitrate a claim, those parties waive their right to litigate the dispute in a judicial forum and, instead, create a contractual right to resolve the dispute in an arbitral forum.[126] The right to arbitrate a claim, bolstered by the policies of the F.A.A. and basic contractual provisions, must not be contravened by a generally applicable state law, such as PAGA.[127]

The Court also noted that there is, in fact, a conflict between the procedural structure of PAGA and the F.A.A. in the context of arbitration.[128] This conflict comes from PAGA's statutory mechanism of claim joinder—the very mechanism that gives PAGA its bite.[129] Moreover, the secondary rule in *Iskanian* practically invalidated agreements to separately litigate or arbitrate "[i]ndividual PAGA claims for Labor Code violations that an employee suffered."[130] This was so because undertaking "victim-specific" claims in separate arbitration proceedings does not serve PAGA's deterrent purpose.[131] More specifically, the rule prohibited the contractual division of PAGA actions into constituent claims. Thus, the rule "unduly circumscribe[d] the freedom of parties" to determine the issues and rules by which they would arbitrate in a way that violates arbitration's fundamental prin-

124. *Id.*

125. *Id.* at 1918.

126. *See* 9 U.S.C. § 2.

127. *Viking River*, 142 S. Ct. at 1918 (quoting Epic Sys. Corp. v. Lewis, 138 U.S. 1612 (2018) ("Section 2's mandate [of the F.A.A.] protects a right to enforce arbitration agreements. That right would not be a right to arbitrate in any meaningful sense if generally applicable principles of state law could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace.'").

128. *Id.* at 1923.

129. *See id.*; *see also* discussion *supra* Section II.C.

130. *Viking River*, 142 S. Ct. at 1923.

131. *Id.* at 1917 (quoting *Iskanian*, 59 Cal. 4th at 383).

ciple of consent.[132] The Court explained that state law "cannot condition the enforceability" of agreements to arbitrate on a procedural mechanism that would allow parties to "expand the scope of the arbitration" by submitting claims that the parties had not consented to arbitration.[133] That is contrary to typical procedural rules of joinder, and the F.A.A. departs from this approach, favoring individualized arbitration procedures of the parties' own "design," even if bifurcated proceedings inevitably results from that procedure.[134]

Iskanian prohibited the division of individual and representative PAGA claims. The effect was an expanded PAGA joinder mechanism. The result undermined parties' abilities to choose what claims and in what forum they will arbitrate.[135]

After addressing the preemption issue, the Court considered the severability clause issue. The Court held that the severability clause entitled Viking River to enforce the arbitration agreement of Moriana's individual PAGA claim.[136] The Court highlighted that PAGA's joinder provision rests solely on the basis of a plaintiff's individual claim, absent an agreement to arbitrate *representative* PAGA claims. Therefore, once an employee's *individual* PAGA claim has been submitted to arbitration, any *representative* claims would lack standing to

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

133. *Id.*

134. *Id.*

135. *Id.* at 1924 (quoting *Lamps Plus, Inc.*, 139 S. Ct. at 1416). That rule would allow parties to "superadd new claims to the proceeding." *Id.* at 1924. This, in turn, would compel parties to either accept arbitration or wholly relinquish the right to arbitration. A consequence of that forced choice is that the parties relinquish their right to *choose* what and what not to arbitrate. Under this rule, even if an employee agreed to arbitrate an *individual* PAGA claim, that employee could later demand court proceedings or arbitration of the *representative* PAGA claims of other alleged aggrieved employees. The result is adjudication of claims in ways not consented to by the parties. This ultimate result frustrates the purpose of a contract and is "incompatible" with the F.A.A. *See id.* at 1924; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347–48 (2011). *See, e.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945.

136. *Viking River*, 142 S. Ct. at 1925.

be adjudicated, either in court or in arbitration.[137] PAGA simply lacks any other procedural mechanism that would confer standing on representative claims, leaving them unable to be enforced or litigated.

IV. EXPLORING POTENTIAL SOLUTIONS TO CALIFORNIA'S PAGA PROBLEM

Viking River dictates that employees with unsettled PAGA claims may only seek monetary penalties for their individual claims of Labor Code violations. Employee plaintiffs may no longer collect for representative claims of violations experienced by any other employee—let alone hundreds, thousands, or even millions of employees. Currently, employee plaintiffs seeking to adjudicate alleged Labor Code violations as *representative* PAGA claims have no avenues for resolution, especially if they sign arbitration agreements similar to the one signed by Moriana in *Viking River*.[138] Certainly, employers could consent to the arbitration of all representative PAGA claims. However, it is difficult to believe they would do so. After all, the purpose of the severability waiver in Moriana's employment agreement was to preclude the adjudication of representative PAGA claims.

Moreover, given *Iskanian's* reversal, it is unlikely that these same employers would not immediately move to amend their arbitration agreements to include severability provisions that would split individual and representative PAGA claims. Indeed, many employers likely have already made such amendments.[139] The only real option for em-

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137. *Id.*; *see also* U.S. CONST. art. VI, § 2; *Preemption*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Nov. 15, 2022).

138. *See* discussion *supra* Section III.B.

139. *See, e.g.*, Anet Drapalski & John Skousen, *Employers Earn Critical Post-Viking River Arbitration Victory: Your 7-Step Action Plan to Beat Back PAGA Claims*, JD SUPRA (Oct. 5, 2022), https://www.jdsupra.com/legalnews/employers-earn-critical-post-viking-3765343/ (encouraging employers to check the wording of arbitration agreements to "[d]etermine whether existing arbitration agreements should be replaced with updated arbitration agreements consistent with the elements and employer safeguards set forth by *Viking River*); Michael Kelly & Cristen Hintze, *Lessons for California Employers from Viking River (US)*, SQUIRE PATTON BOGGS: EMP. LAW WORLDVIEW (June 20, 2022), https://www.employmentlaw worldview.com/lessons-for-california-employers-from-viking-river-us/ ("Arbitration agreements must be reviewed to ensure they have appropriate and enforceable class, collective, and representative action waiver provisions. Severability clauses

ployees, of course, is to simply adjudicate their individual PAGA claims in arbitration. It follows that individual PAGA claims are less profitable to plaintiffs' attorneys than representative claims.[140] In essence, *Viking River* identified a procedural—and, arguably, a fatal—flaw in the PAGA statute. In *Viking River's* wake, California must now reassess how to resolve its problem of insufficient prosecution of Labor Code violations.

A. A Roadmap from Justice Sotomayor

One potential solution came from the text of *Viking River* itself. In her concurrence, Justice Sotomayor's clarified that California is not "powerless" to address its concern that the State is unable to adequately enforce the Labor Code without the assistance of deputized private attorneys general.[141] First, the Court may have misunderstood California's state law: California's courts should clarify its case law regarding the bifurcation of PAGA claims.[142] Ultimately, these state courts could "have the last word."[143]

A second, and more practical, solution would require action by the legislature, not the judiciary. Justice Sotomayor explained that if the Court did *not* misunderstand California law, then "the California Legislature is free to modify the scope of statutory standing under

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also need review in light of Viking River."); Jack S. Sholkoff & Zachary V. Zagger, *Supreme Court Sides with Viking River Over Arbitration of California PAGA Claims*, OGLETREE DEAKINS: INSIGHTS (June 15, 2022), https://ogletree.com/insights/supreme-court-sides-with-viking-river-over-arbitration-of-california-paga-claims/ ("[T]hose employers with operations in California and arbitration agreements may want to update their agreements . . . ."); George W. Abele, Chris A. Jalian & Deisy Castro, *Viking Victory: Supreme Court Holds PAGA Cannot Circumvent Arbitration Agreement*, PAUL HASTINGS: INSIGHTS (June 16, 2022), https://www.paulhastings.com/insights/client-alerts/viking-victory-supreme-court-holds-paga-cannot-circumvent-arbitration ("Employers who have arbitration agreements should review them with counsel to ensure that they provide the best protection possible in light of the Viking River Cruises decision.").

140. Michael S. Kun, *Will 2022 Be the Year California Voters Repeal PAGA*?, NAT. L. REV.: LAB. & EMP. (Jan. 4, 2022), https://www.natlawreview.com/article/will-2022-be-year-california-voters-repeal-paga.

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

142. *Id.* (Sotomayor, J., concurring).

143. *Id.* (Sotomayor, J., concurring).

PAGA within state and federal constitutional limits."[144] Essentially, Justice Sotomayor provided a roadmap for addressing representative PAGA claims. The California Legislature could amend the text of PAGA to create statutory standing for representative PAGA claims, provided it did not run afoul of the state or federal constitutions, and avoided F.A.A. preemption. Thus, severed representative claims could be heard and adjudicated; plaintiff employees' representative standing would not rely on the standing of a main, individual claimant.[145]

This legislative solution should be financially attractive to California because the State would continue to collect seventy-five percent of any monetary award. Additionally, this solution would not depend on a future decision by California justices upon hearing an "appropriate case,"[146] which may or may not resolve this issue for the California LWDA. Furthermore, permitting individual plaintiffs to again join representative claims would clearly be attractive to the California Plaintiff's Bar.[147]

Legislative reform could force employers—under pain of financial penalty—to pay closer attention to their behavior. However, the resulting benefit to the employees would remain overshadowed by the exploitative nature of the PAGA joinder mechanism. If the purpose of PAGA is to protect California's employees, this is not realized in practice. In fact, the LWDA itself has recognized this issue. In their joint Budget Request Summary for fiscal year 2019-2020, the LWDA and Department of Industrial Relations stated:

> Seventy-five percent of the 1,546 settlement agreements reviewed by the PAGA Unit in fiscal years 2016/17 and 2017/18 received a grade of fail or marginal pass, *reflecting the failure of many private plaintiff's attorney[s] to fully protect the interests of the aggrieved employees and the state*.[148]

144. *Id.* (Sotomayor, J., concurring).

145. This Note does not address potential concerns regarding PAGA plaintiffs' constitutional standing should such an amendment to PAGA be enacted.

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

147. *See* discussion *supra* Section I.

148. CAL. DEPT. OF FIN., BCP FISCAL DETAIL SHEET NO. 7350-110-BCP-2019-MR: PAGA UNIT STAFFING ALIGNMENT 6 (2019) (emphasis added).

That the LWDA—the very agency that PAGA was enacted to benefit—expressly recognizes the checkmate of the plaintiff's bar to the statute's entire purpose indicates the severity of PAGA's exploitation. Moreover, it is indicative of PAGA's ineffectiveness. Notwithstanding legislative reforms permitting joinder of representative claims, PAGA continuing to operate in this manner does not solve the LWDA's problem.

B. The Fair Pay and Employer Accountability Act Ballot Measure

The California Fair Pay and Employer Accountability Act ("F.P.E.A.A.") is another potential solution to the issues posed by PAGA.[149] The law, if passed, would repeal PAGA in its entirety and eliminate the authority of the Labor Commissioner to authorize private attorneys to assist with enforcing the Labor Code.[150] The law would also require the California Legislature to provide funding for enforcement by the Labor Commissioner and allow employers to correct identified violations without penalties.[151] The F.P.E.A.A. would also create and maintain a "Consultation and Policy Publication Unit" to provide information, advice, and assistance to California employees

149. *See generally California Fair Pay and Employer Accountability Act of 2024*, CALIFORNIANS FOR FAIR PAY & ACCOUNTABILITY, https://cafairpay.com/ (last visited Nov. 5, 2022). The F.P.E.A.A. will appear on the November 2024 California ballot and, if passed, will put workers' labor claims back in the hands of the independent regulator by empowering the Labor Commissioner to enforce labor laws and impose penalties. Victoria Antram, *California ballot initiative to repeal PAGA qualifies for 2024 ballot*, BALLOTPEDIA NEWS: STATE BALLOT MEASURES (July 26, 2022), https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/; *see also* Mark Theodore & Michelle Lappen, *California Voters to Decide Future of PAGA in November 2024*, PROSKAUER: CAL. EMP. LAW UPDATE (July 26, 2022), https://calemploymentlawupdate.proskauer.com/2022/07/california-voters-to-decide-future-of-paga-in-november-2024/. The Reader should note that, even despite the passage of PAGA, the Labor Commissioner was never fully stripped of their authority to enforce the Labor Code. Rather, the F.P.EA.A. seeks to take PAGA claims from the hands of plaintiff's attorneys, and return the Labor Commissioner to its pre-PAGA status as the *only* entity with the power to enforce actions against employers for Labor Code violations.

150. Letter from Brian Maas, Cal. New Car Dealers Ass'n President, to Anabel Renteria, Initiative Coordinator 2–3, 5 (Nov. 8, 2021) (on file with Initiative Coordinator Attorney General's Office) [hereinafter Letter from Brian Maas].

151. *Id.* at 4.

and employers.[152] Finally, the law would award all penalties to the alleged aggrieved employees and authorize increased penalties for employers who willfully violate the Labor Code.[153] Essentially, the F.P.E.A.A. would reposition the Labor Commissioner as the ultimate enforcer of California Labor Code violations in a manner that is more financially agreeable to employers.

Unfortunately, this solution lacks creativity. While it rids California of the exploitation by plaintiffs' attorneys via PAGA claims, it sends California back to 2004 by putting prosecutions of Labor Code violations back into the hands of an underfunded Labor Commissioner. California's workforce has expanded exponentially since 2004; meanwhile, the LWDA budget has not increased commensurate to that growth.[154] At its current budget, the LWDA cannot effectively prosecute violations in a way that protects California employees.[155] The measures proposed in the F.P.E.A.A. address this issue,[156] albeit incompletely. Assuming that California, who has depended on the prosecution of Labor Code violations by private parties since the passage of PAGA, would be suddenly equipped to handle the enforcement of the violations by "all the necessary funding," is imprudent.[157] This proposal within the F.P.E.A.A. directs the legislature in a conclusory way to amend the very issue that made PAGA necessary in the first place—fund the LWDA. Without clearer parameters, and in the face of the ever-expanding Califiornia workforce, this solution does not afford sufficient protection to employees. This proposal simply

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152. *Id.* at 7.

153. *Id.* at 1.

154. *See* discussion *supra* Section I.

155. In 2021, the California LWDA had access to funding reserves of $152.5 million. Christine Baker & Len Welsh, *California Private Attorneys General Act of 2004, Outcomes and Recommendations*, CABIA FOUND. 1 (2021), https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf. *Cf.* STATE OF CAL., REPORT 400 C: MONTHLY LABOR FORCE DATA FOR COUNTIES 1 (Nov. 18, 2022), https://labormarketinfo.edd.ca.gov/file/lfmonth/countyur-400c.pdf (showing that in October 2022, California had 19,213,500 and 18,487,200 people in its labor force and employment, respectively).

156. Letter from Brian Maas, *supra* note 150, at 4 ("The legislature shall ensure that all necessary funding is provided to the division as needed to fully meet the division's mandates under the Labor Code.").

157. *Id.*

does not equip California with the necessary structure and guidelines needed to handle the rights of its workforce.

C. A Preventative and Remedial Measure is the Best Solution for California

The solution proposed by Justice Sotomayor—clarifying the law, legislatively or judicially—seems to better address the problem highlighted in *Viking River* than the F.P.E.A.A. However, both solutions share a common flaw: they take effect *after* the violations have already occurred. As a result, employers lack financial incentive to proactively adhere to the Labor Code. If the underlying issue is employers violating the Labor Code, then why not aim to prevent those violations from the start?

If California truly wants to protect its employees while preventing excessive litigation, it should repeal PAGA and enact a tax expenditure to reward employers who commit minimal Labor Code violations per capita. Separately, the State could still allocate funds to the LWDA to prosecute serious violations of the Labor Code. Alternatively, the State could cap the recoverable attorney fees for privately vindicated PAGA suits at a figure comparable with the lodestar calculation.[158] Put simply, tax expenditures work.[159] Also known as tax

158. The Lodestar method calculates attorneys fees by multiplying the reasonable number of hours of work performed by a reasonable hourly rate. *See* Micheael R. Diliberto, *The Golden Rule of Attorney Fees*, CAL. LAWS. ASS'N, https://calawyers.org/solo-small-firm/the-golden-rule-of-attorney-fees/. U.S. Federal Bankruptcy practice has codified a lodestar-type calculation of attorney fees, which considers: the reasonable hours spent on the work, the reasonable results achieved by the work performed, whether the work was performed within a reasonable time commensurate with its complexity and importance, and whether the services were necessary or beneficial at the time. 11 U.S.C. § 330(a)(3)(A)–(B).

159. In 1981, Congress passed a research and development tax credit which operated as a dollar-for-dollar exemption for federal income tax. On average, this reduced the amount firms had to spend on research and development by 10%. Following the policy change, this study found a 20% increase in the ratio of research and development spending to spending on sales for qualifying firms. *See generally* Nirupama Rao, *Do Tax Credits Stimulate R&D Spending? The Effect of the R&D Tax Credit in its First Decade*, 140 J. PUB. ECONS. 1 (2016), https://wagner.nyu.edu/files/faculty/publications/RD_Second_Revision.pdf. A study assessed the cost-effectiveness of the Work Opportunity Tax Credit, enacted by Congress in 1996 to boost the employment opportunities for individuals who have consistently faced

incentives,[160] these policies create exceptions to the state's basic tax structure and incentivize businesses and employers to alter their behavior to benefit from a reduction in their taxable incomes.[161] Tax expenditures, while lacking an official definition, generally refer to either a special inclusion, exemption, or deduction in taxes, which function as an alternative to other policy apparatuses, including regulatory and spending programs.[162]

Fortunately, California has been a leader in this area. Following the federal government by only a few years, California was one of the first states to focus on tax incentives in its budget and legislative processes.[163] Moreover, California consistently analyzes and reports on the effectiveness of its tax expenditures and conducts statutorily required annual reports.[164] Thus, the State already has a system to as-

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barriers to employment. Analyzing data from two independent studies, this study weighed the benefits to taxpayers and qualified employees with the cost on the government, and found that "even with conservative estimates," the program was remarkably cost-effective. Peter Cappelli, *Assessing the Effect of the Work Opportunity Tax Credit*, ADP, https://www.adp.com/tools-and-resources/compliance-connection/tax-incentives/resources/legislative-updates/~/media/Reference%20PDFs/Cappelli_Study_2011.ashx (last visited Nov. 15, 2022). Another study found that the passage of the New Jobs Tax Credit, offering a credit of 50% of the first $4,200 of wages per employee for increases in employment exceeding two percent over the previous year, led to 150,000–670,000 of the more than 1 million increase in employment occurring between 1977 and 1978 by construction and retailing industries. John Bishop, *Employment in Construction and Distribution Industries: The Impact of the New Jobs Tax Credit*, *in* STUDIES IN LABOR MARKETS 209, 209 (Sherwin Rosen ed., 1981), https://www.nber.org/system/files/chapters/c8912/c8912.pdf.

160. The term "tax expenditure" dates back to the 1960s, when federal official Stanley Surrey compiled lists of federal tax code provisions that resembled spending. Surrey described the provisions as departing from the normal tax structure that were designed specifically to favor a particular industry or activity and provide incentives directly through the tax system, rather than by grants or loans. Jason Sisney et al., *California State Tax Expenditures Total Around $55 Billion*, LEGIS. ANALYST'S OFF.: CAL. ECON. & TAXES (Feb. 19, 2015), https://lao.ca.gov/LAOEconTax/Article/Detail/60#:~:text=Tax%20expenditures%20create%20exceptions%20to%20the%20basic%20tax,corporation%20tax%2C%20is%20a%20good%20example%20of%20this.

161. *Id.*

162. U.S. DEP'T OF THE TREAS.: OFF. OF TAX ANALYSIS, TAX EXPENDITURES 1 (2021), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2022.pdf.

163. Sisney et al., *supra* note 160.

164. *Id.* (increasing the cadence of the Department of Finance's report, which includes tax expenditure analyses, to once per year).

sess the efficiency and success of a potential tax expenditure program, thereby ensuring that the program functions as intended. This would allow for the maximization of resources.

Because of its proactive, incentivizing character, a tax expenditure is an effective way to tackle California's problem. California legislators should pass an expenditure, either in the form of an exemption or a deduction, that is tethered to a number of Labor Code violations. This would allow employers who heed that line to pay less taxes. This expenditure should be structured to reach all employers, regardless of incorporation or size, in the same way that PAGA reaches all California employers. Based on the number of workers employed by a particular employer, the legislature should set a quota of Labor Code violations permissible under the expenditure. If an employer commits more than its allotted quota of Labor Code violations, it will not be allowed to reap the benefits of the tax incentive. This will encourage employers to pay close attention to the less-noticeable Labor Code violations often prosecuted under PAGA, including failure to provide and maintain detailed wage statements, which requires no proof of injury.[165] Keeping a closer eye on similar, often unintentional violations, will reduce the number of Labor Code violations committed by employers.

The broad nature of the Labor Code makes it nearly impossible to prevent *all* Labor Code violations. The tax expenditure would be designed to thwart a majority of Labor Code violations at their source. For all others, the LWDA would maintain its prosecutorial authority. The prospect of an underfunded LWDA is allayed in this case because the tax expenditure should proactively reduce the number of violations the LWDA would need to prosecute. This reduction in Labor Code violations conserves the LWDA's resources and allows it to act efficiently in its capacity as the State's main prosecutor of these offenses. Of course, the LWDA would continue to collect civil penalties for the violations it does prosecute.

Alternatively, if the LWDA remains underfunded in spite of the tax incentive, California should amend the PAGA statute to include a cap on attorney's fees. This cap should be based on the hours worked

165. *Court Rules: PAGA Claim Doesn't Require Injury*, JD SUPRA (Oct. 3, 2018), https://www.jdsupra.com (type "Court Rules: PAGA Claim Doesn't Require Injury" in search bar at top right of page; then click article link).

and the reasonable, actual results achieved by the plaintiffs' attorneys, similar to the lodestar fee methodology.[166] As this Note previously discussed, a common sentiment among employers, businesses, and defense attorneys is that the Plaintiff's Bar exploits PAGA's recovery provisions to maximize their personal financial recovery.[167] Through real-life examples, the attorneys' recovery seems wildly unfair, both to the employees whose rights have been violated and to the State, who actually brought the case.[168] Furthermore, considering that PAGA was enacted because the State lacks adequate resources to vindicate the rights of employees, PAGA's exploitation by the plaintiff's bar seems all the more distasteful.

This cap would limit the perverse financial incentives for plaintiffs' attorneys to bring PAGA suits on behalf of thousands or millions of employees simply for the payout. Instead, plaintiffs' attorneys would be compensated reasonably and fairly.

A preventative tax-measure coupled with a cap on attorney's fees is what makes this two-pronged approach most effective. The tax incentive solution adopts a more comprehensive approach than the solutions posited by Justice Sotomayor and in the F.P.E.A.A. because it curbs a number of violations at their source.

CONCLUSION

The current framework under PAGA has proven to be untenable, both in its failure to prevent the Labor Code violations and in terms of adequately and fairly compensating those employees who have suffered from violations. Moreover, the exploitation of PAGA's attorney's fees provision by the California Plaintiff's Bar undermines the legislative intent of PAGA.[169]

The United States Supreme Court's recent decision in *Viking River* highlights the futility of PAGA as a tool for the enforcement of labor rights of employees who have signed arbitration agreements. A recent empirical study found that over fifty-five percent of workplaces in

166. *See* Diliberto, *supra* note 158.
167. *See* discussion *supra*, Sections II.B., III.C.
168. *See* discussion *supra*, Section I.
169. Kun, *supra* note 140.

California require mandatory arbitration.[170] Because a substantial portion of the California workforce is now unable to bring representative claims under PAGA's joinder mechanism, California needs a new way to ensure the protection of its employees. Two solutions to this problem have been put forth, as laid out above, one by Justice Sotomayor and one by proponents of the F.P.E.A.A. Both solutions address California's problem from a remedial, not a preventative, perspective. Moreover, attempts by the courts to reconcile PAGA with the tenets of the F.A.A. have created chaos, and the underfunded LWDA lacks the resources to effectively enforce the Labor Code. A better approach is to abandon PAGA, maintain the structure and policies of arbitration, and incentivize California employers to commit fewer Labor Code violations through the adoption of a tax incentive. By adopting this approach, California can liberate its employers from the suffocating effects of PAGA's exploitation while paving a path to justice for its workforce.

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170. Colvin, *supra* note 63, at 8 (reflecting arbitration agreements from 2017 and 2018).

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