No. 20-1573

IN THE
Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the
California Court of Appeals

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *amicus curiae*.

TAFEF is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. TAFEF has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has provided testimony before Congress regarding each of the proposed amendments to the FCA since 1986, and has participated in litigation both as a *qui tam* relator and as *amicus curiae* regarding the proper interpretation of the FCA. TAFEF presents an annual educational conference for FCA attorneys, typically attended by more than 300 private and government attorneys from across the country. TAFEF's members regularly bring FCA actions on behalf of private citizens and the United States to protect public resources through public-private partnership.

TAFEF submits this brief to address the arguments made by the parties and *amici* suggesting that this Court could, or should, address whether a *qui tam* plaintiff can be compelled to arbitrate claims brought on behalf of the government under the False Claims Act. As both Petitioner and Respondent note

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[1] No party's counsel authored this brief in whole or in part, and no persons or entities other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

in their merits briefs, that question is not presented in this case. Moreover, resolution of that question would require consideration of the very specific statutory mechanism that authorizes a *qui tam* plaintiff to proceed with an action in which the governmental entity remains the real party in interest and to collect damages sustained by that governmental entity which retains significant control over the case. In addition, the question of whether *qui tam* claims under the False Claims Act may be subject to mandatory arbitration based on an employee's consent to arbitrate claims when the government was not a party to the agreement, nor otherwise consented to arbitration, presents different policy considerations than those presented in this case.

Accordingly, *Amicus* TAFEF respectfully asks that this Court make clear that its decision in this case does not resolve the question of whether, and when, allegations under the False Claims Act in a *qui tam* suit could be subject to arbitration. If the Court is inclined to consider that question, *Amicus* TAFEF would encourage the Court to solicit the views of the Solicitor General of the United States, and other interested state Attorney Generals, given the potential significance of the question for False Claims Act enforcement through the *qui tam* mechanism.

SUMMARY OF ARGUMENT

There are strong public policy reasons why private plaintiffs bringing civil actions against defendants in order to recover funds for and on behalf of the government, should not be limited to arbitration. For one, an agreement to arbitrate claims cannot bind a non-party to that agreement. Under the federal and

state False Claims Acts, it is the government which is, and remains, the real party in interest in *qui tam* litigation with the discretion to intervene, settle, or even dismiss a *qui tam* action. Enforcing private arbitration agreements to preclude private citizens from pursuing statutory claims on the government's behalf would limit the rights of the real party in interest, the governmental plaintiff, to a forum choice it had not elected and could impair the vindication of its interests in recovery of civil damages payable to the governmental entity.

That being said, this case does not involve a *qui tam* plaintiff bringing an action for damages on behalf of a government entity. Instead, it raises the very different question of whether the Federal Arbitration Act (FAA)'s preemption provision may be used to preclude employees who have agreed to arbitrate their employment claims from also enforcing the state of California's Private Attorneys General Act (PAGA) as part of their arbitrated claim. PAGA functions as a "private attorney general" statute and authorizes employees who have claims for violations of California's labor code to add claims for additional violation of the California labor code sustained by other employees and to collect civil penalties. PAGA grants a private right of action authorizing private citizens to step into the shoes of governmental entities in their role as enforcers of the California state labor code. California public policy favors non-waiver of the private right of action under PAGA, and, here, the California courts declined to preclude the plaintiff from pursuing both individual and PAGA claims in arbitration.

Therefore, as Respondent has explained, the question presented in this case is not whether the

employee can be required to arbitrate but whether the arbitration clause can be used to waive a plaintiff's right to pursue PAGA claims whether in arbitration or in court. In other words, this Court is called upon in this action to resolve the question whether the FAA preempts California's public policy against waiver by employees of their right to pursue PAGA claims.

Both Petitioner and Respondent agree, however, that the question whether a *qui tam* plaintiff can be compelled to arbitrate a *qui tam* action for enforcement of the False Claims Act, is *not* presented in this case. Nonetheless, *amici* Washington Legal Foundation and the Chamber of Commerce argue that, not only can that question be reached in this case, but that this Court should hold that a *qui tam* claim is subject in arbitration when a *qui tam* plaintiff has agreed to resolve their claims through arbitration.

This Court should decline *Amici's* bold request to go beyond the question presented in this case and to address the wholly separate questions implicated by compelling arbitration of FCA *qui tam* claims. These issues should only be considered in the context of a concrete case or controversy presenting the issue. *See GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.* (1980) ("The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.") Full consideration of the question should involve input from the Department of Justice's Solicitor General as well as an invitation to the state Attorney Generals, given the governmental interests. Among the issues that question presents is how to reconcile the text of the False Claims Act, which provides for filing an

action in federal district court, with mandatory arbitration claims, and how a decision on this issue might impact fraud enforcement and collection of damages for the governmental entity.

None of those concerns need or should be resolved to dispose of this case. The authorities cited by Petitioner and its supporting *amici* do not in fact support the conclusion that the FAA compels arbitration of *qui tam* actions. Further, important public policies weigh against concluding that arbitration clauses negotiated by an individual employee, as part of their employment contract, can also be used to require arbitration of fraud claims brought in the name of the government. Such a holding could threaten to undermine the public-private partnership that Congress crafted when it enacted the *qui tam* statutory mechanism for enforcement of the FCA.

The Court should affirm the decision of the California Court of Appeals.

ARGUMENT

I. Petitioner and Respondent Agree that the Question Whether a *Qui Tam* Suit is Subject to Mandatory Arbitration is Not Presented in this Case.

In a nutshell, Petitioner's argument is that the FAA requires enforcement of arbitration agreements including, in this case, a preclusion of the plaintiff employee from pursuing "representative claims" including those under California's PAGA which allows an employee to seek monetary awards for violations of

the California Labor Code. Brief of Petitioner at 2-3. Relying on this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Petitioner argues that, just as with class actions or other collective actions that may be precluded through an enforceable agreement to arbitrate, an action under PAGA is representative, and therefore, may also be precluded through an agreement to arbitrate. *Id.* at 23. In other words, where an arbitration agreement precludes "class, collective, representative or private attorney general actions," *id. at* 19, those claims may not be brought by the individual who had previously consented to bilateral arbitration.

Petitioner acknowledges, however, that although the California courts have noted some similarities to *qui tam* actions, there is no binding precedent that a *qui tam* claim can be subject to an arbitration clause and, in fact, FCA claims are typically outside the scope of issues that parties to an employment contract agree to arbitrate. Brief of Petitioner at 40 & n.4 (citing *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791(9th Cir. 2017) and *United States v. Bankers Ins. Co*, 245 F.3d 315 (4th Cir. 2001)).

The authorities cited by Petitioner are instructive. In *My Left Foot,* the Ninth Circuit declined to address whether the FAA applies to a *qui tam* action under the FCA because it concluded that the private arbitration agreement at issue did not encompass *qui tam* claims. The Court of Appeals explained that

> a relator cannot bind the government to an agreement to which it is not a party because a

> *qui tam* action involves "no claim that [the defendant] has against [the relator]. Nor can it be said to be a claim, dispute, or controversy that [the relator] 'may have against [the defendant].' Indeed, though the FCA grants the relator the right to bring a FCA claim on the government's behalf, an interest in the outcome of the lawsuit, and the right to conduct the action when the government declines to intervene, our precedent compels the conclusion that the underlying fraud claims asserted in a FCA case belong to the government and not to the relator."

871 F.3d at 799-800. *Bankers Ins*. also did not address whether the FAA compels arbitration of a *qui tam* action. Instead, that case involved an agreement by a *government agency* to arbitrate the government's claim and, there, the Court of Appeals held that the *government* was bound by its own agreement to arbitrate. 245 F.3d at 324-325.

In any case, Petitioner acknowledges that, "whatever rule would apply in the case of a true *qui tam* action," that PAGA is "fundamentally different" and does not seek resolution of that question in this action. Brief at 40-42. Similarly, Respondent also does not suggest that this case is an appropriate vehicle to address the question of whether a FCA action may be enforced through an arbitration clause. Respondent's Brief at 49 & n. 13.

II. Authorities Cited by Petitioner and its Supporting *Amici* Cite Do Not Support the

Argument that *Qui Tam* Actions Can be Subject to Mandatory Arbitration.

Although the parties recognize that the case before this Court does not present the question of whether a FCA *qui tam* action is subject to arbitration, some of the supporting *amici* for Petitioner push the argument that the case law supports holding that, when a relator agrees to arbitrate claims arising out of their employment, they can be compelled to arbitrate FCA *qui tam* claims. Washington Legal Foundation (WLF) Brief in Support of Petitioner at 20; WLF Brief in Support Petition for Certiorari at 15; Brief of the Chamber of Commerce in Support of Petitioner at 21. These arguments, however, mischaracterize and overstate the holdings of the cases cited.

For example, WLF relies heavily on this Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) to support its argument that the FAA "applies to governmental claims." WLF Brief in Support of Petitioner at 19. *Epic,* however, involved this Court's analysis of the FAA in relation to the National Labor Relations Act (NLRA). *Epic* neither addressed the FCA nor whether a private party's agreement to arbitrate could preclude pursuit of an action by the person on the government's behalf. Further, a finding that the FAA is not applicable to *qui tam* actions is not incompatible with this Court's holding in n *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), as that case did not address that question, but rather involved an agreement to arbitrate in a consumer contract which prohibited the

consumer from bringing a class action to resolve such disputes. *Id.* at 336, 352.

WLF argues that, "the very nature of a *qui tam* claim confirms that the named plaintiff asserting such a claim on the government's behalf binds the government to an arbitration provision to which the plaintiff previously agreed before becoming the relator." WLF Brief in Support of Petitioner at 20. In support of that sweeping conclusion, WLF cites *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009) for the proposition that the government is a "real party in interest," but the relator is the sole "party" in a declined case. WLF also cites *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) in support of the assertion that "by partially assigning its claim to the relator, the government makes the relator the sole interested party pursuing the claim," in a declined case. WLF Brief in Support of Petitioner at 20.

But neither of these cases address nor support the argument WLF seeks to advance -- that the private party's agreement to arbitrate can preclude litigation of the *qui tam* allegations brought on the government's behalf. *Eisenstein* concerned interpretation of the Federal Rules of Appellate Procedure (FRAP), which provide a longer period to appeal when the United States is "party" to the case, and concluded that the relator could not benefit from that longer period because the United States was not a party to the declined *qui tam* case for purposes of the FRAP timing rules. Nothing in *Eisenstein* suggests that the relator is the sole interested party. *Stevens,* in fact, emphasizes that in a *qui tam* action

it is "beyond doubt that the complaint asserts an injury to the United States" and that the "FCA can reasonably be regarded as effecting a *partial* assignment of the Government's damages claim." *Stevens*, 529 U.S. at 773 (emphasis added).

WLF also cites *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2011) to support its conclusion that *qui tam* claims must belong to "both the relator and the government," and thus, the relator can enter into a valid arbitration agreement without the government's consent. However, *Ritchie* involved a relator who agreed to a pre-filing release of *her* right to bring a *qui tam* action that was signed after the government was aware of the fraud allegations. In the context of pre-filing releases, courts have followed the framework that, if the government was unaware of the fraud allegations at the time the relator signed a release, the release is not enforceable because that would undermine the purposes of the FCA, which is to bring information about fraud to the government's attention. *See Ritchie,* 558 F.3d at 1169-70. Accordingly, if anything, *Ritchie* recognizes that it is the government's interests that must be considered in evaluating the waiver and release issues.

Cases that have considered the legal and policy interests in enforcing arbitration clauses have noted that the scope of arbitration is based on the parties' consent. *See Cooper v. Ruane Cunniff & Goldfarb, Inc.*, 990 F.3d 173 (2nd Cir. 2021) (noting that while the FAA "embod[ies] [a] national policy favoring arbitration." (citations omitted)…the law is undisputed that "a court may order arbitration of a particular dispute only where the court is satisfied

that the parties agreed to arbitrate *that dispute*.") (emphasis in original); *see also U.S. ex rel. Paige v. BAE Systems Technology Solutions & Services, Inc.,* 566 Fed.Appx. 500 (6th Cir. 2014) (holding that statutory employment claim under 3730(h) was not within the scope of the parties' arbitration agreement, which did not refer to the FCA retaliation or statutory claims). WLF relies on two cases in the Southern District of Ohio that did require arbitration of a *qui tam* action. But, significantly, in both of those cases, the Court based its decision, at least in part, on the government's decision not to oppose arbitration of its claim. *United States ex rel. Hicks v. Evercare Hosp*., No. 12-cv-887, 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015); *Deck v. Miami Jacobs Business College Co*., No. 3:12-cv-63, 2013 WL 394875, at *6–*8 (S.D. Ohio Jan. 31, 2013).[2]

Courts also have observed that *qui tam* claims vindicate different interests in recovering damages for frauds perpetrated on the government. *See United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.,* 381 F.Supp.3d 1240, 1250 (E.D. Cal. 2019) (noting that *qui tam* claims concern fraud perpetrated on the government). Thus, while courts have enforced arbitration of a FCA retaliation claims have expressly noted that they were not addressing arbitration, they have noted that they were not addressing arbitration of the government claims. *See, e.g., Orcutt v. Kettering Radiologists, Inc*., 199 F. Supp. 2d 746, 756 (S.D. Ohio

[2] The Chamber of Commerce also cites to *Deck* to support its argument that a private party can bind the government to an arbitration agreement to which it is not a party, Brief of the Chamber of Commerce in Support of Petitioner at 21.

2002) (observing that plaintiff's retaliation claim is not brought as a private representative of the government); see also *Evercare Hosp.*, 2015 WL 4498744 at *3; *Deck,* 2013 WL 394875 at *6–*8).

III. Strong Public Policy Also Disfavors Enforcement of Private Arbitration Agreements in *Qui Tam* Actions.

Strong public policy reasons also militate against requiring arbitration of *qui tam* claims under the FCA. Most importantly, the governmental entity will not have consented to resolution of its claims through arbitration. Cf. *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009) (advising against "reflexive transfer of rules of preclusion from private to public litigation" where the government is the real party in interest and its interests need protection when employees and their employment lawyers may not be familiar with qui tam litigation).

So too, requiring employees to arbitrate *qui tam* claims pursuant to private employment contracts may deter relators from reporting fraud and severely undermine the purpose of the *qui tam* provisions of the FCA, which is to enlist the public to report allegations of fraud to the government and assist the government in pursing fraudulent schemes. See S. REP. NO. 99-345, at 5267 (1986) ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease [fraud against the Government].") Although *qui tam* relators under the FCA need not be employees, most are. Typically, they discover the fraudulent practices in

the course of their employment due to their access to the company's inner workings, policies and procedures, and communications. Employees who sign arbitration agreements at the outset of their employment, when focused on resolving terms of employment only, will not typically be able to anticipate discovering fraudulent conduct and make any kind of informed consent.

Employers' increased use of arbitration agreements could be detrimental to *qui tam* enforcement if employees are allowed to agree to arbitrate claims for damages to the government. Some projections show that by 2024, "more than 80 percent of private sector nonunion workers will be blocked from court by forced arbitration clauses…" Economic Policy Institute, *Unchecked Corporate Power* (May 2019), available at https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf. If the FAA is interpreted to compel employees who sign broad arbitration agreements to arbitrate their *qui tam* claims rather than litigate them in court, the number of employees who will come forward and apprise the government of violations of the law is likely to be severely diminished.

Empirical evidence indicates that mandatory arbitration provisions suppress the filing of claims. *See Forced Arbitration Undermines Enforcement of Federal Laws by Suppressing Consumers' and Employees' Ability to Bring Claims* (Dec. 17, 2013) (Cong. testimony to the S. Judiciary Comm. of Jean R. Sternlight), available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi ?article=1000&context=c ongtestimony (discussing indication that "miniscule numbers" of claims are filed

in arbitration). When subject to mandatory arbitration clauses, "almost no consumers or employees actually bring claims in arbitration. Thus, rather than providing greater access to justice the main function of arbitration clauses is to protect companies from claims brought in any venue." *Id*. at 3 (emphasis in original).

For relators bringing *qui tam* actions, forcing them to privately arbitrate their *qui tam* claims is even more likely to deter them from stepping forward because they will not receive the relief that many relators want most -- to hold their employer publicly responsible for breaking the law. S. REP. NO. 99-345, at 5290 (recounting Committee testimony observing that the provision allowing the relator to proceed without the government as enacted with the 1986 amendments to the FCA was intended to address that "in many cases, individuals knowing of fraud are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem"). Relators are often motivated to file a *qui tam* complaint because such an action results in the public being informed of the fraud or other violation of the law and the defendants being forced to publicly answer for their conduct. That is consistent with the basic purpose of the FCA, which is to vindicate the public's interest in protecting and recovering taxpayer funds and deterring future fraud. *See United States ex rel. Green v. Northrop Corp.,* 59 F.3d 953, 968 (9th Cir. 1995) ("*qui tam* actions exist only to vindicate the public interest."). That result cannot be achieved in arbitration, which is conducted in secret. Christopher R. Drahozal, *Confidentiality in Consumer and*

Employment Arbitration, 7 Y.B. ON ARB. & MEDIATION 28, 30 (2015); Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 484-85 (2006) ("Parties cannot share, and the public cannot access, evidence, testimony, briefs, motions, and other information disclosed" and "[a]bsent party agreement, the [arbitral] forum makes no transcript of the proceedings.").[3]

Furthermore, from TAFEF's experience with relators in the FCA context, they face many risks in coming forward to report fraud, including humiliation, stress, stigma, isolation, being excluded from their relevant employment industry, and, significantly, retaliation. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary*, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), *available at* https://www.judiciary.senate.gov /download/testimony-of-tina-m-gonter-pdf. When FCA cases are adjudicated in court, relators can seek protection in a public forum, from a judge, in the face of retaliatory conduct, whereas if they are forced to

[3] Congress expressed similar concerns when it recently enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub.L.N0. 117-90, which prohibits mandatory arbitration of sexual assault and sexual harassment claims. *See* H.Rept. 117-234 (2022)

arbitrate their *qui tam* claims, relators may be even less willing to take the risk of coming forward. [4]

Further, the procedural provisions of the FCA were carefully crafted to balance a number of interests, including encouraging private individuals to file claims and protecting the government's interests in its investigations.

For example, the FCA requires relators to file *qui tam* claims under seal and to serve the "complaint and written disclosure of substantially all material evidence and information the person possesses . . . on the Government pursuant to Rule 4(d)(4) [now Rule 4(i)] of the Federal Rules of Civil Procedure." 31 U.S.C. § 3730(b)(2). That procedure is "simply inapplicable to an arbitration proceeding." Charles A. Sullivan, *Whose Claim Is It Anyway? Arbitrating Relators' FCA Claims*, 9 J. HEALTH & LIFE SCI. L. 4, 7 (2015). As such, from the very outset, arbitrating a *qui tam* claim is impractical because there is no legal mechanism for a relator to initiate a *qui tam* claim in arbitration.

The procedural impediments only mount from there. "[E]ven when the DOJ opts not to intervene, the FCA provides it certain rights that do not fit within the framework of arbitration." *Id*. For instance, the FCA requires both the Attorney General and the court to approve the dismissal of any action. 31 U.S.C. § 3730(b)(1). It also permits the government to intervene at any time after initially declining upon a

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[4] The FCA and PAGA have different procedural schemes, we address only the impracticality of arbitration in the FCA context here.

showing of good cause. *Id.* § 3730(c)(3). Given the prevalence of confidentiality provisions in arbitration agreements, mandatory arbitration of FCA claims may also disturb the essential collaboration between the relator and the government that occurs in intervened cases.

Yet another impracticality of arbitrating FCA actions is the fact that discovery is generally limited in scope in the arbitral forum. Doré, 81 Chi.-Kent L. Rev. at 484. Discovery occurs only "at the agreement of the parties or the discretion of the arbitrator." Id. at 484, n. 117 (citing *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 164 & n.5 (5th Cir. 2004)). This narrowing of the broad scope of discovery permitted in a court of law is incongruous with the often-complicated nature of cases involving fraud against the government, which typically entail extensive discovery.

Further, parties to an arbitration have no way to enforce certain third-party subpoenas for purposes of a hearing, and they may not be able to issue third-party subpoenas at all for purposes of discovery. Several federal courts of appeal have held that the FAA does not give arbitrators any authority to order third parties to appear to testify or produce documents for purposes of prehearing discovery. See *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275–76 (4th Cir. 1999). Inability to obtain third party testimony could easily prove detrimental to the pursuit of an FCA case.

CONCLUSION

The question whether a *qui tam* claim may be subject to arbitration is not presented in this case and is not ripe for adjudication. The Court should affirm the decision of the California Court of Appeals allowing the plaintiff to pursue PAGA claims.

Respectfully submitted,

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