

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

VIKING RIVER CRUISES, INC.,)
 Petitioner,)
 v.) No. 20-1573
ANGIE MORIANA,)
 Respondent.)

Pages: 1 through 77
Place: Washington, D.C.
Date: March 30, 2022

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VIKING RIVER CRUISES, INC.,)

Petitioner,)

v.) No. 20-1573

ANGIE MORIANA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, March 30, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

SCOTT L. NELSON, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is participating remotely.

We'll hear argument this morning in Case Number 20-1573, Viking River Cruises versus Moriana.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The outcome here is controlled by this Court's decisions in Concepcion, Epic, and Lamps Plus. After those decisions, a state is not free to simply declare that a state statute is too important to be relegated to bilateral arbitration.

None of the varying theories offered by Respondent or the lower courts supports a different result. Respondent suggests that the waiver here is an invalid effort to immunize Viking rather than a valid effort to preserve bilateral arbitration, but Viking remains liable to Moriana for any labor code violation that she

1 can prove affected her personally and remains
2 liable to the state for civil and criminal
3 penalties.

4 The only thing that is foreclosed is
5 Moriana's effort to inject the facts and
6 circumstances of countless other workers into
7 this dispute, despite her agreement to arbitrate
8 bilaterally. The Ninth Circuit viewed PAGA
9 claims as more consistent with arbitration than
10 class actions, but employer-wide PAGA claims are
11 very similar to employer-wide FLSA collective
12 actions.

13 And Moriana's own complaint
14 demonstrates the great difference between an
15 effort to inject all manner of labor code
16 violations for the entire sales force, as
17 opposed to Moriana's dispute about her final
18 paycheck. The former requires a claim
19 settlement process borrowed from a class action
20 manual. The latter can be arbitrated in an
21 afternoon.

22 California's Supreme Court, for its
23 part, said that PAGA claims are outside the FAA
24 entirely based on a misplaced analogy to Waffle
25 House. But Iskanian's theory that the PAGA

1 claim belongs to the state and the state didn't
2 agree to arbitrate would make all PAGA claims,
3 whether individual or employer-wide, immune from
4 arbitration, which would make the conflict with
5 the FAA unmistakable.

6 And the analogy to Waffle House is a
7 nonstarter. Here, the same party that is in
8 court seeking to litigate on behalf of the
9 entire workforce is the self-same party who
10 agreed to arbitrate bilaterally.

11 I'd welcome the Court's questions.

12 CHIEF JUSTICE ROBERTS: Mr. Clement,
13 if somebody else, a different employee of Viking
14 Cruises, brings a PAGA action that, by its
15 terms, would include Ms. Moriana, would she be
16 able to be included among the group of people,
17 the large group of people, that would recover
18 under that action?

19 MR. CLEMENT: I --

20 CHIEF JUSTICE ROBERTS: In other
21 words, she would not be bringing the action
22 herself. It would be brought by somebody else,
23 and she would be among the beneficiaries under
24 California law of that action.

25 MR. CLEMENT: I think, Mr. Chief

1 Justice, that that would still be foreclosed by
2 the class arbitration PAGA waiver here.

3 The provision -- and it's reproduced
4 at page 13 of the blue brief -- but it has
5 essentially two subsections. The first involves
6 the employee saying that they won't bring a
7 class action, a collective action, or a private
8 attorney general action, and then it continues
9 to say that they won't participate as a member
10 in a class action, a collective action, or a
11 PAGA action.

12 So I would think that, based on the
13 contract, that Moriana has foreclosed her
14 ability to essentially benefit from that kind of
15 employer-wide PAGA action, but, if I'm wrong
16 about that, I don't think it changes the outcome
17 in this particular case.

18 I think, here, the important thing is
19 that this action shares the fundamental
20 attributes of a class action and a collective
21 action that make them inappropriate for
22 traditional bilateral arbitration. They
23 aggregate multiple claims in a single proceeding
24 with heightened stakes and wide discovery, and
25 --

1 CHIEF JUSTICE ROBERTS: Well, but this
2 is what strikes me as one -- one difference is
3 that this is not her cause of action. This is
4 the state's cause of action. It is an action --
5 it's the attorney general's action. She's
6 acting not really as -- would be acting not
7 simply as herself but as a delegee of the
8 attorney general and would be securing a
9 recovery for the state, as well as for other
10 employees.

11 MR. CLEMENT: But, Mr. Chief Justice,
12 I don't think that's the critical feature of
13 PAGA. It's certainly not what we object to.
14 So, if Ms. Moriana wants to bring an individual
15 PAGA action, assuming that that exists, if she
16 wants to bring that in arbitration and
17 75 percent of the recovery of the penalties
18 provided by that statute go to the state, Viking
19 has no objection to that.

20 So it's not the state's involvement
21 here as sort of a latent real party in interest,
22 however you want to characterize them. That's
23 not the gravamen of our concern. The gravamen
24 of our concern is that this action is not just
25 trying to litigate Moriana's labor code

1 violation but the labor code violation of
2 essentially the entire sales force.

3 JUSTICE KAGAN: But that is what the
4 state has decided is necessary to adequately
5 enforce its own labor laws. I mean, the state
6 has made a decision here, and it's we don't have
7 the capacity to do this ourselves. We need
8 private people to do it. And we need private
9 people to do it in this way. They're not going
10 to come in with a claim for \$2.32.

11 So this is a state decision to enforce
12 its own labor laws in a particular kind of way
13 that the state has decided is the only way to
14 adequately do it. And, essentially, your
15 position says, you know, the state just can't
16 make that decision, even though that's the way
17 that the state has decided best serves its
18 sovereign interests.

19 MR. CLEMENT: At the end of the day,
20 that's right, but the state made a decision in
21 Concepcion, and this Court said that that state
22 decision has to yield.

23 And I don't think it's functionally
24 different. I mean, a state could say, boy,
25 enforcing our labor code is really important, so

1 we are going to provide particular penalties
2 that are only available in a class action.

3 And then, if somebody tries to invoke
4 their class action waiver, we'll say: A-ha, you
5 can't invoke the class action waiver because
6 we've put these penalties behind a firewall.
7 They're only available in class actions. So now
8 you're not just waiving the class action, you're
9 waiving the substantive penalties we've put
10 behind the class action firewall.

11 I don't think that --

12 JUSTICE KAGAN: Well, I mean, that's
13 -- it's an honest answer that you just gave, but
14 I'm wondering whether anybody -- when they were
15 enacting the FAA about, you know, making sure
16 that people -- that, you know, people could
17 agree to arbitrate and making sure that courts
18 would not disrespect those agreements, whether
19 anybody thought that the FAA was going to end up
20 precluding the ability of the state to structure
21 its own law enforcement with respect to labor
22 violations. You know, just to say to the state:
23 You can't do things a certain way. You can't
24 enforce your labor laws in that way.

25 MR. CLEMENT: So, Justice Kagan, I

1 mean, it's -- you know, it's an interesting
2 question whether the FAA -- the Congress that
3 passed the FAA in 1925 would have foreseen the
4 kind of class actions at issue in Concepcion,
5 the kind of collective actions that were
6 provided for in the FLSA that were at issue in
7 the Epic case, or whether they would have
8 foreseen this particular kind of PAGA action.

9 But I do think that, certainly, if we
10 take Concepcion and Epic and Lamps Plus as a
11 given, and nobody's asked you to overrule those
12 cases here, the logic follows directly that,
13 just as a state can't say, you know, these class
14 action waivers in the consumer context, that's
15 not something that we really cotton to here in
16 California, we're going to find those sort of
17 categorically unconscionable. This Court said
18 that state policy had to yield.

19 I don't think the state policy here is
20 any more sacrosanct. And I do think it's worth
21 noting that this is a very anomalous statute
22 that's at issue here. I think it's telling that
23 no other state has showed up to participate as
24 an amicus in this case, and I think that
25 underscores what an outlier this PAGA remedy is.

1 It's an exceptionally good device if
2 you're trying to circumvent the Concepcion and
3 Epic decisions, but it really is an outlier in
4 terms of what --

5 JUSTICE BREYER: Oh, that may be. But
6 I try to stay right on a list, and you have what
7 are the differences between this and a class
8 action. There are quite a few.

9 I mean, one of them is you're not
10 looking at the damages of the other employees,
11 just trying to see if there's a violation of the
12 code that this employer did with respect to some
13 other employees and the money then is set and
14 goes to California and they distribute it, the
15 state.

16 And then some other ones are that you
17 -- there's no right to receive notice -- I wrote
18 them down -- yeah, no right to intervene, no
19 right to object to -- there is no appeal from
20 the settlement approval. There's no procedural
21 formalities. Rule 23 doesn't apply. There's no
22 numerosity. There's no commonality. There's no
23 typicality. There's no representation.

24 And in -- in all those procedural
25 things, of which there are a lot, the arbitrator

1 doesn't have to go into. I mean, it's not a
2 class action. It's more like a qui tam action.
3 And I never heard that you couldn't bring a --
4 agree to have an arbitration in a qui tam
5 action. Why not?

6 MR. CLEMENT: So, Justice Breyer, when
7 you tell me all the things that aren't present
8 in these --

9 JUSTICE BREYER: Yeah.

10 MR. CLEMENT: -- kind of actions, I
11 sort of get a chill down my spine.

12 JUSTICE BREYER: Because?

13 MR. CLEMENT: Because many of the
14 things that you're talking about are things --
15 are the essential protections for a defendant in
16 the class action.

17 Sure, some of them are there to
18 protect absent class members as well, but they
19 are the things that keep a class action within
20 the rails.

21 JUSTICE BREYER: Yes. So -- so, in
22 fact, I guess, if there's some problem of due
23 process or something with that, if there was no
24 arbitration agreement and this individual
25 brought a -- a PAGA action in a court, it would

1 be the same. So, if you think it's unfair to
2 the defendant, it's unfair in court. It's
3 unfair wherever you go.

4 MR. CLEMENT: But -- but here's --
5 there's two critical differences that make PAGA
6 actions really exactly the same as class
7 actions, and I think they're the things that --
8 the two things that are most material for
9 purposes of applying Concepcion and Epic.

10 One of them is that you have massive
11 liability -- sure, it's not damages, but the
12 penalties here are actually larger than the
13 damages associated with most of these labor code
14 violations.

15 So you have these massive claims in
16 terms of their monetary amount. And the
17 massiveness is not driven by the inherent nature
18 of the claim. It's driven by the aggregation of
19 multiple claims in a civil proceeding --

20 JUSTICE KAGAN: But you are not
21 contesting that the state could bring this
22 lawsuit, is that right, and the state could do
23 it in this completely aggregated way?

24 MR. CLEMENT: I -- I think that's
25 right. And then the state would bring it in

1 court, and that really gets to the second piece
2 of this, which is the -- the critical thing is,
3 if you have these massive damages from
4 aggregating claims and then you have -- I mean,
5 California has made it clear that the discovery
6 in these PAGA actions is coextensive with
7 discovery in class actions.

8 So courts are very good at dealing
9 with those kind of discovery issues.
10 Arbitrators are very bad at dealing with
11 class-wide discovery.

12 And, at the same time, given the high
13 stakes because of the aggregation of the claims,
14 if I'm a defendant and you're telling me I can't
15 escape this kind of aggregate litigation, it's
16 going to happen, it's going to happen to me
17 either in arbitration or in litigation, then I'm
18 going to pick litigation every time because I
19 get lots of additional judicial review and
20 judicial remedies available to me there, and
21 what that's going to mean in practice is that
22 arbitration is going to wither on the vine.

23 JUSTICE BREYER: Okay. So -- but what
24 you're saying -- so -- so your point -- I just
25 want to be clear on this -- is that, okay,

1 suppose you win. If you win, then they can't
2 bring this kind of action in arbitration. You
3 can't agree to it and so forth. But you could
4 bring it in court.

5 MR. CLEMENT: Well, if -- if -- if I
6 win, then the bilateral arbitration provision
7 will be enforceable, and Ms. Moriana cannot
8 bring the claim in court. That's --

9 JUSTICE BREYER: Oh, no, this is sort
10 of -- let me understand this. In other words,
11 we have a -- a state action, it's a provision
12 there, for the state, and the person,
13 Ms. Moriana, says, I agree to bring this only in
14 arbitration. But that she can't do, in your
15 opinion, cannot arbitrate this.

16 MR. CLEMENT: Well, she can arbitrate
17 her own --

18 JUSTICE BREYER: No, no, I understand
19 that, but she can't arbitrate this big thing,
20 okay? No, you can't --

21 MR. CLEMENT: She cannot -- she cannot
22 arbitrate the --

23 JUSTICE BREYER: Got it. Got it.

24 MR. CLEMENT: Right.

25 JUSTICE BREYER: Got it. Got it. You

1 can't arbitrate it.

2 Okay, I'll go to court. Oh, no, you
3 agreed to go to arbitration.

4 I mean, I hate to tell you that
5 reminds me of catch-22. Here, you agree to go
6 to arbitration, but you can't go to arbitration,
7 so you can't agree to go to arbitration, but
8 because you agreed to do it in arbitration, you
9 can't go to court. That's your view?

10 MR. CLEMENT: No, that's not my view.
11 My view is, if you agree to go to arbitration,
12 the way it was understood in 1925 and the way
13 it's been traditionally understood, which is a
14 bilateral proceeding, you can get all of the
15 remedies available to you as an individual.

16 You can't get all of the same remedies
17 you would if you didn't sign an arbitration
18 agreement that involved a pledge to arbitrate
19 bilaterally.

20 JUSTICE KAGAN: One way to make
21 Justice Breyer's point is that you're sort of
22 trying to have it both ways. You're saying this
23 aggregate claim is so different from her
24 individual claim that we can't possibly allow it
25 in arbitration.

1 But then, when she goes to court, it
2 turns out to be it's not so different, that
3 it's, you know, because you're precluding it in
4 court. So it really is, you know, the
5 arbitration agreement that affects her
6 individual claim also prevents her from doing
7 the aggregate claim.

8 And, as I said, what all this does is
9 prevent the state from protecting its own
10 sovereign interests in the way it has chosen to
11 do.

12 MR. CLEMENT: I -- I -- I will be
13 honest and agree with you that this federal
14 statute does impose limits on the state. That's
15 commonplace of the Supremacy Clause and
16 preemption analysis.

17 The state doesn't have free reign to
18 --

19 JUSTICE KAGAN: It is a common place
20 of preemption analysis, but, you know, in our --
21 in our best moments when we use preemption, we
22 do it based on something that a statute says.
23 And there's nothing that this statute says about
24 arbitration procedures that would -- that, you
25 know, reasonably understood extends to a state

1 decision like this one, to enforce its state
2 labor laws through private parties.

3 MR. CLEMENT: Well, Justice Kagan,
4 that's where I disagree with you. And I think a
5 majority of the Court took a different turn in
6 Concepcion and Epic, and I think it's even
7 clearer in Epic.

8 And I think Epic correctly just reads
9 Section 2 of the FAA as a direction to enforce
10 the terms of a party's arbitration agreement as
11 written, unless there's some generally
12 applicable state law that says otherwise that
13 makes it inapplicable.

14 JUSTICE KAGAN: But Epic is, like,
15 really quite specific, more so than Concepcion,
16 about how it is that the text of Sections 3 and
17 4 and their emphasis on certain kinds of
18 streamlined procedures are responsible for the
19 Epic device.

20 And, as Justice Breyer suggested, this
21 is not essentially a case about the complexity
22 of procedures. It's a case about the complexity
23 of a substantive claim, the high stakes of a
24 substantive claim as the -- as California has
25 defined it. It's not about, you know,

1 streamlined procedures.

2 MR. CLEMENT: I -- I think it
3 ultimately is because the streamlined procedures
4 in bilateral arbitration are just incompatible
5 with this process of taking lots of employees'
6 claims, aggregating them in a single proceeding,
7 raising the stakes, and saying we're going to
8 have employer-wide discovery.

9 And I think, in some respects, if you
10 want to talk about the differences between class
11 actions and employer-wide PAGA actions, I think
12 they are materially similar in the critical
13 respects, but the parallels are even closer
14 between an employer-wide PAGA claim and an
15 employer-wide FLSA collective action --

16 JUSTICE SOTOMAYOR: Counsel --

17 MR. CLEMENT: -- in --

18 JUSTICE SOTOMAYOR: -- I'm having a
19 series of problems with all of your answers.
20 PAGA came eight years before Concepcion or Epic.

21 So it's not California creating an
22 intentional evasion of Concepcion or Epic,
23 correct? It didn't intentionally predict that
24 what we were going to do there and say now we
25 got to find a way to get around Epic and

1 Concepcion?

2 MR. CLEMENT: So, Justice Sotomayor,
3 I'm not going to disagree with you on the
4 timeline, but I will say that PAGA is -- could
5 have been interpreted a number of different ways
6 in Iskanian.

7 And the Iskanian decision, which is, I
8 think, the focal point of this --

9 JUSTICE SOTOMAYOR: Well, let's put
10 that aside, however the courts interpret it.

11 Now let's go to the second point. In
12 1925, there were plenty of representative
13 actions, arbitrations. 1925, there were
14 railroad arbitrations that were representative
15 arbitrations. There were navigation, maritime
16 arbitrations. There were agricultural
17 arbitrations.

18 All of them were representative. All
19 of them were complex. We don't have a rule that
20 says arbitration's incapable of dealing with
21 complex cases. We have permitted arbitration in
22 RICO cases, in securities cases, in antitrust
23 cases, in sexual harassment cases. All of those
24 cases involve very complex issues with proof
25 related to parties other than the individuals

1 bringing them, involving in RICO patterns of
2 RICO activity, of racketeering that involve
3 multiple layers of crimes. In sexual harassment
4 and disparate impact claims, we have to have the
5 plaintiff prove what happens to a bunch of other
6 people.

7 So, when you say to me that complexity
8 or multiple proof is incompatible with
9 arbitration, it's not incompatible. We haven't
10 said you can't, with the permission of parties,
11 litigate a class action with the permission --
12 I'm sorry, arbitrate class action. We let
13 parties make that choice.

14 The question here for me is not
15 whether the case is too complex. I don't see it
16 as incompatible, PAGA incompatible. The
17 question is the one that Justice Kagan raised,
18 which is how do we read a substantive state law,
19 a substantive cause of action by a state that
20 says, if you do something, this is the penalty,
21 this is the amount you pay us? The mechanism
22 we're going to collect is going to be the PAGA
23 mechanism.

24 But I don't see anything in the FAA
25 that says we preempt that, because they're not

1 anti-arbitration. You can do it in arbitration
2 or you can do it in litigation, your choice.
3 And you say: But it's really not a choice. I'm
4 never going to -- me, the employer, is never
5 going to permit this in arbitration. Well, that
6 may or may not be true. Some employers might
7 choose it.

8 But, on the other hand, if you
9 preclude employees from bringing it in
10 arbitration, you're precluding the state from
11 having an effective enforcement mechanism
12 because each individual employee is not going to
13 have a financial incentive to bring these suits
14 on behalf of the state.

15 That's what you're banking on. You're
16 banking on destroying the state's mechanism for
17 enforcing its law -- for enforcing labor law
18 violations, aren't you?

19 MR. CLEMENT: No, Justice Sotomayor,
20 we're not. Moriana can still bring her claims.
21 Those claims are backed by attorneys' fee
22 provisions.

23 JUSTICE SOTOMAYOR: It's the same --
24 no, sir. What's the incentive? The entire
25 incentive for California was to ensure that

1 employers did what they were supposed to do.
2 And the only way to ensure that is to tell them,
3 if you violate the law, you are going to be
4 subject to a claim by us through our
5 representative for all of your violations, not
6 just one tiny piece of one.

7 MR. CLEMENT: So, Justice Sotomayor, I
8 think you're making my point, which is, you're
9 right, the state made a decision that the way
10 we're going to enforce these labor code
11 violations is we're going to let one employee
12 litigate the entire sales force, so the entire
13 workforce, and bring all these claims in a
14 single proceeding.

15 And the state's decision to do that is
16 no different from the state's decision to want
17 to have class actions or collective actions or
18 to say -- or --

19 JUSTICE SOTOMAYOR: No, those were
20 actual procedural laws by California that
21 designated arbitration as -- as forbidden or
22 forced to do. This is something totally
23 different. This is a state substantive cause of
24 action.

25 MR. CLEMENT: So --

1 JUSTICE SOTOMAYOR: Give me a case in
2 preemption law that says that a substantive
3 state cause of action is implicitly preempted.
4 I've got a bunch of colleagues who don't believe
5 in implicit preemption.

6 MR. CLEMENT: So --

7 JUSTICE SOTOMAYOR: So cite to them,
8 other than Epic and Concepcion, where have we
9 ever said that.

10 MR. CLEMENT: So, Justice Sotomayor,
11 to the extent it's relevant, both the California
12 Supreme Court in its Amalgamated decision and
13 California in a recent brief have described PAGA
14 as a procedural statute, not a substantive
15 statute. It doesn't regulate new primary
16 conduct. That continues to be regulated by the
17 labor code. So California itself views this as
18 procedural.

19 But, at the end of the day, like most
20 distinctions between procedure and substance,
21 that can't ultimately be the answer. That's
22 just a construct. And you could say a statute
23 is procedural if what it does is say that you
24 can only get a treble damages remedy if you
25 pursue it through a class action.

1 I don't think a state can get around
2 Concepcion, I don't think it can get around Epic
3 by passing that kind of weird gerrymandered
4 remedy and then saying: A-ha, now your class
5 action waiver isn't just an innocuous provision
6 to promote bilateral arbitration. Now it's an
7 exculpatory clause. I don't think that works,
8 and that's directly parallel to this action.

9 And with respect to how anomalous this
10 action is and how different it is from a RICO
11 violation or any other sort of violation that's
12 known to the common law or statute where you do
13 have to prove up some other conduct of another
14 party, I mean, I do think that's where the fact
15 that no other state comes in here defending
16 California and PAGA speaks volumes.

17 As a general matter, yeah, maybe you
18 have to prove a pattern in a RICO claim, but
19 your interest as the plaintiff is to prove as
20 small a pattern as possible. You just want to
21 check that box, get that element proved, and
22 then you want to show all the damages by reason
23 of that.

24 Here, the plaintiff has an incentive
25 to spread the net as wide as possible and prove

1 up each additional violation they prove as to
2 some employee they've never met. They --

3 JUSTICE SOTOMAYOR: You're not saying,
4 are you, that the FAA on its face doesn't permit
5 the state to have this rule outside of
6 arbitration?

7 MR. CLEMENT: Of course not, Justice
8 Sotomayor. Their -- they can have whatever
9 policy choice they want to have outside of
10 arbitration, but when parties come in and -- we
11 talked about what the parties agreed to. Here,
12 the parties agreed to resolve their disputes
13 through bilateral arbitration.

14 JUSTICE SOTOMAYOR: No, the parties
15 agreed that if there was a private attorney
16 general action that they would do it in court,
17 not arbitration. The employer had a choice.
18 The employee had a choice. The employer chose
19 to say I don't want to do this in arbitration.
20 I'd rather do it in litigation.

21 They -- no choice was ever taken from
22 them. They could have done it in arbitration if
23 they wanted. They chose not to.

24 MR. CLEMENT: The -- the choice, with
25 all due respect, that's being taken from is the

1 choice to arbitrate on a one-to-one bilateral
2 basis. Any claim Moriana has, any claim she
3 suffered, she can bring in arbitration.

4 But what she can't do, whether it's
5 through a class action, an FLSA collective
6 action, a PAGA claim, or anything else, is
7 inject the facts and circumstances in violation
8 of all her co-employees into the case.

9 And, of course, at the back end, all
10 of the complexities you have in class actions
11 are still present because you have to identify
12 the absent employees because all the absent
13 employees are entitled to their 25 percent
14 check. And so you have to identify them, and
15 then you have to use a claims administrator to
16 identify them and send them their check. That's
17 so --

18 JUSTICE ALITO: Mr. Clement, do you
19 have any idea why California chose this
20 particular structure? It could have -- unless
21 the California constitution prohibits this, it
22 could have just said that anybody in California
23 or perhaps any place else could bring a suit to
24 vindicate any violation of the labor code. And
25 that person wouldn't be in any sort of

1 contractual relationship with the employer.

2 And, therefore, I don't see how the FAA would
3 come into the picture.

4 But California chose to do it in this
5 particular way. Do you have any idea why they
6 did? Why did they tie it to somebody who has a
7 contractual relationship?

8 MR. CLEMENT: So, Justice Alito, I
9 mean, I think the -- the best I can give you is
10 that California actually had an experiment not
11 in the labor context but in the consumer context
12 with a statute that did basically let anybody
13 sue, and that proved in practice too much even
14 for California. So they backed that down and
15 said you really have to, like, have bought the
16 product. And then, when it came to labor code
17 violations, they said you have to be an
18 aggrieved employee.

19 Now I think, ultimately, that probably
20 might have something to do with the Due Process
21 Clause, or to put it differently, if they didn't
22 have that constraint, I would be happy to argue
23 that you just can't have a statute where
24 everybody under the sun can sue. It's just not
25 consistent with due process. But that's

1 obviously an argument for another day.

2 But I think, in practice, California
3 had a brief experiment in a different statute
4 where it was "Katie, bar the door," anybody can
5 sue, and they did not like that.

6 JUSTICE KAGAN: But I wonder, Mr.
7 Clement --

8 MR. CLEMENT: They wanted to constrain
9 this.

10 JUSTICE KAGAN: -- if that is exactly
11 the argument that you're making for this day.
12 In other words, the question of, you know, how
13 the FAA relates to this, this is not an
14 agreement not to litigate. This is an agreement
15 not to bring a substantive claim, not to bring
16 it in arbitration and not to bring it in court.

17 So the question is whether a -- a
18 California rule that says, you know, you can't
19 waive a substantive claim in that way across all
20 forums is going to be struck down by virtue of
21 the FAA.

22 And all your arguments are
23 essentially, like, this is really unfair to
24 defendants. But, if it's unfair to defendants,
25 you have a due process claim. This is not an

1 FAA problem.

2 MR. CLEMENT: So, Justice Kagan, it
3 happens to be unfair to defendants, but it also
4 happens to be radically inconsistent with
5 bilateral arbitration and the resolution of
6 disputes through the traditional characteristics
7 of arbitration.

8 So it -- it's -- it's maybe from the
9 perspective of my clients a happy coincidence
10 that this anomalous claim that nobody else has
11 that, you know, blends procedure and substance
12 in weird ways, I mean, you know, you keep
13 calling it substantive, but California calls it
14 procedural.

15 But, at the end of the day, it doesn't
16 matter because this is a claim that because it
17 aggregates all these multitude of claims
18 involving distant employees, puts them all in
19 one proceeding, gives you class action discovery
20 as wide as class actions, it does all that.

21 It's just it's -- it's nothing that
22 looks like the kind of thing that's suitable for
23 bilateral arbitration.

24 And since Congress protected the
25 ability of parties to agree to bilateral

1 arbitration, no matter how much California
2 thinks it's got a better way to do things, it
3 just has to yield when it comes to people who
4 are parties to arbitration agreements.

5 As to other people, as to employees
6 who are not subject to the FAA and the like,
7 they can have their policy, and, subject to the
8 Due Process Clause, there's not much my clients
9 can do with it, about it.

10 But, if they have a binding, valid
11 arbitration agreement to resolve their disputes
12 bilaterally, I think that should carry the day
13 under the FAA.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas, any questions?

17 JUSTICE THOMAS: One question, Mr.
18 Chief Justice. Thank you.

19 Mr. Clement, there's been quite a bit
20 of discussion this morning about the interests
21 of the state in enforcing its labor laws in this
22 manner under PAGA.

23 I think that's the way you -- I would
24 just say P-A-G-A, but -- and the -- my question
25 is, wouldn't it -- you wouldn't be here making

1 this argument if Terminix and Southland had come
2 out the other way, right, since this is state
3 court?

4 MR. CLEMENT: So, Justice Thomas, I
5 wouldn't be making this argument in this case to
6 you. I'd be making this argument in a case that
7 came out of the Ninth Circuit, and the analysis
8 would be exactly the same.

9 And, as we suggested in a footnote in
10 our reply brief, I mean, far be it from me to
11 tell you how to do your job, but it seems to me
12 that there is a difference between legal
13 questions that under your jurisprudence you
14 think sort of don't even arise or don't exist,
15 like whether -- you know, what does the Due
16 Process Clause say about punitive damages?
17 Nothing.

18 But -- but this is a case where your
19 own jurisprudence would give you the same
20 answer, I think, as a majority of the court, if
21 this case arose out of federal court. And it
22 seems to me there's a lot to be said for, under
23 those circumstances, when the Respondent hasn't
24 asked you to revisit any of those precedents,
25 hasn't even really pressed the claim that it

1 matters that this arises out of state court, I
2 think it would be better just to apply this
3 Court's own precedents.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Clement, I
6 would have thought advocates are always telling
7 us how to do our job.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer?

11 JUSTICE BREYER: The termite case was
12 my first case. The termite company liked it, I
13 think, or didn't like it. I can't remember.
14 But the -- the -- the point is --

15 (Laughter.)

16 JUSTICE BREYER: --- the point is that
17 in this case, I think you said a very helpful
18 thing to me intellectually, you said chill. Do
19 you remember when you said chill? Okay.

20 So I have the case now divided into
21 two parts in my mind. I'm going to ask you
22 about the second part.

23 The first part is I just go look at
24 this and I go look at Concepcion, where I was in
25 dissent, but let's forget that, and I accept the

1 majority there, and I say: Is this in the chill
2 factor distinguishable or not? Some things are
3 different. Some things are similar. Okay.
4 I've got how to do that.

5 Now suppose you win that. Suppose I
6 say, okay, you win it. The next question -- and
7 that's what I think is pretty tough -- is very
8 well, can -- does Moriana bring the case in
9 court? Okay.

10 So you want to say no, but there --
11 there -- now there are a lot of dicta anyway
12 where, in FAA cases, you -- you -- there are
13 certain things you can't send to arbitration,
14 but they can't force you to waive them because
15 of the arbitration. You then can bring it in
16 court.

17 And so, if California says, okay, you
18 can't bring it in arbitration, that's what the
19 Supreme Court says, so bring it in court, and
20 you can't waive that, you see?

21 Now is there anything in the FAA that
22 says, California, you can't do that?

23 Now I can't see what it is. I mean, I
24 don't know, what section does it say you can't
25 waive a court proceeding? And you say: Well,

1 of course, you can. You can say I waive the
2 court proceeding in good arbitration, where you
3 can. But you've just won the first part.

4 So you can't go to arbitration. I
5 think that's what Justice Kagan and -- and
6 others and I, what we've been concerned about.
7 I mean, if it were a federal claim, I don't
8 think you could waive it. This is a state
9 claim. And so I -- I -- I -- I find it
10 difficult. It's not obvious. And so I'd -- I'd
11 -- I'd like you to say whatever you think about
12 that.

13 MR. CLEMENT: So, Justice Breyer, I
14 mean, the premise of the second part of your
15 question is that you're accepting that there's a
16 chill here equivalent --

17 JUSTICE BREYER: Yeah.

18 MR. CLEMENT: -- to Concepcion.

19 JUSTICE BREYER: Yeah. That --

20 MR. CLEMENT: And -- and --

21 JUSTICE BREYER: -- at least, if you
22 lose on the first part --

23 MR. CLEMENT: And -- and --

24 JUSTICE BREYER: -- I don't have to
25 reach the second. But, if you win --

1 MR. CLEMENT: Right.

2 JUSTICE BREYER: -- I think I do.

3 MR. CLEMENT: But -- but, if I win the
4 first part on the premise that there is a
5 comparable chill here --

6 JUSTICE BREYER: Yeah.

7 MR. CLEMENT: -- to the chill from
8 class action to --

9 JUSTICE BREYER: Yeah.

10 MR. CLEMENT: -- Concepcion, then,
11 when you get to the second step, it doesn't make
12 any sense to have a different result than in
13 Concepcion.

14 After Concepcion --

15 JUSTICE BREYER: Yeah, but that's
16 about arbitration. I'm saying bringing it in
17 court. Now -- now they can't bring it in
18 arbitration because you won on the chill
19 business. Okay. So California, we imagine,
20 says: Employee, you cannot waive your right to
21 bring this in court, okay? So that part of the
22 contract that says I'm going to arbitration,
23 where I can't go, that's invalid, says
24 California. You can't do that. You can't put
25 that in a contract, okay?

1 Now what?

2 MR. CLEMENT: So, Justice Breyer, I go
3 back to the analogy to Concepcion. The result
4 in Concepcion wasn't, a-ha, the Concepcions win
5 but -- or, rather, they lose this case, they
6 have to arbitrate, but they can still bring
7 their class action in court --

8 JUSTICE BREYER: That was a procedural
9 matter. This is a -- this is a matter of
10 California substantive law. It's procedure,
11 yes, but it's the labor code, and we want to say
12 people can enforce this in court.

13 MR. CLEMENT: But here's the thing,
14 Justice Breyer. She can bring her labor code
15 claim.

16 JUSTICE BREYER: Ah. That's what I
17 want.

18 MR. CLEMENT: That's the substantive
19 law. She can bring that to arbitration.

20 JUSTICE BREYER: Oh, hers I know, but
21 I mean for others -- for others too in court.

22 MR. CLEMENT: She can bring her claim
23 in arbitration.

24 JUSTICE KAGAN: This is the state's
25 claim, Mr. Clement.

1 MR. CLEMENT: She can't bring it --

2 JUSTICE KAGAN: This is the state's
3 claim. And all that the state has done is that,
4 instead of doing that itself, it has enlisted
5 private attorneys general. We know governments
6 do this all the time. We had a case yesterday
7 where the U.S. Government does it, not maybe in
8 the exact same way, but the idea of enlisting
9 private attorneys general is a very old one.

10 And you can call this procedure. You
11 can call it substance. You can call it whatever
12 you want. But I think what Justice Breyer is
13 saying is that what this does is -- is -- is
14 that it -- it -- it waives a right to bring a
15 state law claim, a state law claim that has been
16 created and given to this person in any forum,
17 any forum, not just in arbitration.

18 MR. CLEMENT: So, Justice Kagan, all
19 of that tradition of using private attorneys
20 general, it's consistent with that that the
21 government has to take the private attorney the
22 way that they find them.

23 And if that private attorney has
24 agreed to arbitrate their disputes and arbitrate
25 them bilaterally, none of your Court's cases

1 say, a-ha, well, you know, this is -- you know,
2 the -- the antitrust laws, we sort of think of
3 those as private attorney general laws, so you
4 can't agree to arbitrate that. That's exactly
5 the argument that didn't carry the day in cases
6 like Mitsubishi.

7 So just by saying it's the state's, I
8 don't think that really changes anything, and,
9 in fact, I think it proves too much because, if
10 you accept the argument that, well, it's really
11 the state's claim and the state didn't agree to
12 arbitrate it, well, then you're saying that no
13 arbitration agreement that the individual
14 actually signed is valid, whether it's for an
15 individual claim or a collective claim.

16 You're just -- that's just the state
17 saying we're not going to let you arbitrate this
18 claim because it's really in some metaphysical
19 sense ours.

20 And I don't think that can -- that --
21 that can't possibly work. So, at the end of the
22 day, the critical thing here is the fact that --
23 is not that they call it the state's claim, but
24 they let all of these other multitudinous claims
25 into this one proceeding, and that's

1 inconsistent with bilateral arbitration.

2 CHIEF JUSTICE ROBERTS: Justice Alito,
3 anything further?

4 Justice Sotomayor?

5 Justice Kagan?

6 Justice Gorsuch, anything?

7 Justice Kavanaugh?

8 Justice Barrett?

9 JUSTICE BARRETT: I have a -- I have a
10 question, Mr. Clement. So a lot of the
11 questions that you've gotten today have been
12 about whether this is a substantive claim or a
13 procedural apparatus or procedural mechanism.

14 Would we be bound by Erie by what the
15 California courts think about this claim?
16 Because it seems to me they've characterized it
17 as procedural. So, if we're making an Erie
18 guess and it's a question of state law, it seems
19 to me hard to say that it's substantive, but
20 maybe it's a question of federal law under the
21 FAA that we're obliged as a matter of federal
22 law to characterize this. Which is it?

23 MR. CLEMENT: I think it's ultimately
24 a question of federal law. I mean, the fact
25 that the states have called it procedural might

1 make it convenient for me to say, oh, well, you
2 should defer to them. But I don't think that's
3 right, and I think the proof is kind of in the
4 pudding.

5 I mean, the Preston case of this Court
6 involved an exhaustion requirement, and it's an
7 exhaustion requirement that I think would be
8 substantive for Erie purposes. But,
9 nonetheless, this Court said doesn't matter, we
10 find FAA preemption.

11 Similarly, in the FLSA context, it's
12 sort of a reverse Erie situation, and the -- the
13 collective action procedures under the FLSA,
14 which can be brought in state court, I think,
15 you know, those probably are federal to the
16 extent they're specified. They pick up state
17 afterwards.

18 But none of that makes any difference
19 under Epic. I mean, they're all -- whether
20 they're state court FLSA collective actions or
21 federal court FLSA collective actions, they're
22 still subject to the FAA. They're still subject
23 to preemption. So I -- I don't think the Erie
24 line is the right line here at all.

25 JUSTICE BARRETT: Thanks.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Nelson.

4 ORAL ARGUMENT OF SCOTT L. NELSON
5 ON BEHALF OF THE RESPONDENT

6 MR. NELSON: Mr. Chief Justice, and
7 may it please the Court:

8 PAGA, or the PAGA, creates a right of
9 action that entitles an individual employee to
10 sue on the state's behalf to recover civil
11 penalties for labor code violations.

12 California law prohibits enforcement
13 of a pre-dispute contractual waiver of the right
14 to bring a statutory cause of action involving
15 public rights, like PAGA, whether or not the
16 waiver is in an arbitration agreement.

17 The anti-waiver rule is neutral as to
18 arbitration. It demands only that there be some
19 forum in which an individual can assert a PAGA
20 claim.

21 Viking's employment contract with
22 Ms. Moriana explicitly prohibits private
23 attorney general actions and representative
24 actions. As Viking puts it, it targets PAGA
25 claims by name. It prevents Ms. Moriana from

1 bringing an action for PAGA penalties in any
2 amount in any forum. And as Mr. Clement has
3 explained today, it also prohibits anyone else
4 from seeking PAGA penalties for violations that
5 affected her.

6 The Federal Arbitration Act does not
7 require enforcement of such an agreement and
8 does not conflict with the anti-waiver rule.
9 The FAA's plain language provides for
10 enforcement of agreements to settle
11 controversies by arbitration, not to bar their
12 assertion altogether. Nothing in its text,
13 structure, purposes, or legislative history
14 suggests it was intended as a mechanism for
15 enforcing contractual waivers of statutory
16 rights and remedies, let alone rights to assert
17 a representative cause of action on a state's
18 behalf in a state court.

19 Viking has no response to that textual
20 argument and instead relies on purposes and
21 objectives preemption. But purposes and
22 objectives preemption requires a basis in
23 statutory text, which is lacking here.

24 Moreover, PAGA claims are asserted
25 bilaterally and require no procedural

1 formalities, inconsistent with arbitration.
2 California's anti-waiver rule is not preempted
3 by the FAA.

4 I welcome the Court's questions.

5 CHIEF JUSTICE ROBERTS: Mr. Nelson,
6 your -- your friend touched on this question.
7 You seem to have a disagreement over whether
8 class actions or PAGA actions, which one is less
9 cumbersome, which one is less contrary to the
10 arbitration principles of ease of administration
11 and simplicity and -- and quickness.

12 What do you have to say to his point
13 that all that you've gotten rid of in PAGA
14 actions are the things that were helpful or
15 favorable to the defendant, you know, the
16 adequate representation, common questions of law
17 or fact?

18 In other words, you seem to think that
19 it's a good thing that those are gone, and Mr.
20 Clement suggests that it's a bad thing from --

21 MR. NELSON: Well, Mr. Chief --

22 CHIEF JUSTICE ROBERTS: -- from the
23 point of view of the arbitration perspective --
24 policies.

25 MR. NELSON: Yeah. And -- and I guess

1 my answer is all that you've gotten rid of in
2 the PAGA action is those features of the class
3 action that the Court said in Concepcion and
4 Epic were inconsistent with the nature of
5 arbitration.

6 And, you know, those protections,
7 which, actually, I think are primarily there to
8 protect the due process rights of absent class
9 members, as the Court explained in Concepcion,
10 and thus require procedural formalities that the
11 Court saw as inconsistent with arbitration, none
12 of that is required here. It's undisputed
13 because the nature of a PAGA claim does not
14 involve the kinds of personal rights of third
15 parties that are entitled to that due process
16 protection.

17 If the state brings its action for
18 PAGA penalties, there's no need to certify a
19 class or ensure adequacy of representation or
20 offer those third parties any rights of
21 participation in the agreement -- or in the
22 arbitration or the adjudication in whatever
23 forum it takes place that would make it
24 cumbersome in the way that the Court has held is
25 inconsistent with the nature of arbitration.

1 Now, sure, PAGA claims, like a lot of
2 other claims that are arbitrated, are -- they
3 may involve high stakes, although, in PAGA's
4 case, that's ameliorated by the fact that unlike
5 in a class action or a collective action, where
6 the recovery is dictated by the proof as to the
7 damages of all those -- those third parties, in
8 a PAGA action, the base penalty is set by just
9 mechanical proof of the number of violations per
10 pay period, and the adjudicator has discretion
11 to limit those penalties, regardless of what
12 some third party might want, if -- if the result
13 would be unjust, arbitrary, and oppressive or
14 confiscatory. The adjudicator can also limit
15 discovery and -- and the presentation of
16 evidence in order to confine the claim to
17 manageable -- a manageable scope.

18 But, in any event, the key thing -- I
19 don't think this Court has ever suggested that
20 if a claim is just so big that somebody might
21 prefer not to arbitrate it, that they have the
22 option, in addition to just cutting it out of
23 their arbitration agreement and letting it
24 proceed in court, to just say: No, the
25 individual is required to arbitrate all their

1 claims, but some claims you just can't bring,
2 and you can't bring them in court either.

3 JUSTICE BARRETT: Mr. Nelson, can --

4 CHIEF JUSTICE ROBERTS: One of --

5 JUSTICE BARRETT: Oh, sorry, Chief.

6 CHIEF JUSTICE ROBERTS: I was just
7 going to say one of the difficult or -- or new
8 parts of this area of the law under PAGA, of
9 course, is the state's recovery, in addition to
10 the private individuals'.

11 And I'm wondering if the result --
12 well, how would you handle a law that said, for
13 example, in every private recovery -- there's no
14 PAGA -- it's just the successful plaintiff must
15 give 2 percent of her recovery to the state, you
16 know, to cover the expenses of the, you know,
17 forum or the state's administration of the law?
18 Does that change the nature of a proceeding that
19 otherwise under our cases would be subject to
20 arbitration?

21 MR. NELSON: No, Your Honor, I don't
22 -- I don't believe that would, you know, any
23 more than the fact that -- that certain
24 recoveries are -- are taxable as income.

25 The -- the issue -- the difference

1 here is that the claim for civil penalties
2 undisputedly is the state's claim. It's not
3 simply the state taking a -- you know, a portion
4 of someone's recovery for them personally and --

5 CHIEF JUSTICE ROBERTS: Well, let's
6 just say you say that. You know, because the
7 state provides the laws and all that, in -- in
8 theory, we think any recovery is, whatever you
9 want to say, facilitated by or, you know,
10 provided by the state, and you've got to give us
11 2 percent. That seems to me to be a pretty
12 formal distinction.

13 MR. NELSON: Well, I think not. I
14 don't think anybody would say that in that -- in
15 that action, the individual is representing the
16 state to seek a recovery on its behalf for some
17 violation of the -- the state's sovereign
18 interests in enforcement of its laws. It's just
19 saying, you know, you -- you have a user fee for
20 the courts. I don't think that changes the --
21 the nature of the right asserted from being an
22 essentially private right.

23 And, in this case, as -- as -- as my
24 friend has explained, you know, to the extent
25 that -- of the nine violations that affected

1 Ms. Moriana in this case, if she has damages
2 resulting from that or some entitlement to an
3 individual recovery, which -- which, for a
4 couple of the violations, she doesn't, she could
5 pursue that on her own behalf, and -- and
6 everyone agrees that -- that that is an
7 arbitrable claim and that she can't pursue that
8 as part of a class action under Concepcion if
9 she's agreed not to.

10 But the civil penalties for those
11 violations are the state's penalties. The state
12 has afforded a cause of action for individuals
13 to recover those both for violations that
14 affected them and that affected others, and the
15 agreement here requires or provides that -- that
16 Ms. Moriana waives the right to obtain those
17 civil penalties for violations both affecting
18 her and anyone else.

19 JUSTICE BARRETT: Mr. Nelson, what if
20 California created a cause of action that could
21 be vindicated only in a class action suit?
22 Justice Kagan pointed out to Mrs. -- Mr. Clement
23 that not permitting the PAGA claim to proceed
24 here in arbitration would be overriding -- or on
25 a class-wide basis, essentially, would be

1 overriding California's chosen enforcement
2 mechanism.

3 What if its chosen enforcement
4 mechanism in something that we would consider a
5 cause of action was class action litigation or
6 class-wide litigation? What would -- what then?

7 MR. NELSON: I mean, I -- I -- I
8 guess, if the class consists of a group of
9 individuals who each have an individual cause of
10 action, but they can only pursue that through a
11 class action, I don't think that that would be
12 permissible.

13 I think, if California were to -- to
14 create a right that was held collectively by a
15 group of people such that, you know, like a
16 corporation or an association, it could only
17 proceed to -- to obtain that recovery in its own
18 name, I don't think the FAA would -- would
19 provide a mechanism for defeating that -- that
20 kind of -- of claim.

21 JUSTICE BARRETT: So it's most
22 important to you that this claim, as you say,
23 belongs to California? That's the most
24 important piece of your argument, you would say?

25 MR. NELSON: I'm not -- I'm not sure

1 that that is the most important piece of -- of
2 the argument because the -- the -- my argument
3 is also that if -- if California affords an
4 individual a right to a particular recovery, I
5 -- I think, you know, my premise there is that
6 the FAA cannot be used as a mechanism to -- to,
7 you know, sort of defease that -- that right,
8 so, you know -- and that exists regardless of
9 whether the right is individual or held by the
10 state.

11 But what makes -- what makes this
12 particular action not the kind of collective
13 multi-party aggregated action that concerned the
14 Court in Concepcion and Epic is in large part
15 that the substantive right being pursued is the
16 state's unitary right to civil penalties for
17 this collection of violations through its
18 individual representative.

19 So, if the -- if the action were
20 brought by the state, it's clear that's
21 bilateral litigation between the state and the
22 employer. If it's brought by the state's
23 representative, it's equally bilateral
24 litigation or arbitration. If there's a -- an
25 agreement -- agreement to arbitrate these claims

1 instead of waiving them, it would be a bilateral
2 proceeding between the state through its
3 individual representative and the -- and the
4 defendant.

5 JUSTICE ALITO: For purposes of the
6 FAA question that is before us, are we bound by
7 California's characterization of this PAGA
8 claim?

9 Justice Barrett asked whether we're
10 required to regard it as procedural rather than
11 substantive.

12 And -- and I have Mr. Clement said
13 it's a question of federal law, even though that
14 seems to -- not seems to advance his argument.

15 But I have a similar -- I -- I have a
16 related question. Are we required to regard
17 this PAGA thing as a single claim for these
18 purposes, or could we not understand it as a set
19 of claims, a PAGA claim as in reality, a set of
20 claims integrated into a single action by an
21 implicit rule of claim joinder?

22 And if we viewed it that way, could we
23 not hold that freedom over arbitration procedure
24 recognized by Epic and Concepcion implies that
25 parties can choose a different rule of claim

1 joinder, in other words, one that would limit
2 arbitration to claims based on personal
3 injuries?

4 MR. NELSON: Justice Alito, I -- I --
5 I just want to start my answer by -- by saying
6 that I think your question, although similar to
7 Justice Barrett's, is a little different, and --
8 and so the answer to it may -- may also be
9 different.

10 I agree with my friend that -- that
11 the state's characterization for -- for purposes
12 of the particular issue that was in front of it
13 in the Amalgamated case of the right as being
14 procedural versus substantive would not control
15 the same question in a federal court either for
16 Erie purposes or for purposes of the FAA to the
17 extent that substantive versus procedural is an
18 important part of the FAA analysis.

19 But, as to the nature of the claim,
20 its requisites, what -- what it is for and --
21 and how it proceeds, on those aspects, I think
22 the Court is bound by California law.

23 Now the -- the -- the Iskanian
24 decision, I think, kind of -- had kind of an
25 interesting passage where the California Supreme

1 Court said, you know, we think perhaps that --
2 that if what the state was trying to do was --
3 was just a subterfuge to avoid the FAA, that you
4 might be able to -- to kind of look through the
5 -- the, you know, statute that provided for
6 collective proceedings aggregating individual
7 claims under the, you know, sort of false flag
8 label, that it was -- that it was something
9 different.

10 JUSTICE ALITO: At some point --

11 MR. NELSON: So -- so, I mean, it's
12 conceivable that -- that in some -- some set of
13 circumstances, if -- if -- if there were some
14 indication somehow that the state was, you know,
15 acting in bad faith in -- in the manner in which
16 it had interpreted its law, but I don't think
17 this Court has ever done that --

18 JUSTICE ALITO: But this doesn't seem
19 like --

20 MR. NELSON: -- in -- in this context
21 or any other.

22 JUSTICE ALITO: -- one -- this doesn't
23 seem like one claim to me in any ordinary sense
24 of the word. It's a -- it's a bunch of
25 different -- it involves a bunch of different

1 violations. They don't even have to be -- they
2 don't have to be violations of the same code
3 provision, do they?

4 MR. NELSON: They do not have to be
5 violations of the same code.

6 JUSTICE ALITO: Yeah, they don't have
7 to be violations of the same code provision.
8 They don't have to involve -- they don't involve
9 the same employee. I don't know when -- it's
10 not like RICO, where you have to prove a certain
11 number of predicates in order to make out your
12 claim. These are all, like, independent. They
13 look like independent claims to me.

14 Would they be one claim for purposes
15 of claim preclusion?

16 MR. NELSON: For purposes of claim
17 preclusion, I -- I think that -- that what the
18 California Supreme Court has -- has suggested
19 and the lower courts is you would -- you would
20 look at -- at the unit that was litigated in a
21 prior case and, if it involved a -- a -- a claim
22 of violations that -- that if pursued by the
23 state would have a particular scope, it would --
24 it would preclude claims of that scope, even
25 perhaps if it were settled on a narrower basis.

1 So claim preclusion is not, you know,
2 individual violation by individual violation
3 under PAGA.

4 I want to -- I -- I want to talk a
5 little bit more about this -- this question of
6 -- of substance versus procedure because, as my
7 friend noted, you know, substance and procedure
8 may mean different things in different contexts.

9 And I think what's critical in the FAA
10 context, what the -- what the Court has
11 described as substantive and as the kind of
12 substantive claim that an individual does not
13 waive by agreeing to arbitrate a -- a case
14 rather than litigate it is the right to pursue a
15 statutory remedy.

16 And that's clearly what this -- this
17 agreement waives for -- for Ms. Moriana and for
18 the state to the extent that -- that she
19 represents its interests in a particular manner.
20 It does not permit her to -- to pursue that
21 statutory remedy.

22 And there's nothing in -- as I think
23 Justice Breyer pointed out, in any of the -- the
24 Court's precedents in this area where the Court
25 has -- has said that an arbitration agreement,

1 which is by nature supposed to be enforced
2 insofar as an issue is referable to arbitration,
3 and then that issue is to be arbitrated
4 according to the terms of the agreement, that --
5 that that arbitration agreement can be used as a
6 vehicle for extinguishing a right to a remedy
7 that is not under the terms of the arbitration
8 agreement referable to arbitration.

9 CHIEF JUSTICE ROBERTS: Well, I -- I
10 -- I guess I'm having trouble following that.
11 She -- she doesn't have a right to pursue the
12 substantive claim in court, but she does have a
13 right to pursue the substantive claim. It's
14 just in arbitration. And I thought that's sort
15 of at the core of our -- our precedents. I
16 don't understand -- there is a difference
17 between the -- the right and the remedy, and
18 that's what arbitration gets at, the remedy.

19 MR. NELSON: Well, the substantive
20 claim in this case is the claim to recover civil
21 penalties for these violations, which are
22 available only via PAGA. And the arbitration
23 agreement explicitly prohibits the -- the
24 assertion of a Private Attorney General Act or a
25 private attorney general claim and a

1 representative claim. And both of those
2 precisely describe what a PAGA claim is.

3 And -- and so, you know --

4 CHIEF JUSTICE ROBERTS: But, if the --
5 the PAGA claim is for a late paycheck, she can
6 pursue her claim for a late paycheck under the
7 labor code, right?

8 MR. NELSON: If she has a damages
9 claim for a late paycheck, she can pursue that.
10 But the PAGA claim is a different claim. It's
11 the state's claim for a civil penalty for that
12 violation, and that is what she's prohibited
13 from pursuing by this agreement. And anyone
14 else is apparently prohibited from pursuing it
15 on her behalf, and that is the claim that is
16 being foreclosed here.

17 And, you know, my friend said, well,
18 we have no objection to her pursuing that claim
19 on her own behalf if she limits it to the
20 penalties attributable to the violation
21 affecting her.

22 The problem with that is twofold.
23 First of all, this Court has made abundantly
24 clear that a person can never be compelled to
25 arbitrate a claim that they did not agree to

1 arbitrate. The parties here specifically agreed
2 to carve that claim out from arbitration. So
3 that's not something that Viking can waive and
4 say, well, we've waived that limitation, we're
5 -- we're now compelling her to arbitrate.

6 JUSTICE SOTOMAYOR: Counsel, let's
7 assume -- because the anti-waiver rule as it
8 stands, I think, basically says an individual
9 can't be forced to waive the PAGA claim,
10 correct?

11 MR. NELSON: That's correct.

12 JUSTICE SOTOMAYOR: And the PAGA claim
13 by definition in the state is a claim on the
14 individual's behalf and all others who have
15 suffered the same violation, correct?

16 MR. NELSON: Yes. Thank you.

17 JUSTICE SOTOMAYOR: All right. So
18 assuming for the sake of argument that Mr.
19 Clement had said she can arbitrate it, she can
20 arbitrate that claim in arbitration or she can
21 arbitrate it in court, you wouldn't have a
22 problem with that?

23 MR. NELSON: No, not at all.

24 JUSTICE SOTOMAYOR: All right. And
25 you wouldn't have a problem with the state

1 saying you can't waive it; you can decide it in
2 arbitration or in court, correct?

3 MR. NELSON: That's right.

4 JUSTICE SOTOMAYOR: Now let's assume,
5 going back to the Chief's beginning question --
6 and I think it -- you run into a problem with
7 Concepcion and Epic -- that California said you
8 can't arbitrate this claim at all. You have to
9 bring it in court.

10 I don't see how that would be legal
11 under Concepcion.

12 MR. NELSON: That would depend on
13 whether the FAA applies to -- to a state's claim
14 when a state is not a party to the agreement.
15 That's the -- you know, what we've called an
16 alternative basis for affirmance here.

17 JUSTICE SOTOMAYOR: We -- we've sort
18 of said that, but that's not the issue here.
19 But you're right that it's an open question on
20 that. But the state hasn't done that here,
21 correct?

22 MR. NELSON: That's right. And -- and
23 that's -- that's critical. My -- my friend
24 said, well, if you buy that argument, then --
25 then PAGA claims would not be arbitrable. But

1 the -- the -- the -- the thing that that
2 overlooks is that Iskanian has not said as a
3 matter of state law that you can't agree to
4 arbitrate or enforce an arbitration agreement
5 with respect to a PAGA claim. The --

6 JUSTICE ALITO: Didn't the court --

7 JUSTICE SOTOMAYOR: Thank you.

8 JUSTICE ALITO: -- the court of appeal
9 in this case held that "an employee's predispute
10 -- "predispute agreement to arbitrate PAGA
11 claims is unenforceable absent a showing the
12 state also consented to the agreement"?

13 That's a -- that's an
14 arbitration-specific rule, is it not?

15 MR. NELSON: Your Honor, that would be
16 an arbitration-specific rule. In our view,
17 that's dicta in this case, and it's been dicta
18 in every case in which the California Court of
19 Appeal -- there have been a handful of other
20 cases where the California Court of Appeal has
21 said that.

22 The California Supreme Court has never
23 said that. It has consistently described
24 Iskanian as an anti-waiver rule. And in this
25 case, it was unnecessary to decision because the

1 parties did not agree to arbitrate a PAGA claim.

2 So that issue would only come up if
3 the parties had agreed to arbitrate PAGA claims
4 and someone subject to such an agreement
5 nonetheless objected to proceeding with
6 arbitration. Then a court would have to face
7 that issue. But it's not presented here and, in
8 our view, not necessary to -- to sustain the
9 judgment below in this case.

10 JUSTICE BREYER: But how -- here's --
11 I'm -- I'm having trouble getting my mind around
12 this. I get the argument that this isn't like
13 Concepcion because PAGA is not a class action,
14 dah-dah-dah. That's the -- what I call the
15 chill, okay? I know how to deal with that.

16 Now I also know this: Suppose you
17 lose on that. Suppose. Okay. The next
18 question, can they bring it in court? Now we
19 know this. If California says here's a claim of
20 a certain kind which we give to certain people
21 and they can't arbitrate it, we know that that
22 would be preempted, unlawful if -- it's not a
23 general matter but is aimed at arbitration. Am
24 I right? So far, I'm right?

25 MR. NELSON: Yes.

1 JUSTICE BREYER: Okay. Now suppose
2 instead of saying you can't arbitrate it, what
3 they do -- and this is ridiculous, but you'll
4 see why I do it this way for simplification --
5 they put a spider next to it, and there's a rule
6 saying you can't ever arbitrate anything with a
7 spider, okay?

8 Now I guess we'd have to go back and
9 see whether they put that spider on it in order
10 to be hostile to arbitration or whether it was
11 something that applied to a lot of laws, had
12 nothing to do with arbitration. Right? I think
13 so.

14 MR. NELSON: If -- if I'm following
15 correctly, I think the rule that you can't
16 arbitrate anything with a spider on it --

17 JUSTICE BREYER: Yeah.

18 MR. NELSON: -- is an
19 arbitration-specific rule.

20 JUSTICE BREYER: Yeah. If it is, they
21 can't do it.

22 MR. NELSON: But -- but, if it's no
23 contract with a spider on it, then, of course --

24 JUSTICE BREYER: Yeah, yeah. Well,
25 wait, wait. Let me get to step 3, where we are

1 here, because the question here on the spider
2 analogy would be is PAGA, with its special
3 rules, like the spider -- and you can call the
4 spider class action, you say, that's -- that's
5 Concepcion, and if the answer is they put this
6 on to keep it out of arbitration, hey, sorry,
7 you can't have the law at all because there's no
8 way to have this law without the spider.

9 But, if they put it on generally, they
10 can do it. They can do it. And not the
11 briefing, not -- if I'm right in my weird
12 analogy, I don't know where to go because maybe
13 it's just my fault, just ignore it, you don't
14 even have to answer the question because it's
15 too weird, but I -- I -- I -- I would like you
16 to see why I'm having trouble with this question
17 of whether they can bring it at all in a court
18 if you lose on the first point.

19 MR. NELSON: Justice Breyer, it's
20 really tempting to take you up on the offer not
21 to answer, but I'm going to --

22 (Laughter.)

23 MR. NELSON: -- I'm going to take a
24 stab at it anyway because, you know, I don't
25 think these cases are -- are any fun without a

1 little bit of zoology involved.

2 JUSTICE BREYER: Yeah. Right.

3 MR. NELSON: But, you know, if -- if
4 the -- if the -- if what's going on is that the
5 -- the state is imposing a spider that is
6 inconsistent with the nature of arbitration,
7 then that's what creates a problem.

8 And what's happened here is what the
9 state has said is for contracts of -- whether
10 they're part of an arbitration agreement or not,
11 you can't waive the right to bring a PAGA claim
12 in an -- in an employment agreement before the
13 claim arises, okay? So the -- the spider
14 applies to every kind of agreement.

15 But then the -- then the next question
16 is: Okay, but, nonetheless, would there be
17 something -- is there something about that that
18 -- that -- that has an adverse impact on
19 arbitration specifically?

20 And that then gets to the question is
21 -- is a representative action where a
22 representative pursues on a bilateral basis
23 claims that may involve events affecting
24 multiple individuals, is that inconsistent with
25 what Congress meant in 1925 when it said

1 arbitration?

2 And we know the answer to that is no
3 because one of the familiar types of arbitration
4 in 1925 was representative arbitration pursued
5 bilateral between labor representatives and
6 employers, between representatives of
7 agricultural cooperatives and employers.

8 It was -- it was not something like a
9 class action, a modern class action, a Rule 23
10 class action or an FLSA collective action that
11 didn't exist at the time, that someone might say
12 was outside the notion of what the -- what
13 Congress could have meant when it said settle a
14 controversy by arbitration.

15 JUSTICE KAGAN: And, Mr. Nelson, when
16 you look around the world of representative
17 litigation, whether it's shareholder suits or
18 ERISA suits or, you know, anything else you can
19 come up with, I mean, you know, qui tam suits, I
20 guess, are a form of representative litigation.

21 I mean, what is this like and what is
22 it unlike? And if we go down the route that Mr.
23 Clement says we ought to go down, what are the
24 consequences with respect to those
25 representative actions?

1 MR. NELSON: Well, I think -- I think
2 it's quite similar to a qui tam action in the
3 sense -- in -- in a number of respects. One is
4 that the representative in that case pursues the
5 -- the government's claim with respect to false
6 claims regardless of whether they affected that
7 individual.

8 So let's say it's -- it's a medical
9 provider submitted false claims for Medicaid
10 reimbursement. The person happens to notice --
11 know about it because it happened in their case,
12 but they're pursuing that claim on behalf of the
13 government no matter who it affected.

14 And because of the nature of -- of the
15 contractual privity between many potential qui
16 tam relators and defendants, because they're
17 often -- they're often employees who are in a
18 position to be relators or contracting parties
19 who are aware of -- of the false claim that
20 related to that contractual arrangement, if --
21 if the potential defendant were to put in a
22 properly worded arbitration agreement in -- in
23 their -- in their contract with that individual,
24 it could bar the assertion of a representative
25 claim in exactly the same way if -- if my

1 friend's argument is accepted.

2 I think the same is true of
3 shareholder derivative actions, which, you know,
4 are -- that's kind of a -- a new frontier in the
5 area of arbitration, but corporations are
6 increasingly trying to bind their shareholders
7 to arbitration agreements and -- and could
8 significantly limit the -- the ability of
9 shareholders to pursue representative actions
10 that -- that would involve, you know,
11 potentially interests beyond their own but --
12 but that are pursued bilaterally on -- by the
13 shareholder on behalf of the corporation against
14 the wrongdoer.

15 JUSTICE KAGAN: And -- and I take it
16 on Mr. Clement's argument, it would not just be
17 saying we don't want to do this in arbitration,
18 we don't think it's consistent with, you know,
19 the -- the nature of this action is consistent
20 with arbitration.

21 But those, if Mr. Clement prevails, we
22 can entirely wipe out those suits --

23 MR. NELSON: Exactly.

24 JUSTICE KAGAN: -- bring them in
25 arbitration, bring them in litigation. It

1 doesn't matter.

2 MR. NELSON: That's right. And --
3 and, you know, I mean, no one is saying that if
4 you say a PAGA claim is -- is non-waiveable,
5 that that means employers will be required to
6 arbitrate them. If they don't want to arbitrate
7 them, they can always exclude them from the
8 arbitration agreement and let them proceed in
9 court.

10 I don't share my friend's prediction
11 as to what would happen in that regime. I don't
12 think it would lead to a flight from arbitration
13 because, in view of the -- of the authority of
14 an arbitrator to limit the scope of -- of
15 discovery and proof and to limit the recovery, I
16 suspect there would be a flight toward
17 arbitration for PAGA claims.

18 Obviously, employers' first choice is
19 let's eliminate the PAGA claim entirely if we
20 can get away with it. But the -- the -- the
21 idea that -- that companies don't arbitrate
22 large-scale disputes between themselves because
23 they don't perceive any advantage to arbitrating
24 them I think is just empirically false.

25 JUSTICE KAGAN: I suppose Mr. Clement

1 might say the disadvantage of doing it in
2 arbitration is that there's no review of the
3 arbitrator's decision or a -- a very limited
4 kind of review.

5 MR. NELSON: There -- there certainly
6 is limited review. And -- and that -- that
7 disadvantage falls most heavily on the
8 non-repeat players in the process, who are --
9 are the most likely to -- to have an unfavorable
10 outcome in arbitration that they would want to
11 seek review of.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas, any questions?

14 JUSTICE THOMAS: No questions, Mr.
15 Chief Justice.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?

18 Justice Alito, anything further?

19 Justice Gorsuch, any questions?

20 JUSTICE KAVANAUGH: Just one question.
21 I wanted to give you an opportunity to respond
22 to Mr. Clement's point which he mentioned a
23 couple times, not a central point, but about the
24 other states and that California is an outlier
25 here. I'll just give you a chance to respond in

1 any way you want.

2 MR. NELSON: Well, it -- it's
3 certainly true that California is -- is the only
4 -- the only state that -- that has this
5 mechanism. And I think that -- that -- that the
6 reason California chose this mechanism was that
7 it -- it wanted to enhance its enforcement and
8 picked the class of representatives who were the
9 most likely to be effective representatives of
10 its interests as opposed to the entire public.

11 And, you know, it's -- it's -- I think
12 it's somewhat ironic that -- that one of the --
13 one of the arguments made in favor of this
14 Court's review was that if you let California do
15 it, everyone will do it. Now California is the
16 only -- the only state that wants to do it.

17 I -- I think the fact of the matter
18 is, you know, there may be states that -- that
19 for their own purposes will make use of -- of
20 novel structures allowing individuals to bring
21 actions on behalf of the state, and some of
22 those may be in contexts where arbitration
23 agreements might be invoked to block those.

24 We haven't seen a lot of that. But
25 the fact that California has chosen to do it we

1 think is entitled to respect, even if California
2 remains the only state that does so.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett, anything further?

6 Thank you, counsel.

7 Rebuttal, Mr. Clement?

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
9 ON BEHALF OF THE PETITIONER

10 MR. CLEMENT: Thank you, Mr. Chief
11 Justice. Just a few points in rebuttal.

12 First, a lot has been said about the
13 differences between PAGA claims and class
14 actions, but I think it's worth recognizing the
15 similarities between an employer-wide PAGA
16 action and an FLSA collective action.

17 I mean, the FLSA collective action is
18 a means of securing the federal wage and hour
19 laws on behalf of similarly situated employees.
20 PAGA is a way for an employee to vindicate
21 California's wage and hour laws, and it's not
22 even restricted to similarly situated employees.

23 It's anything goes, the whole
24 workforce. It makes no sense to say that Epic
25 controls as to the FLSA collective actions, but

1 you don't extend it to PAGA actions.

2 The second point I want to emphasize
3 is we don't care about this being representative
4 in the sense that a state gets a 75 percent cut
5 of the \$100 violation that was provided or
6 penalty that was provided by PAGA. That's not
7 the sense in which the representative nature of
8 these cases bothers us.

9 It is the fact that it is
10 representative on behalf of all other employees
11 for all these disparate violations. That is
12 what is critical here. And if you can combine
13 those two and just reconceptualize this as a
14 state action on behalf of the entire workforce
15 that one person gets to bring, then there's
16 nothing left of Concepcion.

17 You could easily envision or
18 reconceptualize the harm there, the consumers
19 that paid sales tax on the phone when they were
20 told they were free, as a violation of state law
21 that one individual gets to vindicate on behalf
22 of everybody who paid a little extra for their
23 phone and, poof, there goes Concepcion. This is
24 just too naked a circumvention.

25 And in thinking about how this affects

1 other laws, I do think the dogs that aren't
2 barking here are very relevant. I mean, if this
3 really were a threat to derivative actions,
4 Delaware would be here. If this was a threat to
5 the federal claims -- the False Claims Act qui
6 tam actions, the United States would be here.
7 This is an outlier, just like the DirecTV rule
8 out of California was an outlier. There's a
9 reason this is coming out of California.

10 Third, a word on the differences
11 between substance and procedure here. Those
12 distinctions are always elusive. My friend
13 talks about a PAGA claim. I don't think,
14 properly understood, there is such a thing as
15 even a PAGA claim.

16 There's a claim for violating the
17 labor code. If you violate the labor code by
18 not giving the last paycheck in a timely way,
19 there's a labor code violation. The labor code
20 is what provides the substance here.

21 Now, it provides specific penalties,
22 including a statutory penalty for a late final
23 check. The only question here is whether, in
24 addition to that and damages, you also get this
25 \$100 per violation that was introduced by a

1 statute.

2 We don't have any problem if they get
3 it. The only reason we don't know for sure
4 whether they get it is because my friends on the
5 other side have so far successfully resisted the
6 arbitration and it'd be a question for the
7 arbitrator, whether that's available. But it's
8 certainly not off the table as far as we're
9 concerned.

10 And this distinction between substance
11 and procedure, it can't be used to just get
12 around Concepcion and Epic. It would be the
13 easiest thing in the world to create a new
14 treble damages remedy available only in class
15 actions. Clearly, that new treble damages
16 remedy would be substantive for Erie purposes,
17 and you could then say, Aha, well, now you can
18 no longer have a class action waiver.

19 That's effectively what this is.
20 They've reconceptualized this claim as
21 inherently a class-wide claim, an inherently
22 employer-wide claim. And then they say: All
23 right, you can have -- we're going to force this
24 into arbitration. We know full well you won't
25 do it in arbitration. It's going to end up back

1 in court. And we're going to have all of the
2 problems we were -- this Court tried to avoid in
3 Concepcion and Epic.

4 So there's a lot of conceptual issues
5 here with procedure and substance. I just want
6 to finish for a minute by talking about
7 practicalities.

8 The practicalities, on the one hand,
9 are well illustrated by the complaint in this
10 case. The only specific allegation Moriana
11 makes as to herself is the timing of her final
12 paycheck. If that's all this case were about,
13 then an arbitrator could dispatch that case in
14 about an hour. It's the simplest thing in the
15 world. Cut her a check. If we have to cut a
16 second check to the state, that's easy.

17 But, instead, nine different
18 violations on behalf of the entire sales force,
19 California has made clear in the Williams case
20 you get discovery coextensive with the class
21 action. By the time we're done trying to figure
22 that out in arbitration, we'd have to hire a
23 claims administrator to give the checks and
24 identify people. Nobody is going to do it.
25 Arbitration will be gutted in practice.

1 And then there's this final
2 practicality: Before Concepcion, PAGA was the
3 statute nobody paid too much attention to.
4 After Concepcion, 17 PAGA complaints are being
5 filed every day. These actions are being
6 litigated. They involve 565,000 Lyft drivers,
7 165,000 employees at Marshalls. They look, in
8 every practical effect, just like class actions.
9 They pose the same problems. And, indeed, it's
10 even worse than that because, in practice, if
11 you have to litigate in court the PAGA claim on
12 behalf of the entire work force, as the Chamber
13 amicus brief points out, what you end up doing
14 is you get a class action in there and settle
15 the whole thing, so you can buy employee-wide
16 peace.

17 Thank you, Your Honors.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 11:22 a.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

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