No. 20-1573

In the
Supreme Court of the United States

VIKING RIVER CRUISES, INC.

Petitioner,

v.

ANGIE MORIANA

Respondent.

On Writ of Certiorari
to the California Court of Appeal

BRIEF FOR STEVE CHOW, A SMALL BUSINESS OWNER, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT ANGIE MORIANA

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. PAGA Is Designed to Incentivize Labor Code Compliance by Large Employers Who Are Bad Actors 3

II. Not Every Employer Is Eligible for, or Can Afford, Private Justice Under the FAA 7

III. A Ruling that the FAA Preempts PAGA Will Make Things Worse for Small Businesses 9

IV. Arbitration Is Consistent with Representative Claims 10

V. A Blanket Waiver of Representative Rights Is Not a Written Provision to Settle by Arbitration a Future Controversy 12

VI. The Story of Desme and Congressional Intent 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 10

Abernathy v. DoorDash, Inc.,
438 F.Supp.3d 1062 (N.D. Cal. 2020) 7

Allied-Bruce Terminix Companies, Inc. v. Dobson,
513 U.S. 265 (1995) 8

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 12, 13

Arias v. Superior Court,
46 Cal.4th 969 (2009) 3

Bernhardt v. Polygraphic Co. of America,
350 U.S. 198 (1956) 8

Citizens Bank v. Alafabco, Inc.,
539 U.S. 52 (2003) 8, 9

Doe v. Google,
54 Cal.App.5th 948 (2020) 4

Eastern Associated Coal Corp. v. United Mine Workers of America,
531 U.S. 57 (2000) 12

Hawes v. Oakland,
104 U.S. 450 (1881) 10

In re Salomon Inc. Shareholders' Derivative Litigation,
No. 91 Civ. 5500 (RPP),1994 WL 533595
(S.D.N.Y. Sept. 30 1994) 11

Iskanian v. CLS Transp. Los Angeles, LLC,
59 Cal.4th 348 (2014) 3

Kim v. Reins International California, Inc.,
9 Cal.5th 73 (2020) 3

Kindred Nursing Centers Ltd. Partnership v. Clark,
137 S.Ct. 1421 (2017) 11

Lerma v. D'arrigo Brothers Co.,
77 Cal.App.3d 836 (1978) 11

Marmet Health Care Center, Inc. v. Brown,
132 S.Ct. 1201 (2012) 11

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 11

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
7 F.3d 1110 (3d Cir. 1993) 11

Raines v. Coastal Pacific Food Distributors, Inc.,
23 Cal.App.5th 667 (2018) 4

Ruiz v. Santa Barbara Gas & Elec. Co.,
164 Cal. 188 (1912) 10

Slaughter v. Stewart Enterprises, Inc.,
No. C 07-01157 MHP, 2007 WL 2255221
(N.D. Cal. Aug. 3, 2007) 8

United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.,
484 U.S. 29 (1987) 12

U.S. v. Lopez,
514 U.S. 549 (1995) 3, 8, 9

United Steelworkers of America v. Warrior & Gulf Nav. Co.,
363 U.S. 574 (1960) 11

Williams v. Superior Court,
3 Cal.5th 531 (2017) 3, 4

ZB, N.A. v. Superior Court,
8 Cal.5th 175 (2019) 3

Statutes

8 U.S.C. §§ 1-2 8

9 U.S.C. § 10(a)(4) 12

31 U.S.C. § 3729(a)(1) 4

Cal. Code Civ. Proc. § 372 10

Cal. Labor Code § 90.5 6

Cal. Labor Code § 226.7 4

Cal. Labor Code § 2699(e)(2) 5

Cal. Labor Code § 2699(f)(2) 4

Rules

SUP. CT. R. 37.6 1

Regulations

8 CCR §11040 4

Other Authorities

2003 Cal.Legis.Serv. Ch. 906 S.B. 796 (S.B. 796) .. 4, 6

Scott Baker, *A Risk Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861 (Fall 2004) 8

Abha Bhattarai, *Retail Workers in their 60s, 70s, and 80s say they're worried about their health – but need the money*, WASH. POST, Mar. 30, 2020, at https://www.washingtonpost.com/business/2020/03/30/retail-workers-their-60s-70s-80s-say-theyre-worried-about-their-health-need-money/ 6

Jack Kelly, *Google Has Master Plan to Build a Massive Corporate Town for Its Employees*, FORBES, Sept. 4, 2020 at https://www.forbes.com/sites/jackkelly/2020/09/04/google-has-master-plan-to-build-a-massive-corporate-town-for-its-employees/?sh=bb512582d78c 7

C.S. LEWIS, THE PROBLEM OF PAIN (William Collins 2012) 5

MICHAEL LIND, THE NEW CLASS WAR: SAVING DEMOCRACY FROM THE MANAGERIAL ELITE (Penguin Random House 2020) 6

SEAN MCFATE, MERCENARIES AND WAR: UNDERSTANDING PRIVATE ARMIES TODAY (National Defense University Press, Dec. 2109) 7

Haley Messenger et al., *Facebook content moderators say they receive little support, despite company promises*, NBC NEWS, May 11, 2021 at https://www.nbcnews.com/business/business-news/facebook-content-moderators-say-they-receive-little-support-despite-company-n1266891 5

Stacey Vanek Smith, *The Private Firefighter Industry*, NPR PLANET MONEY, June 27, 2019, at https://www.npr.org/2019 /06/27/736715592/the-private-firefighter-industry 7

INTEREST OF *AMICUS CURIAE*[1]

Steve Chow is a first-generation American who owns and operates three convenience stores in the San Francisco Bay Area. He writes in favor of the Private Attorneys General Act. Mr. Chow cannot afford to require his few employees to arbitrate, and the Federal Arbitration Act might not apply to his small business anyway.

PAGA, though, applies to all businesses, big and small. Multinational corporations should not be permitted to opt-out of PAGA through representative waivers bought with arbitration agreements.[2] Small business owners have it hard enough in their efforts to compete with big business.

SUMMARY OF ARGUMENT

1. PAGA was enacted in part to protect businesses that comply with the Labor Code from those that seek a competitive advantage by flouting it. PAGA protects small businesses, in particular,

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submissions of this brief. No person or entity, other than Mr. Chow or his counsel, has made a monetary contribution to this brief's preparation or submission. *See* SUP. CT. R. 37.6.

[2] While Viking River is the petitioner, Ms. Moriana's employment contract is with TriNet, her co-employer. (JA78). TriNet is a professional employer organization with a market cap in excess of $5B.

through a penalty schedule based on employee pay periods in conjunction with a limitation on unjust penalties. If the FAA is construed to permit PAGA waivers, small businesses will suffer. Many small business owners will forego the PAGA waiver because they are too small to afford the costs of arbitration, or not sophisticated enough to require such arbitrations. Others will fall outside the scope of the FAA altogether because their intrastate employment relationships do not substantially affect interstate commerce.

Also, and as a practical matter, if this Court finds for Viking, California's legislature will likely respond in one of two ways: Either: (1) PAGA will not be amended, and small businesses will be forced to compete against large ones who have opted-out of PAGA; or (2) California will amend PAGA so that any member of the public – and not just aggrieved employees – will be able sue on the state's behalf. Under the second scenario, small business owners will face PAGA suits, not only from aggrieved employees, but also from strangers.

2. The FAA was passed because of the judiciary's hostility to arbitration, not because of Congress's nonexistent hostility to representative rights. There are innumerable types of representative claims, and courts regularly compel their arbitration. A representative waiver, however, *bans* the resolution of representative claims rather than provide a way of *settling* them. Just as a court would not enforce an arbitral award that violates a state's public policy, it should not enforce a contractual waiver that does the same thing. As the hypothetical Desme's story shows, Viking's preemption argument under the FAA has no

limiting principle, and it results in outcomes that Congress could not possibly have intended.

ARGUMENT

I. PAGA Is Designed to Incentivize Labor Code Compliance by Large Employers Who Are Bad Actors

1. The Commerce Clause – upon which the FAA is based – respects a state's sovereignty when it comes to matters of law enforcement, *U.S. v. Lopez*, 514 U.S. 549, 564-65 (1995), and every PAGA action is a law enforcement action. *Arias v. Superior Court,* 46 Cal.4th 969, 986 (2009). A PAGA claim, whether it seeks "penalties for Labor Code violations as to only one aggrieved employee – the plaintiff bringing the action – or as to other employees as well," is a claim on behalf of the state.[3] *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348, 386-87 (2014).

Thus, unlike class or collective claims, PAGA does not permit victim-specific relief. *ZB, N.A. v. Superior Court*, 8 Cal.5th 175, 193 (2019). It also does not require an underlying private right of action. *Id.* at 197; *Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 90-91 (2020). Rather, the purpose of PAGA and its

[3] Because it is the state's claim, PAGA requires that the state receive notice of the Labor Code violation. This notice allows the state to take immediate action to investigate or remedy the violation. *Williams v. Superior Court*, 3 Cal.5th 531, 545-46 (2017). Viking declares there are 17 PAGA notices filed a day. So too much whistleblowing? There are on average 107 property crimes reported per day in San Francisco alone. https://www.neighborhoodscout.com/ca/san-francisco/crime#data

civil penalties is to punish and deter, and thus achieve compliance with the law. *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 681 (2018); 2003 Cal.Legis.Serv.Ch. 906 (S.B. 796) (West) § 1(b).

In furtherance of this goal, PAGA establishes a penalty schedule that generally calculates penalties on a per-employee-pay-period basis. Cal. Labor Code § 2699(f)(2); *Williams v. Superior Court*, 3 Cal.5th 531, 545 (2017) (noting the Legislature purposefully adopted a schedule of civil penalties significant enough to deter violations). This schedule is somewhat like the one set forth in the False Claims Act, which calculates penalties on a per claim basis. 31 U.S.C. § 3729(a)(1). Just as more government claims means more potential exposure under the False Claims Act, more employee pay periods means more potential exposure under PAGA.

This penalty schedule serves the interests of the state, its employees, and its small businesses. For example, one Labor Code requirement is that employees be provided a rest period around the middle of each four-hour shift. 8 CCR §11040(12); Cal. Labor Code § 226.7. Under PAGA's penalty schedule, a small employer with three employees who fails to provide rest periods faces a maximum PAGA exposure of about $7500 (assuming two pay periods a month). The PAGA exposure of a large employer with 30,000 employees is exponentially higher. It is better for 30,000 employees to get rest periods than three employees. PAGA's penalty schedule thus maximizes the State's interests in enforcing its minimum employment standards. *See Doe v. Google,* 54 Cal.App.5th 948, 961 (2020).

In addition, to the extent penalties under the schedule would result in an undeserved punishment, they are unjust, and may be reduced. Cal. Labor Code § 2699(e)(2).[4] To continue with the rest period example, it is one thing for Mr. Chow to fail to give an employee a cigarette break in one store because, in a second store, he is busy trying to keep a drug addicted shoplifter from stealing all the toothpaste. It is quite another for a technology company to set up production quotas for its content moderators such that they cannot take a ten-minute respite, if they need it, from reviewing countless videos of human depravity.[5] Because the nature of the violations is different, PAGA permits the punishments to be different, notwithstanding the penalty schedule.

2. Precisely because of its penalty schedule, PAGA cases can result in seemingly large penalties against giant corporations. This is the predictable result of market concentration in fewer and fewer firms. Wal-Mart, for example, agreed to pay $65,000,000 to resolve a PAGA case arising from the Labor Code's "suitable seating" regulation. Wal-Mart could have avoided this penalty by giving its cashiers, including all the retirees with diabetes or asthma, and who must

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[4] An undeserved punishment, even if it deters, is unjust. C.S. LEWIS, THE PROBLEM OF PAIN p. 91-92 (William Collins 2012) ("What can be more immoral than to inflict suffering on me for the sake of deterring others if I do not deserve it?").

[5] *See* Haley Messenger et al., *Facebook content moderators say they receive little support, despite company promises*, NBC NEWS, May 11, 2021 at https://www.nbcnews.com/business/business-news/facebook-content-moderators-say-they-receive-little-support-despite-company-n126689

continue to work to live,[6] a stool to sit on (or, like convenience stores do, a couple of stacked milk crates). It refused until the PAGA case, which it fought for nine years. Even so, $65,000,000 is equal to 0.012% of Wal-Mart's annual revenue.[7] For a small business with $100,000 in revenue to absorb a proportional hit would require a settlement payment of $12.00.[8]

Through its penalty schedule and limitation on unjust penalties, PAGA protects small businesses who try their best to comply with the Labor Code from the anti-competitive practices of large corporations who do not. 2003 Cal.Legis.Serv. Ch. 906 (S.B. 796) (West); Cal. Labor Code § 90.5 (explaining state policy is to vigorously enforce labor standards to protect employers who comply with those standards). A PAGA waiver permits large employers to opt-out of this penalty schedule altogether.

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[6] Abha Bhattarai, *Retail Workers in their 60s, 70s, and 80s say they're worried about their health – but need the money*, WASH. POST, Mar. 30, 2020, at https://www.washingtonpost.com/business/2020/03/30/retail-workers-their-60s-70s-80s-say-theyre-worried-about-their-health-need-money/.

[7] Walmart's annual revenue in 2021 was $560,000,000,000. *See https://corporate.walmart.com/newsroom/2021/02/18/walmart-reports-record-q4-and-fy21-revenue*

[8] Viking also objects that attorney fees are too high. But high plaintiffs' fees must match high defense fees. "If power checks power, elites countervail elites." MICHAEL LIND, THE NEW CLASS WAR: SAVING DEMOCRACY FROM THE MANAGERIAL ELITE p. 135 (Penguin Random House 2020). Partners at major law firms earn millions of dollars a year.

II. Not Every Employer Is Eligible for, or Can Afford, Private Justice under the FAA

1. The wealthiest companies already have private schools, fire departments, and security forces.[9] Soon, they will have private towns.[10] Arbitration provides them a private judicial system.

Viking – and this Court's precedents – assume that a private judge is cheaper than the public judicial system. The facts on the ground are different. Arbitrators – usually retired judges – charge fees as high as elite lawyer fees. Indeed, filing and case management premiums make arbitrators more expensive than attorneys.[11] If the Court doubts this, consider how hard big tech companies work to avoid their own arbitration agreements when faced with too many arbitration demands. *E.g., Abernathy v. DoorDash, Inc.*, 438 F.Supp.3d 1062, 1067-68 (N.D. Cal. 2020).

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[9] *E.g.*, Stacey Vanek Smith, *The Private Firefighter Industry*, NPR PLANET MONEY, June 27, 2019, at https://www.npr.org/2019/06/27/736715592/the-private-firefighter-industry; SEAN MCFATE, MERCENARIES AND WAR: UNDERSTANDING PRIVATE ARMIES TODAY, pp. 23-24 (National Defense University Press, Dec. 2019).

[10] Jack Kelly, *Google Has Master Plan to Build a Massive Corporate Town for Its Employees*, FORBES, Sept. 4, 2020 at https://www.forbes.com/sites/jackkelly/2020/09/04/google-has-master-plan-to-build-a-massive-corporate-town-for-its-employees/?sh=bb512582d78c.

[11] *E.g.,* JAMS Arbitration Schedule of Fees and Costs (found at https://www.jamsadr.com/arbitration-fees).

A small business owner like Mr. Chow cannot afford arbitration. He must rely on the public justice system. It provides administrative hearings, small claims courts (where lawyers are not allowed), limited civil cases (with limited discovery), and expedited trial procedures. Unlike large employers, arbitration is not a viable risk management device for the small business owner. *See* Scott Baker, *A Risk Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861 (Fall 2004).

2. Even if the small employer could afford arbitration, he might not be eligible for the FAA's proposed preemptive benefits.

The FAA only applies to contracts evidencing a transaction involving interstate commerce. 8 U.S.C. §§ 1-2; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995). While Congress's power to regulate commerce is broad, it is not unlimited. An intrastate employment relationship must "substantially affect" interstate commerce to fall within the scope of the FAA. *See U.S. v. Lopez*, 514 U.S. 549, 558-560 (1995). Unlike, for example, commercial loan transactions involving regional banks, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57-58 (2003), or employment relationships with giant corporations, the employment arrangements between small business owners and their few employees are decidedly local. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-201 (1956) (finding employment contract did not involve interstate commerce and was outside the scope of the FAA); *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157 MHP, 2007 WL 2255221 (N.D. Cal. Aug. 3, 2007) (concluding FAA did not apply to an ar-

bitration agreement between local business and employees because employment relationships did not involve interstate commerce under *Lopez* and *Citizens Bank*). Thus, a finding that the FAA preempts PAGA may not even help the small business owners who can afford arbitration.

III. A Ruling that the FAA Preempts PAGA Will Make Things Worse for Small Businesses

If this Court finds for Viking, one of two things will happen, depending on the legislature and the relative lobbying power of big business (in California, mainly tech, finance, and entertainment), plaintiffs' lawyers, and unions.

One possibility is PAGA will not be amended. Large corporations will opt-out of PAGA's regulatory scheme with representative waivers. Small business owners will not do the same because they lack sophistication, arbitration is prohibitively expensive, or the FAA will not apply to their employment relationships. The lawyers with the experience and resources to sue large corporations will abandon high impact employment litigation for other fulfilling work. But for the lawyers who sue the mom-and-pop shops – and these are the lawyers who file thousands of PAGA notices – it will be business as usual. Small business owners will continue to get sued under PAGA while they are also forced to compete with large corporations who, through PAGA waivers under the FAA, can safely ignore the Labor Code's sometimes onerous requirements.

A second possibility is that PAGA will be amended to broaden the universe of qui tam PAGA plaintiffs to include the general public. PAGA claims will continue, only now small business owners will also be subject to lawsuits by organizations or individuals who do not know them from Adam, and who could care less about the impact of employment litigation on their business.

Either outcome is bad for the small business owner.

IV. Arbitration Is Consistent with Representative Claims

There are innumerable types of representative claims. A guardian (usually a parent) can bring claims on behalf of their children. Cal. Code Civ. Proc. § 372. A personal representative litigates wrongful death claims on behalf of the decedent's heirs. *Ruiz v. Santa Barbara Gas & Elec. Co.*, 164 Cal. 188, 191-192 (1912).[12] A union represents its members, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), a shareholder can represent a corporation, *Hawes v. Oakland*, 104 U.S. 450 (1881), an association can represent its homeowners, and an individual can represent the state.

A representative claim is not like a class or collective claim. For example, a representative claim does not require that the representative be similarly situated to the person he represents. It also does not require the representative to have an individual claim,

[12] The right to take over prosecution of a representative claim is not a condition of such a claim. Neither a dead person nor an infant can "take over" prosecution of claims brought on their behalf.

though one may surely exist.[13] Rather, a representative claim just requires a grant of authority (whether by law or contract) by the person or entity represented.

There is no categorical rule prohibiting arbitration of a particular type of claim, *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1203-04 (2012), including representative ones. For example, arbitration is the linchpin of national labor policy. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577-78 (1960). Every arbitration between a union and an employer – whether under federal or state law – is a representative arbitration. *See Lerma v. D'arrigo Brothers Co.*, 77 Cal.App.3d 836, 843 (1978). Other examples of representative claims, subject to arbitration under the FAA, include wrongful death claims, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017), ERISA claims, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110 (3d Cir. 1993), and shareholder derivative claims, *In re Salomon Inc. Shareholders' Derivative Litigation*, No. 91 Civ. 5500 (RPP), 1994 WL 533595 (S.D.N.Y. Sept. 30 1994). With respect to each of these representative claims, any doubt concerning the scope of arbitrable issues is resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983). Except for the fact that it is a public, not private, dispute, a PAGA claim is no different.

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[13] For example, based on the same facts, a shareholder may both sue as a shareholder and bring a representative derivative claim on behalf of the corporation.

V. A Blanket Waiver of Representative Rights Is Not a Written Provision to Settle by Arbitration a Future Controversy

As explained by Ms. Moriana, Section 2 of the FAA concerns pre-dispute arbitration only to the extent it involves a "written provision" in "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." On its face, a representative waiver is not a written provision to settle a future controversy. It is a written provision to ban settlement of a future controversy. It is the exact opposite of the pre-dispute provision described by Section 2, and is thus outside Section 2's scope.

This reading of Section 2 accords with the rest of the FAA. For example, Section 10 provides that arbitral awards may be vacated "where the arbitrator exceeded their powers." 9 U.S.C. § 10(a)(4). An arbitral award is the parties' bargained-for resolution of a controversy. *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 61-62 (2000). It is a contract. An arbitrator exceeds his powers (or disregards the law) when he issues an award that violates the law because courts will not enforce illegal contracts. *Id.* at 63; *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). Surely, the Court would not enforce an arbitral award under the FAA that concluded an employee prospectively waived all his state law claims. This would delegate to private parties "the power to exempt themselves from whatever state labor standards they disfavored." *See Allis-Chalmers Corp. v. Lueck*, 471 U.S.

202, 212 (1985). Yet this is precisely what Viking seeks with respect to PAGA.

VI. The Story of Desme and Congressional Intent

The question presented is not limited to PAGA. It asks whether an employer can use the FAA to preempt all representative claims. And Viking's waiver provision encompasses all representative claims. (JA 89).

So imagine Desme, a billing clerk at a large hospital chain. She has health insurance through her employer. Because of that insurance, when her husband gets sick from Covid, he is transported to one of its many hospitals. The hospital refuses to put him on a ventilator because those are reserved for the fully vaccinated. Armed with a power of attorney, Desme goes to court on her husband's behalf, seeking relief. The court cannot act (and neither can an arbitrator). Desme signed a representative waiver, like the one at issue here, in order to work for the hospital, and she brings a representative claim on behalf of her husband.

Desme's children are deeply depressed. She buys them a trampoline through an online platform controlled by a giant tech company. The trampoline is defective. Her son breaks his neck and is paralyzed. Her older daughter, who saw the accident and blames herself, suffers terrible nightmares. Desme brings a lawsuit on both their behalfs. She discovers she is barred from doing so both in court and in arbitration. Desme accepted the tech company's terms of service – which includes a representative waiver – when she set up her smart phone.

Desme continues her work as a billing clerk. She learns the hospital is filing false claims with the state, claiming it is continuing to treat her now-deceased husband on a ventilator it refused to provide. Hoping to stop the injustice, and perhaps make some money to pay for her children's treatment, she brings a qui tam action under the state's false claims act. It, too, is barred because it is a representative claim. The hospital chain garnishes Desme's wages under the arbitration agreement's fee-shifting provision. It has decided to make an example of her.[14]

And Desme can't take a new job with the local doctor because the employment agreement also has a noncompete governed by New York law. And her feet hurt because she has no stool. And she has to use the bathroom, but her work station tracks her keystrokes. And on and on. But at least Desme has all the benefits of informal, bilateral, arbitration where she cannot assert any of the claims she seeks to pursue.

Viking might argue "this will never happen," but "this will never happen" is not a limiting principle. It is the rallying cry of the horrible parade. And whatever else Congress intended when it enacted the FAA, Desme's story isn't it.

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[14] This is unjust, no matter the contract. See, supra, footnote 4.

CONCLUSION

Mr. Chow asks that the Court affirm the decision of the Court of Appeal.

Dated: March 8, 2022

Respectfully Submitted,

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