

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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VIKING RIVER CRUISES, INC.,                    )  
  Petitioner,                    )  
  v.                                    ) No. 20-1573  
ANGIE MORIANA,                                    )  
  Respondent.                    )  
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Pages: 1 through 78  
Place: Washington, D.C.  
Date: March 30, 2022

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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 -- a different employee of  
14 Viking Cruises, brings a PAGA action that, by  
15 its terms, would include Ms. Moriana, would she  
16 be able to be included among the group of  
17 people, the large group of people, that would  
18 recover 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 just  
13 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 tried to write down 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 in -- that this employer did respect to  
13    some other employees and the money then is set  
14    and goes to California and they distribute it,  
15    the state.

16           And then some other ones are that you  
17    -- there's no right to receive notice -- I wrote  
18    them down -- no right to intervene, no right to  
19    object to -- there is no appeal from the  
20    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 of 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 --

20 JUSTICE KAGAN: But you are not --

21 MR. CLEMENT: -- in a single  
22 proceeding --

23 JUSTICE KAGAN: -- contesting that the  
24 state could bring this lawsuit, is that right,  
25 and the state could do it in this completely

1 aggregated way?

2 MR. CLEMENT: I -- I think that's  
3 right. And then the state would bring it in  
4 court, and that really gets to the second piece  
5 of this, which is the -- the critical thing is,  
6 if you have these massive damages from  
7 aggregating claims and then you have -- I mean,  
8 California has made it clear that the discovery  
9 in these PAGA actions is coextensive with  
10 discovery in class actions.

11 So courts are very good at dealing  
12 with those kind of discovery issues.  
13 Arbitrators are very bad at dealing with  
14 class-wide discovery.

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

1 JUSTICE BREYER: Okay. So is -- but  
2 what you're saying -- so -- so your point -- I  
3 just want to be clear on this -- is that, okay,  
4 suppose you win. If you win, then they can't  
5 bring this kind of action in arbitration. You  
6 can't agree to it and so forth. But you could  
7 bring it in court.

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

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

19 MR. CLEMENT: Well, she can arbitrate  
20 her own claim.

21 JUSTICE BREYER: No, no, I understand  
22 that, but she can't arbitrate this big thing,  
23 okay? No, you can't --

24 MR. CLEMENT: She cannot -- she cannot  
25 arbitrate the --



1 JUSTICE BREYER: Got it. Got it.

2 MR. CLEMENT: Right.

3 JUSTICE BREYER: Got it. Got it. You  
4 can't arbitrate it.

5 Okay, I'll go to court. Oh, no, you  
6 agreed to go to arbitration.

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

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

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

23 JUSTICE KAGAN: The one way to make  
24 Justice Breyer's point is that you're sort of  
25 trying to have it both ways. You're saying this

1 aggregate claim is so different from her  
2 individual claim that we can't possibly allow it  
3 in arbitration.

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

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

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

20 The state doesn't have free rein to --

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

1 arbitration procedures that would -- that, you  
2 know, reasonably understood, extends to a state  
3 decision like this one to enforce its state  
4 labor laws through private parties.

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

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

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

22 And, as Justice Breyer suggested, this  
23 is not essentially a case about the complexity  
24 of procedures. It's a case about the complexity  
25 of a substantive claim, the high stakes of a

1 substantive claim as the -- as California has  
2 defined it. It's not about, you know,  
3 streamlined procedures.

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

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

18 JUSTICE SOTOMAYOR: Counsel --

19 MR. CLEMENT: -- in --

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

24 So it's not California creating an  
25 intentional evasion of Concepcion or Epic,

1 correct? It didn't intentionally predict that  
2 what we were going to do there and say now we  
3 got to find a way to get around Epic and  
4 Concepcion?

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

10 And the Iskanian decision, which is, I  
11 think, the focal point of this --

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

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

21 All of them were representative. All  
22 of them were complex. We don't have a rule that  
23 says arbitration's incapable of dealing with  
24 complex cases. We have permitted arbitration in  
25 RICO cases, in securities cases, in antitrust

1 cases, in sexual harassment cases. All of those  
2 cases involve very complex issues with proof  
3 related to parties other than the individuals  
4 bringing them, involving in RICO patterns of  
5 RICO activity, of racketeering that involve  
6 multiple layers of crimes. In sexual harassment  
7 and disparate impact claims, we have to have the  
8 plaintiff prove what happens to a bunch of other  
9 people.

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

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

1 mechanism.

2           But I don't see anything in the FAA  
3 that says we preempt that, because they're not  
4 anti-arbitration. You can do it in arbitration  
5 or you can do it in litigation, your choice.  
6 And you say: But it's really not a choice. I'm  
7 never going to -- me, the employer, is never  
8 going to permit this in arbitration. Well, that  
9 may or may not be true. Some employers might  
10 choose it.

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

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

22           MR. CLEMENT: No, Justice Sotomayor,  
23 we're not. Moriana can still bring her claims.  
24 Those claims are backed by attorneys' fees  
25 provisions.

1 JUSTICE SOTOMAYOR: It's the same --  
2 no, sir. What's the incentive? The entire  
3 incentive for California was to ensure that  
4 employers did what they were supposed to do.  
5 And the only way to make sure that is to tell  
6 them, if you violate the law, you are going to  
7 be subject to a claim by us through our  
8 representative for all of your violations, not  
9 just one tiny piece of one.

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

18 And the state's decision to do that is  
19 no different from the state's decision to want  
20 to have class actions or collective actions or  
21 to say -- or --

22 JUSTICE SOTOMAYOR: No, those were  
23 actual procedural laws by California that  
24 designated arbitration as -- as forbidden or  
25 forced to do. This is something totally



1 different. This is a state substantive cause of  
2 action.

3 MR. CLEMENT: So --

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

9 MR. CLEMENT: So --

10 JUSTICE SOTOMAYOR: So cite to them,  
11 other than Epic and Concepcion, where have we  
12 ever said that.

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

22 But, at the end of the day, like most  
23 distinctions between procedure and substance,  
24 that can't ultimately be the answer. That's  
25 just a construct. And you could say a statute

1 is procedural if what it does is say that you  
2 can only get a treble damages remedy if you  
3 pursue it through a class action.

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

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

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

1 of that.

2 Here, the plaintiff has an incentive  
3 to spread the net as wide as possible and prove  
4 up each additional violation they prove as to  
5 some employee they've never met. They --

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

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

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

24 They -- no choice was ever taken from  
25 them. They could have done it in arbitration if

1 they wanted. They chose not to.

2 MR. CLEMENT: The -- the choice, with  
3 all due respect, that's being taken from is the  
4 choice to arbitrate on a one-to-one bilateral  
5 basis. Any claim Moriana has, any claim she  
6 suffered, she can bring in arbitration.

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

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

21 JUSTICE ALITO: Mr. Clement, do you --  
22 do you have any idea why California chose this  
23 particular structure? It could have -- unless  
24 the California constitution prohibits this, it  
25 could have just said that anybody in California

1 or perhaps any place else could bring a suit to  
2 vindicate any violation of the labor code. And  
3 that person wouldn't be in any sort of  
4 contractual relationship with the employer, and,  
5 therefore, I don't see how the FAA would come  
6 into the picture.

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

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

22 Now I -- I think, ultimately, that  
23 probably might have something to do with the Due  
24 Process Clause, or to put it differently, if  
25 they didn't have that constraint, I would be

1 happy to argue that you just can't have a  
2 statute where everybody under the sun can sue.  
3 It's just not consistent with due process. But  
4 that's obviously an argument for another day.

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

9 JUSTICE KAGAN: But I wonder, Mr.  
10 Clement --

11 MR. CLEMENT: They wanted to constrain  
12 this.

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

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

25 And all your arguments are

1 essentially, like, this is really unfair to  
2 defendants. But, if it's unfair to defendants,  
3 you have a due process claim. This is not an  
4 FAA problem.

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

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

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

24 It's just it's -- it's nothing that  
25 looks like the kind of thing that's suitable for

1 bilateral arbitration.

2           And since Congress protected the  
3 ability of parties to agree to bilateral  
4 arbitration, no matter how much California  
5 thinks it's got a better way to do things, it  
6 just has to yield when it comes to people who  
7 are parties to arbitration agreements.

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

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

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           Justice Thomas, any questions?

20           JUSTICE THOMAS: One question, Mr.  
21 Chief Justice. Thank you.

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



1                   I think that's the way you -- I would  
2           just say P-A-G-A, but -- and the -- my question  
3           is, wouldn't it -- you wouldn't be here making  
4           this argument if Terminix and Southland had come  
5           out the other way, right, since this is state  
6           court?

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

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

21                   But -- but this is a case where your  
22          own jurisprudence would give you the same  
23          answer, I think, as a majority of the court, if  
24          this case arose out of federal court.  And it  
25          seems to me there's a lot to be said for, under

1 those circumstances, when the Respondent hasn't  
2 asked you to revisit any of those precedents,  
3 hasn't even really pressed the claim that it  
4 matters that this arises out of state court, I  
5 think it would be better just to apply this  
6 Court's own precedents.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Clement, I  
9 would have thought advocates are always telling  
10 us how to do our job.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Justice  
13 Breyer?

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

18 (Laughter.)

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

23 So I have the case now divided into  
24 two parts in my mind. I'm going to ask you  
25 about the second part.

1           The first part is I just go look at  
2 this and I go look at Concepcion, where I was in  
3 dissent, but let's forget that, and I accept the  
4 majority there, and I say: Is this in the chill  
5 factor distinguishable or not? Some things  
6 different, some things are similar. Okay. I've  
7 got how to do that.

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

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

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

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

25           Now I can't see what it is. I mean, I

1 don't know, what -- what section does it say you  
2 can't waive a court proceeding? And you can  
3 say: Well, of course, you can. You can say I  
4 waive the court proceeding in good arbitration,  
5 where you can. But you've just won the first  
6 part.

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

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

20                   JUSTICE BREYER: Yeah.

21                   MR. CLEMENT: -- to Concepcion.

22                   JUSTICE BREYER: Yeah. That --

23                   MR. CLEMENT: And -- and --

24                   JUSTICE BREYER: -- at least, if you  
25 lose on the first part --

1 MR. CLEMENT: And -- and --

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

4 MR. CLEMENT: Right.

5 JUSTICE BREYER: -- I think I do.

6 MR. CLEMENT: But -- but, if I win the  
7 first part on the premise that there is a  
8 comparable chill here --

9 JUSTICE BREYER: Yeah.

10 MR. CLEMENT: -- to the chill from  
11 class actions in --

12 JUSTICE BREYER: Yeah.

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

17 After Concepcion --

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

1 where I can't go, that's invalid, says  
2 California. You can't do that. You can't put  
3 that in a contract, okay?

4 Now what?

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

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

16 MR. CLEMENT: But here's the thing,  
17 Justice Breyer. She can bring her labor code  
18 claim.

19 JUSTICE BREYER: Ah. That's what I  
20 want.

21 MR. CLEMENT: That's the substantive  
22 law. She can bring that in arbitration.

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

25 MR. CLEMENT: She can bring her claim

1 in arbitration.

2 JUSTICE KAGAN: This is the state's  
3 claim, Mr. Clement.

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

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

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

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

1           And if that private attorney has  
2           agreed to arbitrate their disputes and arbitrate  
3           them bilaterally, none of your Court's cases  
4           say, a-ha, well, you know, this is -- you know,  
5           the -- the antitrust laws, we sort of think of  
6           those as private attorney general laws, so you  
7           can't agree to arbitrate that. That's exactly  
8           the argument that didn't carry the day in cases  
9           like Mitsubishi.

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

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

23           And I don't think that can -- that --  
24           that can't possibly work. So, at the end of the  
25           day, the critical thing here is the fact that --



1 is not that they call it the state's claim, but  
2 they let all of these other multitudinous claims  
3 into this one proceeding, and that's  
4 inconsistent with bilateral arbitration.

5 CHIEF JUSTICE ROBERTS: Justice Alito,  
6 anything further?

7 Justice Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch, anything?

10 Justice Kavanaugh?

11 Justice Barrett?

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

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

1           MR. CLEMENT: I think it's ultimately  
2 a question of federal law. I mean, the fact  
3 that the states have called it procedural might  
4 make it convenient for me to say, oh, well, you  
5 should defer to them. But I don't think that's  
6 right, and I think the proof is kind of in the  
7 pudding.

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

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

21           But none of that makes any difference  
22 under Epic. I mean, they're all -- whether  
23 they're state court FLSA collective actions or  
24 federal court FLSA collective actions, they're  
25 still subject to the FAA. They're still subject

1 to preemption. So I -- I don't think the Erie  
2 line is the right line here at all.

3 JUSTICE BARRETT: Thanks.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Nelson.

7 ORAL ARGUMENT OF SCOTT L. NELSON

8 ON BEHALF OF THE RESPONDENT

9 MR. NELSON: Mr. Chief Justice, and  
10 may it please the Court:

11 PAGA, or the P-A-G-A, creates a right  
12 of action that entitles an individual employee  
13 to sue on the state's behalf to recover civil  
14 penalties for labor code violations.

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

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

24 Viking's employment contract with  
25 Ms. Moriana explicitly prohibits private

1 attorney general actions and representative  
2 actions. As Viking puts it, it targets PAGA  
3 claims by name. It prevents Ms. Moriana from  
4 bringing an action for PAGA penalties in any  
5 amount in any forum. And as Mr. Clement has  
6 explained today, it also prohibits anyone else  
7 from seeking PAGA penalties for violations that  
8 affected her.

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

22           Viking has no response to that textual  
23 argument and instead relies on purposes and  
24 objectives preemption. But purposes and  
25 objectives preemption requires a basis in

1 statutory text, which is lacking here.

2           Moreover, PAGA claims are asserted  
3 bilaterally and require no procedural  
4 formalities, inconsistent with arbitration.  
5 California's anti-waiver rule is not preempted  
6 by the FAA.

7           I welcome the Court's questions.

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

16           What do you have to say to his point  
17 that all that you've gotten rid of in PAGA  
18 actions are the things that were helpful or  
19 favorable to the defendant, you know, the  
20 adequate representation, the common questions of  
21 law or fact? In other words, you seem to think  
22 that it's a good thing that those are gone, and  
23 Mr. Clement suggests that it's a bad thing from  
24 --

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

1 CHIEF JUSTICE ROBERTS: -- from the  
2 point of view of the arbitration perspective --  
3 policies.

4 MR. NELSON: Yeah. And -- and I guess  
5 my answer is all that you've gotten rid of in  
6 the PAGA action is those features of the class  
7 action that the Court said in Concepcion and  
8 Epic were inconsistent with the nature of  
9 arbitration.

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

21 If the state brings its action for  
22 PAGA penalties, there's no need to certify a  
23 class or ensure adequacy of representation or  
24 offer those third parties any rights of  
25 participation in the agreement -- or in the

1 arbitration or the adjudication in whatever  
2 forum it takes place that would make it  
3 cumbersome in the way that the Court has held is  
4 inconsistent with the nature of arbitration.

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

22 But, in any event, the key thing -- I  
23 don't think this Court has ever suggested that  
24 if a claim is just so big that somebody might  
25 prefer not to arbitrate it, that they have the

1 option, in addition to just cutting it out of  
2 their arbitration agreement and letting it  
3 proceed in court, to just say: No, the  
4 individual is required to arbitrate all their  
5 claims, but some claims you just can't bring,  
6 and you can't bring them in court either.

7 JUSTICE BARRETT: Mr. Nelson, can --

8 CHIEF JUSTICE ROBERTS: One of --

9 JUSTICE BARRETT: Oh, sorry, Chief.

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

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

25 MR. NELSON: No, Your Honor, I don't



1 -- I don't believe that would, you know, any  
2 more than the fact that -- that certain  
3 recoveries are -- are taxable as income.

4           The -- the issue -- the difference  
5 here is that the claim for civil penalties  
6 undisputedly is the state's claim. It's not  
7 simply the state taking a -- a -- a -- you know,  
8 a portion of someone's recovery for their  
9 personal damages --

10           CHIEF JUSTICE ROBERTS: Well, let's  
11 just say you say that, you know, because the  
12 state provides the laws and all that, in -- in  
13 theory, we think any recovery is, whatever you  
14 want to say, facilitated by or, you know,  
15 provided by the state, and you've got to give us  
16 2 percent. That seems to me to be a pretty  
17 formal distinction.

18           MR. NELSON: Well, I think not. I  
19 don't think anybody would say that in that -- in  
20 that action, the individual is representing the  
21 state to seek a recovery on its behalf for some  
22 violation of the -- the state's sovereign  
23 interests in enforcement of its laws. It's just  
24 saying, you know, you -- you have a user fee for  
25 -- for the courts. I -- I don't think that

1 changes the -- the nature of the right asserted  
2 from being an essentially private right.

3 And, in this case, as -- as -- as my  
4 friend has explained, you know, to the extent  
5 that -- of the nine violations that affected  
6 Ms. Moriana in this case, if she has damages  
7 resulting from that or some entitlement to an  
8 individual recovery, which -- which, for a  
9 couple of the violations, she doesn't, she could  
10 pursue that on her own behalf, and -- and  
11 everyone agrees that -- that that is an  
12 arbitrable claim and that she can't pursue that  
13 as part of a class action under Concepcion if  
14 she's agreed not to.

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

24 JUSTICE BARRETT: Mr. Nelson, what if  
25 California created a cause of action that could

1 be vindicated only in a class action suit?  
2 Justice Kagan pointed out to Mrs. -- Mr. Clement  
3 that not permitting the PAGA claim to proceed  
4 here in arbitration would be overriding -- or on  
5 a class-wide basis, essentially, would be  
6 overriding California's chosen enforcement  
7 mechanism.

8           What if its chosen enforcement  
9 mechanism in something that we would consider a  
10 cause of action was class action litigation or  
11 class-wide litigation? What would -- what then?

12           MR. NELSON: I mean, I -- I -- I  
13 guess, if the class consists of a group of  
14 individuals who each have an individual cause of  
15 action, but they can only pursue that through a  
16 class action, I don't think that that would be  
17 permissible.

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

1                   JUSTICE BARRETT:  So it's most  
2           important to you that this claim, as you say,  
3           belongs to California?  That's the most  
4           important piece of your argument, you would say?

5                   MR. NELSON:  I'm not -- I'm not sure  
6           that that is the most important piece of -- of  
7           the argument because the -- the -- my argument  
8           is also that if -- if California affords an  
9           individual a right to a particular recovery, I  
10          -- I think, you know, my premise there is that  
11          the FAA cannot be used as a mechanism to -- to,  
12          you know, sort of defease that -- that right,  
13          so, you know -- and that exists regardless of  
14          whether the right is individual or held by the  
15          state.

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

24                   So, if the -- if the action were  
25          brought by the state, it's clear that's

1 bilateral litigation between the state and the  
2 employer. If it's brought by the state's  
3 representative, it's equally bilateral  
4 litigation or arbitration. If there's a -- a --  
5 an agreement -- agreement to arbitrate these  
6 claims instead of waiving them, it would be a  
7 bilateral proceeding between the state through  
8 its individual representative and the -- and the  
9 defendant.

10 JUSTICE ALITO: For purposes of the  
11 FAA question that is before us, are we bound by  
12 California's characterization of this PAGA  
13 claim?

14 Justice Barrett asked whether we're  
15 required to regard it as procedural rather than  
16 substantive.

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

20 But I have a similar -- I -- I have a  
21 related question. Are we required to regard  
22 this PAGA thing as a single claim for these  
23 purposes, or could we not understand it as a set  
24 of claims, a PAGA claim as in reality a set of  
25 claims integrated into a single action by an

1 implicit rule of claim joinder?

2 And if we viewed it that way, could we  
3 not hold that freedom over arbitration procedure  
4 recognized by Epic and Concepcion implies that  
5 parties can choose a different rule of claim  
6 joinder, in other words, one that would limit  
7 arbitration to claims based on personal  
8 injuries?

9 MR. NELSON: Justice Alito, I -- I --  
10 I just want to start my answer by -- by saying  
11 that I think your question, although similar to  
12 Justice Barrett's, is a little different, and --  
13 and so the answer to it may -- may also be  
14 different.

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

24 But, as to the nature of the claim,  
25 its requisites, what -- what it is for and --

1 and how it proceeds, on those aspects, I think  
2 the Court is bound by California law.

3 Now the -- the -- the Iskanian  
4 decision, I -- I think, kind of -- had kind of  
5 an interesting passage where the California  
6 Supreme Court said, you know, we think perhaps  
7 that -- that if what the state was trying to do  
8 was -- was just a subterfuge to avoid the FAA,  
9 that you might be able to -- to kind of look  
10 through the -- the, you know, statute that  
11 provided for collective proceedings aggregating  
12 individual claims under the, you know, sort of  
13 false flag label, that it was -- that it was  
14 something different.

15 JUSTICE ALITO: But California --

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

23 JUSTICE ALITO: But this doesn't seem  
24 like --

25 MR. NELSON: -- in -- in this context

1 or any other.

2 JUSTICE ALITO: -- one -- this doesn't  
3 seem like one claim to me in any ordinary sense  
4 of the word. It's a -- it's a bunch of  
5 different -- it involves a bunch of different  
6 violations. They don't even have to be -- they  
7 don't have to be violations of the same code  
8 provision, do they?

9 MR. NELSON: They do not have to be  
10 violations of the same code.

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

20 Would they be one claim for purposes  
21 of claim preclusion?

22 MR. NELSON: For purposes of claim  
23 preclusion, I -- I think that -- that what the  
24 California Supreme Court has -- has suggested  
25 and the lower courts is you would -- you would



1 look at -- at the unit that was litigated in a  
2 prior case and, if it involved a -- a -- a claim  
3 of violations that -- that if pursued by the  
4 state would have a particular scope, it would --  
5 it would preclude claims of that scope, even  
6 perhaps if it were settled on a narrower basis.

7 So claim preclusion is not, you know,  
8 individual violation by individual violation  
9 under PAGA.

10 I want to -- I -- I want to talk a  
11 little bit more about this -- this question of  
12 -- of substance versus procedure because, as my  
13 friend noted, you know, substance and procedure  
14 may mean different things in different contexts.

15 And I think what's critical in the FAA  
16 context, what the -- what the Court has  
17 described as substantive and as the kind of  
18 substantive claim that an individual does not  
19 waive by agreeing to arbitrate a -- a case  
20 rather than litigate it is the right to pursue a  
21 statutory remedy.

22 And that's clearly what this -- this  
23 agreement waives for -- for Ms. Moriana and for  
24 the state to the extent that -- that she  
25 represents its interests in a particular manner.

1 It does not permit her to -- to pursue that  
2 statutory remedy.

3 And there's nothing in -- as I think  
4 Justice Breyer pointed out, in any of the -- the  
5 Court's precedents in this area where the Court  
6 has -- has said that an arbitration agreement,  
7 which is by nature supposed to be enforced  
8 insofar as an issue is referable to arbitration,  
9 and then that issue is to be arbitrated  
10 according to the terms of the agreement, that --  
11 that that arbitration agreement can be used as a  
12 vehicle for extinguishing a right to a remedy  
13 that is not under the terms of the arbitration  
14 agreement referable to arbitration.

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

25 MR. NELSON: Well, the substantive

1 claim in this case is the claim to recover civil  
2 penalties for these violations, which are  
3 available only via PAGA. And the arbitration  
4 agreement explicitly prohibits the -- the  
5 assertion of a Private Attorney General Act or a  
6 private attorney general claim and a  
7 representative claim. And both of those  
8 precisely describe what a PAGA claim is.

9 And -- and so, you know --

10 CHIEF JUSTICE ROBERTS: But if -- but  
11 if the -- the PAGA claim is for late paycheck,  
12 she can pursue her claim for a late paycheck  
13 under the labor code, right?

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

23 And, you know, my friend said, well,  
24 we have no objection to her pursuing that claim  
25 on her own behalf if she limits it to the

1 penalties attributable to the violation  
2 affecting her.

3           The problem with that is twofold.  
4 First of all, this Court has made abundantly  
5 clear that a person can never be compelled to  
6 arbitrate a -- a -- a claim that they did not  
7 agree to arbitrate. The parties here  
8 specifically agreed to carve that claim out from  
9 arbitration. So that's not something that  
10 Viking can waive and say, well, we've waived  
11 that limitation, we're -- we're now compelling  
12 her to arbitrate.

13           JUSTICE SOTOMAYOR: Counsel, let's  
14 assume -- because it -- the anti-waiver rule as  
15 it stands I think basically says an individual  
16 can't be forced to waive the PAGA claim,  
17 correct?

18           MR. NELSON: That's correct.

19           JUSTICE SOTOMAYOR: And the PAGA claim  
20 by definition in the state is a claim on the  
21 individual's behalf and all others who have  
22 suffered the same violation, correct?

23           MR. NELSON: Yes. Thank you.

24           JUSTICE SOTOMAYOR: All right. So  
25 assuming for the sake of argument that Mr.

1 Clement had said she can arbitrate it, she can  
2 arbitrate that claim in arbitration or she can  
3 arbitrate it in court, you wouldn't have a  
4 problem with that?

5 MR. NELSON: No, not at all.

6 JUSTICE SOTOMAYOR: All right. And  
7 you wouldn't have a problem with the state  
8 saying you can't waive it, you can decide it in  
9 arbitration or in court, correct?

10 MR. NELSON: That's right.

11 JUSTICE SOTOMAYOR: Now let's assume,  
12 going back to the Chief's beginning question --  
13 and I think it -- you run into a problem with  
14 Concepcion and Epic -- that California said you  
15 can't arbitrate this claim at all. You have to  
16 bring it in court.

17 I don't see how that would be legal  
18 under Concepcion.

19 MR. NELSON: That would depend on  
20 whether the FAA applies to -- to a state's claim  
21 when a state is not a party to the agreement.  
22 That's the -- the -- you know, what we've called  
23 an alternative basis for affirmance here.

24 JUSTICE SOTOMAYOR: We -- we've sort  
25 of said that, but that's not the issue here.

1 But you're right that it's an open question on  
2 that. But the state hasn't done that here,  
3 correct?

4 MR. NELSON: That's right. And -- and  
5 that's -- that's critical. My -- my friend  
6 said, well, if you buy that argument, then --  
7 then PAGA claims would not be arbitrable. But  
8 the -- the -- the -- the thing that that  
9 overlooks is that Iskanian has not said as a  
10 matter of state law that you can't agree to  
11 arbitrate or enforce an arbitration agreement  
12 with respect to a PAGA claim. The --

13 JUSTICE ALITO: Didn't the court --

14 JUSTICE SOTOMAYOR: Thank you.

15 JUSTICE ALITO: -- the court of appeal  
16 in this case held that "an employee's  
17 predispute" -- "predispute agreement to  
18 arbitrate PAGA claims is unenforceable absent a  
19 showing the state also consented to the  
20 agreement"? That's a -- that's an  
21 arbitration-specific rule, is it not?

22 MR. NELSON: Your Honor, that would be  
23 an arbitration-specific rule. In our view,  
24 that's dicta in this case, and it's been dicta  
25 in every case in which the California Court of

1 Appeal -- there have been a handful of other  
2 cases where the California Court of Appeal has  
3 said that.

4 The California Supreme Court has never  
5 said that. It has consistently described  
6 Iskanian as an anti-waiver rule. And in this  
7 case, it was unnecessary to decision because the  
8 parties did not agree to arbitrate a PAGA claim.

9 So that issue would only come up if  
10 the parties had agreed to arbitrate PAGA claims  
11 and someone subject to such an agreement  
12 nonetheless objected to proceeding with  
13 arbitration. Then a court would have to face  
14 that issue. But it's not presented here and, in  
15 our view, not necessary to -- to sustain the  
16 judgment below in this case.

17 JUSTICE BREYER: But how -- here's --  
18 I'm -- I'm having trouble getting my mind around  
19 this. I -- I get the argument that this isn't  
20 like Concepcion because PAGA is not a class  
21 action, dah-dah-dah. That's the -- what I call  
22 the chill, okay? I know how to deal with that.

23 Now I also know this: Suppose you  
24 lose on that. Suppose. Okay. The next  
25 question, can they bring it in court? Now we

1 know this. If California says here's a claim of  
2 a certain kind which we give to certain people  
3 and they can't arbitrate it, we know that that  
4 would be preempted, unlawful if -- it's not a  
5 general matter but is aimed at arbitration. Am  
6 I right? So far, I'm right?

7 MR. NELSON: Yes.

8 JUSTICE BREYER: Okay. Now suppose  
9 instead of saying you can't arbitrate it, what  
10 they do -- and this is ridiculous, but you'll  
11 see why I do it this way for simplification --  
12 they put a spider next to it, and there's a rule  
13 saying you can't ever arbitrate anything with a  
14 spider, okay?

15 Now I'd guess we'd have to go back and  
16 see whether they put that spider on it in order  
17 to be hostile to arbitration or whether it was  
18 something that applied to a lot of laws, had  
19 nothing to do with arbitration. Right? I think  
20 so.

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

24 JUSTICE BREYER: Yeah.

25 MR. NELSON: -- is an



1 arbitration-specific rule.

2 JUSTICE BREYER: Yeah. If it is, they  
3 can't do it.

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

6 JUSTICE BREYER: Yeah, yeah. Well,  
7 wait, wait. Let me get to step 3, where we are  
8 here, because the question here on the spider  
9 analogy would be is PAGA, with its special  
10 rules, like the spider -- and you can call the  
11 spider class action, you say -- that's -- that  
12 -- that's Concepcion -- and if the answer is  
13 they put this on to keep it out of arbitration,  
14 hey, sorry, you can't have the law at all  
15 because there's no way to have this law without  
16 the spider.

17 But, if they put it on generally, they  
18 can do it. They can do it. And not the  
19 briefing, not -- if I'm right in my weird  
20 analogy, I don't know where to go because maybe  
21 it's just my fault, just ignore it, you don't  
22 even have to answer the question because it's  
23 too weird, but -- but I -- I -- I -- I would  
24 like you to see why I'm having trouble with this  
25 question of whether they can bring it at all in

1 a court if you lose on the first point.

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

5 (Laughter.)

6 MR. NELSON: -- I'm going to take a  
7 stab at it anyway because, you know, I don't  
8 think these cases are -- are any fun without a  
9 little bit of zoology involved.

10 JUSTICE BREYER: Yeah. Right.

11 MR. NELSON: But, you know, if -- if  
12 the -- if the -- if what's going on is that the  
13 -- the state is imposing a spider that is  
14 inconsistent with the nature of arbitration,  
15 then that's what creates a problem.

16 And what's happened here is what the  
17 state has said is for contracts of -- whether  
18 they're part of an arbitration agreement or not,  
19 you can't waive the right to bring a PAGA claim  
20 in an -- in an employment agreement before the  
21 claim arises, okay? So the -- the spider  
22 applies to every kind of agreement.

23 But then the -- then the next question  
24 is: Okay, but, nonetheless, would there be  
25 something -- is there something about that that

1 -- that -- that has an adverse impact on  
2 arbitration specifically?

3           And that then gets to the question, is  
4 -- is a representative action where a  
5 representative pursues on a bilateral basis  
6 claims that may involve events affecting  
7 multiple individuals, is that inconsistent with  
8 what Congress meant in 1925 when it said  
9 arbitration?

10           And we know the answer to that is no  
11 because one of the familiar types of arbitration  
12 in 1925 was representative arbitration pursued  
13 bilateral between labor representatives and  
14 employers, between representatives of  
15 agricultural cooperatives and employers.

16           It was -- it was not something like a  
17 class action, a modern class action, a Rule 23  
18 class action or an FLSA collective action that  
19 didn't exist at the time, that someone might say  
20 was outside the notion of what the -- what  
21 Congress could have meant when it said settle a  
22 controversy by arbitration.

23           JUSTICE KAGAN: And, Mr. Nelson, when  
24 you look around the world of representative  
25 litigation, whether it's shareholder suits or

1 ERISA suits or, you know, anything else you can  
2 come up with, I mean, you know, qui tam suits, I  
3 guess, are a form of representative litigation.

4 I mean, what is this like and what is  
5 it unlike? And if we go down the route that Mr.  
6 Clement says we ought to go down, what are the  
7 consequences with respect to those  
8 representative actions?

9 MR. NELSON: Well, I think -- I think  
10 it's quite similar to a qui tam action in the  
11 sense -- in -- in a number of respects. One is  
12 that the representative in that case pursues the  
13 -- the government's claim with respect to false  
14 claims regardless of whether they affected that  
15 individual.

16 So let's say it's -- it's a -- a  
17 medical provider submitted false claims for  
18 Medicaid reimbursement. The person happens to  
19 notice -- know about it because it happened in  
20 their case, but they're pursuing that claim on  
21 behalf of the government no matter who it  
22 affected.

23 And because of the nature of -- of the  
24 contractual privity between many potential qui  
25 tam relators and defendants, because they're

1 often -- they're often employees who are in a  
2 position to be relators or contracting parties  
3 who are aware of -- of the false claim that  
4 related to that contractual arrangement, if --  
5 if the potential defendant were to put in a  
6 properly worded arbitration agreement in their  
7 -- in their contract with that individual, it  
8 could bar the assertion of a representative  
9 claim in exactly the same way if -- if my  
10 friend's argument is accepted.

11 I think the same is true of  
12 shareholder derivative actions, which, you know,  
13 are -- that's kind of a -- a new frontier in the  
14 area of arbitration, but corporations are  
15 increasingly trying to bind their shareholders  
16 to arbitration agreements and -- and could  
17 significantly limit the -- the ability of  
18 shareholders to pursue representative actions  
19 that -- that would involve, you know,  
20 potentially interests beyond their own but --  
21 but that are pursued bilaterally on -- by the  
22 shareholder on behalf of the corporation against  
23 the wrongdoer.

24 JUSTICE KAGAN: And -- and I take it  
25 on Mr. Clement's argument, it would not just be

1 saying we don't want to do this in arbitration,  
2 we don't think it's consistent with, you know,  
3 the -- the nature of this action is consistent  
4 with arbitration, but those, if Mr. Clement  
5 prevails, we can entirely wipe out those  
6 suits --

7 MR. NELSON: Exactly.

8 JUSTICE KAGAN: -- bring them in  
9 arbitration, bring them in litigation. It  
10 doesn't matter.

11 MR. NELSON: That's right. And --  
12 and, you know, I mean, no one is saying that if  
13 you say a PAGA claim is -- is non-waiveable,  
14 that that means employers will be required to  
15 arbitrate them. If they don't want to arbitrate  
16 them, they can always exclude them from the  
17 arbitration agreement and let them proceed in  
18 court.

19 I don't share my friend's prediction  
20 as to what would happen in that regime. I don't  
21 think it would lead to a flight from arbitration  
22 because, in view of the -- of the authority of  
23 an arbitrator to limit the scope of -- of  
24 discovery and proof and to limit the recovery, I  
25 suspect there would be a flight toward

1 arbitration for PAGA claims.

2 Obviously, employers' first choice is  
3 let's eliminate the PAGA claim entirely if we  
4 can get away with it. But the -- the -- the  
5 idea that -- that companies don't arbitrate  
6 large-scale disputes between themselves because  
7 they don't perceive any advantage to arbitrating  
8 them I think is just empirically false.

9 JUSTICE KAGAN: I suppose Mr. Clement  
10 might say the disadvantage of doing it in  
11 arbitration is that there's no review of the  
12 arbitrator's decision or a -- a very limited  
13 kind of review.

14 MR. NELSON: There -- there certainly  
15 is limited review. And -- and that -- that  
16 disadvantage falls most heavily on the  
17 non-repeat players in the process, who are --  
18 are the most likely to -- to have an unfavorable  
19 outcome in arbitration that they would want to  
20 seek review of.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Thomas, any questions?

23 JUSTICE THOMAS: No question, Mr.  
24 Chief Justice.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer?

2 Justice Alito, anything further?

3 Justice Gorsuch, any questions?

4 JUSTICE KAVANAUGH: Just one question.

5 I wanted to give you an opportunity to respond  
6 to Mr. Clement's point which he mentioned a  
7 couple times, not a central point, but about the  
8 other states and that California is an outlier  
9 here. I'll just give you a chance to respond in  
10 any way you want.

11 MR. NELSON: Well, it -- it's  
12 certainly true that California is -- is the only  
13 -- the only state that -- that has this  
14 mechanism. And I think that -- that -- that the  
15 reason California chose this mechanism was that  
16 it -- it wanted to enhance its enforcement and  
17 picked the class of representatives who were the  
18 most likely to be effective representatives of  
19 its interests as opposed to the entire public.

20 And, you know, it's -- it's -- I think  
21 it's somewhat ironic that -- that one of the --  
22 one of the arguments made in favor of this  
23 Court's review was that if you let California do  
24 it, everyone will do it. Now California is the  
25 only -- the only state that wants to do it.



1           I -- I think the fact of the matter  
2     is, you know, there may be states that -- that  
3     for their own purposes will make use of -- of  
4     novel structures allowing individuals to bring  
5     actions on behalf of the state, and some of  
6     those may be in contexts where arbitration  
7     agreements might be invoked to block those.

8           We haven't seen a lot of that. But  
9     the fact that California has chosen to do it we  
10    think is entitled to respect, even if California  
11    remains the only state that does so.

12           JUSTICE KAVANAUGH: Thank you.

13           CHIEF JUSTICE ROBERTS: Justice  
14    Barrett, anything further?

15           Thank you, counsel.

16           Rebuttal, Mr. Clement?

17           REBUTTAL ARGUMENT OF PAUL D. CLEMENT

18                   ON BEHALF OF THE PETITIONER

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

21           First, a lot has been said about the  
22    differences between PAGA claims and class  
23    actions, but I think it's worth recognizing the  
24    similarities between an employer-wide PAGA  
25    action and an FLSA collective action.

1                   I mean, the FLSA collective action is  
2 a means of securing the federal wage and hour  
3 laws on behalf of similarly situated employees.  
4 PAGA is a way for an employee to vindicate  
5 California's wage and hour laws, and it's not  
6 even restricted to similarly situated employees.

7                   It's anything goes, the whole  
8 workforce. It makes no sense to say that Epic  
9 controls as to the FLSA collective actions, but  
10 you don't extend it to PAGA actions.

11                   The second point I want to emphasize  
12 is we don't care about this being representative  
13 in the sense that a state gets a 75 percent cut  
14 of the \$100 violation that was provided or  
15 penalty that was provided by PAGA. That's not  
16 the -- the sense in which the representative  
17 nature of these cases bothers us.

18                   It is the fact that it is  
19 representative on behalf of all other employees  
20 for all these disparate violations. That is  
21 what is critical here. And if you can combine  
22 those two and just reconceptualize this as a  
23 state action on behalf of the entire workforce  
24 that one person gets to bring, then there's  
25 nothing left of Concepcion.

1           You could easily envision or  
2 reconceptualize the harm there, the consumers  
3 that paid sales tax on the phone when they were  
4 told they were free, as a violation of state law  
5 that one individual gets to vindicate on behalf  
6 of everybody who paid a little extra for their  
7 phone and, poof, there goes Concepcion. This is  
8 just too naked a circumvention.

9           And in thinking about how this affects  
10 other laws, I do think the dogs that aren't  
11 barking here are very relevant. I mean, if this  
12 really were a threat to derivative actions,  
13 Delaware would be here. If this was a threat to  
14 the federal claims -- the False Claims Act qui  
15 tam actions, the United States would be here.  
16 This is an outlier, just like the DirecTV rule  
17 out of California was an outlier. There's a  
18 reason this is coming out of California.

19           Third, a word on the differences  
20 between substance and procedure here. Those  
21 distinctions are always elusive. My friend  
22 talks about a PAGA claim. I don't think,  
23 properly understood, there is such a thing as  
24 even a PAGA claim.

25           There's a claim for violating the

1 labor code. If you violate the labor code by  
2 not giving the last paycheck in a timely way,  
3 there's a labor code violation. The labor code  
4 is what provides the substance here.

5 Now it provides specific penalties,  
6 including a statutory penalty for a -- a late  
7 final check. The only question here is whether,  
8 in addition to that and damages, you also get  
9 this \$100 per violation that was introduced by a  
10 statute.

11 We don't have any problem if they get  
12 it. The only reason we don't know for sure  
13 whether they get it is because my friends on the  
14 other side have so far successfully resisted the  
15 arbitration and it'd be a question for the  
16 arbitrator, whether that's available. But it's  
17 certainly not off the table as far as we're  
18 concerned.

19 And this distinction between substance  
20 and procedure, it can't be used to just get  
21 around Concepcion and Epic. It would be the  
22 easiest thing in the world to create a new  
23 treble damages remedy available only in class  
24 actions. Clearly, that new treble damages  
25 remedy would be substantive for Erie purposes,

1 and you could then say: A-ha, well, now you can  
2 no longer have a class action waiver.

3           That's effectively what this is.  
4 They've reconceptualized this claim as  
5 inherently a class-wide claim, an inherently  
6 employer-wide claim, and then they say: All  
7 right, you're going to -- we're going to force  
8 this into arbitration. We know full well you  
9 won't do it in arbitration. It's going to end  
10 up back in court, and we're going to have all of  
11 the problems we were -- this Court tried to  
12 avoid in Concepcion and Epic.

13           So there's a lot of conceptual issues  
14 here with procedure and substance. I just want  
15 to finish for a minute by talking about  
16 practicalities.

17           The practicalities, on the one hand,  
18 are well illustrated by the complaint in this  
19 case. The only specific allegation Moriana  
20 makes as to herself is the timing of her final  
21 paycheck. If that's all this case were about,  
22 then an arbitrator could dispatch that case in  
23 about an hour. It's the simplest thing in the  
24 world. Cut her a check. If we have to cut a  
25 second check to the state, that's easy.

1                   But, instead, nine different  
2                   violations on behalf of the entire sales force,  
3                   California has made clear in the Williams case  
4                   you get discovery coextensive with the class  
5                   action. By the time we're done trying to figure  
6                   that out in arbitration, we'd have to hire a  
7                   claims administrator to give the checks and  
8                   identify people. Nobody is going to do it.  
9                   Arbitration will be gutted in practice.

10                   And then there's this final  
11                   practicality: Before Concepcion, PAGA was the  
12                   statute nobody paid too much attention to.  
13                   After Concepcion, 17 PAGA complaints are being  
14                   filed every day. These actions are being  
15                   litigated. They involve 565,000 Lyft drivers,  
16                   165,000 employees at Marshalls. They look in  
17                   every practical effect just like class actions.  
18                   They pose the same problems.

19                   And, indeed, it's even worse than that  
20                   because, in practice, if you have to litigate in  
21                   court the PAGA claim on behalf of the entire  
22                   workforce, as the Chamber amicus brief points  
23                   out, what you end up doing is you get a class  
24                   action in there and settle the whole thing so  
25                   you can buy employee-wide peace.

1 Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

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

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