

**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 77  
Place: Washington, D.C.  
Date: March 30, 2022

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VIKING RIVER CRUISES, INC., )

Petitioner, )

v. ) No. 20-1573

ANGIE MORIANA, )

Respondent. )

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Washington, D.C.

Wednesday, March 30, 2022

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is participating remotely.

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

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

11 I'd welcome the Court's questions.

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

19 MR. CLEMENT: I --

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

25 MR. CLEMENT: I think, Mr. Chief

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

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

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

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

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

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

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



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

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

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

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

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

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

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

11           I don't think that --

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

25           MR. CLEMENT: So, Justice Kagan, I

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

9           But I do think that, certainly, if we  
10 take Concepcion and Epic and Lamps Plus as a  
11 given, and nobody's asked you to overrule those  
12 cases here, the logic follows directly that 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 that this employer did with respect to some  
13                  other employees and the money then is set and  
14                  goes to California and they distribute it, the  
15                  state.

16                  And then some other ones are that you  
17                  -- there's no right to receive notice -- I wrote  
18                  them down -- 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 in a qui tam  
5 action. Why not?

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

9 JUSTICE BREYER: Yeah.

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

12 JUSTICE BREYER: Because?

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

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

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

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

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

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

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

20 JUSTICE KAGAN: But you are not --

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

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 -- but what  
2 you're saying -- so -- so your point -- I just  
3 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: 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 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 having a  
21 series of problems with all of your answers.  
22 PAGA came eight years before Concepcion or Epic.

23 So it's not California creating an  
24 intentional evasion of Concepcion or Epic,  
25 correct? It didn't intentionally predict that

1 what we were going to do there and say now we  
2 got to find a way to get around Epic and  
3 Concepcion?

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

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

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

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

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

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

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

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

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

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

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

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

25           JUSTICE SOTOMAYOR: It's the same --

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

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

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

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



1 action.

2 MR. CLEMENT: So --

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

8 MR. CLEMENT: So --

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

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

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

1 can only get a treble damages remedy if you  
2 pursue it through a class action.

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

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

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

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

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

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

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

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

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

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

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

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

1 vindicate any violation of the labor code. And  
2 that person wouldn't be in any sort of  
3 contractual relationship with the employer, and,  
4 therefore, I don't see how the FAA would come  
5 into the picture.

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

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

21 Now I think, ultimately, that probably  
22 might have something to do with the Due Process  
23 Clause, or to put it differently, if they didn't  
24 have that constraint, I would be happy to argue  
25 that you just can't have a statute where

1 everybody under the sun can sue. It's just not  
2 consistent with due process. But that's  
3 obviously an argument for another day.

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

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

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

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

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

24 And all your arguments are  
25 essentially, like, this is really unfair to

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

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

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

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

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

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

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

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

16                  CHIEF JUSTICE ROBERTS: Thank you,  
17                  counsel.

18                  Justice Thomas, any questions?

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

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

25                  I think that's the way you -- I would



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

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

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

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

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

6 JUSTICE THOMAS: Thank you.

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

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Justice  
12 Breyer?

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

17 (Laughter.)

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

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

25 The first part is I just go look at

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

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

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

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

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

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

19 JUSTICE BREYER: Yeah.

20 MR. CLEMENT: -- to Concepcion.

21 JUSTICE BREYER: Yeah. That --

22 MR. CLEMENT: And -- and --

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

25 MR. CLEMENT: And -- and --

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

3 MR. CLEMENT: Right.

4 JUSTICE BREYER: -- I think I do.

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

8 JUSTICE BREYER: Yeah.

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

11 JUSTICE BREYER: Yeah.

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

16 After Concepcion --

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

1 California. You can't do that. You can't put  
2 that in a contract, okay?

3 Now what?

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

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

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

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

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

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

24 MR. CLEMENT: She can bring her claim  
25 in arbitration.

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

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

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

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

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

25 And if that private attorney has

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

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

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

22           And I don't think that can -- that --  
23 that can't possibly work. So, at the end of the  
24 day, the critical thing here is the fact that --  
25 is not that they call it the state's claim, but



1 they let all of these other multitudinous claims  
2 into this one proceeding, and that's  
3 inconsistent with bilateral arbitration.

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

6 Justice Sotomayor?

7 Justice Kagan?

8 Justice Gorsuch, anything?

9 Justice Kavanaugh?

10 Justice Barrett?

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

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

25 MR. CLEMENT: I think it's ultimately

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

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

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

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

1 line is the right line here at all.

2 JUSTICE BARRETT: Thanks.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Nelson.

6 ORAL ARGUMENT OF SCOTT L. NELSON

7 ON BEHALF OF THE RESPONDENT

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

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

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

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

23 Viking's employment contract with  
24 Ms. Moriana explicitly prohibits private  
25 attorney general actions and representative

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

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

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

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

6                   I welcome the Court's questions.

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

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

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

24                  CHIEF JUSTICE ROBERTS: -- from the  
25                  point of view of the arbitration perspective --

1 policies.

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

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

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

1       cumbersome in the way that the Court has held is  
2       inconsistent with the nature of arbitration.

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

20                 But, in any event, the key thing -- I  
21      don't think this Court has ever suggested that  
22      if a claim is just so big that somebody might  
23      prefer not to arbitrate it, that they have the  
24      option, in addition to just cutting it out of  
25      their arbitration agreement and letting it

1 proceed in court, to just say: No, the  
2 individual is required to arbitrate all their  
3 claims, but some claims you just can't bring,  
4 and you can't bring them in court either.

5 JUSTICE BARRETT: Mr. Nelson, can --

6 CHIEF JUSTICE ROBERTS: One of --

7 JUSTICE BARRETT: Oh, sorry, Chief.

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

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

23 MR. NELSON: No, Your Honor, I don't  
24 -- I don't believe that would, you know, any  
25 more than the fact that -- that certain



1 recoveries are -- are taxable as income.

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

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

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

25           And, in this case, as -- as -- as my

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

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

21 JUSTICE BARRETT: Mr. Nelson, what if  
22 California created a cause of action that could  
23 be vindicated only in a class action suit?  
24 Justice Kagan pointed out to Mrs. -- Mr. Clement  
25 that not permitting the PAGA claim to proceed

1 here in arbitration would be overriding -- or on  
2 a class-wide basis, essentially, would be  
3 overriding California's chosen enforcement  
4 mechanism.

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

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

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

23 JUSTICE BARRETT: So it's most  
24 important to you that this claim, as you say,  
25 belongs to California? That's the most

1 important piece of your argument, you would say?

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

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

21 So, if the -- if the action were  
22 brought by the state, it's clear that's  
23 bilateral litigation between the state and the  
24 employer. If it's brought by the state's  
25 representative, it's equally bilateral

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

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

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

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

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

24 And if we viewed it that way, could we  
25 not hold that freedom over arbitration procedure

1 recognized by Epic and Concepcion implies that  
2 parties can choose a different rule of claim  
3 joinder, in other words, one that would limit  
4 arbitration to claims based on personal  
5 injuries?

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

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

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

25 Now the -- the -- the Iskanian

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

12 JUSTICE ALITO: But, at some point --

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

20 JUSTICE ALITO: But this doesn't seem  
21 like --

22 MR. NELSON: -- in -- in this context  
23 or any other.

24 JUSTICE ALITO: -- one -- this doesn't  
25 seem like one claim to me in any ordinary sense

1 of the word. It's a -- it's a bunch of  
2 different -- it involves a bunch of different  
3 violations. They don't even have to be -- they  
4 don't have to be violations of the same code  
5 provision, do they?

6 MR. NELSON: They do not have to be  
7 violations of the same code.

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

16 Would they be one claim for purposes  
17 of claim preclusion?

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



1 it would preclude claims of that scope, even  
2 perhaps if it were settled on a narrower basis.

3 So claim preclusion is not, you know,  
4 individual violation by individual violation  
5 under PAGA.

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

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

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

24 And there's nothing in -- as I think  
25 Justice Breyer pointed out, in any of the -- the

1 Court's precedents in this area where the Court  
2 has -- has said that an arbitration agreement,  
3 which is by nature supposed to be enforced  
4 insofar as an issue is referable to arbitration,  
5 and then that issue is to be arbitrated  
6 according to the terms of the agreement, that --  
7 that that arbitration agreement can be used as a  
8 vehicle for extinguishing a right to a remedy  
9 that is not under the terms of the arbitration  
10 agreement referable to arbitration.

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

21 MR. NELSON: Well, the substantive  
22 claim in this case is the claim to recover civil  
23 penalties for these violations, which are  
24 available only via PAGA. And the arbitration  
25 agreement explicitly prohibits the -- the

1 assertion of a Private Attorney General Act or a  
2 private attorney general claim and a  
3 representative claim. And both of those  
4 precisely describe what a PAGA claim is.

5 And -- and so, you know --

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

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

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

24 The problem with that is twofold.  
25 First of all, this Court has made abundantly

1 clear that a person can never be compelled to  
2 arbitrate a claim that they did not agree to  
3 arbitrate. The parties here specifically agreed  
4 to carve that claim out from arbitration. So  
5 that's not something that Viking can waive and  
6 say, well, we've waived that limitation, we're  
7 -- we're now compelling her to arbitrate.

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

13 MR. NELSON: That's correct.

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

18 MR. NELSON: Yes. Thank you.

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

25 MR. NELSON: No, not at all.

1 JUSTICE SOTOMAYOR: All right. And  
2 you wouldn't have a problem with the state  
3 saying you can't waive it, you can decide it in  
4 arbitration or in court, correct?

5 MR. NELSON: That's right.

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

12 I don't see how that would be legal  
13 under Concepcion.

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

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

24 MR. NELSON: That's right. And -- and  
25 that's -- that's critical. My -- my friend

1 said, well, if you buy that argument, then --  
2 then PAGA claims would not be arbitrable. But  
3 the -- the -- the -- the thing that that  
4 overlooks is that Iskanian has not said as a  
5 matter of state law that you can't agree to  
6 arbitrate or enforce an arbitration agreement  
7 with respect to a PAGA claim. The --

8 JUSTICE ALITO: Didn't the court --

9 JUSTICE SOTOMAYOR: Thank you.

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

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

24 The California Supreme Court has never  
25 said that. It has consistently described

1 Iskanian as an anti-waiver rule. And in this  
2 case, it was unnecessary to decision because the  
3 parties did not agree to arbitrate a PAGA claim.

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

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

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

1 I right? So far, I'm right?

2 MR. NELSON: Yes.

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

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

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

19 JUSTICE BREYER: Yeah.

20 MR. NELSON: -- is an  
21 arbitration-specific rule.

22 JUSTICE BREYER: Yeah. If it is, they  
23 can't do it.

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



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

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

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

24 (Laughter.)

25 MR. NELSON: -- I'm going to take a

1 stab at it anyway because, you know, I don't  
2 think these cases are -- are any fun without a  
3 little bit of zoology involved.

4 JUSTICE BREYER: Yeah. Right.

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

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

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

22 And that then gets to the question, is  
23 -- is a representative action where a  
24 representative pursues on a bilateral basis  
25 claims that may involve events affecting

1 multiple individuals, is that inconsistent with  
2 what Congress meant in 1925 when it said  
3 arbitration?

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

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

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

23           I mean, what is this like and what is  
24 it unlike? And if we go down the route that Mr.  
25 Clement says we ought to go down, what are the

1 consequences with respect to those  
2 representative actions?

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

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

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

1 it could bar the assertion of a representative  
2 claim in exactly the same way if -- if my  
3 friend's argument is accepted.

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

17 JUSTICE KAGAN: And -- and I take it  
18 on Mr. Clement's argument, it would not just be  
19 saying we don't want to do this in arbitration,  
20 we don't think it's consistent with, you know,  
21 the -- the nature of this action is consistent  
22 with arbitration, but those, if Mr. Clement  
23 prevails, we can entirely wipe out those  
24 suits --

25 MR. NELSON: Exactly.

1 JUSTICE KAGAN: -- bring them in  
2 arbitration, bring them in litigation. It  
3 doesn't matter.

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

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

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

1       them I think is just empirically false.

2                   JUSTICE KAGAN: I suppose Mr. Clement  
3       might say the disadvantage of doing it in  
4       arbitration is that there's no review of the  
5       arbitrator's decision or a -- a very limited  
6       kind of review.

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

14                  CHIEF JUSTICE ROBERTS: Justice  
15      Thomas, any questions?

16                  JUSTICE THOMAS: No questions, Mr.  
17      Chief Justice.

18                  CHIEF JUSTICE ROBERTS: Justice  
19      Breyer?

20                  Justice Alito, anything further?

21                  Justice Gorsuch, any questions?

22                  JUSTICE KAVANAUGH: Just one question.  
23      I wanted to give you an opportunity to respond  
24      to Mr. Clement's point which he mentioned a  
25      couple times, not a central point, but about the

1 other states and that California is an outlier  
2 here. I'll just give you a chance to respond in  
3 any way you want.

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

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

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



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

5                   JUSTICE KAVANAUGH: Thank you.

6                   CHIEF JUSTICE ROBERTS: Justice  
7 Barrett, anything further?

8                   Thank you, counsel.

9                   Rebuttal, Mr. Clement?

10                  REBUTTAL ARGUMENT OF PAUL D. CLEMENT

11                                 ON BEHALF OF THE PETITIONER

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

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

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

25                  It's anything goes, the whole

1 workforce. It makes no sense to say that Epic  
2 controls as to the FLSA collective actions, but  
3 you don't extend it to PAGA actions.

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

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

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

1 just too naked a circumvention.

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

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

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

23           Now it provides specific penalties,  
24 including a statutory penalty for a late final  
25 check. The only question here is whether, in

1 addition to that and damages, you also get this  
2 \$100 per violation that was introduced by a  
3 statute.

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

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

21 That's effectively what this is.  
22 They've reconceptualized this claim as  
23 inherently a class-wide claim, an inherently  
24 employer-wide claim, and then they say: All  
25 right, you're going to -- we're going to force

1 this into arbitration. We know full well you  
2 won't do it in arbitration. It's going to end  
3 up back in court, and we're going to have all of  
4 the problems we were -- this Court tried to  
5 avoid in Concepcion and Epic.

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

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

19 But, instead, nine different  
20 violations on behalf of the entire sales force,  
21 California has made clear in the Williams case  
22 you get discovery coextensive with the class  
23 action. By the time we're done trying to figure  
24 that out in arbitration, we'd have to hire a  
25 claims administrator to give the checks and

1 identify people. Nobody is going to do it.  
2 Arbitration will be gutted in practice.

3 And then there's this final  
4 practicality: Before Concepcion, PAGA was the  
5 statute nobody paid too much attention to.  
6 After Concepcion, 17 PAGA complaints are being  
7 filed every day. These actions are being  
8 litigated. They involve 565,000 Lyft drivers,  
9 165,000 employees at Marshalls. They look in  
10 every practical effect just like class actions.  
11 They pose the same problems.

12 And, indeed, it's even worse than that  
13 because, in practice, if you have to litigate in  
14 court the PAGA claim on behalf of the entire  
15 workforce, as the Chamber amicus brief points  
16 out, what you end up doing is you get a class  
17 action in there and settle the whole thing so  
18 you can buy employee-wide peace.

19 Thank you, Your Honors.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. The case is submitted.

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

24

25

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