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Boba Fett, Bounty Hunters, and the Supreme Court's *Viking River* Decision: A New Hope

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Abstract

The United States Supreme Court recently issued a fractured decision in Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (June 15, 2022), a classic David v. Goliath clash between a worker and employer. Can arbitration agreements be used to eliminate group or representative actions brought against employers, where the plaintiff worker is serving as a bounty hunter for the State? Although the majority clearly holds that a worker's individual claims must be sent to arbitration pursuant to a predispute arbitration agreement, the splintered opinions leave some uncertainty regarding what happens to the representative claims of the other workers. Using the* Star Wars *universe, this Article clarifies and critiques flaws in the Court's ruling. The decision provides a new hope and blueprint for protecting the rights of workers and consumers around the country.*

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INTRODUCTION: A LONG TIME AGO . . . (CUE THE *STAR WARS* MAIN THEME MUSIC)

Arbitration existed before the founding of our country, and like the Force, arbitration has spread throughout every corner of our galaxy. Through arbitration, parties agree to submit their disputes to a private decision maker instead of a court, and arbitration agreements can be found in connection with all types of transactions.[1] Arbitration can have a Light Side, with the potential for speed, efficiency, low costs, and the use of experts serving as adjudicators.[2] But at the same time, there can be a Dark Side, where parties may abuse arbitration as a way to suppress legitimate claims. Arbitration can sometimes involve limited, one-sided procedures designed to favor a stronger party, and arbitration's confidentiality and privacy can help conceal wrongdoing.[3]

1. MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 1:4 (3d ed. 2022).

2. *Id.*

3. *Id.*; Bragg v. Linden Rsch., Inc., 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007) ("Taken together, [the harsh terms in the arbitration clause]

One important episode in this saga regarding arbitration has involved "Class Action Wars." Corporate America and the Supreme Court seem determined to dismantle the class action procedural device,[4] and arbitration has been used like Chewbacca's bowcaster weapon to destroy class actions. An individual arbitration agreement, whereby an individual consumer or worker agrees to arbitrate his or her dispute with the company in a bilateral or one-on-one proceeding, has been used successfully to date to eliminate the threat of class actions or collective proceedings. In a series of decisions, the Supreme Court has held that class actions are incompatible with arbitration, and an individual arbitration agreement can, in effect, end the prosecution of a class action filed in court.[5] An individual consumer or employee who files a class action in court against a company will quickly have the class action dismissed if the consumer or employee is bound by an arbitration clause.[6] Class or collective actions, like the Jedi, seem at times to be going extinct.

However, in California, which tends to be the wild, wild west or Tatooine of arbitration law with its cutting-edge arbitration developments, a bounty hunter appeared who could bring balance to the Class Action Wars: California's Private Attorneys General Act, more commonly known as PAGA.[7]

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demonstrate that the arbitration clause is not designed to provide [consumers] an effective means of resolving disputes with [the company]. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in [the company's] favor.").

4. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., joined by Ginsburg and Breyer, JJ., dissenting) ("To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

5. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (the Federal Arbitration Act preempts a California rule that a class waiver in an arbitration clause is unconscionable because the state rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citations omitted); *Am. Express*, 570 U.S. at 239 (holding that the Federal Arbitration Act does not permit courts to invalidate a class waiver where the plaintiff's cost of individually arbitrating a federal claim exceeds potential recovery).

6. *See, e.g.*, Carrera Chapple v. Ancestry.com Operations Inc., No. 20CV1456-LAB (DEB), 2020 WL 5847552, at *1–2 (S.D. Cal. Sept. 30, 2020) (dismissing a class action due to a class waiver in an arbitration clause).

7. *See generally* Cal. Lab. Code § 2698.

Through PAGA, an aggrieved worker can become like Boba Fett, the most legendary, feared bounty hunter in the *Star Wars* galaxy. This Boba Fett worker, in the name of the State of California, can pursue an employer and collect penalties for the employer's violations of California's labor code, even if the violations involve other co-workers.[8] These PAGA proceedings resemble to some degree a representative or group action of the Rebel Alliance, while the Empire of corporate America would prefer to divide and conquer so that workers can only bring individual claims. With PAGA actions, seventy-five percent of the penalties collected belong to the State, with twenty-five percent of the penalties going to workers like a bounty.[9] The theory behind PAGA is that the State of California, through its attorney general or state agencies, could bring these actions directly against employers who are violating the labor code, but because of limited resources and the size of California's workforce, the State has bestowed this power on private bounty hunter workers who can assist with enforcing the labor code.[10]

For several years, PAGA has been "the Way" to enforce California's labor code.[11] In the larger Class Action Wars, PAGA enables workers to avoid the harshness of individual arbitration agreements and seek collective remedies as bounty hunters for the State. The California Supreme Court has valiantly attempted to shield this process from federal preemption by holding that purported waivers of representative PAGA claims are unenforceable under California law.[12] Thousands of bounty hunters as a result have flooded California courts each year

8. *Id.* § 2699(g) ("[A]n aggrieved employee may recover [a] civil penalty . . . in a civil action . . . filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed.").

9. *Id.* § 2699(i).

10. Mattew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 SANTA CLARA L. REV. 413, 414 ("PAGA was enacted as a response to the growing disparity between California's large labor force and the increasingly finite staff of the state's enforcement agencies.").

11. "This is the Way" is commonly used in Mandalorian culture to refer to their belief system. Boba Fett was indoctrinated in the ways of the Mandalorians, a clan in the *Star Wars* universe.

12. *See* Iskanian v. CLS Transportation Los Angeles, LLC, 327 P.3d 129, 388–89 (Cal. 2014) (holding that PAGA claims do not interfere with the Federal Arbitration Act because the claims, brought on behalf of the government, were outside the scope of the federal statute).

through PAGA, and the rise in power of these bounty hunters set the stage for a galactic battle in the United States Supreme Court.[13] While California's PAGA allows for these representative actions on behalf of the State with a worker serving as a bounty hunter, several United States Supreme Court rulings under the Federal Arbitration Act (FAA) require individual actions through bilateral arbitration.[14] If a PAGA bounty hunter was bound by an arbitration clause, what should happen? Would Boba Fett survive the Sarlaac?[15]

I. BACKGROUND OF THE *VIKING RIVER* LITIGATION AND THE SUPREME COURT'S CERT GRANT: *"I'VE GOT A BAD FEELING ABOUT THIS"*[16]

Angie Moriana worked as a sales representative for Viking River Cruises, Inc., and an arbitration clause was part of her hiring.[17] Upon leaving the company, she sued Viking River in court for failing to pay her final wages on time.[18] In addition to her individual claims, she became like Boba Fett and asserted, in the name of the State of California through PAGA, claims suffered by other coworkers, such as claims regarding minimum wage, overtime payments, meal periods, and rest periods in violation of California's labor code. When Viking River sought to compel arbitration of Ms. Moriana's individual claim and dismissal of her representative PAGA claims, the lower court and appellate court denied Viking River's motion to compel

13. *See, e.g.*, Cameron Molis, *Curbing Concepcion: How States Can Ease the Strain of Predispute Arbitration to Counter Corporate Abusers*, 24 U. PA. J.L. & SOC. CHANGE 411, 430 (2021) (noting that "members of the business community [have] emphasized the 'deluge' of PAGA claims").

14. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (FAA prohibits states from conditioning the enforceability of arbitration agreements on the availability of class-wide procedures).

15. In *Return of the Jedi*, Boba Fett appears to die when he falls into the Great Pit of Carkoon containing the Sarlaac beast. STAR WARS: EPISODE VI – RETURN OF THE JEDI (Lucasfilm 1983).

16. A character says something to this effect in every *Star Wars* movie.

17. The facts set forth in this paragraph are taken from the majority opinion in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1915–17 (June 15, 2022).

18. *Id.*

arbitration.[19] Both courts held that waivers of PAGA claims were contrary to state policy, and PAGA claims cannot be split into arbitrable individual claims and non-arbitrable "representative" claims.[20]

The United States Supreme Court granted certiorari to determine if these rulings were consistent with the FAA. With a long track record of the United States Supreme Court overruling California decisions involving arbitration,[21] workers in California must have had a bad feeling about the Court's grant of certiorari.

II. YODA: "DIVIDED THE SUPREME COURT JUSTICES ARE"

A fractured decision the Justices issued in *Viking River Cruises, Inc. v. Moriana*, with a majority opinion, a partial concurrence, a full concurrence, and a dissent. One could see the possibility of this divided decision during oral argument when it became apparent that the Justices were struggling to conceptualize or disagreed on the nature of a PAGA suit. For example, should PAGA be viewed primarily as a joinder mechanism, whereby the claims of multiple workers are joined together in one proceeding? If PAGA is understood as merely a joinder tool of multiple parties, the employer should win before the Supreme Court because arbitration is viewed as incompatible with collective actions, and through arbitration, it is understood that one can give up procedural rules available in court like joinder rules. Should PAGA be understood as an action brought on behalf of and belonging to the State? If we view the workers as bounty hunters and the State of California as the real party in interest, then the workers should win because the State is not a party to or blocked by an arbitration clause. If the Court conceptualizes PAGA as something like a claim for substantive penalties, like a claim for punitive damages or treble damages, whereby the plaintiff can seek penalties for workplace violations, then perhaps the workers

19. *See* Moriana v. Viking River Cruises, 2020 Cal. App. Unpub. LEXIS 6045, at *6.

20. *Id.* at *5.

21. *See, e.g.,* DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Southland Corp. v. Keating, 465 U.S. 1 (1984).

should also win. Arbitration is not supposed to undermine the vindication of substantive rights, like a claim for damages or penalties. Qui-Gon Jinn wisely recognized in *The Phantom Menace*, "Your focus determines your reality," and Obi-Wan Kenobi in *Return of Jedi* observed that "many of the truths we cling to depend greatly on our own point of view."[22] Similarly, how the Justices conceptualized PAGA would likely determine how the Justices applied the FAA to this case.

A five-Justice majority opinion written by Justice Alito found that pursuant to the FAA, an individual worker who is trying to serve as a Boba Fett bounty hunter under PAGA can be compelled to arbitrate, in a one-on-one arbitration proceeding, his or her individual claims against the employer.[23] Earlier Supreme Court decisions, like *AT&T Mobility LLC v. Concepcion*, had held that the FAA can operate like the Death Star and overshadow and annihilate any state law that threatens fundamental attributes of arbitration.[24] The majority in *Viking River*, relying on such precedent, viewed the "freeform" joinder of claims allowed under PAGA as incompatible with the "basic" nature of arbitration, which the Court considered as "individualized and informal."[25] In other words, state law cannot condition arbitration on the availability of broad, procedural joinder rules. Thus, the worker's individual claims could be sent to one-on-one arbitration, and state law could not be used to impose the joinder of the claims of others in arbitration. Justice Barrett, joined by Justice Kavanaugh and Chief Justice Roberts, wrote a separate opinion and narrowly

22. STAR WARS: EPISODE I – THE PHANTOM MENACE (Lucasfilm 1999); STAR WARS: EPISODE VI – RETURN OF THE JEDI (Lucasfilm 1983).

23. *Viking River*, 142 S. Ct. at 1924–25.

24. *Concepcion*, 563 U.S. at 344.

25. *Viking River*, 142 S. Ct. at 1918, 1921. Notice that the majority assumed arbitration involves "individualized and informal" proceedings, as if arbitration proceedings were frozen in carbonite a long time ago. But such an assumption is not necessarily correct. Arbitration should not be viewed as a homogeneous, simple, informal process. Arbitration can involve rich, varied, complex proceedings. The American Arbitration Association, a leading arbitral association, has more than two hundred sets of archived and active rules on its website, including rules for large, complex commercial disputes. *See Archived Rules,* AM. ARB. ASSOC., https://perma.cc/RR6C-6CXM (last visited June 17, 2022); *Active Rules,* AM. ARB. ASSOC., https://perma.cc/8YKL-8CCV (last visited June 17, 2022).

agreed with the majority that state law cannot condition the enforcement of an arbitration agreement on the availability of complex joinder or aggregation rules.[26] As a result, Ms. Moriana would have to submit her individual claims to an arbitrator.

Spoiler Alert! Boba Fett appears to meet his demise in the Great Pit of Carkoon at the beginning of *Return of the Jedi*.[27] However, after years of speculation, *Star Wars* fandom learns in the *Book of Boba Fett* that the galaxy's preeminent bounty hunter narrowly escapes the pit to live another day.[28] Similarly, with Justice Alito's majority opinion, it looked like California's workers would be doomed and sent to the pit of arbitration. But PAGA's bounty hunters seem to be wearing impenetrable Mandalorian armor like Boba Fett's. In Section IV of the majority's opinion, the Court suggests that "non-individual claims," the representative PAGA claims belonging to the State and covering the other workers, could possibly remain in court, as long as state law provides a mechanism and standing for the enforcement of these non-individual claims.[29] Holy Hutt! Bounty hunters may continue to hunt in California under PAGA as well as in other states that enact similar legislation! However, Justice Alito thought that current California state law provides no mechanism or standing for the PAGA representative claims to proceed in court if Ms. Moriana's individual claims are dismissed to arbitration.[30] According to Justice Alito's interpretation of California law, Ms. Moriana lacks statutory standing under PAGA to pursue the representative claims, and thus, these representative claims would have to be dismissed.[31] Justice Sotomayor, who joined the majority opinion, wrote a separate concurrence amplifying that California retains its sovereignty to use private bounty hunters to enforce California's labor code.[32] She recognizes that Justice Alito may be wrong with his conclusion regarding statutory standing under current

26. *Viking River*, 142 S. Ct. at 1926 (Barrett, J., concurring in part and concurring in the judgment, joined by Roberts, C.J., and Kavanaugh, J.).

27. STAR WARS: EPISODE VI - RETURN OF THE JEDI (Lucasfilm 1983).

28. *The Book of Boba Fett* (Lucasfilm 2021).

29. *Viking River*, 142 S. Ct. at 1924–25.

30. *Id.*

31. *Id.*

32. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1925 (June 15, 2022) (Sotomayor, J., concurring).

California law, and if so, California courts could step in and allow the representative PAGA claims to proceed in court.[33] And even if Justice Alito is correct, Justice Sotomayor recognizes the California legislature may step in and modify statutory standing to allow for such court proceedings.[34] Justices Barrett and Kavanaugh and Chief Justice Roberts apparently are not fans of Boba Fett, and they notably did not join this Section IV of the opinion regarding the survival of the bounty hunter claims under PAGA.[35]

Justice Thomas issued a dissenting opinion based on his long-held view that the FAA should not control in state court at all.[36]

III. JUSTICE ALITO'S JEDI MIND TRICK IN *VIKING RIVER*

In a footnote in the *Viking River* decision regarding the arbitrability of statutory claims, Justice Alito attempts to whitewash almost forty decades of bad precedent with verbal gymnastics akin to a Jedi mind trick.[37] The FAA was never intended to cover statutory disputes; instead, the FAA was designed for contractual, commercial disputes.[38] If one carefully examines the FAA's text, the FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract."[39]

The arbitrability of statutory claims can be traced back in part to the Supreme Court's decision in *Mitsubishi Motors Corp.*

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33. *Id.*

34. *Id.*

35. *Viking River*, 142 S. Ct. at 1926 (Barrett, J., concurring in part and concurring in the judgment, joined by Roberts, C.J., and Kavanaugh, J.).

36. *Viking River*, 142 S. Ct. at 1925 (Thomas, J., dissenting).

37. *Viking River*, 142 S. Ct. at 1919 n.4. The Jedi mind trick made its first appearance in *Star Wars: Episode IV- A New Hope* (Lucasfilm 1977), when Obi -Wan Kenobi convinces Stormtroopers that "[t]hese are not the droids you're looking for." To paraphrase Jabba in *Star Wars: Episode VI - Return of the Jedi* (Lucasfilm 1983), "Your mind powers will not work on me, [Justice Alito.]"

38. *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U.L. REV. 99, 106 (2006) (stating that the FAA was intended only "to provide for enforceability of arbitration agreements between merchants - parties presumed to be of approximately equal bargaining strength").

39. 9 U.S.C. § 2.

v. Soler Chrysler-Plymouth, Inc.[40] In *Mitsubishi*, the Court misread section 2 of the FAA, the FAA's core provision, and as a result, the Court radically transformed and expanded the meaning of the statute.[41] In *Mitsubishi*, the Court selectively quotes from section 2 as follows:

> We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[42]

The Court's quotation of section 2 in *Mitsubishi* leaves out crucial, limiting language. The Court in *Mitsubishi*, through the use of a cleverly-placed ellipsis, avoids quoting the key limitation in the FAA providing that disputes must "aris[e] out of such contract" in order to be covered by the FAA.[43] California's labor code provides statutory protections, such as required meal and rest breaks for workers.[44] One's right to sue for these state-mandated meal or rest breaks is not dependent upon a contract, and instead, such rights arise from, are guaranteed by, and are rooted in California's Labor Code.[45] Similarly, someone's right to be free from bodily harm, assault, or discrimination is thankfully not dependent upon a contract; instead, such rights are rooted in and depend on tort laws and civil rights laws. The FAA was drafted to cover commercial, contractual disputes, not statutory claims that can be asserted without reference to a contract.[46] The full text of the FAA, omitted and ignored by the

40. 473 U.S. 614 (1985).

41. *Mitsubishi*, 473 U.S. at 625.

42. *Id.*

43. 9 U.S.C. § 2 (written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract" are fully binding).

44. Perez v. DNC Parks & Resorts at Asilomar, Inc., 2022 WL 411422, at *4 (E.D. Cal. Feb. 10, 2022) ("California law requires an employer to provide its non-exempt employees with a thirty-minute meal period for every five hours of work.") (citing Cal. Labor Code §§ 226.7, 512).

45. *Id.*

46. *See infra* note 55.

Court in *Mitsubishi,* does not support the expansive arbitrability of statutory claims.[47]

Over the years, the Supreme Court has deflected any scrutiny of the FAA's text and scrutiny of *Mitsubishi*'s cleverly-placed ellipsis by creating an arbitrability test examining the substantive law to be arbitrated. In other words, to determine whether a particular claim can be arbitrated, courts examine the substantive law forming the basis for the underlying dispute, not the FAA.[48] The strong presumption is that every type of claim can now be arbitrated under the FAA, and the burden is on the party opposing arbitrability to show that the legislature intended to preserve the right to litigate for a particular claim.[49] "[S]uch an intent 'will be deducible from [the statute's] text or legislative history, . . . or from an inherent conflict between arbitration and the statute's underlying purposes."[50]

Justice Alito, in a footnote in *Viking River*, attempts to cover up *Mitsubishi*'s error by providing a new justification for the arbitrability of statutory claims.[51] Relying on a Supreme Court opinion discussing due process standards for personal jurisdiction, Justice Alito equates the phrase "arise out of" in the FAA with a lenient "but-for" causation test.[52] If the underlying substantive claim would not have happened, but-for the contract, the claim arises from that contract according to Justice Alito.[53] If two parties have a relationship and enter into a contract containing an arbitration clause, Justice Alito's test is so expansive that virtually every claim subsequently arising

47. *See Mitsubishi*, 473 U.S. at 646 (Stevens, J., dissenting, joined by Brennan, J.) ("The plain language of [the FAA] . . . does not encompass a claim arising under [statutory] law. . . . Nothing in the text of the [FAA], nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.").

48. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (examining the text, history, and purpose of a statute to determine if claims under the statute may be subject to arbitration under the FAA).

49. *Id.*

50. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987) (citations omitted).

51. *Viking River*, 142 S. Ct. at 1919 n.4.

52. *Id.* (citing Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021)).

53. *Id.*

between the parties could be said to be the result of or arise out of the contract. Under this broad test, a dispute may have *absolutely nothing to do with the contract*, but still "arise out of" the contract and be covered by the FAA as long as the claim satisfies a lenient but-for causation test.

Such a but-for causation test is broad and aimless, like a Stormtrooper with horrible aim; this test fails to impose any practical, real limits. Arbitration agreements will only exist if there is a pre-existing relationship between the parties, and with a lenient but-for causation test, any subsequent claim between the parties can be easily traced back to the prior relationship and agreement. For example, if I were not hired (but-for that employment relationship or entering into that initial employment contract), I would never have a discrimination claim against my employer. If I were not hired (but-for that employment relationship or entering into that initial employment contract), I would never be cheated out of my break or mealtimes by my manager. The use of a but-for test in this context where the parties have a prior agreement would in effect cover virtually every possible claim such that the test becomes meaningless and really no test at all.

In the same decision quoted by Justice Alito, Justice Gorsuch wrote a separate opinion, joined by Justice Thomas, concurring in the judgment and critical of the but-for test:

> As every first year law student learns, a but-for causation test isn't the most demanding. At a high level of abstraction, one might say any event in the world would not have happened "but for" events far and long removed.[54]

A more meaningful test, one with real limits, would conclude that a claim arises out of an agreement if the claim relies on the terms of the agreement, and then such contractual claims would be fully consistent with the original history of the FAA's enactment.[55] Justice Alito's footnote was a weak Jedi mind trick

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54. *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring, joined by Thomas, J.).

55. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) (the FAA covers "ordinary, everyday trade disputes," and "it is for them that this legislation is proposed"); *id.* (FAA covers

to attempt to reconcile the FAA's text with several decades of flawed, expansive interpretations by the Court.[56] This footnote about the scope of arbitrability under the FAA is unnecessary for the Court's holding in *Viking River* and should be treated as dicta going forward.

IV. A STARDUST BLUEPRINT FOR PRESERVING SOVEREIGNTY AND REPRESENTATIVE CLAIMS

The *Viking River* case raises constitutional problems, and one can view this case through the lens of federalism and state sovereignty. Section IV of the Court's opinion recognizes the possibility of the non-individual, representative PAGA claims remaining in court.[57] Under the majority's view, the preemptive shadow of the Death Star FAA is limited and does not reach far enough to cover these representative PAGA claims.[58] Unfortunately, the majority's opinion did not provide much explanation or support for this limitation. Below is a sketch of a Stardust blueprint[59] to help support the idea that the Death Star FAA cannot block the assertion of representative PAGA claims in court.

"States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[60] By enacting its labor code and PAGA, California is using its sovereign police powers to regulate

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commercial disputes arising in interstate commerce, such as a "farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey"); *id.* at 30-31 (arbitration reduces "business litigation" and encourages "business men" to settle their "business differences"); *id.* at 31 (adoption of the FAA is necessary to facilitate the resolution of disputes "arising in [merchants'] daily business transactions").

56. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[T]he [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.").

57. *Viking River*, 142 S. Ct. at 1924–1925.

58. *Id.*

59. In *Rogue One: A Star Wars Story* (Lucasfilm 2016), the blueprints for the Death Star were known by the code name Stardust, and such blueprints were ultimately used to destroy the Death Star in *Star Wars: Episode IV- A New Hope* (Lucasfilm 1977). Stay on target! RIP, Gold Five.

60. Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 756 (1985) (citation omitted).

primary conduct at the workplace, such as the requirement of providing meal and rest breaks for workers. How a State regulates the *enforcement* of its own laws is generally within the power of each State.[61] The California legislature designed and adopted PAGA's mechanisms, whereby a worker serves as the State's proxy, as appropriate for enforcement of the State's labor code. The majority in Section IV was correct in not interpreting the FAA in an expansive manner to override PAGA. A fundamental reason why the majority was correct - although this reason is left largely unspoken in the Court's opinion, is that federal law should not be used to deprive States of sovereign authority over the enforcement of state-created rights.[62]

If Congress desires to flex its constitutional powers, perhaps its Commerce Clause powers, to override state sovereignty, basic principles of federalism require that Congress "must make its intention to do so unmistakably clear in the language of the [federal] statute."[63] However, nothing in the FAA's text makes it "unmistakably clear" that Congress intended to displace state sovereignty to enforce state-created labor rights. The text of the FAA relied on by the employer Viking River refers exclusively, and in an unmistakably clear manner, to federal courts, federal jurisdiction, and the Federal Rules of Civil Procedure, not state courts all.[64] In fact, "[t]he

61. *See* Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931) (how "rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control").

62. *See* In re Tarble, 80 U.S. (13 Wall.) 397, 407–08 (1871) ("How [the federal government's and state governments'] respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (recognizing that since "the police power is controlled by 50 different States instead of one national sovereign," "smaller governments closer to the governed" generally exercise police powers and regulate "the facets of governing that touch on citizens' daily lives").

63. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citations and internal quotations omitted).

64. Viking River's opening brief relies on sections 2, 3, and 4 of the FAA as the basis for arbitration, and the Court has recognized these provisions are "integral parts of a whole." New Prime v. Oliveira, 139 S. Ct. 532, 538 (2019) (citation omitted). These provisions apply solely in federal courts. *See, e.g.*, 9 U.S.C. § 3 (referring to "courts of the United States"); 9 U.S.C. § 4 (referring to the "United States district court," Title 28 of the United States Code, and the Federal Rules of Civil Procedure).

FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[65] In light of these constitutional concerns regarding federal interference with state sovereignty, the Court in Section IV was correct to recognize that the FAA does not preempt or block the assertion of California's representative PAGA claims in court.

If the Court in *Viking River* would have held that the FAA somehow blocks representative PAGA claims, such a ruling would undermine political accountability within our federalist system. In this system, where each State retains its own sovereignty, "[t]he Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy."[66] The State of California is ultimately responsible for developing its own Labor Code and establishing how this code is to be enforced, and the people of California must be able to hold their own state representatives accountable for carrying out these labor policies. However, if Congress can easily undermine how a State enforces state-created rights, if the FAA would block the enforcement of representative PAGA claims in court, California would lose control and accountability over its own labor laws.[67] Allowing each sovereign State the freedom to experiment with how its own state-created rights are enforced helps promote the values of federalism and spurs innovation among the States to regulate dispute resolution in different, creative ways.[68]

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65. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

66. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting The Federalist No. 45 (James Madison)).

67. *Cf.* New York v. United States, 505 U.S. 144, 177 (1992) (explaining that "a state government's responsibility to represent and be accountable to the citizens of the State" is a fundamental component of a State's Tenth Amendment sovereignty); Texas v. United States, 106 F.3d 661, 666 (5th Cir. 1997) (asserting that the Tenth Amendment helps promote accountability to the electorate).

68. *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 121 (2013) (arguing that sacrificing the uniformity value of broad FAA preemption would promote federalism values in connection with dispute resolution and the enforcement of rights).

Justice Thomas' dissent in *Viking River* is consistent with these views regarding federalism and respect for the sovereignty of each State.[69] In a galaxy far, far away, when the FAA was first enacted during the 1920s, it was clear that the FAA was supposed to govern solely in federal courts.[70] The late Professor Ian Macneil wrote a detailed book setting forth numerous arguments why the FAA applies solely in federal court, such as the FAA's structure as a unitary, comprehensive statute;[71] the statute's explicit language referring to the Federal courts;[72] the legislative history;[73] and the universal understanding at the time of the FAA's enactment that arbitration laws were procedural.[74] The FAA was never designed to encroach on state sovereignty.[75]

Another major reason supporting the majority's decision in Section IV is that one can conceptualize the real party in interest here as the State of California.[76] The Supreme Court's prior decision in *EEOC v. Waffle House, Inc.*,[77] is instructive and

69. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1926 (2022) (Thomas, J., dissenting).

70. *Infra* notes 71–74 and accompanying text.

71. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 105–07 (1992) (arguing that given the "constant reference to federal courts throughout the act," Congress likely intended to enact "an integrated statute, either applicable in its entirety to any given proceeding in any given court or not at all.").

72. *Id.* at 106–07.

73. *See id.* at 111–19; *see also* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought, and not one of substantive law to be determined by the law of the forum in which the contract is made.").

74. *See* MACNEIL, *supra* note 71, at 109–11 (asserting that it was well-known that the enforceability of an arbitration agreement was a question of procedure); *see also* Berkovitz v. Arbib & Houlberg, Inc., 130 N. E. 288, 290 (N.Y. 1921) ("Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.").

75. *See* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (2016) ("[T]he FAA was never intended to apply in state courts.").

76. *See* Contreras v. Super. Ct., 275 Cal. Rptr. 3d 741, 746 (Cal. Ct. App. 2021) ("Every PAGA claim is a dispute between an employer and the state." (emphasis in original) (internal quotations and citation omitted)).

77. 534 U.S. 279 (2002).

helps support the Court's reasoning in Section IV, although none of the different opinions in *Viking River* even mention *Waffle House*. The representative claims at issue in *Viking River* do not involve an adjudication of the substantive contractual rights belonging to a worker or private party; such a dispute can generally be subject to a broad, pre-dispute arbitration clause. Instead, this case involves the collection, on behalf of the State of California, of civil penalties that are mainly paid to the State's treasury for violations of statutory duties, such as mandatory meal and rest breaks, imposed by the State's labor code. Cal. Lab. Code § 2699.[78] In *Waffle House*, the EEOC brought an action on behalf of an individual worker, and the Court held that an arbitration agreement between the worker and employer did not bar such an action by the EEOC.[79] PAGA actions are instead brought on behalf of the State of California.[80] Just like the EEOC was not a party to the arbitration agreement at issue in *Waffle House*, the State of California is not a party to arbitration agreements between California workers and their employers. The *Waffle House* case supports the majority's reasoning in Section IV.[81]

The FAA has been used over time to override and displace state sovereignty and block the ability of victims to access the

78. *Viking River*, 142 S. Ct. at 1913–15 (2022).

79. *See Waffle House*, 534 U.S. at 294 (asserting that when the EEOC is a nonparty to an arbitration agreement, the agreement cannot bind the EEOC, and, moreover, "the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so").

80. *See* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 133 (Cal. 2014) ("[PAGA] authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.").

81. None of the Justices' opinions in *Viking River* address *Waffle House*. If the Justices had relied on *Waffle House* and expressly equated private attorney general mechanisms with actions by the State, such a ruling would potentially influence how the Justices analyze future cases. Private attorney general mechanisms are being used or discussed as a strategy to address controversial matters, such as abortion, guns, banned books in libraries, the teaching of critical race theory in classrooms, and transgender rights. *See* Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created A 'Vigilante' Loophole*, WASH. POST (Feb. 22, 2022) ("Congress has encouraged private enforcement of more anodyne laws. . . . Many civil rights statutes also rely on this style of enforcement, brought by what are commonly referred to as 'private attorneys general.'").

courts,[82] and such efforts have been strongly supported by business interests such as the U.S. Chamber of Commerce.[83] When Palpatine announces in *Revenge of the Sith* that the Republic would be reorganized as an all-powerful Empire with an absolute sovereign, for the sake of a stable, safe, and prosperous society, the members of the Senate applauded.[84] But Padme observes, "So this is how liberty dies, with thunderous applause . . . "[85] Like Padme, we should be on the lookout for preserving democratic institutions, such as access to our public courts and juries, and for decades, the Court has unfortunately construed the FAA in an overly expansive, flawed manner that overrides state sovereignty and undermines access to courts.[86]

V. CONTINUED LITIGATION ABOUT VIKING RIVER: "DIFFICULT TO SEE; ALWAYS IN MOTION IS THE FUTURE"[87]

Section IV of the *Viking River* majority decision is likely to produce litigation going forward. First, employers may try to argue that Section IV, particularly its finding that PAGA representative claims can remain in court, is mere dicta. Recall that Justice Barrett, Justice Kavanaugh, and Chief Justice Roberts did not join Section IV, and instead, these Justices characterized Section IV as "unnecessary to the result," and "much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case."[88] If the findings of Section IV are not necessary for the result, there is a

82. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 359 (2008) (asserting that "the FAA supersedes state laws lodging primary jurisdiction in another forum," including a special administrative tribunal carefully designed by a state to enforce state-created rights).

83. "A top priority for the [Chamber's] Litigation Center remains protecting the enforceability of pre-dispute arbitration agreements, including those that waive the availability of class actions and similar representative litigation." *Arbitration*, https://perma.cc/8L7F-MLCH (last visited Oct. 21, 2022).

84. STAR WARS: EPISODE III - REVENGE OF THE SITH (Lucasfilm 2005).

85. *Id.* (quoting Padme).

86. *Supra* note 82 and accompanying text; *see also supra* Part III.

87. STAR WARS: EPISODE V - THE EMPIRE STRIKES BACK (Lucasfilm 1980) (quoting Yoda).

88. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1926 (2022) (Barrett, J., concurring in part and concurring in the judgment).

Sith sense that employers will likely flood California courts with arguments that the statements in Section IV are dicta.[89] Although five Justices joined Section IV of the opinion, one of whom was Justice Breyer, Justice Breyer will no longer serve on the Court after this term.[90] Thus, assuming the statements in Section IV are dicta, it is not clear whether there would be a majority of five Justices who would adopt Section IV's arguments as binding down the road. Although always in motion is the future, there will likely be continued litigation in California courts as to whether the FAA preempts enforcement of a representative PAGA claim belonging to the State.

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89. *See* Lawson v. United States, 176 F.2d 49, 51 (D.C. Cir. 1949)

> The courts of the land have many times defined the terms "obiter dicta" and "dicta" as "language unnecessary to a decision," "ruling on an issue not raised," or "opinion of a judge which does not embody the resolution or determination of the court, and made without argument or full consideration of the point."

It is not clear whether the statements about the representative claims in Section IV are dicta. The majority's opinion involved two sets of claims, the individual claims and the representative claims, and the state courts had treated these two sets of claims as inseparable. *See Viking River*, 142 S. Ct. at 1916 ("The trial court denied that motion, and the California Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable 'representative" claims.'"). The majority held that under the FAA, these two sets of claims must be separated, and only the individual claims had to be sent to arbitration. *See id.* at 1925 (stating that the former employer "was entitled to enforce the [arbitration] agreement insofar as it mandated arbitration of [the former employee's] individual PAGA claim" but that the former employee "lack[ed] statutory standing to continue to maintain her non-individual claims in court"). In dividing the claims and not compelling arbitration of the representative claims, the majority necessarily held that the representative claims are not subject to arbitration under the FAA. *See id.* at 1925–26. On the other hand, the State was not a party to this proceeding before the Court, except by virtue of Ms. Moriana as a bounty hunter, and one may argue that the disposition of the State's claims was not necessary to resolve Ms. Moriana's individual claim. In other words, the majority could have ruled on Ms. Moriana's individual claim while at the same time recognizing that the applicability of the FAA to State's claims brought by a bounty hunter remains an undecided issue.

90. Adam Liptak, *Justice Breyer to Retire from Supreme Court*, N.Y. TIMES (Jan. 26, 2022), https://perma.cc/D35N-QPMY.

In Section IV, Justice Alito construes California law as requiring dismissal of the remaining representative claims,[91] but Justice Sotomayor, in her separate, concurring opinion, acknowledges the possibility that Justice Alito may be misunderstanding California law.[92] And Holy Sith, it appears that Justice Alito did misconstrue California law! Justice Alito treats the worker Ms. Moriana as lacking statutory standing under California law to prosecute the non-individual PAGA claims as a proxy for the State. Section IV of the opinion says that "[w]hen an employee's own dispute is pared away from a PAGA action, . . . PAGA does not allow such persons to maintain suit,"[93] and Justice Alito immediately cites as support the California Supreme Court decision in *Kim v. Reins International California, Inc.*[94] However, if one reads *Kim* more closely, the California Supreme Court actually allows a worker to proceed with representative PAGA claims, *even though the worker's individual claims were already settled*.[95] The *Kim* case, instead of supporting Justice Alito's conclusion that no one is left here to prosecute the representative claims, actually undermines Justice Alito's conclusion. Although the *Kim* case involves a settlement of a worker's individual claims, the California Supreme Court also recognized that a worker can bring a representative action under PAGA as a proxy for the State without simultaneously asserting an individual claim:

> This provision [of PAGA] expressly authorizes PAGA suits brought "separately" from individual claims for relief. (§ 2699, subd. (g)(1).) Indeed, many PAGA actions consist of a single cause of action seeking civil penalties. . . . Standing for these PAGA-only cases cannot be dependent on the

91. *See Viking River*, 142 S. Ct. at 1925 (asserting that under California Labor Code, a "plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action").

92. *See id.* at 1925–26 (Sotomayor, J., concurring) ("[I]f this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits.").

93. *Viking River*, 142 S. Ct. at 1925.

94. 459 P.3d 1123 (Cal. 2020).

95. *Id.* at 1126 ("Settlement of individual claims does not strip an aggrieved employee of standing, as the state's authorized representative, to pursue PAGA remedies.").

> maintenance of an individual claim because individual relief has not been sought.[96]

In *Kim*, the California Supreme Court already directly addressed the issue of standing to bring a representative PAGA claim.[97] The very case cited by Justice Alito, instead of justifying a dismissal of the remaining PAGA claims, justifies keeping the PAGA claims in court. This oversight by Justice Alito is unfortunate and will lead to litigation where some employers will inevitably argue that the representative PAGA claims must be dismissed.[98] According to *Kim*, aggrieved workers do not lose standing to bring representative PAGA claims just because the worker's individual claim was dismissed through a contractual settlement.[99] Similarly, if a worker's individual claim is dismissed and resolved through contractual arbitration (and some courts have compared an arbitral award to a contractual settlement),[100] *Kim*'s reasoning suggests that such a worker can still prosecute the representative claims on behalf of the State.

After the Court issued its ruling in *Viking River*, Ms. Moriana's counsel petitioned the Court for a rehearing.[101] One ground for the rehearing involved the majority's flawed conclusions regarding the standing issue under California law, but the Court denied Ms. Moriana's petition.[102] There will be continued litigation in California about standing to pursue the representative claims.[103]

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96. *Id.* at 1132.

97. *See supra* note 95 and accompanying text.

98. Johnson v. Lowe's Home Centers, L.L.C., No. 221CV00087TLNJDP, 2022 WL 4387796, at *4 (E.D. Cal. Sept. 22, 2022) (citing conflicting California cases in the wake of *Viking River* regarding standing to bring representative PAGA claims).

99. *See Kim*, 459 P.3d at 1126 ("Settlement of individual claims does not strip an aggrieved employee of standing, as the state's authorized representative, to pursue PAGA remedies.").

100. *See, e.g.*, George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001) (comparing arbitration awards to the types of "settlement[s] businesses reach all the time").

101. Petition for Rehearing, Viking River Cruises, Inc. v. Moriana, No. 20-1573 (July 6, 2022).

102. Viking River Cruises, Inc. v. Moriana, No. 20-1573, 2022 WL 3580311, at *1 (U.S. Aug. 22, 2022).

103. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1925 (2022); *supra* note 98.

CONCLUSION: A NEW HOPE

In a moving scene at the end of *Rogue One*, a surprise character (who shall rename nameless to avoid spoiling one of the most iconic moments in the *Star Wars* canon) says, "What is it they've sent us? Hope."[104] Arbitration, although it has potential benefits, has unfortunately been abused over the last few decades to limit the rights of workers and consumers, to suppress claims, conceal wrongdoing, and eliminate class action liability.[105] The *Viking River* case, particularly Section IV of the majority opinion, and California's Boba Fett law represent a glimmer of hope for workers to seek some type of collective redress of labor code violations through the collection of civil penalties on behalf of the state. However, the Empire's business interests will attempt to extinguish this hope with aggressive litigation and flawed arguments about the preemptive powers of the Death Star FAA. Other states, and maybe even the federal government,[106] will hopefully use California's efforts as a Stardust blueprint to protect vulnerable workers and consumers. As Jyn Erso powerfully declares in *Rogue One*, "We have hope. Rebellions are built on hope!"[107]

104. ROGUE ONE: A STAR WARS STORY (Lucasfilm 2016).

105. *See* Szalai, *supra* note 75, at 135 ("On a day to day basis as I read cases compelling consumers and employees to arbitrate, I can cynically view arbitration as a means not to resolve disputes in good faith, but as an attempt to suppress claims and insulate wrongdoers from liability.").

106. At the federal level, landmark legislation was recently enacted to protect survivors of sexual harassment and sexual assault from forced arbitration. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

107. ROGUE ONE: A STAR WARS STORY (Lucasfilm 2016) (quoting Jyn Erso).