LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, MARCH 31, 2022

GUEST COLUMN

Viking River cruises through oral argument

By Steven B. Katz

Supreme Court justices in Washington on April 23, 2021 | New York Times News Servicehere

Yesterday, the U.S. Supreme Court held argument in *Viking River Cruises, Inc. v. Moriana* (No. 20–1573), where it granted certiorari to decide whether the Federal Arbitration Act preempted California's ban on enforcing agreements individually to arbitrate claims under the Labor Code Private Attorneys General Act, Labor Code §§ 2699 et seq., established in *Iskanian v. CSL Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014).

The Court granted certiorari with a built-in majority favoring a ruling invalidating Iskanian's ban on enforcement, and yesterday's argument offered little to suggest that the majority has changed its views.

Petitioner Viking River Cruises started its argument by laying down a framework never really questioned: a decision turns on applying the holding of three prior cases: *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (FAA preempts California's ban on class-action waivers in consumer arbitration agreements.); *Epic Systems Corp. v. Lewis*, 584 U.S. —, 138 S.Ct. 1612 (2018) (FAA preempts construction of NLRA invalidating class relief waivers); and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (FAA preempts California rule construing silent arbitration agreements to permit class arbitration).

The voting in these cases reveals a clear majority who would vote to reverse Iskanian's ban on representative relief in arbitration: the Chief Justice, and Justices Samuel A. Alito and Clarence Thomas, were in the majority in Concepcion, Epic Systems, and Lamps Plus. Justice Neil M. Gorsuch joined the Court after Concepcion, but voted with the majority in the two later decisions. Justice Brett M. Kavanaugh joined the Court after Epic Systems, but voted with the majority in Lamps Plus. Justices Stephen G. Breyer, Elena Kagan and Sonia Sotomayor dissented in all three earlier decisions. Even if you view Justice Amy Coney Barrett as a toss-up (which seems unlikely, given the overall tenor of her judicial philosophy), that leaves a solid 5-3 majority for finding Iskanian preempted.

Some commentators suggested Justice Thomas' well-established view that the FAA does not apply to the states would cause him to dissent, leaving effectively a 4-4 split. There are two problems with such a prediction: First, Justice Thomas' viewpoint led him to vote with the majority in Concepcion and Lamps Plus — cases that came from state court — and express his unique views in a concurrence. There is no reason he would do differently here. Second, Justice Barrett replacing Justice Ginsburg reduces the reliable minority in FAA preemption cases from 4 to 3. During the argument, Justice Thomas (participating remotely due to his recent hospitalization) was his usual quiet self. His only question was whether the case would be before the Court had it previously held the FAA does not apply to states. Nothing in the question intimated that he would do anything different from Concepcion and Lamps Plus.

Nothing happened in the argument to suggest that the predictable majority has evaporated. Overall, the justices in the predictable majority were a "cold bench," suggesting they view the case as being one settled by precedent with little room for debate. Except for Justice Thomas' question about his pet issue, they barely questioned Petitioner. They woke up a little when Respondent argued: Justices Alito and Barrett questioned whether they were bound by state court characterization of PAGA as a procedural device. And more tellingly, Chief

Justice John G. Roberts and Justice Alito asked questions – suggesting a skepticism about whether PAGA representative actions raise a single, indivisible claim owned by the state. Justice Alito starkly stated that they do not "seem like one claim to me in any ordinary sense of the word." Justice Gorsuch asked Respondent to comment on the fact that no other state filed an amicus brief supporting California.

The predictable minority formed the "hot bench," largely monopolizing the questioning of both sides. Justices Kagan and Sotomayor actively questioned along familiar lines. They view Petitioner as arguing for a "Catch-22": a plaintiff cannot bring a PAGA representative claim in arbitration, but cannot bring one in court either. They seem ready to dissent as they have in the past.

Justice Breyer was the "hottest" justice on the bench. Whether he will remain with Justices Kagan and Sotomayor in the minority, or join the majority (at least in result) is an open question. And it is the most interesting one from the argument—although given the size of the predictable majority, the answer may not matter.

He repeatedly returned to the "Catch-22," asking counsel to assume that under Concepcion, the first part is correct. If an arbitration agreement says that PAGA claims must be arbitrated individually, then a rule that nevertheless permits representative arbitration cannot be enforced. But what about the second part? He expressed genuine puzzlement over whether the FAA would also require the courts to forbid such a plaintiff from bringing a PAGA representative action in court.

His puzzlement, albeit sincere, has all the marks of cognitive dissonance. Justice Breyer knows where reason and stare decisis lead him, but it is a place he would rather not go. Underlying Concepcion, Epic Systems, and Lamps Plus is the bedrock principle first announced in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989): arbitration contracts must be enforced "in accordance with their terms." If an agreement requires a PAGA claim to be arbitrated, it must be arbitrated; if the agreement requires that arbitration to be individual, it must be individual. Had Justice Breyer been in the majority in Concepcion, Epic Systems, and Lamps Plus, the Court would have crafted a rule that permitted states to avoid the "Catch-22" the minority decries. But the Court charted a different path. One way out of the bind in which Justice Breyer finds himself is to join Justices Kagan and Sotomayor in focusing on distinctions that avoid existing precedent. He seems unpersuaded by them (at least for now), and finds himself backed into a corner.

Justice Breyer's questioning suggests that behind the scenes lies a bigger debate about stare decisis. The Court is debating in *Dobbs v. Jackson Women's Health Org.* (No. 19-1392) the fate of its abortion decisions. Justices Beyer, Kagan and Sotomayer are doubtlessly scrambling to convince their conservative colleagues that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), enjoy precedential weight that commands respect even from justices who believe them to have been wrongly decided. It is easy to see Viking River Cruises as a "test case" for principles Justice Breyer is doubtlessly advocating in Dobbs. If he refuses to vote in Viking River Cruises as precedent commands, how can he hope to persuade colleagues to do so in Dobbs?

An interesting question, but the answer likely makes no difference. Whether Justice Breyer ultimately joins a 7-2 majority in Viking River Cruises, or a 6-3 minority, there remains a majority to reverse Iskanian's rule that PAGA representative relief waivers in arbitration are unenforceable.

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