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Reconciling Mandatory Arbitration Clauses with California's Private Attorneys General Act: Why Courts Should Preserve State Qui Tam Enforcement Actions

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Reconciling Mandatory Arbitration Clauses with California's Private Attorneys General Act: Why Courts Should Preserve State Qui Tam Enforcement Actions

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ABSTRACT

The Ninth Circuit recently challenged a well-established notion that state laws cannot disrupt arbitration agreements by invaliding an arbitration contract under California's Private Attorneys General Act (PAGA), a statute designed to enforce the state's labor code. Just four years earlier, the Supreme Court held in AT&T Mobility v. Concepcion *that state laws cannot nullify the procedural benefits of arbitration. The Ninth Circuit distinguished this case by noting that PAGA is a qui tam law, which makes the government a party to the litigation and implicates the state's power to enforce the labor code. If left intact, this decision has potential to unsettle millions of arbitration agreements. If overruled, the decision could weaken state governments and our federalist system of governance. This Comment asserts that the Ninth Circuit reached the correct conclusion, but could have better supported its decision on federalism and statutory interpretation grounds. In addition, the court could have contemplated other approaches to reconcile arbitration agreements with PAGA, more convincingly addressed the concerns of arbitration advocates, and endorsed the Supreme Court's distinction between procedural rights that may be waived in arbitration and substantive ones that may not. Last, this Comment explores the arbitration of qui tam claims under an implicit consent theory and envisions how these claims could be arbitrated.*

I. INTRODUCTION

In *Sakkab v. Luxottica*,[1] the Ninth Circuit challenged a well-established notion that state laws cannot disrupt arbitration agreements.[2]

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[1] 803 F.3d 425 (9th Cir. 2015).

[2] *Id.*; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that federal arbitration agreements preempt certain state laws).

The court invalidated an arbitration agreement under California's Private Attorneys General Act (PAGA),[3] a statute designed to enforce the state's labor code through qui tam actions.[4] Just four years earlier, the Supreme Court ruled that the Federal Arbitration Act (FAA)[5] preempted a California law that invalidated class action waivers in consumer contracts in *AT&T Mobility LLC v. Concepcion*[6]—a decision that many scholars viewed as the final conclusion on whether state laws can upset arbitration agreements.[7] If left intact, the Ninth Circuit's decision in *Sakkab* has the potential to unsettle the enforceability of millions of arbitration agreements that businesses, employees, and consumers utilize.[8] If weakened by the Supreme Court, the decision could agitate the enforcement power of state governments and our federalist system of governance.

In a case of first impression, the Ninth Circuit held in *Sakkab* that the FAA did not preempt PAGA,[9] which bars the waiver of representative qui tam claims.[10] This ruling permits employees to pursue representative PAGA claims for themselves and other employees on behalf of the government, despite waiving these rights in their employment contracts. The court reasoned that contractual agreements to waive representative PAGA claims would be unenforceable regardless of whether

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[3] *Sakkab*, 803 F.3d at 427.

[4] *Qui tam action*, *Black's Law Dictionary* (10th ed. 2014) (A qui tam action is "an action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."); *see also* CAL. LAB. CODE §§ 2698–2699.5.

[5] 9 U.S.C. § 2 (2012).

[6] 563 U.S. 333 (2011).

[7] *See generally* Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767 (2012); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955 (2014); Charles H. Samel & Amanda J. Beane, *Closing the Courthouse Doors to Consumer Class Actions? What Recent Case Law Reveals About Successful Enforcement of Arbitration Agreements and Class Action Waivers*, 21 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 15 (2012).

[8] Tens of millions of consumers are subject to pre-dispute arbitration clauses for financial products and services alone. *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), § 1 at 9 (Mar. 2015). In addition, one 1988 study found that approximately 80% of Fortune 1000 companies use arbitration agreements. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 346 (2007) (citing DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 8 (Cornell Inst. on Conflict Resolution 1988)). It is worth noting that only 600 of the 1,000 companies surveyed responded. *Id.*

[9] Sakkab v. Luxottica, 803 F.3d 425, 427 (9th Cir. 2015).

[10] Representative claims are qui tam actions brought on behalf of the government, unlike individual claims which are not. CAL. LAB. CODE §§ 2698–2699.5.

the agreement was subject to arbitration, and therefore may be invalidated under the FAA's savings clause.[11] The court also determined that enforcing these waivers would problematically bind the government without its consent since qui tam suits are litigated on behalf of the government.[12]

The Ninth Circuit's decision in *Sakkab* disrupts the ascendancy of arbitration agreements over state law, and raises complicated questions regarding the strength of arbitration agreements, federal preemption of state law, and the relationship between the FAA and state qui tam statutes like PAGA. Since the Ninth Circuit's decision, lower courts have permitted employees to pursue representative PAGA claims in contravention of their arbitration agreements.[13] Scholars and anti-arbitration activists have contemplated the expanded use of qui tam statutes like PAGA to diminish the reach of arbitration agreements.[14] Given the Supreme Court's strong historical adherence to enforcing arbitration agreements even at the expense of state laws,[15] *Sakkab* is an audacious decision that—due to the unique legal issues implicated by qui tam actions—also has the potential to mark a new era in arbitration jurisprudence.

The Ninth Circuit correctly concluded that representative PAGA claims cannot be waived in arbitration agreements; however, the court could have strengthened its decision on multiple grounds. The court could have further addressed the concerns of arbitration advocates, contemplated other approaches to reconcile the FAA with PAGA, and endorsed the Supreme Court's distinction between procedural rights that may be waived in arbitration and substantive ones that may not.[16] Most importantly, the Ninth Circuit could have more explicitly defended the decision on both federalism and statutory interpretation grounds. The Supreme Court has held that statutes should not be construed as alter-

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[11] *Sakkab*, 803 F.3d at 432; *see also* 9 U.S.C. § 2 (2012).

[12] *Sakkab*, 803 F.3d at 443.

[13] *See generally* Wulfe v. Valero Ref. Co.-California, 641 F. App'x 758, 760 (9th Cir. 2016); Da Loc Nguyen v. Applied Med. Res. Corp., 209 Cal.Rpt.3d. 259, 260 (Cal. Ct. App. Oct. 4, 2016); Hernandez v. DMSI Staffing, LLC, 79 F. Supp. 3d 1054 (N.D. Cal. 2015); Young v. Remx, Inc., 206 Cal. Rptr. 3d 711, 712 (Ct. App. 2016) (bifurcated claim).

[14] *See generally* Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203 (2013); Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103 (2015) (noting that some viewed PAGA as an "end run" around the FAA).

[15] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011): American Express Corp. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

[16] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

ing the usual constitutional balance between states and the federal government unless congressional intent to do so is unmistakably clear.[17] Although qui tam statutes have predated the FAA by at least half a century, the plain text of the FAA governs only "contract[s]" and "transaction[s]," not matters involving the government such as qui tam suits.[18] Qui tam actions function as a powerful tool for states to discover fraud, incentivize whistleblowers, and enforce laws and regulations at a lower cost to taxpayers. Given these considerations, limiting qui tam suits could harm state governments and upset the usual constitutional balance between states and the federal government. The judicial branch would be wise to defer to Congress to determine the relationship between state qui tam statutes and the FAA. Answering this question has important ramifications for regulatory enforcement, budget-constrained governments, and even state sovereignty.

Even if PAGA claims may not be waived, important questions remain regarding if and how these claims may be arbitrated. The unfettered proliferation of state qui tam actions could hamper arbitration. On the other hand, compelling the arbitration of qui tam actions could harm state sovereignty by forcing state governments to appear before arbiters rather than judges. Viewing state governments as implicitly consenting to arbitration is one way to reconcile these tough questions. State governments are often required to decline to litigate qui tam actions before private litigants may proceed.[19] In addition, distinguishing between substantive rights and procedural protocols could promote a peaceful coexistence between qui tam actions and arbitration. Maintaining the substantive benefits of qui tam actions and the procedural efficiency of arbitration is obtainable and perhaps desirable.

This Comment proceeds as follows. Part II examines the text and purpose of the FAA and the preemption of state laws under *Concepcion*. Part III explores PAGA as a qui tam tool to enforce California's labor code. Part IV discusses case law reconciling the FAA and PAGA such as the Ninth Circuit's decision in *Sakkab* and lingering questions in the lower courts. Part V argues that PAGA claims are not waivable primarily due to common conceptions of statutory interpretation and federalism. Last, Part VI notes theoretical justifications for arbitrating PAGA claims and envisions how such claims could be arbitrated.

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[17] Gregory v. Ashcroft, 501 U.S. 452, 452 (1991).

[18] *See* 9 U.S.C. § 2 (2012).

[19] *See generally* CAL. LAB. CODE § 2699.3.

II. THE FEDERAL ARBITRATION ACT AND ENFORCEMENT OF CLASS ACTION WAIVERS

Congress passed the Federal Arbitration Act (FAA) in response to judicial resistance to arbitration agreements.[20] The primary purpose of this legislation was to ensure that arbitration agreements between private parties are enforced according to their terms[21] and that such agreements are on "equal footing" with other contracts.[22] Congress defined the FAA's scope to cover controversies arising out of a "contract" or "transaction."[23] The FAA states, in pertinent part, that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[24] The latter clause, known as the FAA's "savings clause," permits arbitration agreements to be invalidated by general contract defenses, but not defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.[25] This language also strikes a unique dichotomy between mandating specific federal regulation of arbitration agreements while respecting general state regulation of contracts.[26]

In *Concepcion*, the Supreme Court determined that the FAA preempted a California judicial rule that found class action waivers unconscionable under state law.[27] The court emphasized that the FAA mandates a liberal policy favoring arbitration, and that arbitration is simply a matter of contract.[28] While the California judicial rule did not explicitly bar arbitration agreements, the Supreme Court determined that the rule barring class action waivers effectively nullified the benefits of arbitration such as lower costs, greater efficiency and speed, and the ability to choose expert adjudicators.[29] The Supreme Court further noted that, unlike arbitration procedures, class actions bind members in litigation.[30] Class representatives must adequately represent absent class members and give them proper notice, an opportunity to be heard,

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[20] *Concepcion*, 563 U.S. at 339.

[21] *Id.* at 344.

[22] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

[23] *See* 9 U.S.C. § 2 (2012).

[24] *Id.*

[25] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[26] Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92–93 (2012).

[27] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[28] *Id.* at 339.

[29] *Id.* at 348.

[30] *Id.* at 349.

and the ability to opt out of the class.[31] In addition, class action procedures disrupt the contractual expectations of parties and the freedom to select informal procedures.[32] Last, class action suits expose defendants to substantial and unanticipated risk, which pressures defendants into settling meritless claims unlike in arbitration.[33]

For these reasons, the Court found bars against class action waivers incompatible with the FAA's objective of enforcing arbitration agreements, even though the California rule was technically neutral towards arbitration.[34] Rather than placing the California rule within the statute's saving clause, the Court construed the FAA to preempt "procedures incompatible with arbitration." Counterfactually, the Court determined that California's rule would "eviscerate arbitration agreements"[35] and therefore the FAA's saving clause should not be interpreted in a manner that nullifies the purpose of the act itself.[36]

III. CALIFORNIA'S PRIVATE ATTORNEYS GENERAL ACT: THE STATE'S QUI TAM ENFORCEMENT OF THE LABOR CODE

California's 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."[37] An employee must provide both the employer and the state government written notice of the alleged labor code violation, and the fact and theories supporting the violation.[38] Only after the employer declines to investigate further and the government declines to intervene may an employee pursue a claim under PAGA.[39] A successful PAGA claimant is entitled to collect twenty-five percent of the civil penalties recovered.[40]

The California legislature enacted PAGA to correct for two supposed flaws in enforcing California's Labor Code.[41] First, prior to the

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[31] *Id.*

[32] *Id.* at 350–51.

[33] *Id.* at 350.

[34] *Id.* at 333.

[35] *Id.* at 343.

[36] *Id.*

[37] CAL. LAB. CODE §§ 2698–2699.5.

[38] *See id.* § 2699.3.

[39] *Id.*

[40] The remaining 75% is provided to California's Labor and Workforce Development Agency, which helps the agency administer PAGA and educate employers and employees about the labor code. Penalties are $100 for initial violations per pay period and $200 for violations in subsequent pay periods. *See* CAL. LAB. CODE § 2699.

[41] Sakkab v. Luxottica, 803 F.3d 425, 427, 429 (9th Cir. 2015).

enactment of PAGA, only criminal sanctions (not civil penalties) were available to address violations of the labor code.[42] Violations could only be enforced in criminal proceedings by a district attorney, not by the labor commissioner in civil actions.[43] In the legislature's view, this left many labor code violations unpunished.[44] Second, the legislature felt California lacked the resources to enforce the labor code.[45] By one measure, California was losing approximately three to six billion dollars per year in tax revenues due to labor code violations.[46] A U.S. Department of Labor study estimated the existence of nearly 33,000 "serious and ongoing wage violations" in the Los Angeles garment industry alone, yet the state of California issued fewer than 100 wage citations per year throughout the entire state.[47] In short, the state's resources for enforcing labor laws fell behind the pace of economic growth[48] and the California legislature viewed PAGA as a remedy for severe underenforcement of the labor code.[49]

PAGA also includes procedural protections to help shield defendants from abuse. Plaintiffs are usually required to exhaust administrative remedies before litigating a PAGA claim.[50] First, plaintiffs must notify the employer in writing and employers then have thirty-three days to remedy the violation and avoid penalties.[51] Second, a PAGA claimant may proceed in court only after the government takes no action or intends not to investigate.[52]

IV. JUDICIAL ATTEMPTS TO RECONCILE PAGA WITH THE FAA

This part explores how courts have evaluated whether the FAA mandates enforcing representative PAGA waivers in employment agreements. Part IV.A outlines the California Supreme Court's conclusion that employees cannot waive PAGA claims while Part IV.B discusses how the Ninth Circuit reached a similar conclusion. Part IV.C explores how lower courts have struggled to deal with the ramifications of these decisions.

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 429–30.

[46] Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 146 (Cal. 2014).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* BRENT A. OLSON ET AL., CAL. BUS. LAW DESKBOOK § 16:28 (2010).

[51] *See* CAL. LAB. CODE § 2699.3.

[52] *Id.*

A. California's Supreme Court Bars the Waiver of Representative PAGA Claims

In a case seen as a precursor to the Ninth Circuit's decision in *Sakkab*, the California Supreme Court ruled that an arbitration clause that waived an employee's right to pursue representative PAGA claims was unenforceable under state law.[53] The court reasoned that the civil penalties recovered through PAGA are distinct from other damages pursued by plaintiffs—the government is always the real party in interest in PAGA suits[54] and such suits are necessary for enforcing the state's labor code.[55] Under California law, individuals may waive the advantages of laws that benefit themselves in private agreements but not laws "established for a public reason."[56] In this case, waiving representative claims frustrated PAGA's objectives because it diminished the penalties and deterrence contemplated by the California legislature.[57] This holding came to be known as the "*Iskanian* Rule," which became shorthand for a judicial rule barring the waiver of representative PAGA claims under California law.[58]

The California Supreme Court concluded that the FAA did not preempt PAGA because the FAA was designed to ensure an "efficient forum for the resolution of private disputes" whereas PAGA involved disputes between employers and the state's labor agency.[59] This distinction sufficiently differentiated the case at bar from *Concepcion*, which dealt with the bilateral arbitration of a private dispute rather than the state's interest in penalizing and deterring labor code violations.[60] In sum, the FAA was not designed to govern disputes between employers and government agencies.[61] In such cases, there should be a presumption against preemption of state laws because the enforcement of a state's employment laws is within the state's historic police powers.[62] Last, the court was careful to limit the decision to qui tam actions that

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[53] *Iskanian*, 370 P.3d at 140.

[54] *Id.* at 147–48.

[55] *Id.* at 133.

[56] CAL. CIV. CODE § 3513 (noting that "[a]ny one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.").

[57] *Iskanian*, 327 P.3d at 149.

[58] Sakkab v. Luxottica, 803 F.3d 425, 439 (9th Cir. 2015).

[59] *Iskanian*, 327 P.3d at 149.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 152.

actually serve government interests.[63] If the qui tam action was pretextual and seemed "tantamount" to a class action suit, the *Iskanian* rule should not apply.[64]

B. *Sakkab*: The Ninth Circuit Bars Representative PAGA Waivers

The Ninth Circuit upheld the *Iskanian* rule in a 2-1 decision, overruling the lower court's determination that enforcing waivers of representative PAGA claims was required under *Concepcion*.[65] The Ninth Circuit mostly followed the reasoning in *Iskanian* that collective PAGA claims do not interfere with the FAA's objectives.[66] Among other things, the court noted that employees' representative claims are brought on behalf of the government and therefore such disputes are outside the contractual scope of arbitration agreements.[67] Furthermore, PAGA claims are central to the state's enforcement of its labor laws, an area of law the FAA was not designed to regulate.[68] In addition, violations of state law, including PAGA, are "generally applicable contract defenses" that can invalidate any contract, whether they are arbitrated or not, and therefore fall within the FAA's Savings Clause.[69]

In contrast to the California Supreme Court in *Iskanian*, the Ninth Circuit focused more on differentiating the case at bar from *Concepcion* than defending the state's historic police powers in the context of qui tam statutes. The court distinguished representative PAGA claims from class actions through the same modes of analysis used in *Concepcion*.[70]

First, the court observed that PAGA did not prohibit or diminish the freedom to choose informal arbitration procedures because the class action is a procedural device for resolving the claims of absent parties, whereas PAGA is a statutory action brought on the government's behalf.[71] Unlike class actions, there is no need to worry about the due process rights of absent class members and therefore PAGA claims are not

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[63] *Iskanian*, 327 P.3d at 152 (noting that "Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature.").

[64] *Id.*

[65] Sakkab v. Luxottica, 803 F.3d 425, 431 (9th Cir. 2015).

[66] *Id.* at 427.

[67] *Id.* at 438–39.

[68] *Id.* at 439–40.

[69] *Id.* at 432.

[70] *Id.* at 438–39.

[71] *Id.* at 436.

as procedurally complex as class actions and do not interfere with arbitration procedures.[72]

Second, permitting representative PAGA claims may defeat the party's contractual expectations, but the FAA did not intend for a party's expectations to displace all other interests—doing so would render the FAA's savings clause ineffectual.[73]

Third, PAGA claims may increase the risk to defendants like the class actions in *Concepcion*; however, the fact that PAGA may make arbitration less attractive by increasing litigation risks is immaterial because some claims will always be more attractive to arbitrate than others.[74] The FAA should not prohibit a statutory cause of action merely because it leads to more liability. Just as parties may choose to litigate rather than arbitrate antitrust claims, parties may choose to litigate PAGA claims as well.[75]

Last, the Ninth Circuit articulated why representative PAGA actions are not necessarily "procedurally complex" and will not make the process "slower," "more costly," or "more likely to generate procedural morass" in a manner forbidden under *Concepcion*.[76] The complexity of resolving PAGA claims flows from the substance of the law itself, not the law's procedures.[77] Any complex or fact-intensive claim may be more costly but may not interfere with the FAA in a meaningful sense.[78] Parties may still streamline PAGA procedures in arbitration such as by limiting discovery.[79] PAGA could theoretically be too procedurally complex, but in practice, the law permits parties to select informal procedures that are available in arbitration.[80] PAGA only prohibits parties from opting out of the law's private enforcement scheme, which includes representative claims.[81]

The dissent believed the majority mistakenly upheld yet another judicial rule that prevented private parties from enforcing arbitration agreements. In the dissent's view, the case at bar was no different from *Concepcion*: both judicial rules equally frustrated the purpose of arbitration agreements.[82] Like class actions, representative PAGA claims

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[72] *Id.*

[73] *Id.* at 437.

[74] *Id.*

[75] *Id.* at 437–39.

[76] *Id.* at 438.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 439.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 440.

were likely to make arbitration slower, more complex, and likely to generate procedural morass.[83] Furthermore, the dissent concluded this decision defeated the contractual expectations of parties ex ante[84] and was not justified on public policy grounds.[85]

C. Aftermath: Ambiguity over the Scope and Remedy of *Sakkab*

The Ninth Circuit's September 2015 decision in *Sakkab* has already systematically affected the judicial system. Multiple lower courts have vindicated the rights of employees to pursue representative PAGA claims despite waivers to the contrary.[86] In addition, some legal scholars have advocated that state legislatures craft qui tam statutes like PAGA to dilute the supremacy of arbitration agreements over state law.[87]

Lower courts are divided over whether *Sakkab* prohibits the arbitration of representative PAGA claims or just the waiver of these claims. Textually, *Sakkab* clearly states that parties are free to adopt arbitration procedures and that the decision only prevents opting out of PAGA's enforcement scheme ex ante.[88] Nonetheless, the court left ambiguous what happens when such waivers are struck down ex post: are the surviving representative PAGA claims submitted to arbitration or must they be litigated in federal court?[89]

Amidst rising challenges to the waiver of representative PAGA claims in the lower courts, judges have primarily responded in three ways. First, some judges have postponed determining whether the surviving claims should be arbitrated, deciding to reevaluate the question after non-PAGA claims have been fully arbitrated.[90] Second, judges

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[83] *Id.* at 444.

[84] *Id.* at 445.

[85] First, the dissent observed that any employee not subject to an arbitration agreement is welcome to file a PAGA claim. *Id.* at 449. The employee in *Sakkab* declined to exercise an opt-out provision from the arbitration agreement—which many employers offer to avoid contracts of adhesion claims. *Id.* Second, PAGA claimants must first provide notice to the state government, which remains free to intervene regardless of the legal outcome of the case-at-bar. *Id.* Last, no parties disputed that individual PAGA claims may be raised in arbitration; only representative PAGA claims were in dispute. *Id.*

[86] *See generally* Wulfe v. Valero Ref. Co.-California, 641 F. App'x 758, 760 (9th Cir. 2016); Da Loc Nguyen v. Applied Med. Res. Corp., 209 Cal.Rpt.3d. 259, 260 (Cal. Ct. App. Oct. 4, 2016); Hernandez v. DMSI Staffing, LLC, 79 F. Supp. 3d 1054 (N.D. Cal. 2015).

[87] *See generally* Alexander, *supra* note 14; *see also* Weston, *supra* note 14 (noting that "corporate advocates seeking reversal of *Iskanian* assert that the California Supreme Court was attempting yet another failed 'end run' around the FAA by having legislatures 'deputize' individuals to enforce otherwise preempted state laws.").

[88] *Sakkab*, 803 F.3d at 439.

[89] *Id.* at 440.

[90] Shepardson v. Adecco USA, Inc., No. 15-CV-05102-EMC, 2016 WL 1322994, at *7 (N.D. Cal.

have let arbitrators decide whether the claims should be arbitrated or litigated.[91] Last, some judges have refused to submit such claims to arbitration altogether, instead opting to bifurcate PAGA and non-PAGA claims between federal courts and arbiters, respectively.[92] To make matters even more confusing, *Iskanian* suggests PAGA claims may never be arbitrated because the state did not consent to arbitration proceedings.[93] Some legal practitioner guides have taken this position,[94] despite *Sakkab*'s suggestion that PAGA claims can be arbitrated.[95]

The aftermath of the *Sakkab* and *Iskanian* decisions leaves two potential issues for courts to resolve. First, other appellate courts and perhaps the Supreme Court may need to consider whether individuals may waive qui tam actions, such as representative PAGA claims, in contractual agreements. Second, if individuals may not waive certain qui tam actions, courts will need to determine if and how qui tam actions may be arbitrated. Unsurprisingly, the default rule that emerges will have large consequences for the future of arbitration, the ability to contract under conditions of certainty, and whether the state can be compelled to unconsented arbitration proceedings.

V. REPRESENTATIVE PAGA CLAIMS SHOULD NOT BE WAIVABLE

Determining whether private parties may contractually waive representative PAGA claims involves considering many factors. Part V.A explores the text and purpose of the FAA while Part V.B considers federalism as a canon of statutory interpretation. Part V.C suggests reviving the distinction between substantive and procedural rights in arbitration agreements. Part V.D reevaluates the regulatory enforcement needs of state governments in the twenty-first century. Part V.E addresses the concerns of arbitration advocates and proposes compromise solutions. Last, Part V.F suggests that, while representative PAGA claims should be preserved, states still have viable but less attractive alternatives.

Apr. 5, 2016).

[91] Tajonar v. Echosphere LLC, No. 14CV2732-LAB (RBB), 2016 WL 3523040, at *1 (S.D. Cal. June 28, 2016); *see also* Levin v. Caviar, Inc., No. 15-CV-01285-EDL, 2016 WL 270619, at *4 (N.D. Cal. Jan. 22, 2016).

[92] Young v. Remx, Inc., 206 Cal. Rptr. 3d 711, 712 (Ct. App. 2016) (bifurcated claim); *see also* Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 947 (N.D. Cal. 2015).

[93] Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 151 (Cal. 2014) ("Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code.").

[94] *See also* OLSON ET AL., *supra* note 50.

[95] Sakkab v. Luxottica, 803 F.3d 425, 439 (9th Cir. 2015).

A. The FAA's Plain Text and Purpose as Applied to Qui Tam Suits

The FAA's plain language—"a controversy thereafter arising out of such *contract* or *transaction*"[96]—is naturally read to cover the rights and obligations of parties in ordinary commercial disputes rather than qui tam enforcement actions.[97] Unlike class actions, which were created after the FAA's enactment, qui tam statutes similar to PAGA were a part of the nation's legal framework when the FAA was contemplated in 1924.[98] Therefore, Congress could have indicated that qui tam claims may be waived in arbitration agreements. Nonetheless, Congress did not and qui tam statutes are ordinarily not considered to be contracts or transactions. [99] Furthermore, the FAA's legislative history indicates the statute was designed to enforce arbitration agreements between private parties.[100] Nothing appears to suggest that arbitration agreements should interfere with powers typically reserved to the state like enforcing violations of a state's labor code. In sum, the plain text and legislative history suggests Congress did not intend for the FAA to preempt qui tam laws like PAGA.

Case law regarding the FAA also suggests that the statute is thought to govern commercial transactions rather than qui tam actions. Supreme Court jurisprudence, with one exception, discusses disputes between private parties rather than public enforcement agencies, further suggesting the statute did not contemplate favoring arbitration at the expense of qui tam actions or even government enforcement actions generally.[101] The one exception, *EEOC v. Waffle House*,[102] considered

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[96] *See* 9 U.S.C. § 2 (2012) (emphasis added).

[97] *Iskanian*, 327 P.3d at 150.

[98] The history of qui tam actions dates back to colonial times. *See* Vermont Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 776–77 n.5 (2000) (noting that "the First Congress passed one statute allowing injured parties to sue for damages on both their own and the United States' behalf"). In addition, Congress passed the False Claims Act (FCA) during the Civil War, which allowed whistleblowers to share in the recovery of false claims made against the federal government. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 539–40 (1943); *see also* 31 U.S.C § 3730 (2016).

[99] As recently as 2000, the Supreme Court affirmed that FCA plaintiffs, despite lacking actual injury, have standing in court because their claims are reasonably regarded as a partial assignment of the government's claim. *Vermont Agency*, 529 U.S. at 771–78.

[100] *See generally Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 29 (1924) (testimony of Julius Henry Cohen, the drafter of the FAA, that the Act will merely make enforceable the customs within trade associations to arbitrate disputes); *see also Iskanian*, 327 P.3d at 150.

[101] *Iskanian*, 327 P.3d at 150. This could also be symptomatic of availability bias: courts can only hear the cases before them. Nonetheless, it seems implausible that courts have only just begun considering arbitration cases in the context of government enforcement.

[102] 534 U.S. 279 (2002).

whether an arbitration agreement could prevent the Equal Employment Opportunity Commission (EEOC) from suing on behalf of an employee.[103] The Supreme Court held that the FAA does not prevent such action primarily because the government was not a party to the agreement.[104] While the opinion did not directly touch upon qui tam actions brought on the government's behalf, the holding suggests that government enforcement actions such as qui tam actions are outside the purview of the FAA.[105] Nonetheless, a few lower courts have required parties to arbitrate their qui tam claims, usually by finding that only individuals—not the government—may own qui tam claims and therefore their arbitration agreements should be fully enforced.[106]

While the Supreme Court inferred that the FAA preempted state laws that bar class action waivers,[107] those state laws interfered with the contracted-for procedures in arbitration agreements. PAGA claims may be inconvenient for employers, but such claims uphold rights that differ substantially from the procedural requirements in class actions. Qui tam actions existed when Congress enacted the FAA in 1924, and thus could have been contemplated during the statute's enactment.[108] Class actions did not exist.[109] The FAA's plain text, legislative history, and subsequent case law suggest that the bar against PAGA waivers is best classified as a general contractual defense, which would be permitted under the plain text of the FAA's savings clause.[110]

B. Applying Federalism as a Canon of Statutory Interpretation

The Supreme Court's general language concerning federalism and preemption suggests that state qui tam statutes should be excluded from the FAA.[111] The Supreme Court has stated that statutes should

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[103] *Id.*

[104] *Id.* at 294.

[105] *Id.* at 289 ("For nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. The FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum.").

[106] *See, e.g.*, Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12-CV-63, 2013 WL 394875, at *8 (S.D. Ohio Jan. 31, 2013) (permitting arbitration of FCA claims because the claim "still represents a claim belonging to the Plaintiffs themselves."); *see generally* Charles A. Sullivan, *Whose Claim Is It Anyway? Arbitrating Relators' FCA Claims*, 9 J. HEALTH & LIFE SCI. L. 4 (2015).

[107] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[108] Vermont Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 765, 777 (2000).

[109] Rule 23, which governs class actions, was formulated in 1966. *See* Dep't Def. News, *Class Action Reform Gets a Shot in the Arm*, 69 DEF. COUNS. J. 263, 264–65 (2002).

[110] 9 U.S.C. § 2 (2012) (specifying that arbitration agreements may be invalided under "grounds as exist at law or in equity for the revocation of any contract.").

[111] This Comment does not assert that the federal government lacks the power to regulate state

not be construed in a manner that alters the usual constitutional balance between states and the federal government unless congressional intent is "unmistakably clear" in the statute's language.[112] In addition, courts should not preempt the "historic police powers of the States" unless there is a "clear and manifest purpose of Congress."[113] Overall, this precedent has established a "high threshold" for preemption of state laws that purportedly conflict with the purpose of a federal act.[114]

The Supreme Court's strong language on federalism and preemption is contrasted with specific Supreme Court precedent regarding how the FAA should be applied. As noted earlier, the Supreme Court concluded there is a "national policy favoring arbitration,"[115] a "liberal federal policy favoring arbitration,"[116] and that such agreements should be enforced according to their terms.[117]

Reconciling the Supreme Court's instructions on federalism and arbitration may be straightforward with run-of-the-mill arbitration agreements, but it is much more complex when inferring how the FAA should treat state qui tam statutes like PAGA. As noted, the FAA's plain language and legislative history is silent regarding qui tam actions. Construing the FAA as favoring arbitration at the expense of state qui tam actions may honor the parties' contractual expectations and the strength of arbitration agreements, but it also constricts the enforcement powers of states without a clear instruction from Congress that arbitration should preempt those powers.

In this particular case, construing the FAA to apply to PAGA would disrupt modern notions of federalism and statutory interpretation. Congress likely has the constitutional power to preempt qui tam statutes,[118] but the real question is whether Congress intended to preempt state qui tam powers. Qui tam actions play a powerful role for states to uncover fraud, encourage whistleblowing, and enforce laws and regulations. Budget-conscious states such as California have turned to qui tam actions to enforce the labor code at a lower cost.[119]

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qui tam actions, but rather, that the FAA should not be presumed to preempt qui tam actions without clear congressional intent.

[112] Gregory v. Ashcroft, 501 U.S. 452, 452 (1991).

[113] Arizona v. United States, 567 U.S. 387, 400 (2012).

[114] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 110 (1992).

[115] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

[116] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[117] Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 469 (1989).

[118] *See generally* United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000).

[119] *See* Sakkab v. Luxottica, 803 F.3d 425, 429–30 (9th Cir. 2015).

Given the strong state interest in enforcing laws and regulations through qui tam actions, the FAA should not be read to preempt qui tam actions without a clear directive from Congress. In *Gregory v. Ashcroft*, the Supreme Court articulated that statutes should not be interpreted in ways that (1) upset the usual constitutional balance between the federal government and states or (2) lessen the state's historic police powers without clear indicia from Congress.[120] Reading the FAA to preempt PAGA would contradict the Court's decision in *Gregory v. Ashcroft*, which would make this canon of statutory interpretation less effectual by unsettling Supreme Court precedent. Given the lack of clear congressional intent that the FAA should preempt state qui tam laws, one can also imagine increased judicial uncertainty and error costs in future cases of federal preemption. A legal realist may fear increased judicial manipulation if judges are granted additional discretion to decide preemption issues. Last, state governments would lose the clarity provided by current case law, which could create additional difficulty for crafting laws that avoid federal preemption.

Rather than asking the judiciary to speculate how an early-twentieth century Congress would have felt about enforcing arbitration agreements to the detriment of state qui tam actions, Congress could clarify its views. Congress may choose to modify the scope of the FAA's savings clause or perhaps do nothing at all. Either way, Congress is better suited to decide whether the FAA preempts PAGA than the judiciary. This decision ultimately turns on congressional intent and has serious institutional and political consequences for private actors and state governments. Last, a congressional decision on this question would avoid obfuscating modern Supreme Court precedent concerning federalism and statutory interpretation.

Arbitration advocates may argue that *Concepcion* already answered whether the FAA preempts state laws that disfavor arbitration. Nonetheless, representative PAGA claims are distinguishable from the class actions in *Concepcion*. First, *Concepcion* reviewed a judicially created rule whereas the bar against waiving representative PAGA claims has a stronger statutory basis. California law directly states the right to a PAGA claim;[121] state courts determined that the bar against class action procedures was "unconscionable."[122] Second, there is a substantive difference between representative PAGA claims and class actions

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[120] Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (intentionally interpreting federal antidiscrimination laws in a manner that avoids preempting Missouri's mandatory retirement age for state court judges).

[121] CAL. LAB. CODE §§ 2698–2699.5 (2016).

[122] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, (2011).

despite procedural similarities.[123] Third, *Concepcion* did not consider qui tam actions and whether governments may be bound to unconsented arbitration agreements. Unlike in *Conception*, there is an additional body of qui tam case law that courts must weigh.[124] Fourth, the substance of PAGA implicates the sovereignty of state governments to a far greater degree than class actions. The former is a tool for the state to enforce laws and regulations; the latter was a view of what made contracts unconscionable.[125]

C. Distinguishing between Procedural and Substantive Rights

Federal courts have distinguished between procedural and substantive rights when evaluating what statutory claims may be waived in arbitration agreements. In *Mitsubishi Motors Corp.*, the Supreme Court determined that the substantive rights provided by statute are not implicitly waived in arbitration.[126] On the other hand, procedural rights could be implicitly waived because arbitration agreements are designed to promote simplicity and expedition compared to ordinary courtroom procedures.[127] As a result, determining whether a statutory right is substantive or procedural determines whether that right can be implicitly forfeited in arbitration agreements. Although *Sakkab* did not rely on this distinction,[128] it is a useful mode of analysis for determining whether an arbitration agreement is merely streamlining procedure or depriving individuals of substantive rights.

A representative PAGA claim implicates substantive rights. A representative claim, as opposed to an individual one, results in higher recoveries for both PAGA claimants and the government.[129] Arbitration agreements that ban representative claims do more than streamline procedure; they forbid the exercise of a statutory right provided by

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[123] *See generally infra* Part V.C.

[124] *See generally* Vermont Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765 (2000).

[125] *Discover Bank*, 113 P.3d at 1110.

[126] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (noting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.").

[127] *Id.*

[128] Sakkab v. Luxottica, 803 F.3d 425, 433–34 n.9 (9th Cir. 2015) (citations omitted) (noting that "the 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute, does not extend to state statutes").

[129] CAL. LAB. CODE § 2699 (2016). While class actions also result in higher recoveries, representative PAGA claims can be distinguished. The higher recoveries result from the offense itself, not the number of parties to a suit.

PAGA.[130] Even if waiving a PAGA claim is arguably procedural to an individual, it is substantive to the government. California explicitly designed an enforcement scheme that relies on qui tam claims for enforcement. When private parties waive PAGA claims without the government's consent, the government's enforcement power is substantively weakened.

Neither the majority opinions in *Iskanian*[131] nor *Sakkab*[132] expressly endorsed the procedural/substantive distinction. A prior Ninth Circuit decision precluded the *Sakkab* Court from endorsing the procedural/substantive distinction as applied to state statutes like PAGA;[133] however, a court is not prohibited from considering this mode of analysis in dicta. As applied to this scenario, this factor clearly leans towards PAGA claims being non-waivable. In addition, this mode of analysis could assist arbitration advocates who are concerned state legislatures may enact qui tam legislation to evade arbitration agreements. Courts could strike qui tam motions that appear to be pretextual mechanisms for promoting representative claims as procedural, while upholding qui tam motions that further a state's enforcement scheme as substantive. The distinction between procedure and substance would also help courts decipher which qui tam claims are substantively legitimate, and which are pretenses for dismantling arbitration generally.

Courts could look to a number of factors to determine whether qui tam agreements are furthering substantive government enforcement interests or functioning as pretexts to evade arbitral agreements. First, courts could examine the origin of the right. Is the qui tam action rooted in a power typically reserved to the states such as enforcing the labor code? Second, courts could consider the governmental interest in the qui tam action. Does the action promote a substantive state interest in enforcing a certain area of law such as the labor code? Does the government have initial control over the qui tam motion? Third, courts could consider the private interest by assessing how much private parties collect versus the government. Like with any multi-factor test, there may be close calls but these factors present a useful starting point.[134] Although no court appears to have explicitly utilized this test, these three

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[130] Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 157 (Cal. 2014) (Chin, J., concurring).

[131] *Id.* at 156 (Chin, J., concurring).

[132] *Sakkab*, 803 F.3d at 433.

[133] Ferguson v. Corinthian Colls., Inc., 733 F.3d 928, 936 (9th Cir. 2013) (preventing the application of the substantive/procedural distinction endorsed by the Supreme Court in *Mitsubishi Motors Corp.* from applying to state statutes like PAGA).

[134] Nonetheless, delineating between procedure and substance may still pose unique challenges. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (demonstrating disagreement over whether certain state laws qualified as substance or procedure

factors help separate substantive qui tam motions from pretextual ones and are consistent with the earlier limitations implied in *Iskanian*.[135]

D. The Importance of Qui Tam for State Sovereignty and Efficient Regulation

While arbitration advocates have valid concerns, the entirety of a PAGA claim should not be waivable by private parties. The incentives for an individual to fully waive a PAGA claim are different from the state's interests in doing so. Allowing an individual to waive PAGA claims would benefit private individuals at the expense of the taxpayers qui tam actions are partially designed to serve. Permitting individuals to fully waive PAGA claims would restrict the government's enforcement scheme without its consent and allow private parties to agree to prevent the enforcement of state laws and regulations. Not only are PAGA waivers barred by California law, contravening state law enforcement under the guise of a liberal policy favoring arbitration is likely outside the scope of the FAA's language and intent.

Since PAGA claimants do not own the entirety of their PAGA claims, private parties should not be permitted to waive more than they own. PAGA claimants must first notify the employer and state government of their claim.[136] Only after the government declines to take action may a PAGA claimant proceed in court.[137] This suggests that, at the very least, the government has ownership in the PAGA claim. In addition, full qui tam waivers are inconsistent with the long-standing notion that governments partially own qui tam claims.[138]

Qui tam actions are a billion-dollar industry[139] and appear to be rising in importance, including as a regulatory tool for state governments. Enforcing arbitration agreements that bar qui tam statutes

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under the Rules Enabling Act).

[135] *Iskanian*, 327 P.3d at 151–52.

[136] *See* CAL. LAB. CODE § 2699.3 (2016).

[137] *Id.*

[138] *See* Vermont Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 771–76 (2000) (noting that FCA claimants bring forth claims on behalf of the government, and therefore, need not suffer injury in fact); *see also* United States v. My Left Foot Children's Therapy, LLC, No. 214CV017 86MMDGWF, 2016 WL 3381220, at *6 (D. Nev. June 13, 2016) (noting that "[b]ecause the [FCA] fraud claims at the heart of this case belong to the government, the Court will not compel arbitration of the qui tam claims").

[139] False Claims Act litigation is a billion-dollar industry and remains a powerful tool to prevent fraud and abuse. *See generally* Andrews Publications, *Study Shows Anti-Fraud Law Has Restored $9 Billion to Taxpayers Reducing Health Care Fraud: An Assessment of the Impact of the False Claims Act*, 7 ANDREWS HEALTH CARE FRAUD LITIG. REP. 10 (2001); *see also* U.S. Dep't of Justice, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015 [https://perma.cc/2GSZ-EK6L].

would weaken the impact of a qui tam regulatory scheme, as many potential plaintiffs may have signed arbitration agreements as either consumers or employees. Given rising budget deficits and hesitation for expanding the size of regulatory and administrative agencies, other states may follow California's lead in turning to qui tam statutes to enforce functions typically enforced by government prosecutors.

Qui tam enforcement may be more efficient than ordinary government regulation. Deputizing private parties that are most likely to encounter violations may provide the same or greater levels of enforcement at lower cost. While some scholars have advocated that the contemporary administrative state may be more efficient than litigation-based systems such as in tort law,[140] there is greater reason to use a litigation-based system like PAGA regarding labor violations. First, unlike torts, the remedies in labor law are easier to administer ex post. Issuing monetary damages and rewards as prescribed by the labor code is simpler than evaluating the monetary value of injuries. Second, prevention is less critical. Many tort injuries are permanent; most labor code violations are not.

Before impeding the utility of qui tam actions like PAGA, unintended consequences should be fully considered. For example, the efficiency obtained by incentivizing individuals to directly report wrongdoing is lost if representative qui tam claims are waivable, and governments may need to find new ways to deter wrongdoing. The present use of qui tam actions may promote smaller government agencies, reduced costs, and alternatives to agency adjudications. In sum, states may need to increase regulation and government spending on traditional law enforcement, administrative inspections, and prosecution if qui tam actions become waivable.

E. Addressing the Concerns of Arbitration Advocates and Avoiding Absurdity

Arbitration advocates may assert that employees such as the plaintiff in *Sakkab* should have the right to waive qui tam claims, especially if such waivers are consensual. Under this view, rulings like *Sakkab* allow individuals to agree to arbitration agreements ex ante and then disregard these agreements ex post. This undercuts the predictability and perhaps even the function of arbitration agreements. While this argument has merit when the legal rule is uncertain, a clear resolution of whether rights such as PAGA may be waived provides parties the

[140] *See generally* Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REG. VS. LITIG.: PERSP. FROM ECON. & L. 11–26 (Daniel P. Kessler ed., 2010).

ability to contract around the rule ex ante. This would allow future parties to price in the risk of PAGA claims. In addition, while *Sakkab* incrementally limits freedom of contract interests for private parties, the decision also protects freedom of contract interests: third parties such as the government are not bound to unconsented contracts.

Arbitration proponents may also worry that qui tam statutes will be systemically used to dismantle arbitration; however, there are a few limiting principles that address this concern. First, the California Supreme Court in *Iskanian* noted that this ruling is applicable only to qui tam actions that serve the government; qui tam suits that only serve private parties may be waived.[141] If the qui tam action is more similar to a class action suit than a true mechanism of government enforcement, the *Iskanian* rule should not apply.[142]

Second, PAGA includes procedural protections that shield arbitration agreements from excessive abuse. The statute generally requires plaintiffs to exhaust administrative remedies before submitting a claim in court.[143] First, plaintiffs must notify the employer and appropriate government agency in writing.[144] Employers then have 33 days to remedy the violation and avoid penalties.[145] If the agency takes no action or intends not to investigate, only then may a PAGA claimant proceed in court.[146]

Should the two limitations above be insufficient for protecting arbitration agreements, the factors suggested in Part V.C to differentiate between substantive rights and procedural protocols could be a useful starting point to disregard pretextual qui tam actions. In addition to discounting pretextual qui tam statutes, compromise solutions are worth considering. First, state governments could provide more information when declining to litigate qui tam claims. Did the government turn over the claim due to a lack of resources, or because the government thought the claim lacked merit? Allowing private parties to waive less meritorious PAGA claims encroaches less on state sovereignty than instances where the government foreclosed the opportunity due to a lack of resources. This compromise has the potential to lessen the number of unwaivable PAGA claims.

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[141] Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 152 (Cal. 2014); *see generally supra* Part IV.A.

[142] *Iskanian*, 327 P.3d at 152.

[143] *See also* OLSON ET AL., *supra* note 50.

[144] *See* CAL. LAB. CODE § 2699.3 (2016).

[145] *Id.*

[146] *Id.*

Second, courts could find that PAGA claimants waived their own right to collect damages, but not claims of the government. In this context, the state could still collect seventy-five percent of the proceeds, but the PAGA claimant would not receive their twenty-five percent allotment. This framework may reduce the incentive of some litigants to pursue PAGA claims, but it would still allow individuals to sue on behalf of others and potentially recover attorney's fees.[147] This could preserve the government's enforcement power and interest in the claim, maintain some deterrence incentives, and allow private parties to maintain their contractual obligations. This solution may not be perfect, but it represents a compromise between arbitration and qui tam interests. Nonetheless, PAGA suits are less likely to arise if the plaintiff no longer has an economic incentive to pursue such violations. This could impermissibly limit the enforcement scheme contemplated by states and therefore effectively waive qui tam claims.

Both of these compromises may lack a clear statutory hook and would require voluntary state action or new judicial interpretation to implement. Concluding that private parties may waive their own claims, but not the government's, could justify the second compromise.

F. Increased Individual Penalties: An Inferior Alternative to Representative Claims

PAGA claims should not be waivable by private parties given the strong state interest in representative qui tam actions. Nonetheless, should a future court determine that representative qui tam actions like PAGA may be waived, the anticipated harm to state sovereignty and enforcement may be exaggerated. *Sakkab* and *Iskanian* did not address whether individual[148] PAGA claims could be waived.[149] Therefore, state legislatures may still increase the penalty schemes for individual PAGA claims should representative ones be barred. Nonetheless, increasing the penalties of individual claims to approximate the anticipated decrease of barring representative claims would likely be imprecise. This could also lead to higher error costs if penalties are indiscriminately higher. Deterrence could be less effective and fair if employer penalties

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[147] CAL. LAB. CODE § 2699(g) (2016).

[148] Individual PAGA are only brought on behalf of individuals, unlike representative PAGA claims which are also brought on behalf of the government. CAL. LAB. CODE §§ 2698–2699.5.

[149] The *Sakkab* Court only upheld the *Iskanian* rule, which solely addressed whether representative claims may be waived. Sakkab v. Luxottica, 803 F.3d 425, 434 (9th Cir. 2015) (noting that "The California Supreme Court's decision in *Iskanian* expresses no preference regarding whether individual PAGA claims are litigated or arbitrated. It provides only that representative PAGA claims may not be waived outright.").

cannot be individualized to account for the number of employees impacted, as would be calculated by representative PAGA claims. Despite obvious drawbacks, a similar net level of government enforcement could result over the course of hundreds or even thousands of violations.

VI. RATIONALES AND SUGGESTIONS FOR ARBITRATING QUI TAM CLAIMS

If representative PAGA claims cannot be waived in arbitration agreements, can these claims still be arbitrated? Following *Sakkab*, courts have reached different conclusions about whether surviving claims are appropriate to bring before arbiters.[150] While *Sakkab* explicitly states that qui tam claims may be arbitrated,[151] *Iskanian* can be read to conclude that such claims cannot be resolved in arbitration.[152] Part VI.A argues that qui tam arbitration could theoretically be justified under an implicit consent theory. Part VI.B asserts that distinguishing between substantive rights and procedural protocols provides a framework for arbitrating qui tam claims.

A. Implicit Consent: Justifying the Government's Participation in Arbitration

Submitting qui tam actions to arbitration technically makes the state a party to the arbitration proceeding. Compelling a state sovereign to unconsented arbitration may be concerning. This scenario could raise constitutional problems: is an arbiter able to resolve government enforcement disputes in lieu of courts? Unique cases could implicate due process rights for private parties if arbitration procedures are too streamlined. Some courts have allowed the arbitration of other qui tam claims,[153] but this question remains unsettled.[154]

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[150] *Compare* Young v. Remx, Inc., 206 Cal. Rptr. 3d 711, 712 (Ct. App. 2016) (bifurcated claim), *with* Tajonar v. Echosphere LLC, No. 14CV2732-LAB (RBB), 2016 WL 3523040, at *1 (S.D. Cal. June 28, 2016) (PAGA claims submitted to arbitration to determine proper forum).

[151] *Sakkab*, 803 F.3d at 439.

[152] Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 152–53 (Cal. 2014) (noting that "the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself."); *see also* OLSON ET AL., *supra* note 50.

[153] *See* Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12-CV-63, 2013 WL 394875, at *8 (S.D. Ohio Jan. 31, 2013) (permitting arbitration of FCA claims).

[154] *See* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000) (noting that "Congress must have intended that whistleblower retaliation actions brought under 31 U.S.C. § 3730(h) be heard in a district court rather than before an arbitrator."); *see also* Sullivan, *supra* note 106, at 7 (citations omitted) (noting that "congressionally-prescribed filing-under-seal procedure is simply inapplicable to an arbitration proceeding. Further, even when the DOJ opts not to

On the other hand, private PAGA litigation requires implicit consent by state governments. The government has the right to intervene in a state or a federal court in the first instance. A qui tam claim may be submitted to arbitration only when a state declines to litigate the case. This can be seen as implicit consent by the state that the claim could be arbitrated. First, when a state declines to litigate a claim, it grants full litigation authority to a private litigant. The private litigant may choose their own counsel, litigation strategy, and presumably forum for resolution, whether arbitral or judicial. Second, state governments presumably have knowledge that a claim will be arbitrated before declining, assuming they are aware of the relevant legal facts. The statute requires employees to provide notice of the alleged labor violation, as well as the fact and theories supporting the violation.[155] This likely includes relevant information from the underlying contractual agreement. If the state implicitly consents to the agreement, the state's sovereignty is less weakened. Furthermore, it is an act of Congress, the FAA, which legally compels the state to arbitrate, not the contractual agreement itself. This makes the federal government, not private parties, ultimately responsible for bringing the state into arbitration. Arbitration advocates may also point to the enforcement of FCA qui tam claims in arbitration as precedent for arbitrating PAGA qui tam claims.[156]

Counterintuitively, construing the private litigation of PAGA claims as implicit governmental consent to arbitration may preserve state sovereignty over qui tam matters. The opposite rule is more likely to frustrate the objectives of arbitration by making arbitration less likely, and could encourage federal courts to rule that the FAA preempts state qui tam statutes. In addition, there is some precedent for arbitrating qui tam motions.[157]

No matter the result, the question of whether qui tam motions like PAGA may be arbitrated should be resolved. The status quo offers too

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intervene, the FCA provides it certain rights that do not fit within the framework of arbitration. Thus, the court must approve any settlement of the relator's claim and must determine, within the statutory cap and floor, the percentage of the overall recovery the relator will receive.").

[155] *Iskanian*, 327 P.3d at 146–147.

[156] *See Deck*, 2013 WL 394875 at *8 (permitting arbitration of FCA claims); *see generally* Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203, 207 (2015) (citations omitted) (noting that "[b]y failing to include anti-arbitration provisions in the FCA, Congress set the groundwork for corporate defendants to oust whistleblower suits from court, and employers are obliging. Corporations have begun to prevail in federal court and are creating precedent in favor of qui tam arbitration.").

[157] *See Deck*, 2013 WL 394875 at *8 (permitting arbitration of FCA claims).

much uncertainty, which could lead to inconsistent rulings, higher decision costs, and even potential judicial manipulation. Should California courts conclusively determine that PAGA prevents the arbitration of all qui tam claims, the state legislature would be wise to resolve the conflict with *Sakkab* before federal courts may unfavorably address the situation.

B. Procedure vs. Substance: A Framework for Qui Tam Claims in Arbitration

Consenting parties should be able to fully arbitrate PAGA claims, whether they are representative or individual as suggested in *Sakkab*. As long as the arbitration process upholds the substantive ends of PAGA, arbitration of representative PAGA claims has the potential to (1) take advantage of more efficient arbitration procedures and (2) keep all of an employee's claims lumped together in one proceeding.[158] Arbitration of PAGA claims would only occur in cases where the government declines to intervene, thus leaving the litigation fully in the hands of the PAGA claimant.

While this Comment does not provide a complete overview of how qui tam claims may be arbitrated,[159] distinguishing between substantive rights and procedural protocols is a useful starting point that preserves the substantive benefits of qui tam actions and the procedural efficiency of arbitration agreements. Courts and arbiters could look to the factors mentioned in Part V.C to assess what aspects of qui tam motions should be maintained and what can be disregarded. For example, rules regarding recoveries, which implicate the government's recovery and punishment scheme, should be maintained while requirements benefitting only private parties such as certain discovery rules could be weakened. This framework would preserve the notion that private parties cannot waive the enforcement of laws intended for public benefit, while still permitting private parties to obtain the procedural benefits of arbitration.

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[158] Some courts have bifurcated PAGA claims in court and non-PAGA claims in arbitration agreements. *See* Young v. Remx, Inc., 206 Cal. Rptr. 3d 711, 712 (Ct. App. 2016) (bifurcated claim).

[159] For more information on governments as third parties in arbitration proceedings, see Jacob Stoehr, *A Question of Sovereignty, Development, and Natural Resources: A New Standard for Binding Third Party Nonsignatory Governments to Arbitration*, 66 WASH. & LEE L. REV. 1409 (2009); *see also* Hans Smit, *When Is a Government Bound by A Contract, Including an Arbitration Clause, It Did Not Sign?*, 16 AM. REV. INT'L ARB. 323 (2005); Linda R. Boyle, *Three's Company: Examining the Third-Party Problem Through an Analysis of* Bridas S.A.P.I.C. v. Government of Turkmenistan, 45 HOUS. L. REV. 261 (2008).

Permitting representative PAGA claims will inevitably diminish some arbitration agreements. Arbitrating qui tam claims will likewise unavoidably weaken the litigation position of some parties ex post. Nonetheless, there are solutions available that balance the concerns of both arbitration and qui tam advocates ex ante.

VII. CONCLUSION

The Ninth Circuit's decision in *Sakkab* has unsettled modern orthodoxy regarding the supremacy of arbitration agreements over state law, and has raised complicated questions regarding state sovereignty, federal preemption, and the relationship between qui tam actions and arbitration. While the Ninth Circuit correctly determined that representative PAGA claims cannot be waived, alternate approaches and open questions remain. As other courts may consider similar issues, judges should be careful to consider the importance of qui tam actions for law enforcement and the repercussions to federalism and state sovereignty. In addition, ensuring a peaceful coexistence between qui tam action and arbitration agreements should be prioritized. While qui tam actions and arbitration agreements can conflict, courts should attempt to maintain the aims and purposes of both. The intersection of qui tam actions and arbitration presents difficult questions, but preserving the substantive benefits of qui tam actions and the economic advantages of arbitration agreements are achievable and worth exploring.