

## TO SKIN A CAT: *QUI TAM* ACTIONS AS A STATE LEGISLATIVE RESPONSE TO *CONCEPCION*

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*The Supreme Court's decision in *Concepcion* is widely regarded as heralding the demise of small-claims class actions whenever contracts of adhesion are involved in the transaction—which means for virtually all consumer and employment claims. Amending the Federal Arbitration Act to overturn *Concepcion* would be a relatively simple exercise in legislative drafting, but in the current political climate such efforts are unlikely to succeed. Thus far, proposed federal corrective legislation has failed to pass, and federal agency regulation of class waivers has been lacking. State legislatures might have the political ability to pass corrective legislation, but virtually all state limitations on class waivers in mandatory arbitration clauses are foreclosed by federal preemption under *Concepcion*.*

*This Article proposes an alternative approach that could be taken at the state level: statutory *qui tam* actions to enforce civil penalties for violations of state consumer protection and employment laws. A *qui tam* action is a representative action brought on behalf of the state, to enforce the state's claim for civil penalties, rather than a class action to recover compensation for individual injuries. The penalties are owed to the state, with a share of the recovery payable to the plaintiff as an incentive to private enforcement. The action is for the public benefit, for the law enforcement purpose of ensuring compliance with state law, rather than for private benefit. Thus, the rationale of *Concepcion* simply does not apply to such actions. Indeed, allowing private parties to contract away the state legislature's chosen means of enforcing claims that belong to the state would seriously impair the state's ability to execute core governmental functions. It would be an intrusion into state sovereignty that should give pause to neo-federalists such as the majority in *Concepcion*.*

*California's Private Attorneys General Act (PAGA), which provides a mechanism for private enforcement of civil penalties for violation of the state labor code, is an example of how a state might use the *qui tam* model to hold defendants accountable for mass harms without being vulnerable to FAA preemption under *Concepcion*. After describing the operation of PAGA and how courts have interpreted it, I propose some simple adjustments that would increase the likelihood that courts would find *Concepcion* inapplicable to a PAGA-style *qui tam* statute. *Qui tam* actions are not a perfect substitute for class actions, because they can provide only limited compensation to victims. But they may partially fill the deterrence gap that *Concepcion* is widely expected to create.*

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## INTRODUCTION

*AT&T Mobility v. Concepcion*<sup>1</sup> is the latest and most expansive step in the Supreme Court's ongoing project of transforming the Federal Arbitration Act (FAA),<sup>2</sup> a statute passed to forbid discrimination against arbitration, into a virtually irrebuttable federal preference for arbitration that displaces states' power to develop generally applicable contract law regarding contracts of adhesion. After *Concepcion*, if a party with power to dictate the terms of a contract chooses to eliminate access to courts or to aggregative proceedings, states are essentially powerless to protect the other party through substantive rules of contract law such as the doctrine of unconscionability—even when those rules are equally applicable to litigation and arbitration. The decision affects “virtually every arbitration clause arising out of a commercial transaction,”<sup>3</sup> and “permits most of the companies that touch consumers’ day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.”<sup>4</sup> It may lead to the virtual death of the class action in employment cases and consumer contracts involving the sale of goods and services—any small-dollar transaction that can be governed by shrinkwrap, clickwrap, claim check, or other form contract. The decision is all the more remarkable because the Justices who comprised the majority profess to be strong advocates of federalism and defenders of state autonomy.<sup>5</sup> *Concepcion* demonstrates that for these Justices, a disdain for consumer class action

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1. 131 S. Ct. 1740 (2011).

2. 9 U.S.C. §§ 1–16, 201–08, 301–07 (2006).

3. Jill Gross, *AT&T Mobility and FAA Over-Preemption*, 4 Y.B. ON ARB. & MEDIATION 25, 26 (2012).

4. Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights>. A pre-*Concepcion* empirical study published in this Journal revealed that 75 percent of the studied consumer contracts contained arbitration clauses, and all of those contained class waivers. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–84 (2008). The desire to obtain immunity from litigation is illustrated by Professor Sternlight's anecdote about a Whataburger franchise in East Texas that had, before the *Concepcion* decision, posted a sign on the door saying that by entering customers agreed to arbitrate “any and all disputes . . . which arise from the products, services, or premises.” Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 719 (2012).

5. Justice Breyer in dissent pointedly observed that the majority's decision “do[es] not honor federalist principles.” *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting) (“[F]ederalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of th[e] federalist ideal, embodied in specific language in this particular

litigation and individuals' access to courts outweighs any commitment to federalism and state autonomy.<sup>6</sup>

Recent scholarship has established that *Concepcion* fundamentally misreads the original purpose and design of the FAA.<sup>7</sup> The enacting Congress never intended the FAA to have the expansive reach the Supreme Court has recently fashioned for it. The statute was passed to address the problem of discrimination against bargained-for arbitration agreements between merchants having roughly equal bargaining power.<sup>8</sup> It was not intended to apply to employment contracts or contracts of adhesion.<sup>9</sup> It expressed no hostility to class actions or aggregative procedures, for the Federal Rules of Civil Procedure were not even promulgated until over a decade after the FAA's enactment, and the modern class action did not arise until a full four decades later.<sup>10</sup> The FAA's "overarching purpose" was not to create a federal preference for arbitration to "facilitate streamlined proceedings,"<sup>11</sup> as *Concepcion* asserts, but to prohibit

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statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach."). See also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315, 1328 (2004) (noting that justices who profess "concern for states' rights or the application of a neutral methodology . . . [i]nstead . . . reflect traditional conservative value choices to limit civil rights and to protect business.").

6. The Court will shortly decide what, if anything, is left of the "effective vindication doctrine" in cases involving federal statutory rights. *Am. Express Co. v. Italian Colors Rest.* 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (Justice Sotomayor, who was a member of the Second Circuit panel before her elevation to the Supreme Court, has recused herself). See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting that "it may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in an arbitral forum" but holding such a claim was not demonstrated in the record); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (permitting arbitration "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"). The Court may also further limit the availability of classwide arbitration in *Oxford Health Plans LLC v. Sutter*, 675 F.3d 215 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), in which the defendant challenges the arbitrator's decision that class arbitration was permitted.

7. See Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-making*, 44 LOY. U. CHI. L.J. 391, 399-407 (2012); see generally, Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011) (advancing an argument that the FAA should be read as an anti-discrimination statute preventing non-enforcement of arbitration agreements). For a classic study of the purposes of the FAA, see Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N. CAR. L. REV. 991 (1999).

8. See, e.g., Wasserman, *supra* note 7, at 396.

9. *Id.* at 396-99 (describing in detail legislative history and statutory provisions disclaiming application to employment contracts and contracts of adhesion).

10. The FAA was enacted in 1925. The Federal Rules were promulgated in 1938, and Rule 23 in its modern form was adopted in 1966.

11. *Concepcion*, 131 S. Ct. at 1748.

discrimination against parties' mutual agreement to arbitrate.<sup>12</sup> The Court's recent cases have ignored the FAA's history and structure<sup>13</sup> and have used the statute as a tool to advance an agenda that is hostile to consumer litigation and classwide procedures.<sup>14</sup>

Moreover, *Concepcion* is based on a mythologized view of arbitration as a simple, bilateral proceeding that is fundamentally inconsistent with and unable to accommodate both high-stakes, complex procedures and the sorts of legal issues that arise in class proceedings. This view of arbitration is seriously out of date. Arbitration is often used to resolve complex commercial disputes, including international disputes, in which hundreds of millions of dollars may be at stake.<sup>15</sup> Arbitration proceedings to resolve IBM's claims against Fujitsu for unauthorized use of IBM's software code, for example, extended for over a decade and resulted in payments of over \$800 million.<sup>16</sup> Arbitration proceedings can be very simple<sup>17</sup> or stunningly complex.<sup>18</sup> The organization that bills itself as the

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12. See Wasserman, *supra* note 7 at 395–96; Stone, *supra* note 7 at 942 (“[T]he FAA was intended to facilitate self-regulation within commercial communities, not to regulate relationships between consumers and large corporations in arm’s length, anonymous transactions”). See generally *id.* at 969–91 (discussing the history of arbitration and the FAA).

13. This criticism has been made by dissenting justices as well as commentators. See, e.g., *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting) (the enacting Congress’s assumption that arbitration would be used in disputes between merchants of roughly equal bargaining power suggests “that California’s statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.”).

14. See Wasserman, *supra* note 7, at 401 (“In just the last two years, the Court has continued to substitute its policy preferences for Congress’s, reading into the FAA its current skepticism about class actions and collective litigation, notwithstanding a complete dearth of evidence that Congress intended to mandate enforcement of class action waivers.”).

15. Justice Breyer’s dissent in *Concepcion* lists several notable arbitrations resulting in awards of hundreds of millions of dollars. See *Concepcion*, 131 S. Ct. at 1760.

16. See, e.g., Andrew Pollack, *I.B.M. and Fujitsu Agree to End Arbitration*, N.Y. TIMES (May 12, 1997), <http://www.nytimes.com/1997/05/12/business/ibm-and-fujitsu-agree-to-end-arbitration.html>. After a settlement in IBM’s 1982 suit against Fujitsu fell apart, the parties agreed to arbitration. The arbitrators reached a resolution quickly (in twenty-six months) for a dispute of such complexity. The resolution provided for an initial payment of \$237 million and continued annual arbitration proceedings until 2002 to govern Fujitsu’s access to IBM’s code. *Fujitsu to Pay Big Premium for IBM Data: Arbitrators Resolve ‘82 Suit; Cost Put in Hundreds of Millions*, L.A. TIMES (Nov. 29, 1988), [http://articles.latimes.com/1988-11-29/news/mn-693\\_1\\_ibm-mainframe](http://articles.latimes.com/1988-11-29/news/mn-693_1_ibm-mainframe). The parties agreed to terminate the arbitration panel in 1997 because Fujitsu no longer desired access to the code. Pollack, *supra*. For an overview of the IBM-Fujitsu arbitration, see generally Robert H. Mnookin & Jonathan D. Greenberg, *Lessons of the IBM-Fujitsu Arbitration: How Disputants Can Work Together to Solve Deeper Conflicts*, 4 DISP. RESOL. MAG. 16 (1997–98) (Mnookin was one of the two arbitrators).

17. See, e.g., *Simplified Arbitrations*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/SpecialProcedures/SimplifiedArbitrations/index.htm> (last visited Mar. 6, 2013); Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 64–69 (2012).

18. See, e.g., *International Business Machines Corp. v. Fujitsu Ltd.*, Am. Arbitration Ass’n, Commercial Arbitration Tribunal, Case No. 13-T-117-0636-85 (1987) (Mnookin & Jones,

largest private alternative dispute resolution provider in the world has a large number of arbitrators who, as retired federal and state judges, are intimately familiar with class action procedures.<sup>19</sup> And the major arbitration organizations have extensive written rules and procedures for classwide arbitrations and have been conducting classwide arbitrations for years. The California Supreme Court's decision in *Discover Bank* itself characterized classwide arbitration as "well accepted under California law,"<sup>20</sup> and the *Concepcion* majority noted that the American Arbitration Association had opened 283 classwide arbitrations as of September 2009.<sup>21</sup> Nevertheless, the Court found that the California rule at issue in the case, though facially applicable to both litigation and arbitration, in practice disfavored arbitration because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration"—that is, "its informality"<sup>22</sup>—"and thus creates a scheme inconsistent with the FAA."<sup>23</sup>

Classwide procedures have provided significant public policy benefits in resolving disputes across a broad range of subject areas by making it economically feasible to enforce legal rules in small-dollar transactions, thereby providing deterrence, compensation, and a supplement to governmental enforcement efforts. State courts have recognized these public benefits and have acted to protect the right to aggregative procedures through the law of unconscionability.<sup>24</sup> Nevertheless, the Court has discerned a strong federal policy favoring arbitration that provides little room for state

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Arbs.), (describing the arbitration process, including extensive discovery, for a complex intellectual property dispute over computer programs).

19. *About Jams*, JAMS, [http://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/) (last visited Mar. 6, 2013) (founded as Judicial Arbitration and Mediation Services).

20. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005). *Discover Bank* held that class waivers "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money" are "in practice" exculpatory and thus unconscionable. *Id.* at 1110. The Ninth Circuit relied on *Discover Bank* in holding the class waiver provision in the *Concepcions'* contract unenforceable under California law. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

21. *Concepcion*, 131 S. Ct. at 1751. The majority disregarded this fact because none of those cases had resulted in a decision on the merits, but did not consider the proportion of classwide *litigations* that result in adjudication on the merits. *See id.*

22. *Id.* at 1751.

23. *Id.* at 1748. The "principal advantage" of arbitration, according to the Court, is "its informality." *Id.* at 1751. The Court listed three ways in which arbitration is "inconsistent with the FAA": it sacrifices informality and makes the process slower, more costly, and more procedurally complex; it requires procedural formalities to protect absent class members; and its higher stakes increase the risk to defendants without appellate review. *Id.* at 1751–52.

24. *See, e.g., Discover Bank*, 113 P.3d at 1105–06.

regulation through unconscionability doctrine. And thanks to *Concepcion*, consumers and employees today are subject to unilaterally imposed arbitration provisions that overwhelmingly contain class waivers. Most lower courts have interpreted *Concepcion* broadly.<sup>25</sup> A study by Public Citizen found that by the one-year anniversary of the decision, courts had cited *Concepcion* to hold class arbitration waivers enforceable in seventy-six cases.<sup>26</sup>

This Article considers how statutory reforms might correct the Court's policy of "over-preemption."<sup>27</sup> At the federal level, a legislative solution would be simple to draft but difficult to enact. *Concepcion* is based on statutory interpretation, not the Constitution, and Congress could amend the FAA to make it clear that the statute does not affect states' power to make substantive law governing contracts of adhesion. Part I discusses possible federal responses, including three bills introduced in the last Congress that were aimed at overturning *Concepcion*, as well as the potential for federal agency regulations to limit class waivers. None of these potential federal responses has so far been successful, and in the current political climate it appears increasingly unlikely that Congress will pass legislation to limit or reverse *Concepcion*.

By contrast, while legislation might be more likely to succeed in some state legislatures, it would be much more difficult for states to draft legislation that could withstand the pre-emptive power of the FAA and *Concepcion* in the absence of federal legislation. The Supremacy Clause assures that *Concepcion* preemption forecloses both judicial and legislative attempts by states to regulate class waivers in arbitration agreements, and lower courts have not shown any inclination to read the case narrowly.

In Part II I propose a possible state legislative response in the form of a *qui tam* or private attorney general action to redress violations of consumer protection or labor laws. The California Private Attorneys General Act of 2004 (PAGA), which employs a *qui tam* mechanism to enforce provisions of the state labor code, is a well-developed example of this approach. After examining the structure and operation of PAGA, I suggest ways this model could be adapted to authorize private aggregate enforcement of consumer and employment laws without triggering FAA preemption or vulnerability

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25. See Sternlight, *supra* note 4, at 708 ("Most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a 'get out of class actions free' card.").

26. CHRISTINE HINES ET AL., PUB. CITIZEN, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *Concepcion* Decision are Plainly Evident 4 (2012), available at <http://www.citizen.org/concepcion-anniversary-justice-denied>.

27. See Gross, *supra* note 3.

to contractual class waivers. The text of PAGA is provided as an Appendix.

## I. POSSIBLE FEDERAL RESPONSES

The obvious way to correct an error in the Court's interpretation of a federal statute is for Congress to amend the law. For example, one of the first legislative acts of the 111th Congress was to pass the Lilly Ledbetter Fair Pay Act of 2009<sup>28</sup> for the purpose of overturning the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>29</sup> Several bills have been introduced to limit or overturn *Concepcion*.<sup>30</sup>

### A. *The Arbitration Fairness Act of 2011*

On the day *Concepcion* was handed down, Senator Al Franken announced that he would re-introduce legislation to prohibit "forced arbitration clauses."<sup>31</sup> The Arbitration Fairness Act (AFA)<sup>32</sup> would amend the FAA to invalidate all pre-dispute arbitration agreements in consumer, employment, and civil rights actions.<sup>33</sup> The preamble contains legislative findings that the FAA was originally "intended

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28. Pub. L. No. 111-2, 123 Stat. 5 (2009).

29. 550 U.S. 618 (2007) (holding that Title VII's six month statute of limitations begins to run the first time an employee receives unequal pay and does not recommence with each paycheck). Similarly, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), was passed in part to overturn the Court's holding in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that jurisdiction-stripping provisions of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2006), were not intended to apply to cases already pending. See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1997) (striking down statute passed to overturn the Court's interpretation of the limitations period applicable to suits brought under Rule 10b-5).

30. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 165-67 (2011) (discussing various bills responding to Court expansion of the FAA by limiting its application to certain consumers or employees).

31. Press Release, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corporations (Apr. 27, 2011), available at [http://www.franken.senate.gov/?p=press\\_release&id=1466](http://www.franken.senate.gov/?p=press_release&id=1466).

32. Arbitration Fairness Act of 2011 (AFA), S. 987, 112th Cong. (2011). The statute, identical to a bill introduced in the previous congressional session, would add a new Chapter 4 to the FAA. It is identical to the Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009), except that its provisions would no longer apply to franchise agreements. See Sara Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 459 n.4 (2011).

33. AFA, S. 987, 112th Cong. § 3 (2011), (amending the FAA to include Chapter 4, § 402(a)). The decision whether the statute applies to a particular arbitration agreement would have to be made by a court rather than by an arbitrator. *Id.* § 402(b)(1).

to apply to disputes between commercial entities of generally similar sophistication and bargaining power,<sup>34</sup> that decisions by the Supreme Court “have changed the meaning of the Act” in applying it to consumer and employment disputes,<sup>35</sup> and that under current law “most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration.”<sup>36</sup> The bill, in short, proposes to correct the Supreme Court’s interpretation of the FAA.<sup>37</sup>

The bill sweeps more broadly than simply overruling *Concepcion*. It would overturn the entire direction of the Supreme Court’s FAA preemption jurisprudence by making the FAA inapplicable to pre-dispute arbitration agreements in consumer and employment contracts, the most common categories of contracts between parties of unequal bargaining power.<sup>38</sup> The bill would set a course correction to the Supreme Court’s project of extending its preference for arbitration to consumer contracts of adhesion.<sup>39</sup> While some critics have argued that a prohibition on pre-dispute mandatory arbitration clauses in consumer and employment contracts goes too far and all that is needed is a ban on class waivers,<sup>40</sup> the better view recognizes that pre-dispute arbitration clauses in contracts of adhesion can never be truly voluntary. The Congress that enacted the FAA never intended it to reach employment contracts or consumer contracts of adhesion, and it is fully within the present Congress’s

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34. *Id.* § 2(1).

35. *Id.* § 2(2).

36. *Id.* § 2(3).

37. Other provisions of the AFA would exempt collective bargaining agreements between employers and unions, or between two labor organizations, *id.* § 402(b)(2), but such agreements may not “have the effect of waiving the right” to judicially enforce the federal Constitution, state constitution, or federal or state statutory right. *Id.* But see Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 757 (2012) (questioning whether Congress has the power to forbid states from enforcing agreements to arbitrate disputes over state-created rights).

38. Unlike the 2009 AFA bill, the statute would not apply to franchise agreements, so the Court’s decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding arbitration agreements in franchise agreements enforceable notwithstanding state law to the contrary) would continue to be good law.

39. One might question whether its protections should apply to *all* employment contracts, including those of high-level, sophisticated individuals such as top management.

40. See Cole, *supra* note 32, at 461, 491–93 (contending that a prohibition on all pre-dispute arbitration provisions is “draconian” and “excessively overbroad” and arguing instead that procedural reforms, including barring class waivers, would be sufficient); Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sept. 13, 2011), <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act> (arguing that the AFA is overbroad because corporations use arbitration clauses for reasons besides avoiding classwide proceedings and because a uniform federal law would prevent states from adopting their own policies); Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PENN. L. REV. 1233, 1273 (2011).



power to return to the original purpose of simply making *voluntary* arbitration agreements enforceable. If arbitration is a superior method of dispute resolution for consumers because it is faster, cheaper, and simpler, they should be willing to opt in to a voluntary program after the dispute arises and they understand the stakes.

The AFA gained substantial, but not bipartisan, support, with sixteen co-sponsors in the Senate and eighty-one in the House, all of them Democrats. The bill languished in committee from May 2011 onward.<sup>41</sup> With no Republican co-sponsors, lengthy recesses during the presidential election season, the House under Republican control, and Congress's attention focused on avoiding the "fiscal cliff" in January 2013, the bill died in committee. The bill was reintroduced in the 113th Congress in May 2013.<sup>42</sup>

### *B. The Fair Arbitration Act of 2011*

The Fair Arbitration Act of 2011, authored by Republican Senator Jeff Sessions, would have provided a narrower, procedural response.<sup>43</sup> This bill, based largely on the American Arbitration Association's Consumer Due Process Protocol,<sup>44</sup> "sought to ensure the continuing viability of arbitration while enhancing its effectiveness through certain reforms."<sup>45</sup> The bill would have amended the FAA to require that any arbitration clause have a heading printed in bold capital letters, state whether arbitration is mandatory or elective, provide a contact for a consumer to inquire about costs, fees, and forms required for participation, and state that a consumer or employee may proceed in small claims court rather than arbitration.<sup>46</sup> It would have required additional procedural protections

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41. See *Arbitration: Is it Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

42. The bill was introduced in the House by Rep. Hank Johnson, D-GA, and in the Senate by Sen. Al Franken. Arbitration Fairness Act of 2013, H.R. 1844, <http://www.govtrack.us/congress/bills/113/hr1844/text>; S.878, <http://www.govtrack.us/congress/bills/113/s878>. See *Rep. Johnson Introduces Bill to Protect Legal Rights of Consumers*, available at <http://hankjohnson.house.gov/press-release/rep-johnson-re-introduces-bill-protect-legal-rights-consumers>.

43. S. 1186, 112th Cong. (1st sess., introduced June 13, 2011).

44. Other arbitration providers provide similar procedural guarantees. See generally Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289 (2012).

45. Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 WESTLAW J. CORP. OFFICERS & DIRECTORS LIABILITY, July 5, 2011, at 7–8.

46. Fair Arbitration Act of 2011, S. 1186, 112th Cong. § 2(a) (2011) (amending Title 9, U.S. Code, to add a § 17, and specifically a § 17(a) governing fair disclosure).

such as a competent and neutral arbitrator who has no personal or financial interest in the dispute or ties to the parties, a voice for the parties in the selection of the arbitrator, ethical and disclosure rules for arbitrators, and administration of the arbitration by a neutral alternative dispute resolution organization rather than by one of the parties.<sup>47</sup> In addition, the parties would have had the right to be represented by a lawyer, to have notice and an opportunity to be heard, and to present evidence and cross-examine witnesses, as well as a limited right to discovery.<sup>48</sup> The bill would have done nothing to change *Concepcion's* holding that state rules barring class waivers are preempted or its assertion that class procedures are fundamentally inconsistent with arbitration.

The Fair Arbitration Act was referred to committee in June 2011, where it died.<sup>49</sup>

### C. The Consumer Mobile Fairness Act of 2011

Senator Blumenthal, a primary supporter of the AFA, also introduced a more limited ban on pre-dispute arbitration agreements that was similar to the AFA but would have applied only to mobile phone service contracts, thus limiting it squarely to the facts of *Concepcion*.<sup>50</sup> The apparent purpose of the bill was to encourage support for the AFA from Republicans on the Judiciary Committee who had previously supported industry-specific bans on arbitration clauses.<sup>51</sup> The bill was included in the Judiciary Committee hearings

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47. *Id.* (creating 9 U.S.C. § 17(b) to afford additional procedural protections in arbitration).

48. The bill also provides for time limits for the parties' submissions and the arbitrator's decision and requires a written explanation of the factual and legal basis for the decision. *Id.* (adding 9 U.S.C. §§ 17(9)–(10)).

49. S. 1186 (112th): *Fair Arbitration Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1186> (last visited Mar. 8, 2013).

50. Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. (2011) (co-sponsored by Senators Franken and Whitehouse).

51. Mike Sacks, *Arbitration Kickback: Supreme Court's Anti-Consumer Rulings Trigger Democratic Bills*, HUFFINGTON POST (October 20, 2011, 4:09 PM) [http://www.huffingtonpost.com/2011/10/20/arbitration-supreme-court-decisions-democratic-bills\\_n\\_1022207.html](http://www.huffingtonpost.com/2011/10/20/arbitration-supreme-court-decisions-democratic-bills_n_1022207.html) ("Staffers in Franken's office explained the senator's support for the more targeted Consumer Mobile Fairness Act by noting the bipartisan popularity of other industry-specific restrictions on pre-dispute arbitration agreements."). Sen. Grassley, for example, successfully sponsored a bill that restricted arbitration clauses in the poultry industry, Fair Contracts for Growers Act of 2007, S. 221, 110th Congress (2007), and Sen. Hatch successfully sponsored a similar bill limiting arbitration between automobile dealers and manufacturers, Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2011). Sen. Franken referred to these earlier bills in his opening statement during the Judiciary Committee hearings. *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1–2 (2011) (opening statement of Sen. Franken).

on the AFA, but did not receive significant attention in its own right.

#### *D. Prospects for Federal Legislation*

Though the Arbitration Fairness Act died in committee during 2012, it garnered significant support and has been reintroduced in the current Congress.<sup>52</sup> The prospects for passage are not encouraging, however. Congress is divided along partisan lines to a nearly unprecedented extent, and congressional Republicans have been willing to block any legislation proposed by Democrats through procedural maneuvers, even if they would not have the votes to reject the legislation outright. Conservative Republicans tend to oppose litigation against corporations as frivolous and view class actions in particular as extortionate. In such a climate, no proposal to allow consumers and employees to bring a large number of claims against corporations is likely to succeed. The passage of the Lilly Ledbetter Fair Pay Act actually emphasizes this point. That legislation was passed at the very beginning of the 112th Congress, when Democrats held a majority in both houses and a near-filibuster-proof majority in the Senate,<sup>53</sup> political momentum was strongly with the Democrats, and Republicans had not yet settled on their strategy of monolithically blocking Democratic-sponsored legislation. Moreover, the legislation was strongly supported by interest groups such as unions. Even if the Supreme Court's statutory interpretation of the FAA is objectively incorrect and is viewed as incorrect by a majority of the present Congress, many institutional factors make it difficult for Congress to enact corrective legislation.<sup>54</sup> Thus, the prospects for federal legislative reform are not promising at the moment.

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52. See *supra* notes 41, 42 and accompanying text.

53. It is customary to say that Democrats held a sixty-seat majority, but that is not really true. The Minnesota Senate election was subject to extensive recounts and litigation, and Al Franken was not seated until July 7, 2009. Additionally, after his diagnosis of brain cancer in June 2008, Senator Ted Kennedy became progressively less able to participate in daily business until his death in August 2009, eventually appearing only to cast crucial votes on legislation such as health care reform and the stimulus plan (in both cases he voted for cloture but did not participate in the final vote). This left the Democrats short of the sixty votes needed to stop a filibuster.

54. For an excellent economic analysis of the transaction costs of enacting corrective legislation, see Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251 (2013).

*E. Federal Agency Regulations Limiting Class Arbitration Waivers*

In the absence of congressional action, reform might be possible through federal agency action. Regulations limiting class waivers or otherwise constraining the terms of arbitration clauses in adhesive contracts might even be entitled to *Chevron* deference.<sup>55</sup> Such regulations, of course, could only govern contracts within the agency's sphere of authority and could not apply broadly to all consumer contracts.

Professor Wasserman notes that on occasion federal agencies have issued regulations invalidating class action waivers, notably a National Labor Relations Board decision relating to employment contracts<sup>56</sup> and a Financial Industry Regulatory Authority (FINRA) regulation barring class waivers in securities brokerage agreements.<sup>57</sup> The Fifth Circuit declined to follow the NLRB's lead, as have most district courts.<sup>58</sup> One federal district court has denied a motion to compel arbitration based on the FINRA regulation,<sup>59</sup> and another dismissed for lack of jurisdiction a declaratory judgment action against the agency challenging the regulation.<sup>60</sup> A FINRA panel later ruled that the FAA prohibited it from enforcing the regulation against Charles Schwab after Schwab amended its mandatory arbitration provision to include a class waiver.<sup>61</sup>

In response to the FINRA panel decision, a group of thirty-seven Democratic members of Congress, led by Senator Franken, wrote to the SEC urging it to exercise its authority under section 921 of the Dodd-Frank Act to restrict or bar mandatory arbitration provisions

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55. See Wasserman, *supra* note 7, at 422–28.

56. *In re* D. R. Horton, Inc., 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012) (requiring contractual class action waiver as condition of employment violates employees' substantive federal statutory right to engage in concerted action).

57. See Wasserman, *supra* note 7, at 422–28.

58. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 n.3 (8th Cir. 2013) (collecting cases). An appeal of the NLRB's decision is currently pending in the Fifth Circuit. *D. R. Horton, Inc.*, v. NLRB, No. 12-60031 (5th Cir. filed Jan. 13, 2012); *Owen*, 702 F.3d at 1054 n.2.

59. *Alakozai v. Chase Inv. Servs. Corp.*, 2012 U.S. Dist. LEXIS 30759 (C.D. Cal. 2012).

60. Following *Concepcion*, Charles Schwab inserted a class action waiver in its customer agreements and sued for a declaratory judgment that FINRA could not enforce its regulation. The district court dismissed the complaint for lack of jurisdiction because of Schwab's failure to exhaust administrative remedies. See *Court Dismisses Schwab's Challenge to FINRA Rule for Failure to Exhaust Administrative Remedies*, SECURITIES LAW PROF BLOG (May 14, 2012), <http://lawprofessors.typepad.com/securities/2012/05/court-dismisses-schwabs-challenge-to-finra-rule-for-failure-to-exhaust-administrative-remedies.html>.

61. *FINRA Dep't of Enforcement v. Charles Schwab & Co.* (CRD No. 5393), No. 2011029760201, 2013 WL 1463100 (Feb. 21, 2013).

in contracts between securities brokers and their customers.<sup>62</sup> The North American Securities Administrators Association also urged the SEC to adopt regulations banning class waivers (and, indeed, all mandatory pre-dispute arbitration agreements).<sup>63</sup> The SEC would have authority under Dodd-Frank to bar class waivers in broker-customer and investment advisor contracts, but it has not yet acted to do so.<sup>64</sup>

The Consumer Financial Protection Bureau (CFPB) could regulate class waivers in consumer financial contracts. Section 1028 of the Dodd-Frank Act empowers the CFPB to study the use of pre-dispute arbitration in consumer contracts for financial products or services and to submit a report to Congress.<sup>65</sup> The Act also confers on the CFPB seemingly broad authority to promulgate regulations to “prohibit or impose conditions or limitations” on pre-dispute arbitration clauses in contracts for consumer financial products or services “if the Bureau finds that such a prohibition or imposition of conditions or limitations *is in the public interest and for the protection of consumers.*”<sup>66</sup> The CFPB announced in April 2012 that it would

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62. Press Release, Al Franken, Sen. Franken Leads Charge to Protect Consumers’ Legal Rights Against Wall Street (Apr. 30, 2013), [http://www.franken.senate.gov/?p=press\\_release&id=2381](http://www.franken.senate.gov/?p=press_release&id=2381); see *SEC Urged to Curb Arbitration Clauses in Broker-Customer Contracts*, Class Action Litig. Report (BNA) (May 1, 2013), [http://news.bna.com/clsn/CLSNWB/split\\_display.adp?fedfid=30887815&vname=clasnotallissues&jd=a0d8b8j4r5&split=0](http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=30887815&vname=clasnotallissues&jd=a0d8b8j4r5&split=0).

63. Letter from A. Heath Absure, President, North American Securities Administrators Association, to Hon. Mary Jo White, Chair, Securities and Exchange Commission (May 3, 2013), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Letter-to-SEC-on-Arbitration-and-Class-Action-Waivers.pdf>.

64. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376 § 1841 (2010), codified at 15 U.S.C. §§ 78o, 80b-5(f) (2010). Section 921 gives the SEC authority:

[B]y rule, [to] prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

15 U.S.C. § 78o. It also gives similar authority with respect to contracts with investment advisors. 15 U.S.C. 80b-5(f).

65. *Id.* at § 1028(a) (codified at 12 U.S.C. § 5518).

66. *Id.* at § 1028(b) (emphasis added). Specifically, § 1028(b) authorizes the CFPB to:

[P]rohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

All promulgated regulations must be consistent with the results of the study conducted by the agency under § 1028(a). *Id.*

open a public inquiry into the effects of arbitration clauses on consumers.<sup>67</sup>

Though the CFPB may have statutory authority to limit *Concepcion* in the consumer credit and banking context through regulation,<sup>68</sup> this power is itself constrained. To begin with, the CFPB's authority is expressly confined to contracts for consumer financial products and services. Moreover, regulations must await and be consistent with the results of the pending study and an accompanying report to Congress. It would take time to conduct a study that could support a nationwide regulation with teeth,<sup>69</sup> and promulgation and implementation could be further delayed by litigation under the APA or by congressional action after receipt of the report.

More practically, there is no private right of action to enforce violations of CFPB rules. If the agency were to promulgate rules relating to pre-dispute arbitration agreements, those rules could only be enforced by agency action seeking monetary penalties or injunctive or equitable relief.<sup>70</sup>

It is also quite possible that the Supreme Court would strike down any CFPB regulation that it perceived as attempting to reverse *Concepcion* or its other FAA decisions. Over the past three decades, the Court has consistently expressed a strong policy preference for arbitration (all the while attributing this preference to Congress). The Court has also been skeptical of agency regulations that authorize litigation rights that the Court itself is not prepared to find in statutes.<sup>71</sup> It might be difficult for a CFPB study to provide

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67. Press Release, Senator Richard Blumenthal, Blumenthal Applauds CFPB for Inquiry Into Arbitration Clauses (Apr. 24, 2012), available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-applauds-cfpb-for-inquiry-into-arbitration-clauses>.

68. See Sternlight, *supra* note 4, at 726–27.

69. See Laetita L. Cheltenham, *The Consumer Financial Protection Bureau and Class Action Waivers After AT&T v. Concepcion*, 16 N.C. BANKING INST. 273, 294 (2012). Compounding the delay necessitated by the requirement of a study, such a regulation, once promulgated, would apply only to agreements entered into at least 180 days after the regulation becomes final. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(d).

70. See Sandler & Holstein-Childress, *supra* note 45, at 6.

71. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that an implied right of action to enforce Title VI of the 1964 Civil Rights Act did not extend to regulations prohibiting conduct having disparate impact). To be sure, that case implicated constitutional issues regarding the meaning of the Fourteenth Amendment and arose during a period in which the Court was engaged in the project of changing the rules for implying rights of action. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating a federal statute that attempted to re-impose a First Amendment standard that the Court had recently changed). But the Court has also scrutinized statutes attempting to reverse the Court's interpretation of statutes. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that a statute that attempted to reinstate cases that had been dismissed based on a previous decision interpreting statutory limitations period violated separation of powers).

findings that the Court would view as sufficient to justify a ban on pre-dispute arbitration agreements or class waivers.<sup>72</sup>

Moreover, the CFPB's very ability to function is currently in question. Senate Republicans prevented the agency from coming into existence for months after the legislation creating the agency went into effect by refusing to confirm a director.<sup>73</sup> President Obama had to make a controversial recess appointment to allow the agency to begin operations.<sup>74</sup> The D.C. Circuit has drawn the legality of such recess appointments—routinely employed by previous presidents—into question.<sup>75</sup> If the decision stands, the CFPB could be further hamstrung.

In the end, the weakness of the fledgling CFPB, Republican opposition to both the agency and the proposed AFA, and the statutory requirement that the CFPB complete a study before promulgating regulations make it unlikely that the CFPB will attempt to regulate arbitration clauses soon. And if it did, as Professor Wasserman points out, it would not be surprising if the Supreme Court invalidated the regulations because they “trench” on “the pro-arbitration policy that the Court has read into the FAA.”<sup>76</sup>

## II. A PROPOSAL FOR A STATE LEGISLATIVE RESPONSE

The availability of classwide proceedings provides important public policy benefits, especially where unlawful conduct affects many

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72. See Alan S. Kaplinsky, Mark J. Levin, & Martin C. Bryce, Jr., *Arbitration Developments: Concepcion—The Supreme Court Decisively Steps In*, 67 *BUS. LAW.* 629, 638 (2012). The Court has held even congressional findings to an impossibly rigorous standard when it frowns on the substantive enactment. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (voluminous congressional record for Title I of the Americans with Disabilities Act held insufficient to meet the congruence and proportionality test); *Fla. Prepaid Postsecondary Educ. Expense Act v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (“Congress came up with little evidence of infringement on the part of the States” to support abrogation of state sovereign immunity in the Patent Remedy Act); *United States v. Morrison*, 529 U.S. 598 (2000) (noting that Congress did not have evidence of constitutional violations in all or most states when it enacted the Violence Against Women Act).

73. Kaplinsky et al., *supra* note 72, at 638.

74. The appointment has been described as “a bold act of political defiance.” David Nakamura & Felicia Sonmez, *Obama Appoints Richard Cordray to Head Consumer Watchdog Bureau*, *WASH. POST.*, (Jan. 4, 2012), available at [http://articles.washingtonpost.com/2012-01-04/politics/35441368\\_1\\_richard-cordray-president-obama-consumer-financial-protection-bureau](http://articles.washingtonpost.com/2012-01-04/politics/35441368_1_richard-cordray-president-obama-consumer-financial-protection-bureau).

75. See *Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) (invalidating three NLRB recess appointments made by President Obama during an “intrasession” recess throughout which the Senate gavelled in and out of pro forma sessions and thus, the court determined, was formally in session). *Canning* places the NLRB decision banning class waivers in employment contracts, see *supra* note 56, as well as the CFPB's ability to function at all, in doubt.

76. Wasserman, *supra* note 7, at 431.

people for small amounts—for example, in consumer transactions and standardized employment contracts. Aggregation creates incentives for private enforcement to augment enforcement by prosecutors and government agencies, which increases deterrence and compliance with the law, reduces the opportunities for externalizing the costs of risky or fraudulent behavior, and provides a measure of compensation to people harmed by unlawful conduct. In a time when state governments are strapped for resources and are forced to slash budgets, private enforcement can be especially important.

After *Concepcion* and the Supreme Court's other recent FAA-preemption cases, however, it will be far more difficult for states to act to preserve access to aggregative procedures than it would be for Congress.<sup>77</sup> A host of state and lower federal court decisions have held that state laws attempting to prohibit class waivers in arbitration are preempted by *Concepcion*.<sup>78</sup> State legislatures could not avoid preemption by enacting statutes prohibiting class waivers, even if they applied to litigation and arbitration equally, because FAA preemption applies to all state laws, whatever their source.<sup>79</sup>

*Concepcion*'s pro-arbitration policy is so strong that it virtually forecloses state regulation of mandatory arbitration clauses in consumer or employment contracts. This is true even when—like the *Discover Bank* rule—the state law is part of the state's substantive law of contracts and addresses contracts of adhesion however they may be enforced, whether through litigation or in arbitration.<sup>80</sup> At its

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77. Additionally, *Wal-Mart v. Dukes*, which clamped down on certification of employment discrimination cases for damages under Rule 23(b)(2) and raised the bar for finding commonality in all types of class actions, will also greatly limit the possibilities for class treatment of small claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

78. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160 (9th Cir. 2012) (holding Washington state contract law barring class waivers is preempted by FAA); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212–13 (11th Cir. 2011) (“to the extent that Florida law would . . . invalidate the class waiver . . . [it] is preempted.”); *Litman v. Cellco P’ship*, 655 F.3d 225, 231–32 (3d Cir. 2011) (holding New Jersey law to be preempted); *Sternlight*, *supra* note 4, at 707–17 (collecting and analyzing state and federal decisions) (“Readers can almost feel the anguish of certain judges who state in their opinions that they would have liked to void the class action waiver but felt their hands were tied by *Concepcion*.”); HINES, *supra* note 26, at 4 and accompanying text.

79. See, e.g., *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2011 WL 2886407, at \*3 (N.D. Cal. Jul. 19, 2011) (holding that a claim that a California statute bars class waivers is preempted under *Concepcion*); *Sternlight*, *supra* note 4, at 727 (“State legislatures have quite limited power to combat the effects of *Concepcion* given prior Supreme Court decisions. In particular, state legislatures can neither prohibit mandatory arbitration nor prohibit use of arbitral class action waivers.”); Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPPLEMENT 31, 32 (2012) (“[A]ny attempt by a court or state legislature to limit the method and means of arbitration in a way inconsistent with what Congress envisioned is preempted by the FAA.”).

80. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).



heart, the *Discover Bank* rule concerned fundamental issues of contract formation, the nature of consent, and the practical efficacy of contractual remedies, issues that are within the core of substantive contract law. Having held that even such a substantive, nondiscriminatory rule of state contract law is pre-empted by the FAA, it seems almost foreordained that the Court would strike down any state regulation limiting what businesses could include in mandatory arbitration clauses with individuals.

The ability to bring small claims in aggregate proceedings is regarded by many states as an important public policy, however. In *Discover Bank*, the California Supreme Court emphasized the “important role of class action remedies in California law”<sup>81</sup> and the strong and long-standing California policy favoring class actions,<sup>82</sup> as well as the state’s history of finding procedural unconscionability in contracts of adhesion containing unfair terms.<sup>83</sup> As the California Supreme Court said forty years ago (and repeated in *Discover Bank*):

A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.<sup>84</sup>

Individual enforcement may be impractical in arbitration as well as in traditional litigation when claims are small, and private enforcement may be even more necessary for state law claims than for federal claims. The Supreme Court’s stated assumption that individual claims are “most unlikely to go unresolved” under an arbitration clause such as the one in *Concepcion* is implausible.<sup>85</sup>

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81. *Id.* at 1106.

82. *See id.* at 1105–06.

83. *See id.* at 1106 (“[C]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication.” (quoting *Keating v. Super. Ct.*, 645 P.2d 1192, 1207 (Cal. 1982))).

84. *Id.* at 1105 (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 968-69 (1971)); *see also id.* at 1106 (“This court has repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of persons.” (quoting *Keating*, 645 P.2d at 1199 (authorizing classwide arbitration in appropriate cases))).

85. *Concepcion*, 131 S. Ct. at 1753. Individual consumers may not realize their rights have been violated, or may find it too confusing or not economically worthwhile to pursue a claim. Even if they realize they have a claim, they are unlikely to try to hire a lawyer for a small recovery, being unaware of the attorneys’ fee provision, and a lawyer is unlikely to take the case because the promise of attorneys’ fees and a large award will never be realized. In his dissent, Justice Stevens observed that the “\$7,500 payout . . . that supposedly [made] the

Many consumer and employment claims under state law are common law claims rather than statutory claims and thus are not enforced by state agencies. Even for state statutory claims that do have a responsible agency, budget constraints are likely to be more severe for state government than for the federal government, particularly during the long recession. *Concepcion* is thus likely to create an enforcement gap, particularly in consumer and employment cases where claims are small and one side is in a position to impose a standard contract of adhesion containing an arbitration clause with a class waiver.<sup>86</sup>

States therefore may have good reason to want to find a way to secure the benefits of private enforcement for mass small claims.<sup>87</sup> Before *Concepcion*, California, Washington, and New Jersey had found class waivers in contracts of adhesion unconscionable—in California, where damages were predictably small and the party with superior bargaining power “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money”;<sup>88</sup> in Washington, where damages were small and “class action litigation or arbitration is the only practical remedy available”;<sup>89</sup> and in New Jersey, when waivers “functionally exculpate wrongful conduct.”<sup>90</sup>

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Conceptions’ arbitration worthwhile” was illusory because all AT&T had to do to avoid this payout was to tender the amount of the claim to anyone who got as far as filing a claim. *Id.* at 1760–61. Instead, Justice Stevens noted, “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Id.* at 1761 (quoting *Carnegie v. Household Int’l, Inc.*, 376 F. 3d 656, 661 (7th Cir. 2004) (Posner, J.)). Myriam Gilles and Gary Friedman estimate that bilateral arbitration of the Conceptions’ claim would cost more than \$25,000 in attorneys’ fees and observe that “it is almost impossible to imagine a court awarding \$25,000 (or anything remotely close) as a ‘reasonable fee’ for recovering \$30.22.” *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 646–47 (2012).

86. At least one court has held that *Concepcion* only bars categorical state rules that invalidate all class waivers but permits “fact-sensitive analysis” of whether a class waiver is unconscionable in a particular context. *Coiro v. Wachovia Bank*, No. 11–3587, 2012 WL 628514 (D.N.J. Feb. 27, 2012). See Wasserman, *supra* note 7, at 77. Even if *Concepcion* does leave this door ajar (which seems unlikely, as the Court was unfazed by the possibility that some claims would go unredressed), few actions would likely be permitted to go forward. This is particularly true since the contract at issue in *Concepcion* provides a Supreme Court-approved template for drafting class waivers.

87. Some commentators have proposed that state attorneys general could bridge the “enforcement gap” by bringing *parens patriae* suits under existing law, perhaps retaining private attorneys under contingent-fee arrangements to augment their existing staffs. See Gilles & Friedman, *supra* note 85, at 658. The mechanisms for such actions are well understood and I do not discuss them here.

88. *Discover Bank*, 113 P.3d at 1110.

89. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1009 (Wash. 2007).

90. *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 189 N.J. 1, 21–22 (N.J. 2006). *But see Sternlight*, *supra* note 4, at n.14.

One way to accomplish this goal, even after *Concepcion*, would be to approach the problem from a different direction. Rather than trying to prevent corporations from requiring consumers and employees to resolve their claims for contractual monetary remedies in bilateral arbitration, a state could create an alternative means for private enforcement of the substantive law. That is, rather than looking for a way for consumers and employees to bring their individual claims for compensatory damages in an aggregate proceeding in order to preserve the public benefits of holding violators liable, the state could simply provide a means for private litigants to enforce the substantive law directly, without the need to amass individual damages claims. Specifically, a state could enact a statutory penalty for consumer fraud or violation of state labor laws and provide for private enforcement through a *qui tam* or private attorney general action.

This section first discusses how *qui tam* actions could provide a way out of the *Concepcion* dilemma and then describes one such statute, California's Private Attorneys General Act. As I explain in more detail below, such a statute, if carefully drafted, could provide an alternative mechanism to deter misconduct when classwide proceedings are preempted.

#### A. *Thinking Outside the Box: Qui Tam Actions*

How might a state attempt to preserve the public policy benefits of aggregate enforcement after *Concepcion*? Trying to directly regulate or override class waivers appears futile because of the breadth of the Court's preemption doctrine. Post-*Concepcion* legislative efforts to prohibit class action waivers in Maryland and California have been unsuccessful, perhaps partly because of this consideration. Recently, California narrowly rejected a bill that would have added a provision to the California Civil Code banning all class action waivers, whether for litigation or for arbitration, in contracts of adhesion.<sup>91</sup> The bill's proponents argued that "the bill is needed to

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91. S. 491, 2012 Leg., 2011–2012 Sess. 1 (Cal. 2012). The bill would have added § 1589.5 to the Civil Code, providing that:

Any term in a contract of adhesion purporting to waive the right to join or consolidate claims, or to bring a claim as a representative member of a class or in a private attorney general capacity shall be deemed to lack the necessary consent to waive that right, and is void.

*Id.* See Cheryl Miller, *Legislation to Blunt "Concepcion" Is Killed in State Assembly*, THE RECORDER (July 3, 2012), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202561826154&slreturn=1>.

respond to a decision of the U.S. Supreme Court last year upholding a contract provision that required the waiver of class arbitration rights and striking down a California court rule to the contrary.<sup>92</sup> The principal opposition to the proposed legislation raised concerns that it was preempted by the FAA.<sup>93</sup> The bill died in committee, at least partly because of doubts about whether preemption would apply.<sup>94</sup>

A similar bill that would have made pre-dispute class action waivers categorically unenforceable passed overwhelmingly in the Maryland House of Delegates in 2011, but was narrowly defeated in the State Senate.<sup>95</sup> Some opponents argued that in becoming the first state to adopt an outright ban on class waivers, “Maryland

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92. *Hearing on S.B. 491 Before the Assemb. Com. on Judiciary*, 2012 Leg., 2011–2012 Sess. 1 (Cal. 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0451-0500/sb\\_491\\_cfa\\_20120702\\_112553\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_491_cfa_20120702_112553_asm_comm.html). Supporters invoked a footnote in the majority opinion in *Concepcion* to argue that the Supreme Court acknowledged the role states continue to play in contract law: “Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.” *Id.* at 3 (quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1750 n.6).

93. Proponents argued that the bill did not discriminate against arbitration agreements since it applied to waivers in both litigation and arbitration. See Brian Kabateck, *SB 491: Protecting Consumers’ Right to Join Together*, DAILY J. (June 25, 2012), available at <http://www.kbklawyers.com/pdf/SB%20491-%20Protecting%20Consumers’%20Right%20to%20Join%20Together.pdf> (arguing that the bill is “a generally applicable rule that falls squarely within the savings clause of the FAA.”). The California Chamber of Commerce opposed the bill, pointing out that “While the language of SB 491 appeared to only create a general contract rule, the reality is that class action waiver clauses are primarily found in arbitration agreements,” and, therefore, “it is almost certain that SB 491 would have been struck down as unlawful.” *CalChamber-Opposed Job Killer Fails to Pass Policy Committee*, CALCHAMBER (July 6, 2012), <http://www.calchamber.com/headlines/pages/07062012-calchamberopposedjobkillerfailstopasspolicycommittee.aspx>.

94. Miller, *supra* note 91 (quoting Katherine Pettibone of the Civil Justice Association of California, a tort-reform group, as speculating that two Democrats may have refrained from voting to report the bill out of committee in the “belie[f] this would be a litigation trap and a mess that would be pre-empted by the United States Supreme Court—again.”).

95. H.D. 729, 2011 Leg., 428th Sess. (Md. 2011). The bill, entitled “Civil Actions—Class Action Waiver in a Written Agreement—Unenforceability,” stated that any “written agreement made before a dispute arises between the parties to the agreement may not waive or have the practical effect of waiving the rights of a party to that agreement to resolve the dispute by obtaining relief as a representative or as a member of a class” and further stated that any such agreement “may not be enforced.” *Id.* The bill passed the House of Delegates by a vote of 108-32 on March 17, 2011, with ten Republicans and all of the chamber’s Democrats in favor. *Seq. No. 0281*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/webmga/frmMain.aspx?ys=2011rs/votes/house/0281.htm> (last visited Mar. 9, 2013). Although the bill was reported out of committee in the state Senate on an 8-3 party-line vote, *Senate Judicial Proceedings Committee—Voting Record HB 729*, MD. GEN. ASSEMB., [http://mgaleg.maryland.gov/2011rs/votes\\_comm/hb0729\\_jpr.pdf](http://mgaleg.maryland.gov/2011rs/votes_comm/hb0729_jpr.pdf) (last visited Mar. 9, 2013), fourteen of the thirty-five Senate Democrats broke with their party to oppose the bill on the final vote, and it was defeated 25-21. *Seq. No. 1182*, MD. GEN. ASSEMB., <http://mgaleg.maryland.gov/webmga/frmMain.aspx?ys=2011rs/votes/senate/1182.htm> (last visited Mar. 9, 2013).

would draw national attention for actions that damage its business climate.”<sup>96</sup> The statutory language, more sweeping than the *Discover Bank* rule, would almost certainly have failed the *Concepcion* test.<sup>97</sup>

Nevertheless, it may be possible to obtain the benefits of private enforcement of remedies for group harms in some contexts without using the class action device. A historical alternative can be found in the *qui tam* action. *Qui tam* proceedings, which trace their origins to Roman times, allow private individuals to prosecute an action on behalf of the state, rewarding them with property seized from the defendant.<sup>98</sup> Currently, such actions on behalf of the federal government are brought under the False Claims Act (FCA).<sup>99</sup>

The traditional *qui tam* action is brought by a private party to recover money or property on the government’s behalf, with the relator receiving a portion of the recovery as an incentive to bring the suit. The action is brought to enforce a right that belongs to the state itself. Its primary purpose is to augment the government’s ability to recover on its own claims by recruiting private enforcement. FCA claims are usually brought by whistleblowers, who may have better access than the government to information about fraud.<sup>100</sup> Litigation under the FCA has recovered some \$20 billion in settlements or judgments since 1986 for fraudulent charges to the federal government, roughly twice the amount the government has

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96. Will Burns, *Arbitration Jeopardized by Bill*, MD. CHAMBER ACTION NETWORK (Mar. 30, 2011) <http://www.chamberactionnetwork.com/2011/03/arbitration-jeopardized-by-bill/>; see also Consumer Financial Services Group, *Maryland Legislature’s Attempt to Ban Class Action Waivers Fails*, BALLARD SPAHR LLP (Apr. 15, 2011), [http://www.ballardspahr.com/alertspublications/legalalerts/2011-04-15\\_maryland\\_legislature\\_ban\\_class\\_action\\_waivers\\_fails.aspx](http://www.ballardspahr.com/alertspublications/legalalerts/2011-04-15_maryland_legislature_ban_class_action_waivers_fails.aspx); *Roll Call 2011*, MD. BUS. FOR RESPONSIVE GOV’T (June, 2011), available at <http://www.mbrg.org/assets/documents/Roll%20Call/2011-Roll-Call.pdf>.

97. The bill was acted on before *Concepcion* came down, but the General Assembly’s Fiscal and Policy Note did discuss the pending case, taking no position on how the case’s outcome should affect the legislation. See DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE: HB 729, 428th Sess., at 2–3 (Md. 2011), available at [http://mgaleg.maryland.gov/2011rs/fnotes/bil\\_0009/hb0729.pdf](http://mgaleg.maryland.gov/2011rs/fnotes/bil_0009/hb0729.pdf).

98. For an excellent discussion of the modern *qui tam* action, see David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012); see also R. Harrison Smith, *A Key Time for Qui Tam: The False Claims Act and Alabama*, 58 ALA. L. REV. 1199, 1200 (2007).

99. 31 U.S.C. §§ 3729–3733 (2006). See Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471, 474–75 (2008).

100. See CLAIR M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 1.12 (2004); Engstrom, *supra* note 98. The Supreme Court has emphasized the requirement that the relator have “insider” information. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 471, 475–76 (2007); *Schindler Elevator Corp. v. United States ex rel Kirk*, 131 S. Ct. 1885, 1893 (2011) (finding relator may not rely on information obtained through FOIA request). These cases suggest that the Court views whistleblowers as the paradigm FCA relators.

recovered in suits brought without the assistance of a relator.<sup>101</sup> Many states have passed statutes based on the FCA.<sup>102</sup>

The potential reach of *qui tam* actions is much broader than recovery of false claims, however. The government brings many claims for money other than those for overpayments or breach of contractual obligations. These include actions for criminal and civil fines and penalties and actions by agencies such as the SEC for disgorgement of profits from illegal activities. Persons who violate federal securities laws, for example, are subject not only to suit by defrauded investors, but also to civil actions by the SEC for disgorgement. The primary purpose of these actions is to enforce the law for the benefit of the investing public; a secondary purpose is to deprive the defendant of the fruits of the illegal conduct. The SEC often coordinates with shareholder class action litigation to distribute disgorgement proceeds to defrauded investors but is not required to do so.

Nothing would prevent states from creating *qui tam* actions to enforce any statute containing civil penalties payable to the state. States interested in more vigorous enforcement of consumer protection laws, for example, could enact civil penalties for consumer fraud, payable to the state, and give private individuals who have been the subject of a violation the right to bring suit to enforce such penalties for all similar violations by the defendant, as well as a share of any recovery. Such actions would be for the public benefit because they augment enforcement by government agencies, thereby deterring wrongdoing by making the penalties for illegal conduct more efficacious.

Most importantly from the perspective of *Concepcion*, an arbitration provision should not be able to bar individuals from bringing such *qui tam* actions. The relator does not sue to recover group members' individual claims for compensatory damages. Rather, a *qui tam* suit seeks to recover on the state's own claim, measured by the number of violations, and payable to the state.<sup>103</sup> Because the

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101. Stengle, *supra* note 99, at 481 (citing the \$20 billion figure); CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2009), available at <http://www.fas.org/sgp/crs/misc/R40785.pdf>. All told, \$24.2 billion has been recovered since 1986 in settlements and judgments from *qui tam* actions, while only \$10.9 billion has been recovered by the government from non-*qui tam* fraud actions. See DEPARTMENT OF JUSTICE, FRAUD STATISTICS OVERVIEW (2011), available at [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). Relators were paid \$558 million in 2011 in 638 *qui tam* actions brought that year. See *id.*; Engstrom, *supra* note 98, at 1270–71.

102. Smith, *supra* note 98, at 1207.

103. The relator has a concrete interest in the suit based on her financial stake in the recovery, sufficient (along with the statutory conferral of a right of action) to provide standing.

suit does not attempt to adjudicate the legal interests of absent parties, the due process concerns familiar in class action litigation are not implicated. Even assuming that an arbitration provision could require a relator to pursue the action in arbitration rather than in court, it could not bar the relator from seeking a recovery based on a large number of violations because the suit would not seek to adjudicate individual claims, but rather to enforce the state's right to penalties for unlawful conduct against a group. These concepts can be understood more clearly by considering the California Private Attorneys General Act.

### *B. The California Private Attorneys General Act*

California has created just such a regime in the labor context through the Private Attorneys General Act (PAGA).<sup>104</sup> According to the legislative findings, the state faced a budget shortfall in 2004 that led to understaffing in the Labor and Workforce Development Agency (LWDA), the state agency that enforces California's labor law, and insufficient resources for effective enforcement of the labor code.<sup>105</sup> To address these problems the legislature passed PAGA, which allows an aggrieved employee to act as a "private attorney general" by suing the employer for civil penalties arising from labor code violations "on behalf of himself or herself and other current or former employees."<sup>106</sup> Any civil penalty that can be assessed and collected by the LWDA can also be recovered in a civil action brought by an aggrieved employee.<sup>107</sup> If the labor code does not specify a penalty for a violation, PAGA allows private plaintiffs to recover a statutory penalty of \$100 or \$200 per violation<sup>108</sup> in

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104. CAL. LAB. CODE §§ 2698–2699.5 (West 2011). The text of PAGA is reproduced in the Appendix.

105. See *infra* note 131 and accompanying text; 2003 Cal. Legis. Serv. c. 906 § 1 (West); Ben Nicholson, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 McGEORGE L. REV. 581, 584 (2004) (describing events leading to passage of PAGA).

106. *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1300 (2009) ("The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws."); LAB. § 2699(a).

107. LAB. § 2699(a). The plaintiff must give notice to the LWDA and can only sue if the agency does not issue a citation. *Id.* § 2699.3.

108. *Id.* § 2699(f)(2). A court has discretion to decrease the civil penalties awarded if a full award would be "unjust, arbitrary, and oppressive, or confiscatory." *Id.* § 2699(e)(2). Minor, technical violations of the labor code cannot be prosecuted in a PAGA action. See *id.* § 2699(g)(2); see also Erich Shiners, *Chapter 221: A Necessary but Incomplete Revision of the Labor Code Private Attorneys General Act*, 36 McGEORGE L. REV. 877 (2005) (discussing a 2005 revision of PAGA that barred private plaintiffs from asserting claims for minor code violations).

addition to reasonable attorneys' fees and costs.<sup>109</sup> The recovery is allocated 75 percent to the LWDA and 25 percent to the aggrieved employees.<sup>110</sup> Though they are called private attorney general actions, PAGA actions thus are similar to *qui tam* actions as described in the preceding section. The distinction between the two terms comes down largely to how the recovery is allocated. In *qui tam* actions, the recovery goes to the government and the private plaintiff receives a share as a bounty or reward for bringing the action. In a private attorney general action, the plaintiff brings the action on behalf of a group and all or a portion of the recovery goes to the group.<sup>111</sup>

As in a class action, PAGA allows a private individual to sue for violations affecting a group of similarly situated persons and to recover an amount based on the aggregate harm to the group. But there are important differences from class proceedings that make *Concepcion* inapplicable to PAGA actions.

To begin with, a PAGA action is a *representative* action, not a class action.<sup>112</sup> California courts have held that PAGA suits can be brought as class actions, but they need not be.<sup>113</sup> Indeed, PAGA claims are often brought as a separate count in the same suit as class claims.<sup>114</sup> A private plaintiff can pursue an individual claim for compensatory damages in addition to a PAGA claim, and a judgment in a PAGA action does not preclude absent employees from bringing their own claims for compensatory damages.

Second, the PAGA action is not an aggregation of individual claims. It is an action for a statutory penalty due to the state, the

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109. LAB. § 2699(g)(1). Because PAGA provides for fee-shifting of attorney's fees, plaintiffs do not need to pay attorney's fees out of their share of the recovery.

110. LAB. § 2699(i).

111. See discussion *infra* note 115.

112. Representative actions are well known in California law. For example, in a "common interest development" the homeowners' association can bring a representative action in its own name, as the real party in interest, for damage to the common areas (and certain other actions) without joining the individual owners. Any recovery goes to the association. CAL. CIV. CODE § 1368.3, formerly CAL. CODE OF CIV. PROC. § 383.

113. *E.g.*, *Arias v. Superior Court*, 46 Cal. 4th 969, 981–88 (2009); *Lopez v. Ace Cash Express, Inc.*, 2012 U.S. Dist. LEXIS 70051, at \*7 (C.D. Cal. 2012). A federal court case holding that California would interpret PAGA to require that the action be brought as a class action, *Benitez v. Wilbur*, CV F 08-1122 LJO GSA, 2009 U.S. Dist. LEXIS 15018, at \*29 (E.D. Cal. 2009), apparently decided before the California Supreme Court's decision in *Arias*, is erroneous. See also *Willner v. Manpower, Inc.*, No. C 11-02846 JSW, 2012 U.S. Dist. LEXIS 62227, at \*21–26 (N.D. Cal. 2012) (PAGA claims are fundamentally different from class actions).

114. See, *e.g.*, *Arias*, 46 Cal. 4th 969 (plaintiff alleged six counts for individual claims, four counts on behalf of himself and other employees, and one PAGA count; the California Supreme Court held that the claims brought on behalf of other employees had to meet class action requirements but the PAGA claims did not).



amount of which is measured by the number of violations. Insofar as part of the recovery goes “to the aggrieved employees,” it is “awarded not to the individual plaintiff but to the aggrieved employees as a whole.”<sup>115</sup> The penalties are “common and undivided with those employees on whose representative behalf [the plaintiff] sues.”<sup>116</sup> A private plaintiff cannot bring a PAGA suit based solely on violations with respect to herself, but must sue to recover penalties for violations against the whole group.<sup>117</sup> Indeed, “the PAGA plaintiff has no individual right to recovery”<sup>118</sup> and “does not sue under PAGA to vindicate his individual interest.”<sup>119</sup> Neither the plaintiff nor the other employees even have an individual claim under PAGA, any more than a relator in a False Claims Act case has a personal right to the sums the defendant fraudulently obtained from the government. A judgment in a PAGA case precludes government agencies and other employees from suing on the same (PAGA) claim, but is not binding as to non-party employees’ individual claims.<sup>120</sup>

Because PAGA actions do not adjudicate anyone’s individual claims, they do not present the issues of notice, due process, and commonality that the Supreme Court considered beyond the ken of arbitrators.<sup>121</sup> The California Supreme Court has explicitly held that class action requirements do not apply to PAGA actions because the individual interests of non-party employees are not being

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115. *Id.* at \*10; *see also* *Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06456-CJC(PJWx), 2011 U.S. Dist. LEXIS 114746, at \*22 (C.D. Cal. 2011) (“The statute therefore contemplates a common group action with civil penalties being awarded to the entire group.”). Courts have analogized PAGA actions to shareholder derivative suits, “in that the aggrieved employees as a whole sustain the injury, and the PAGA plaintiff steps into the shoes of those employees and the LWDA to seek a remedy as a result of the alleged violations.” *Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*11–12; *see also* *Thomas v. Aetna Health of Cal., Inc.*, No. 1:10-cv-01906-AWISKO, 2011 U.S. Dist. LEXIS 59377, at \*17 (E.D. Cal. 2011) .

116. *Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*10.

117. *Id.* at \*13 (“[T]he parties do bring their claim only with one another.”); *accord*, *Machado v. M.A.T. & Sons Landscape, Inc.*, No. 2:09-cv-00459 JAM JFM, 2009 U.S. Dist. LEXIS 63414, at \*7 (“PAGA’s language explicitly states that the representative action must include ‘other current or former employees.’”).

118. *Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*12; *accord* *Thomas* 2011 U.S. Dist. LEXIS 59377, at \*58 (“Aggrieved employees have no right to seek any individual recovery under PAGA . . . [They] have no separate and individual rights to pursue under PAGA that would transform it from a law enforcement action that furthers the interests of the LWDA into a myriad of separate and distinct claims of the aggrieved employees.”).

119. *Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*10.

120. *Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009). A judgment in a PAGA action is not, of course, binding as to aggrieved employees’ individual claims for compensatory damages, because individual claims are not at issue. *See infra* notes 132–39.

121. *See* *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 503 (2011); *Alcantar v. Hobart Serv.* No. ED CV 11-1600 PSG (Spx), 2013 WL 146323, at \*4–5 (C.D. Cal. 2013) (collecting cases).

adjudicated.<sup>122</sup> The entire portion of *Concepcion*'s analysis that discusses the need to comply with due process requirements governing class actions and the unfamiliarity of arbitrators with those requirements is thus wholly irrelevant to PAGA actions.

More fundamentally, the reason why PAGA claims are not within the ambit of FAA preemption under *Concepcion* is that they do not involve claims belonging to private individuals at all. The claim is not for private compensation, but for a civil penalty, the claim belongs to the state, and the penalty is payable to the state and collectable by a state agency. The private plaintiff stands in the state's shoes to litigate the action for the public benefit, not to vindicate a private right. These characteristics remove PAGA claims from the reach of *Concepcion* because private individuals cannot contract away the state's right to enforce the law.

PAGA was enacted to augment the enforcement power of the LWDA in a time when severe budget constraints had caused the agency to be underfunded and understaffed.<sup>123</sup> The legislature aimed to harness the power of the private bar to assure "maximum compliance" with the labor code, based on a legislative finding that in many cases "the only meaningful deterrent to unlawful conduct" is "the vigorous assessment and collection of civil penalties," and that private enforcement would provide an "effective disincentive for employers to engage in unlawful and anticompetitive labor practices."<sup>124</sup> California and federal courts have correctly viewed PAGA in this light.

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122. *Arias*, 46 Cal. 4th at 984–86; *see also Brown*, 197 Cal. App. 4th at 499.

123. *See Arias*, 46 Cal. 4th at 980 ("The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations. . . .").

124. The legislative findings accompanying the statute state:

(a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.

(b) Although innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.

(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.

According to the courts, a PAGA action “is essentially a law enforcement action designed to benefit the public, not to compensate aggrieved employees.”<sup>125</sup> It is “a mechanism by which *the state itself* can enforce state labor laws.”<sup>126</sup> The action is “brought by a group of aggrieved employees *on behalf of the State*,”<sup>127</sup> and the private plaintiff acts as a “proxy or agent of the state’s labor law enforcement agencies.”<sup>128</sup> The primary purpose of PAGA is to “achieve maximum compliance with state labor laws”<sup>129</sup> for the public benefit, not to recover compensation or restitution for individual employees. The statute is designed “to incentivize private parties to recover civil penalties *for the government* that otherwise may [sic] not have been assessed and collected by overburdened state enforcement agencies”<sup>130</sup> by “creat[ing] a means of ‘deputizing’ citizens as private attorneys general to enforce the Labor Code.”<sup>131</sup>

The “primary beneficiary [of the action] is the public at large, not the private individuals involved.”<sup>132</sup> “The PAGA plaintiff has no individual right to recovery”<sup>133</sup> and “does not sue under PAGA to vindicate his individual interest.”<sup>134</sup> Rather, the “employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that

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(d) It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies’ enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

CAL. LAB. CODE §§ 2698–2699.5 note (West 2011).

125. *Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06456-CJC(PJWx), 2011 U.S. Dist. LEXIS 114746, at \*24 (C.D. Cal. 2011); *see also Arias*, 46 Cal. 4th at 96; *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1300 (2009) (“The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action . . .”).

126. *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 503 (2011) (emphasis added). This is “because the employee suing under the PAGA ‘does so as the proxy or agency of the state’s labor law enforcement agencies.’” *Id.* (citation omitted).

127. *Urbino*, 2011 U.S. Dist. LEXIS 114746, at \*21 (emphasis added).

128. *Arias*, 46 Cal. 4th at 986; *see also Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*12; *Reyes v. Macy’s, Inc.*, 202 Cal. App. 4th 1119, 1123 (1st Dist. 2011).

129. *See Arias*, 46 Cal. 4th at 980 (quoting legislative findings). The statute does not contain any requirements for certification or notice.

130. *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C 08-2073 MHP, 2010 U.S. Dist. LEXIS 32774, at \*12 (N.D. Cal. 2010) (emphasis added).

131. *Brown*, 197 Cal. App. 4th 489, 501, *cert. denied*, 132 S. Ct 1910 (2012) (mem.).

132. *Urbino*, 2011 U.S. Dist. LEXIS 114746, at \*21.

133. *Lopez v. Ace Cash Express, Inc.*, 2012 U.S. Dist. LEXIS 70051, at \*12 (C.D. Ca. 2012); *accord Thomas v. Aetna Health of Cal., Inc.*, No. 1:10-cv-01906-AWI-SKO, 2011 U.S. Dist. LEXIS 59377, at \*58 (E.D. Cal. 2011) (“Aggrieved employees have no right to seek any individual recovery under PAGA . . . [they] have no separate and individual rights to pursue under PAGA that would transform it from a law enforcement action that furthers the interests of the LWDA into a myriad of separate and distinct claims of the aggrieved employees.”).

134. *Lopez*, 2012 U.S. Dist. LEXIS 70051, at \*10.

otherwise would have been assessed and collected by the Labor and Workforce Development Agency.”<sup>135</sup> The fact that the LWDA receives 75 percent of the recovery “only highlights the primary public focus of a PAGA action.”<sup>136</sup> “[A]ny direct financial benefit to those harmed by the employer’s unlawful conduct is ancillary to the primary object” of the statute, which is for the private plaintiff to act as a proxy for the LWDA and obtain a recovery on its behalf and on behalf of all aggrieved employees.<sup>137</sup>

The statute ensures that the state agency retains “primacy” over the action.<sup>138</sup> The plaintiff must notify the agency before commencing the action, and the agency can take over the claim if it so chooses. In this way, the statute embodies an “understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.”<sup>139</sup>

### C. FAA Preemption and PAGA Waivers

California employers have begun to include waivers of the ability to proceed in a representative or private attorney general capacity in their standardized arbitration clauses.<sup>140</sup> Such clauses have apparently become widespread in California, particularly since *Concepcion*.<sup>141</sup> For example, the provision at issue in *Brown v. Ralphs Grocery* provided:

[T]here is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated. . . . [T]here are no judge or

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135. *Arias*, 46 Cal. 4th at 986.

136. *Urbino*, 2011 U.S. Dist. LEXIS 114746, at \*29–30.

137. *Arias*, 46 Cal. 4th at 987 n.7.

138. See CAL. LAB. CODE §§ 2698–2699.5 note (West 2011).

139. *Arias*, 46 Cal. 4th at 980.

140. See *infra* notes 144–49 and accompanying text.

141. A large empirical study concluded that, in general, corporations use mandatory arbitration clauses for the primary purpose of avoiding classwide proceedings. Eisenberg et al., *supra* note 4, at 886–88. See also Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 144–50 (2010) (examining cell phone and credit card contracts and concluding that “companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions”); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010) (arguing that Eisenberg’s conclusions should be limited to credit card and cell phone companies).

jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy.<sup>142</sup>

Similarly, the clause at issue in *Urbino v. Orkin Services of California, Inc.*, provided that the parties “waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity.”<sup>143</sup>

*Brown* held that such clauses are not covered by *Concepcion* because PAGA actions do not seek individual recoveries, but are fundamentally law enforcement actions in which the plaintiff asserts the same legal right and interest as the LWDA. The Supreme Court denied certiorari.<sup>144</sup> Other California state courts have reached a similar result.<sup>145</sup> In *Urbino*,<sup>146</sup> for example, the federal district court followed *Brown* and held that because a contractual PAGA waiver “contradicts the fundamental purpose of a representative enforcement action under PAGA, it is unconscionable and unenforceable . . . because it both deprives the individual of the right to bring a representative action and deprives the LWDA the benefits of the enforcement action brought by aggrieved employees.”<sup>147</sup> Other federal district courts have also denied employers’ motions to compel arbitration of PAGA claims on reasoning similar to *Brown*: that a PAGA claim is not an individual claim but is brought as the proxy or agent of state law enforcement agencies.<sup>148</sup>

142. *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 495 (2011) (emphasis omitted).

143. *Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06456-CJC(PJWx), 2011 U.S. Dist. LEXIS 114746, at \*35 (C.D. Cal. 2011).

144. 132 S. Ct. 1910 (2012). Obviously, a denial of certiorari does not mean that the Court agreed with *Brown*’s analysis, but it does tell us that there were not four justices who voted to hear the case.

145. See *Reyes v. Macy’s, Inc.*, 202 Cal. App. 4th 1119, 1123 (2011).

146. 2011 U.S. Dist. LEXIS 114746 (C.D. Cal. 2011)

147. *Id.* at \*24. “The waiver clause was unconscionable because, *inter alia*, the provision expressly prohibited the plaintiff’s ability to collect civil penalties in a representative capacity, thereby preventing plaintiff ‘from performing the core function of a private attorney general’ and undermining the very purpose and nature of a PAGA enforcement action. . . .” *Id.* at \*35 (quoting *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1303 (2009)).

*Urbino*’s argument that a waiver takes away an individual’s right to bring a representative action is not persuasive, at least to me; it is indistinguishable from the contention that a mandatory arbitration clause takes away an individual’s right to go to court. *But see* *Deposit Guar. Nat’l Bank Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) (holding that the right to bring a claim as the representative of a class is substantial enough to allow a named plaintiff to appeal denial of class certification). The conclusion that the waiver infringes the state’s own interest is sound, however.

148. *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063 (C.D. Cal. 2011); see also *supra* notes 113, 115–19. Alcantar also determined that class certification is not required for standing in PAGA cases brought in federal court, *Alcantar v. Hobert Service*, No. ED CV 11-1600 PSG (SPx), 2013 WL 146323, at \*3 (C.D. Cal. Jan. 14, 2013); accord, *Moua v. Int’l Bus. Mach.*

A number of federal court decisions, by contrast, have held that “[a] PAGA claim is a state-law claim, and states may not exempt claims from the FAA.”<sup>149</sup> Thus, the fate of PAGA under *Concepcion* is not clearly established.

It should be apparent from the discussion in the preceding section, however, that the FAA should pose no obstacle to the application of state unconscionability law to bar pre-dispute waivers of the right to bring a PAGA action. PAGA was enacted as a means to augment the state’s law enforcement powers to achieve “maximum compliance” with the law, and its primary purpose is to benefit the public, not to compensate private individuals. The legislature enacted PAGA on the determination that the “only meaningful deterrent” in some cases “is the vigorous assessment and collection of civil penalties” and that in light of budget constraints state law enforcement agencies “are likely to fail to keep up with the growth of the labor market in the future.”<sup>150</sup> The private

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Corp., 2012 WL 370570, at \*3 (N.D. Cal. Jan. 31, 2012); *Thomas v. Aetna Health of California*, No. 1:10-cv-01906 AWI (Sko), 2011 WL 2173715, 12–13 (E.D. Cal. June 2, 2011) (surveying cases). *Alcantar* also rejected the argument that PAGA claims could not be tried as representative actions in the absence of certification without violating defendants’ due process rights. *Alcantar*, 2013 WL 146323, at \*4.

149. *Luchini v. Carmax*, No. CV F 12-0417 LJO DLB, 2012 U.S. Dist. LEXIS 126230 (E.D. Cal. 2012); see also *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (“[T]he Court must enforce the parties’ Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general.”); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011) (declining to follow *Brown* and finding that PAGA claims are arbitrable); *Valle v. Lowe’s HIW, Inc.*, No. 11-1489 SC, 2011 U.S. Dist. LEXIS 93639 (N.D. Cal. 2011); *Nelson v. AT&T Mobility, LLC*, No. C10-4802 TEH, 2011 U.S. Dist. LEXIS 92290 (N.D. Cal. 2011); *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (holding that plaintiff’s “PAGA claim is arbitrable, and . . . the arbitration agreement’s provision barring him from bringing that claim on behalf of other employees is enforceable” and declining to follow *Brown* because preemption is a question of federal, not state law); *Hill v. Ins. Co. of the W.*, 2010 U.S. Dist. LEXIS 40632 (S.D. Cal. 2010) (decided before *Concepcion*); *Iskanian v. CLS Transp. L.A., LLC*, 206 Cal. App. 4th 949, 966 (“Following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration.”), *vacated and review granted*, 2012 Cal. LEXIS 8925 (2012); cf. *Kilgore v. KeyBank, Nat. Ass’n*, 2013 U.S. App. LEXIS 7312 (9th Cir. Apr. 11, 2013) (en banc) (plaintiffs’ argument that a contractual ban on class arbitration was unconscionable under California law “is now expressly foreclosed by *Concepcion*”). A number of federal courts have held that PAGA is a procedural statute that is superseded in federal court by Rule 23; accordingly, an individual lacks standing to recover on behalf of non-named third parties absent class certification. See *Fields v. QSP, Inc.*, No. CV 12–1238 CAS (PJWx), 2012 WL 2049528, at \*5 (C.D. Cal. June 4, 2012); *Ivey v. Apogen Technologies, Inc.*, No. 11CV366 DMS NLS, 2011 WL 3515936, at \*3 (S.D. Cal. Aug. 10, 2011); *Thompson v. APM Terminals Pac. Ltd.*, No. C 10–00677 JSW, 2010 WL 6309364, at \*2 (N.D. Cal. Aug. 26, 2010); *Adams v. Luxottica U.S. Holdings Corp.*, No. SA CV 07-1465 AHS (MLGx), 2009 WL 7401970, at \*2 (C.D. Cal. Jul. 24, 2009). Each of these cases can be found cited in *Alcantar*, 2013 WL 146323.

150. See CAL. LAB. CODE §§ 2698–2699.5 note (West 2011).

plaintiff stands in the shoes of the state, to enforce a claim belonging to the state, and the state agency retains primacy over the litigation.

As the court held in *Brown*, “[i]f the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified.”<sup>151</sup> It is difficult to see how a private individual could contract away the state’s right to enforce its law. This is what *Brown* meant in saying that *Concepcion* does not hold that a *public* right (a right belonging to the public) may be contractually waived by a private individual if such a waiver is contrary to state law. If the agency were suing in its own name, it would clearly have the power to retain outside counsel to conduct the litigation. PAGA is functionally a means of doing the same thing. Allowing private employers to nullify the legislature’s chosen means of enforcing the labor code by inserting mandatory waiver provisions in contracts of adhesion would seriously impair the state’s ability to perform a core governmental function. For that reason, extending *Concepcion* to allow mandatory waivers of PAGA actions should raise grave federalism concerns.

It is even unclear whether mandatory arbitration clauses should be enforceable in PAGA actions. If PAGA-style actions assert the state’s own rights and are for the benefit of the state, then such a statute should be able to bar not only class waivers but also litigation waivers—just as a state could refuse to arbitrate a lawsuit brought directly by the state to collect a civil penalty. Certainly, private parties could not, through a private contract, waive or destroy the state’s right to bring an enforcement action in court. Neither the text of the FAA nor the Supreme Court’s previous cases have suggested that the FAA should be interpreted to invade state sovereign interests to this extent.

To be sure, the majority in *Concepcion* responded to Justice Breyer’s concern that without classwide proceedings small claims might “slip through the legal system” by saying, “[b]ut States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>152</sup> Here, however, the private attorney general or *qui tam* action is not inconsistent with the FAA because it is a mechanism for prosecuting claims belonging to the state, not to the contracting private parties.

Some courts have assumed, without much reflection, that because the FAA requires enforcement of mandatory arbitration

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151. *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 502 (2011).

152. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2012).

clauses generally, the same would be true for PAGA claims. The argument is that the employee has agreed to submit any dispute arising from the employment relationship to arbitration, and this includes PAGA claims. On the other hand, a PAGA plaintiff is asserting a claim belonging to the state, on behalf of the state. In an enforcement action by the state agency, the agency would have the absolute right to decline arbitration and go to court. Why should a private individual be able to make this choice for the state, and in a contract of adhesion no less?

Yet even if a mandatory arbitration clause can require PAGA claims to be resolved through arbitration, there is no reason why *Concepcion* should require enforcement of outright waivers of the right to bring PAGA claims in any forum. As *Brown* reasoned, this would nullify an important interest—and right—of the state.<sup>153</sup> It would thus be an unreasonable intrusion on state autonomy and sovereignty.

#### *D. Drafting a Qui Tam or Private Attorney General Statute for Contracts of Adhesion*

A statute similar to PAGA that created a mechanism for private plaintiffs to sue to enforce statutory penalties in a *qui tam* action could offer a way for states to obtain private enforcement of state law in standardized transactions involving harm to large numbers of people, even when defendants could avoid traditional class action litigation through mandatory arbitration clauses containing class waivers.

PAGA applies only to statutory penalties prescribed for violations of the state labor code, but a similar mechanism could be added to consumer protection laws. For example, California's Consumer Legal Remedies Act<sup>154</sup> outlaws a long list of "unfair methods of competition and unfair or deceptive acts or practices" in transactions involving the sale of goods or services to consumers<sup>155</sup> and authorizes "any consumer who suffers any damage as a result" of such practices to sue for actual and punitive damages, restitution, and injunctive relief.<sup>156</sup> The statute could be amended to provide a statutory penalty for violations and to authorize private attorney

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153. *Brown*, 197 Cal. App. 4th at 501; see *supra* note 151 and accompanying text.

154. CAL. CIV. CODE §§ 1750–1784 (West 2009).

155. *Id.* § 1770 (a).

156. *Id.* § 1780(a). Senior citizens and disabled persons may be entitled to an additional \$5,000. § 1780(b).



general or *qui tam* actions similar to those in PAGA. Statutes regulating unfair competition, insurance, environmental protection, and other subjects where contracts of adhesion are common could be similarly amended.

The preceding discussion of PAGA highlights features that should be included in any such statute. The statute should contain a civil penalty, enforceable by a state agency and payable to the state. Private plaintiffs who suffer injury sufficient to confer standing<sup>157</sup> should be authorized to bring *qui tam* or private attorney general actions to recover those penalties for the state, retaining a share of the recovery as an incentive (or bounty) to encourage enforcement. The statute should make it clear that the legal right belongs to the state; the purpose of the statute is to augment enforcement by the state agency; the private plaintiff acts for the benefit of the state and the public; and the primary purpose of the provision is for the benefit of the public, not for private benefit. For general policy reasons, the state agency charged with enforcement of the statute should receive pre-filing notice of any intended action and should be given the opportunity to take over the investigation and prosecution.

Some additional tweaks and improvements might be suggested. For example, PAGA states that the plaintiff brings the action “on behalf of himself or herself and other current or former employees.” A crisper formulation would be that of *Urbino*: “on behalf of the State.” That is to say, framing the statute more clearly as a traditional *qui tam* provision in which recovery goes to the state with an incentive share to the plaintiff, rather than as a private attorney general action in which a private plaintiff stands in the shoes of the state as *parens patriae* representing a group, would draw a clearer distinction between the *qui tam* proceeding to recover the state’s claim and a class action to recover the individual claims of a group of people. Making this distinction clearer would make it more likely that a court would find *Concepcion* inapplicable.

In the same vein, the statute should make it quite clear that the action is not brought as an aggregation of individual claims. In a *qui tam* action under the FCA, the recovery goes to the government, with a share going to the relator. PAGA provides, however, that the “civil penalties recovered by aggrieved employees shall be distributed” 75 percent to the state agency and 25 percent “to the

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157. Standing requirements may be more lenient in state courts than in federal court, but a requirement that the plaintiff have been subjected to the defendant’s violation would provide a nexus between the plaintiff and the enforcement action. The statutory incentive award should be sufficient to satisfy federal standing requirements in the case of removal.

aggrieved employees.”<sup>158</sup> This language creates the possibility of confusion over whether PAGA actions are brought to recover individual claims for compensation, though case law makes it clear that this amount is for the affected employees “as a whole” or as a group.<sup>159</sup> The possibility for such confusion could be avoided by making the incentive share of the statutory penalty payable to the plaintiff, as the FCA provides, rather than “to the aggrieved employees.”

On the other hand, the drafters of PAGA probably thought that it was in the public interest to assure that aggrieved employees receive some monetary benefit from the lawsuit. Taking this view, the statute could award a share of the penalties to the group affected by the misconduct but should make it clear that the award is not compensation for individual claims and is awarded to the group as a whole.<sup>160</sup>

A third set of issues involves the amount of the statutory penalty and the percentage of the recovery to be designated as an incentive payment to the plaintiff. It might not be necessary to set the incentive as high as PAGA’s 25 percent if the statute also provides, as PAGA does, for attorneys’ fees and costs. However, just as the FCA bounty encourages private plaintiffs to initiate proceedings, a significant bounty could encourage enforcement.

Whether a significant share of the penalties should go to absent members of the group, as well as whether a particular level of statutory penalty is “too large,” may depend on how likely it is that defendants will face claims for both the statutory penalties and compensatory awards for aggrieved individuals. *Concepcion* effectively eliminates the possibility of class actions in cases where savvy defendants write the governing contracts, and the *Concepcion* majority’s assertion that the provisions of the contract make it likely that a significant number of affected persons will pursue their claims in

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158. CAL. LAB. CODE § 2699(i) (West 2011).

159. Presumably the plaintiff is responsible for distributing this sum, though court approval of the distribution apparently is not necessary. See *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) (holding PAGA actions need not meet the procedural requirements for class actions).

160. It would probably be wise to give some guidance about how the recovery should be allocated and distributed. It is also possible that if a single plaintiff could bring both a private attorney general claim and a class action over the same conduct, as was the case in California before *Concepcion*, the fact that the named plaintiff would receive all of the incentive share in the *qui tam* action, but the class recovery would have to be distributed to the class subject to court approval, might create a conflict of interest. See *Nordstrom Comm’n Cases*, 186 Cal App 4th 576 (2010) (finding that the trial court did not abuse its discretion in approving a settlement that did not allocate any damages to the class’s civil penalty claims under the Private Attorneys General Act of 2004; such claims were resolved as a part of the overall settlement of the case).

arbitration is touchingly naïve.<sup>161</sup> If *Concepcion* means, as Justice Stevens argued, that there will be virtually no individual enforcement because bilateral arbitration is not feasible for most people, then the only practical chance affected group members will have of recovering any money will be through a private attorney general action. In these circumstances, a legislature would be justified in allocating a significant share of the penalty to the group as a whole in order to provide some chance of recovery for those injured by defendant's illegal conduct. Similarly, if it is unlikely that many members of the group will be pursuing individual claims, then there need be little concern that statutory penalties imposed separately from individual claims for compensation will result in too much deterrence.

Because the statutory penalty is lower than compensatory damages would be for many labor violations, awards in PAGA-style actions to recover statutory penalties may be smaller than they would be in class actions for similar violations. In one case that included both class claims and PAGA claims, for example, the penalties awarded under PAGA were less than one-third of the compensatory damages awarded to the class.<sup>162</sup> Before *Concepcion*, PAGA claims were generally brought together with class claims. One can expect that after *Concepcion* and *Wal-Mart v. Dukes*, many cases where PAGA applies will not be maintainable as class actions, either because plaintiffs cannot meet the more stringent commonality requirement of *Wal-Mart* and its new requirement that class actions seeking back pay be certified as (b)(3) classes, or because the employment contract contains an arbitration provision with a class waiver. Therefore, the total recoverable amount, and thus the deterrent effect, in such actions will likely be lower after these recent decisions.

Most class actions that are certified, however, are resolved by settlement. Courts might award, and plaintiffs might collect, a greater

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161. If the defendant simply tenders to anyone who seriously threatens to pursue arbitration the value of the claim (\$30.22 in *Concepcion*), it will not have to pay either the \$7,500 penalty or the claimant's attorneys' fees. *Concepcion*, 131 S. Ct. at 1753. Information asymmetries guarantee that few consumers will even realize that they may have a claim, and any competent attorney will realize that there is no economic future in representing individuals in bilateral arbitration proceedings for \$30 claims. Thus, the class waiver allows the defendant to avoid all but de minimis costs of its illegal behavior. In Judge Posner's memorable phrase, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30." *Carnegie*, 376 F. 3d at 661 (quoted in *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1783 (2010) (Ginsburg, J., dissenting)).

162. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1174 (Cal. App. 3d 2008) (approximately \$800,000 recovered for damages to the class and \$250,000 in civil penalties under PAGA).

proportion of potential recoveries in PAGA-type actions than is the norm in class action settlements, and therefore cases might also settle for a higher percentage of the potential recovery. The cases might be easier to prove than common law claims, for example. More streamlined proof, the lack of extended litigation over class certification, and the emergence of a small specialized bar litigating under the statute might even lead to a higher trial rate than for consumer class actions, and more trials could lead to higher settlement values.<sup>163</sup> Additionally, if class actions prove to be no longer feasible and individual enforcement through arbitration does not provide sufficient deterrence in the legislature's judgment, the legislature can adjust the amount of the statutory penalty to achieve the desired level of deterrence.

In calibrating the amount of the penalty, the legislature has two variables to work with. The size of the penalty (under PAGA, \$50, \$100 or \$200 per violation) should be based on deterrence—will a particular amount be too low to deter unlawful behavior or too high to be fair in light of the number of claims that could be raised? The legislature should consider the fact that the statutory penalty will be in addition to individuals' right to recover compensatory damages. But in situations where, after *Concepcion*, it is unlikely that class actions can be brought because waivers will be enforceable and unlikely that much will be recovered through individual arbitration because of the small amount of the claim, asymmetrical information, and the transaction costs of pursuing a claim, the legislature may conclude that the statutory penalty will be the primary means of deterrence and could decide to set the penalty at a higher amount.

The size of the plaintiff's share of the recovery (under PAGA, 25 percent), by contrast, should be determined by the incentive effect desired. How much of an incentive is necessary to encourage private enforcement, and how much would amount to an unfair windfall for a single individual and thereby perhaps encourage too much litigation? In statutes like PAGA that contain an attorneys' fees provision, the percentage of the award going to the plaintiff could be relatively small because attorneys' fees might be enough incentive to attract lawyers to bring the claims, as in civil rights cases where compensatory damages are often small or nonexistent but attorneys' fees assure that representation is available.

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163. See, e.g., Janet Cooper Alexander, *Do the Merits Matter?: A Study of Settlements of Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Marc Galanter, *The Vanishing Trial: An Examination of the Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

In any event, such judgments, including the question of how likely it is that large numbers of individuals will pursue claims in arbitration, are quintessentially legislative, not judicial, in nature, and courts should defer to the legislature's judgment.

#### CONCLUSION

*Concepcion* makes it possible for corporations to avoid being sued in class actions for any claim arising out of a transaction involving a standard-form contract—that is to say, for almost all consumer and employment claims. Restoring effective enforcement through legislation would be challenging. Federal legislation to prohibit class waivers in consumer and employment contracts of adhesion could be effective but is unlikely to be politically feasible. State legislation would be more politically feasible, but the Supremacy Clause makes it virtually impossible to draft a bill that would be effective. Creating statutory civil penalties for violations of consumer protection and employment laws, together with a *qui tam* mechanism to permit private enforcement of those penalties, offers an unorthodox but possibly fruitful alternative to achieving the deterrent effect of class proceedings. *Qui tam* actions are not a perfect substitute for class actions, of course, because they can fulfill the compensatory function of class actions only to a limited extent. But they may partially fill the deterrence gap that *Concepcion* is widely expected to create.

APPENDIX  
CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT  
CALIFORNIA LABOR CODE §§ 2698 ET SEQ.

§ 2698. Citation of part.

This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

§ 2699. Recovery of civil penalty for violation of Labor Code through civil action brought by aggrieved employee; Amount of penalty; Attorney's fees and costs; Distribution of penalty proceeds; Applicability of section.

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole.

(e)

(1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars (\$500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g)

(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l) The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.



**Note**

Stats 2003 ch 906 provides:

SECTION 1. The Legislature finds and declares all of the following:

(a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.

(b) Although innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.

(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.

(d) It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

§ 2699.3. Requirements for commencement of civil actions under Lab C § 2699 alleging specified violations; Time limits.

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2)

(A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

(B) If the agency intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the 158-day period prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action pursuant to Section 2699.

(C) Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.

(b) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give notice by certified mail to the Division of Occupational Safety and Health and the employer, with a copy to the Labor and Workforce Development Agency, of the specific provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including the facts and theories to support the alleged violation.

(2)

(A) The division shall inspect or investigate the alleged violation pursuant to the procedures specified in Division 5 (commencing with Section 6300).

(i) If the division issues a citation, the employee may not commence an action pursuant to Section 2699. The division shall notify the aggrieved employee and employer in writing within 14 calendar days of certifying that the employer has corrected the violation.

(ii) If by the end of the period for inspection or investigation provided for in Section 6317, the division fails to issue a citation and the aggrieved employee disputes that decision, the employee may challenge that decision in the superior court. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board. If the court finds that the division should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action pursuant to Section 2699.

(iii) A complaint in superior court alleging a violation of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall include therewith a copy of the notice of violation provided to the division and employer pursuant to paragraph (1).

(iv) The superior court shall not dismiss the action for nonmaterial differences in facts or theories between those contained in the notice of violation provided to the division and employer pursuant to paragraph (1) and the complaint filed with the court.

(B) If the division fails to inspect or investigate the alleged violation as provided by Section 6309, the provisions of subdivision (c) shall apply to the determination of the alleged violation.

(3)

(A) Nothing in this subdivision shall be construed to alter the authority of the division to permit long-term abatement periods or to enter into memoranda of understanding or joint agreements with employers in the case of long-term abatement issues.

(B) Nothing in this subdivision shall be construed to authorize an employee to file a notice or to commence a civil action pursuant to Section 2699 during the period that an employer has voluntarily entered into consultation with the division to ameliorate a condition in that particular worksite.

(C) An employer who has been provided notice pursuant to this section may not then enter into consultation with the division in order to avoid an action under this section.

(4) The superior court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with Section 6300) to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation. The provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on those settlement provisions, and the court shall grant the division's commentary the appropriate weight.

(c) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision other than those listed in Section 2699.5 or Division 5 (commencing with Section 6300) shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2)

(A) The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice. The employer shall give written notice by certified mail within that period of time to the aggrieved employee or representative and the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to Section 2699 may commence. If the alleged violation is not cured within the 33-day period, the employee may commence a civil action pursuant to Section 2699.

(B) No employer may avail himself or herself of the notice and cure provisions of this subdivision more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.

(3) If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative shall provide written notice by certified mail, including specified grounds to support that dispute, to the employer and the agency. Within 17 calendar days of the postmark date of that notice, the agency shall review the actions taken by the employer to cure the alleged violation, and provide written notice of its decision by certified mail to the aggrieved employee and the employer. The agency may grant the employer three additional business days to cure the alleged violation. If the agency determines that the alleged violation has not been cured or if the agency fails to provide timely or any notification, the employee may proceed with the civil action pursuant to Section 2699. If the agency determines that the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

(d) The periods specified in this section are not counted as part of the time limited for the commencement of the civil action to recover penalties under this part.

**Note**

Stats 2004 ch 221 provides:

SEC. 7. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

