

The State Qui Tam To Enforce Employment Law

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THE STATE QUI TAM TO ENFORCE EMPLOYMENT LAW

*Andrew Elmore**

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This Article examines the states’ response to Epic Systems v. Lewis, which held enforceable under the Federal Arbitration Act (FAA) mandatory arbitration agreements that require employees to waive their participation in collective and class actions in employment contracts. Recent evidence shows that mandatory arbitration can erode access to justice for and deterrence of employment law claims. States in response are considering qui tam statutes, which assign the state interests in penalties for employment law violations to private enforcers in return for a bounty, to substitute for the loss of class action enforcement after Epic Systems.

These statutes can increase deterrence and access to justice, and do not implicate the FAA so long as the claim belongs to the state. But the Supreme Court’s FAA jurisprudence evinces a hostility to statutes that permit an end run around class action waivers. It is an open question at what point a qui tam statute requires waiver under the FAA for insufficiently distinguishing between the private and public interests in enforcement. Current due process protections do not sufficiently protect against this threat, or the interests of states and the affected employees.

This Article offers the safeguard of agency oversight, often required by state nondelegation doctrine, to protect state qui tam statutes from FAA preemption by constraining qui tam claims to those that serve a distinct, public interest. Meaningful public agency oversight over the resolution of qui tam claims would protect the interests of the states and enable agencies to protect the interests of aggrieved employees. States can also reduce incentives for misuse of qui tam enforcement that harms the interests of aggrieved employees by extending qui tam enforcement to nonprofit public interest corporations as representative organizations.

INTRODUCTION

The Supreme Court has recently explored two provisions commonly paired together in contracts between entities and their employees or customers in Federal Arbitration Act (FAA) cases. The first—the mandatory arbitration clause—purports to require their employee or customer to pursue all future claims in arbitration rather than in federal or state court. The second—the class waiver—purports to waive the employee’s or customer’s right to pursue her future claims against the firm as part of a class, requiring her to proceed in individual arbitrations with any disputes. In *Epic Systems Corp. v. Lewis*, the most recent foray into this area, the Court held these provisions enforceable for wage-and-hour law claims.¹ Recent empirical evidence suggests that foreclosing aggregate litigation of these claims has a detrimental impact on deterrence and access to justice.²

In response, modeled on a current California law, seven states—Connecticut, Maine, Massachusetts, New York, Oregon, Vermont, and Washington—have contemplated qui tam statutes to provide employees and representative organizations with standing to sue on behalf of the state for penalties associated with employment law violations, in return for a portion of the award.³ In this Article, I assess whether the state qui tam action might be a viable substitute for the kinds of lawsuits covered by waivers like the one in *Epic Systems*. Qui tam statutes such as the state false claims acts and California Private Attorney General Act (PAGA) can be effective deterrents.⁴ They have survived significant constitutional and FAA challenges because of the long qui

1. 138 S. Ct. 1612, 1632 (2018).

2. See *infra* Part II.B and notes 104–161.

3. H.B. 5381, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020); S.B. 1066, 191st Gen. Assemb. (Mass. 2019); S.P. 558, 129th Leg., 1st Reg. Sess. (Me. 2019); Assemb. B. A2265, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019); S.B. 750, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.B. 139, 2019 Leg. (Vt. 2019); H.B. 1965, 66th Leg., Reg. Sess. (Wash. 2019).

4. See, e.g., CAL. LAB. CODE §§ 2698 *et seq.*

tam tradition in the United States and the judiciary's tolerance of private delegation in economic and social regulation. There are also strong federalism interests upheld in permitting states to preserve their historic role of protecting vulnerable workers. Qui tam enforcement, then, appears to be on solid constitutional ground.⁵

Epic Systems, however, presents a new threat that the FAA preempts state qui tam statutes that seek to deter employment law violations as an end run around class waivers. State qui tam statutes permit aggrieved parties to seek penalties for conduct that also harms the litigant without significant agency oversight. Additionally, they can place considerable pressure on the distinction between public and private interests. A ruling that a state may not assign an interest in penalties for violation of substantive laws protecting victims may destabilize the holding of *Equal Employment Opportunity Commission v. Waffle House Inc.*,⁶ which permits public agencies to seek victim-specific relief notwithstanding a mandatory arbitration agreement.

State qui tam experimentation with insufficient agency oversight can also create incentives for private enforcers to use the qui tam vehicle in ways that do not clearly advance the public interest. Despite criticism by employers that qui tam statutes risk over-enforcement,⁷ this Article argues that under-enforcement is the greater threat. Qui tam legislation can address the risk of over-enforcement by exempting harmless violations from its scope, and there is little evidence that the private qui tam bar abuses qui tam statutes with frivolous claims. The Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment, recently incorporated to the states in *Timbs v. Indiana*,⁸ moreover, offer strong constitutional guardrails protecting against the risk of over-enforcement.

Binding states and affected employees to the private enforcer's resolution of a qui tam claim, however, can create perverse incentives to under-enforce that are more difficult to resolve. Regulated entities, specifically, may seek to collude with the weakest private enforcers in substandard settlements that preclude more aggressive enforcement.⁹ Current due process protections for defendants in qui tam actions do

5. See *infra* Part III.A and notes 147–204.

6. 534 U.S. 279 (2002).

7. See, e.g., Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the "Sue Your Boss" Law*, 49 U. PAC. L. REV. 265, 278–79 (2018).

8. 139 S. Ct. 682 (2019).

9. Qui tam claims bind government agencies and subsequent relators in order to safeguard the due process rights of defendants. See *infra* note 239. Aggrieved parties, of course, are not barred from vindicating their own rights in individual arbitrations.

not protect against this threat. They only consider whether penalties should be lowered, not raised, and do not enable courts to discern whether the private enforcement advances a distinct, public interest.

This Article offers safeguards for state agency intervention as a conceptual framework to address the FAA preemption threat to qui tam enforcement and to better align private enforcement and public agency interests in qui tam enforcement. Many of these safeguards are already in place in the laws proposed in other states and may be easily incorporated in PAGA. Most important is the right by state agencies to intervene in qui tam claims in cases of private enforcer misuse.¹⁰ I argue that state agency safeguards reduce the risk of FAA preemption by providing agency oversight to ensure that qui tam enforcement serves a distinct public interest. In some cases, state agency supervision is constitutionally required, while in others it may be established through legislation or by administrative design.

The possibility of state agency intervention may improve deterrence by encouraging enforcement of employment laws; however, a stronger state agency role may only improve access to justice if the aggrieved employees have voice in the resolution of the qui tam claim. But qui tam statutes must be cautious in extending class action procedures for resolving claims that provide portions of a bounty to aggrieved parties. Extending full due process rights to these nonparties by statute may convert qui tam into class claims, requiring FAA enforcement of class waivers. State agency intervention in qui tam enforcement may improve affected worker due process, by mimicking class action settlement procedures in internal agency distribution of claims resolution funds. Assigning qui tam enforcement to nonprofit public interest organizations may also encourage aggrieved employee participation in private enforcer resolution of qui tam claims and can reduce the risk of private enforcer misuse caused by the profit motive.¹¹

Although this analysis has important implications for other under-enforced areas of law, especially consumer protection, housing and employment discrimination laws, and safety-and-health standards,¹²

10. See *infra* Part IV.A. and notes 239–275.

11. Channeling enforcement to non-profit organizations may also create incentives for misuse that may require conditions on the delegation. See *infra* Part IV.B.2.

12. The most direct implications are for employment and housing discrimination and consumer protection laws, where mandatory arbitration agreements with class waivers also distort private enforcement. Connecticut and Washington have proposed qui tam statutes to enforce their state employment discrimination laws. H.B. 5381, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020); H.B. 1965, 66th Leg., Reg. Sess. (Wash. 2019). Vermont recently proposed a qui tam statute for consumer protection claims. See Vermont Model State Consumer Justice Enforcement Act, S.B. 18, No. 74 (Vt. 2019). State qui tam enforcement also has implications for safety

this Article focuses on wage-and-hour law for several reasons. There is a well-documented trend of under-enforcement of wage-and-hour laws that are often subject to mandatory arbitration agreements with class waivers.¹³ The cases consolidated in *Epic Systems* illustrate this trend: The putative class members alleged that their employers misclassified employees and required unpaid off-the-books work in violation of the Fair Labor Standards Act (FLSA).¹⁴ These claims are often inefficient to bring individually in arbitration. Many individual FLSA claims are of low value, or are difficult to prove, and unlikely to garner the interest of attorneys willing to represent them in individual arbitration.¹⁵ While these claims are often brought on a collective or class basis, employment contracts with mandatory arbitration and class waiver provisions are becoming increasingly common.¹⁶

Current public and private enforcement cannot realistically substitute the lost enforcement from the decline in class and collective actions after *Epic Systems*. Public agency enforcement of employment law is a small fraction of total enforcement,¹⁷ and unions, which have historically served as an internal safeguard to protect the fairness of

and health standards enforced by the state, as there is no private right of action to enforce the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 653(b)(4) (2012), and OSHA has chronically insufficient public enforcement resources. Devah Pager, Bruce Western & David Pedulla, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEGAL F. 317, 325–26 (OSHA staffing and annual federal and state OSHA inspections declined by half between 1980 and 2006.). California extends its qui tam statute to state safety-and-health violations, and Washington has contemplated a similar measure. See CAL. LAB. CODE § 2699.3(b); H.B. 1965, 66th Leg., Reg. Sess. (Wash. 2019). In contrast, the qui tam vehicle has little applicability outside of public law. While the state has a *parens patriae* interest in protecting “the health and well-being-both physical and economic-of its residents in general,” *Snapp v. Puerto Rico*, 458 U.S. 592, 607 (1982), a representational interest untethered to a sovereign or pecuniary harm appears to be the type of device to disfavor individual arbitration that the majority in *Epic Systems* cautioned against. See Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1235 (2013) [hereinafter Alexander, *To Skin A Cat*] (proposing that California sufficiently distinguish its qui tam statute from “a private attorney general action in which the private plaintiff stands in the shoes of the state as *parens patriae* representing a group,” in order to avoid FAA preemption).

13. See *infra* Parts I, II.B.

14. In the cases consolidated in *Epic Systems*, employees alleged that the employer misclassified them as exempt from the Fair Labor Standards Act to avoid paying overtime premiums, in violation of 29 U.S.C. § 207 (2012). See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018).

15. See *infra* Part II.B.2 and accompanying notes 139–143.

16. See *infra* Part I and accompanying notes 38–42.

17. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-458T, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 9 (2009) (Public enforcement of employment laws has been far outpaced by the growth of employers.); ANDREW ELMORE & MUZAFFAR CHISHTI, STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS 17 n.64, 87 (Migration Policy Inst. 2018) (Most states have

employee arbitrations, are absent from sectors where noncompliance rates are highest.¹⁸

There is a longstanding and unresolved debate about whether an arbitral forum can be an effective forum for some types of claims.¹⁹ But there is little doubt that in cases of misclassification, off-the-books work, and minimum wage violations, the violations are often too subtle and damages too low to efficiently adjudicate them in individual arbitration.²⁰ Assuming the wide adoption of mandatory arbitration with class waivers in employment contracts after *Epic Systems*, private enforcers will be unable to aggregate these claims. Recent empirical evidence suggests that many such claims are unlikely to be asserted at all.²¹

Deterring employment law violations and improving access to justice to assert employment law claims through state qui tam statutes is an under-discussed and timely topic after *Epic Systems*. Most Federal Arbitration Act scholarship critiques its expansion for ignoring its legislative intent and purpose²² and its impact on private litigant access to

fewer than ten investigators to enforce a wide range of workplace laws, and five states do not engage in any labor or safety and health regulation at all.).

18. Alison D. Morantz, *What Unions Do for Regulation*, 13 ANN. REV. LAW & SOC. SCI. 515, 523 (2017) (finding more frequent and intensive inspection of unionized establishments compared with non-union establishments); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 41, 245–46, 254 (2014) (Union density has fallen from about thirty-five percent of the private-sector workforce in 1954 to its current level of 6.6%, and is virtually absent in under-regulated sectors of the economy, such as commercial cleaning and restaurants.).

19. Compare Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STU. 1, 30 (2011), with NDP ANALYTICS, FAIRER, FASTER, BETTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 4–5, 15 (May 2019) [hereinafter NDP ANALYTICS].

20. See *infra* Part II.B.2.

21. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696–97 (2018) (comparing claims in workplaces that do and do not require mandatory arbitration with class waivers, and estimating that mandatory arbitration agreements reduce employee claims by over ninety-nine percent).

22. As Christopher Leslie demonstrates, Congress enacted the FAA to require “arbitration of contract disputes between merchants, [and] . . . was not intended for complex legal issues, such as those involving statutory claims.” Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 305–12 (2015). As such, Congress did not intend the FAA to apply to consumer contracts, and moreover, in enacting the FAA before the New Deal federalization of workplace regulation, “did not consider itself to have the authority to legislate as to the arbitrability of the worker’s employment contract.” *Id.*; see also Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 973–96 (1999) (describing pre-FAA rise of arbitration among merchants, and common law rules enforcing self-regulation by trade associations, such as bankers and stock exchanges, “in order to support a system of self-regulation”).

the courthouse.²³ Few scholars who have focused on qui tam statutes²⁴ have addressed the threat of FAA preemption.²⁵ Examination of state versions of qui tam enforcement reveals their relative strength against FAA challenges, but that they can closely resemble class claims, giving rise to a need for law to constrain their use. While other scholars have

23. See, e.g., Arthur R. Miller, *Widening the Lens: Refocusing The Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 87 (2018) (“It is claimed that efficiency gains will result from [mandatory arbitration’s flight] from the courthouse and should be celebrated. But, again, why aren’t the unquantifiable deleterious effects on due process protections, jury trial rights, and citizen access more important than a reduction in court filings?”); 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, 88 (2011) (Open access to courts levels distinctions between individuals and entities, and imparts “the dignity reflected in the status held by a juridical person, competent to sue or be sued, able to prompt an answer from and entitled to be treated on a par with one’s adversary—whether that be an individual, a corporation, or the government itself.”).

24. Janet Cooper Alexander, Pamela Bucy and Myriam Gilles have written extensively about qui tam enforcement as an alternative to purely private enforcement. See, e.g., Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solution to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2224 (2018); Alexander, *To Skin A Cat*, *supra* note 12, at 1203; Pamela Bucy, *Private Justice and The Constitution*, 69 TENN. L. REV. 939, 950–78 (2002) [hereinafter Bucy, *Private Justice and the Constitution*]. Qui tam scholarship primarily evaluates the federal False Claims Act, which provides for a greater level of agency oversight than state qui tam experimentation. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1424 (2000) (“The current qui tam provisions [of the False Claims Act] . . . have thus proven the most effective means of recapturing the estimated billions of dollars of public money lost to fraudulent practices each year.”); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 53 (2002) [hereinafter Bucy, *Private Justice*] (arguing that compared with private enforcement of securities and environmental law, the False Claims Act is “extraordinarily successful as a regulatory tool”). Janet Cooper Alexander argues that the California Private Attorney General Act (PAGA) can address under-enforcement of consumer protection and employment laws but does not address the risk of FAA preemption because of loose agency oversight. See Alexander, *To Skin A Cat*, *supra* note 12.

25. Myriam Gilles and Gary Friedman have engaged in the most recent, sustained analysis of FAA preemption of state qui tam enforcement. They argue that states have an insufficient interest in enforcing employment laws to confer standing on claimants in state qui tam claims and propose as an alternative an agency model of qui tam enforcement in which public agencies deputize private enforcers as agents of the state. Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for The Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020) [hereinafter Gilles & Friedman, *The New Qui Tam*]. This Article argues that, assuming sufficient public agency oversight, qui tam statutes are currently safe from constitutional and FAA challenge. See *infra* Part III.A and notes 147–204. But should the Supreme Court adopt a less formalist interpretation of the FAA, and examine the de facto interests advanced by qui tam statutes, and in strong nondelegation states that constitutionally require the agency oversight that Professor Gilles and Mr. Friedman propose, an agency relationship is an important alternative model. An agency model must, however, overcome the public agency risk that deputizing politically unaccountable private enforcers will cause electoral backlash, or distort public enforcement aims, and the private enforcer risk that public agencies will abuse their oversight role by derailing meritorious cases. In light of these risks, extending state qui tam statutes is preferable to deputization so long as the doctrinal and normative risks can be managed. Zachary Clopton also recently discusses the possibility of FAA preemption of PAGA. See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 455 (2018).

discussed constitutional limitations as potential threats to qui tam enforcement,²⁶ this Article offers state agency oversight, which is often constitutionally required by states, as a safeguard to preserve qui tam statutes from FAA preemption.

This Article proceeds in four parts. Part I describes the under-enforcement of wage-and-hour law as driven by the historic lack of legal remedies and access to justice and the new threat of mandatory arbitration and class waivers. This Part introduces the two leading types of qui tam statutes—whistleblower claims by informers, such as federal and state false claims acts (FCAs), and aggrieved party claims by victims, exemplified by PAGA. Part II turns to the recent Supreme Court expansion of the FAA and its erosion of deterrence and access to justice by removing access to collective and class litigation, particularly for low-value, complex claims. Part III evaluates the recent state interest in qui tam statutes as a substitute for the collective and class employment law claims lost after *Epic Systems*. It finds that while qui tam enforcement can improve deterrence of employment law violations and access to justice, it creates a doctrinal risk of FAA preemption because of the Supreme Court’s hostility to statutes that can create an end run around class waivers. This Part concludes that addressing this risk, and the risk of private enforcer misuse, will require constraining their use beyond current due process protections. Part IV proposes the requirement of agency oversight as a conceptual framework to do this. While preserving the qui tam vehicle from FAA preemption, however, agency oversight alone cannot adequately protect the interests of the affected employees. To address this due process concern, this Part proposes that state agencies encourage aggrieved party participation in the resolution of qui tam claims. The legislature may, additionally, assign qui tam enforcement to nonprofit public interest organizations that are internally accountable to the affected employees. The Article concludes that state qui tam statutes can substitute for the lost deterrence of employment law violations after *Epic Systems* and partially substitute for the access to justice lost after the decline of employment class claims.

I. THE UNDER-ENFORCEMENT OF EMPLOYMENT LAW AFTER *EPIC SYSTEMS*

Many employment laws are under-enforced in the United States, particularly in the low-wage workplace. Studies have consistently

26. See, e.g., Bucy, *Private Justice and the Constitution*, *supra* note 24, at 950–78; Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 384 (2001).

found that between ten percent and twenty percent of low-wage employees are paid below the minimum wage in the previous month.²⁷ In New York City, Chicago, and Los Angeles alone, wage-and-hour law violations result in \$3 billion in annual underpayments to low-wage workers.²⁸ Employment law violations are particularly likely in under-regulated sectors of the economy. Up to one-third of construction and transportation employees are misclassified as independent contractors.²⁹ Nearly one-half of garment workers report receiving less than their owed minimum wages, and eighty-eight percent of home health workers report illegal, unpaid off-the-books work.³⁰

Scholars attribute these low compliance levels to the under-enforcement of employment laws in the low-wage workplace.³¹ Claims for owed wages, the primary focus of this Article, are often low-value claims that do not justify the hassle and expense of an individual lawsuit in light of the rational fear of employer retaliation.³²

Employers in low-wage industries often seek to remain competitive through systematic noncompliance with employment law,³³ even shifting employees off payroll entirely, avoiding not only potential liability from a FLSA claim but also unpaid workers compensation premiums, payroll taxes, and unemployment insurance contributions.³⁴ Misclassification of employees as independent contractors can be difficult to identify, and litigation typically requires application of an unstructured, multi-factor test that is difficult and expensive to litigate, with

27. E. RESEARCH GRP., *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK* 2-3, 26 (2014), <https://www.dol.gov/asp/evaluation/completed-studies/wageviolationsreportdecember2014.pdf>.

28. ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2009) [hereinafter BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS*].

29. ELMORE & CHISHTI, *supra* note 17, at 10 nn.24-25.

30. BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS*, *supra* note 28.

31. See generally WEIL, *supra* note 18, at 54, 70-73, 245.

32. SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* 118-22 (2015) (finding that "the administrative procedure of rights enforcement is not cost-neutral and can lead to unintended consequences that compound the harms of the original injury . . . [including] time and opportunity costs, the ability to reenter the labor market, and the impact on family and social networks"). Workers who lack authorization to work under immigration law may additionally fear that a complaint to a public agency will lead to arrest and deportation. See ELMORE & CHISHTI, *supra* note 17; Christina Goldbaum, *Trump Crackdown Unnerves Immigrants, and the Farmers Who Rely on Them*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/ny-farmers-undocumented-workers-trump-immigration.html>.

33. Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY* 47 (2006).

34. Employers in dangerous industries such as construction and transportation can save between thirty percent to fifty percent of labor costs by misclassifying employees as independent contractors. ELMORE & CHISHTI, *supra* note 17, at 12.

an uncertain outcome.³⁵ As Elizabeth Tippett explains, employers can also use timekeeping software to round down, automatically deduct, or otherwise shave small increments of time from work days without employees noticing.³⁶

Employment laws encourage private enforcement of low-value, complex claims with the availability of collective or class action vehicles to aggregate claims and spread litigation costs.³⁷ About forty percent of FLSA claims are filed as collective actions.³⁸ But mandatory arbitration provisions, while only applying to two percent of workplaces in the mid-1990s, now cover over half of private-sector, non-union employees.³⁹ While arbitrations can theoretically adjudicate class claims, the Supreme Court recently held in *Lamps Plus v. Varela*⁴⁰ that the FAA envisions “an individualized form of arbitration,” and requires individual arbitration unless the parties expressly agree to class adjudication.⁴¹

In response to the fall of the class action after *Epic Systems*, states have sought to improve employment law compliance through qui tam statutes. The classic qui tam statute is the federal False Claims Act, replicated in some form by most states. In 2004, California amended its labor code to provide a Private Attorneys General Act (PAGA), a qui tam statute specifically for victims of employment law violations.⁴² Seven states (Connecticut, Maine, Massachusetts, New York, Oregon, Vermont, and Washington) have contemplated versions of this statute. The remainder of this Part will describe these two leading types of qui tam statutes for whistleblowers and for aggrieved parties.

35. See Andrew Elmore, *Collaborative Enforcement*, 10 NE. U.L. REV. 72, 86–93 (2018).

36. Elizabeth Tippett, *How Employers Profit from Digital Wage Theft Under the FLSA*, 55 AM. BUS. L.J. 315 (2018).

37. See 29 U.S.C. § 216(b) (2012); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (Class actions “overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action . . . by aggregating the relatively paltry potential recoveries into” a worthwhile claim.); Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 879 (2017) (“[S]ince 1966, federal and state legislatures have routinely relied on private enforcement to further societal goals such as deterrence and compensation.”).

38. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-69, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD DEVELOP A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE 16 (2013).

39. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Arbitration System has Developed?*, 29 OH. STATE. J. ON DISP. RES. 59 (2014); Estlund, *supra* note 21, at 689.

40. 139 S. Ct. 1407 (2019).

41. *Id.* at 1416. No estimate is available of the proportion of mandatory arbitration agreements that expressly permit class adjudication. But since most employers expressly require mandatory arbitration agreements that waive participation in class and collective claims, it seems unlikely that many do.

42. CAL. LAB. CODE §§ 2698 *et seq.*

A. *State Qui Tam Claims to Deter Violations of Employment Law*

This Section introduces state qui tam enforcement to encourage the identification and litigation of employment claims. It will define qui tam statutes and their use by whistleblowers and aggrieved parties, and conclude that both can be effective in their primary goal of increasing deterrence.

In a qui tam action, the state partially assigns its interests to a private individual, often called a relator, who civilly litigates the claim on behalf of the state, in return for a bounty or a portion of the collected award. A qui tam statute is unlike other forms of private litigation in that a relator seeks to vindicate a claim on behalf of the state, rather than on her own behalf.

Qui tam has an ancient pedigree;⁴³ as the Supreme Court in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens* explains, the qui tam statutes:

[h]istorically “were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown’s) . . . and . . . those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves”⁴⁴

These two types of qui tam claims—by whistleblowers and by aggrieved parties⁴⁵—find modern examples among the states. State whistleblower statutes, modeled on the federal False Claims Act, assign the states’ interest in fraud on the states to whistleblowers and exist in most states.⁴⁶ Only California has adopted an aggrieved party qui tam claim, the Private Attorney General Act (PAGA), which deters public law violations that harm individuals by assigning to those individuals the state’s interest in penalties for the public law violations.

This Section next explores the structure and administrative designs of whistleblower and aggrieved party qui tam statutes.

43. Qui tam originated under English common law in the thirteenth century and means he “who pursues this action on our Lord the King’s behalf as well as his own.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2000).

44. *Id.* at 776. The relator in *Vermont Agency of Natural Resources* was an employee who alleged that his former employer submitted false claims to the Environmental Protection Agency that fraudulently overstated the employer’s time spent on federally funded projects. *Id.*

45. This Article uses the terms “aggrieved party” and “whistleblower” as cognates for the jurisdictional bars in PAGA and the FCA, respectively, and in that sense the two terms are mutually exclusive. Certainly, an aggrieved party can also be a whistleblower to the extent that the aggrieved party brings forward unique information about a harm to the state and/or other individuals who also harm her.

46. 29 states and the District of Columbia have enacted state false claims acts. Gilles & Friedman, *The New Qui Tam*, *supra* note 25, at 492.

1. Whistleblower Qui Tam Statute

Whistleblower qui tam statutes are intended to encourage individuals with inside knowledge about fraud on the state to come forward as informants. The quintessential whistleblower qui tam statute is the False Claims Act (FCA),⁴⁷ which Congress enacted in 1863, over a half century before the FAA. While originally an obscure statute, the 1986 amendments to the qui tam provision of the FCA, guaranteeing successful qui tam relators a minimum share in the recovery and relaxing its proof requirement and fraud standard, elevated its profile and use.⁴⁸

Under the federal FCA's qui tam provision, a bona fide whistleblower, called a relator, may assert claims of fraud on behalf of the federal government.⁴⁹ To avoid redundant and fraudulent qui tam filings, relators must be an "original source" of the information about the fraudulent practice and must file a specialized complaint in federal court alleging the FCA violation, which is filed under seal. The action is stayed while qui tam counsel delivers a copy of the complaint to the Department of Justice (DOJ) notifying DOJ about the lawsuit. DOJ then determines whether or not to intervene and assume primary responsibility for the case. Even if DOJ does intervene, the relator may remain a party and retains substantial input in the conduct of the case. While DOJ may intervene to dismiss the claim, it must provide the relator with notice and an opportunity for a hearing on the motion. If DOJ declines to intervene, the relator may proceed independently and litigate the case on behalf of the government.⁵⁰ While in either event, a successful case entitles the relators to a bounty,⁵¹ FCA claims are far more likely to prevail with DOJ intervention.⁵²

The FCA is an effective vehicle to harness private litigation to identify and litigate fraud against the state. The DOJ reports that in fiscal year 2017 \$3.4 billion of the \$3.7 billion in settlements and judgments reported from civil cases involving fraud and false claims against the

47. 31 U.S.C.A. § 3730(b)(1) (West 2017).

48. See False Claims Amendments Act of 1986, 31 U.S.C.A. §§ 3729-3731 (West 2017); see Bucy, *Private Justice*, *supra* note 24, at 54 (reporting an average of 237.5 qui tam FCA cases filed annually after 1986, far greater than the 181.8 securities fraud and 34.7 environmental citizens suits filed annually during the same period). While DOJ reports having received six qui tam cases per year until 1986, from 1986 to 2000, "3326 qui tam cases have been filed and \$4.024 billion has been recovered." *Id.* at 48.

49. 31 U.S.C.A. § 3729(a).

50. 31 U.S.C.A. § 3730.

51. 31 U.S.C.A. §§ 3729(a), 3730(b)(2)-(4) (A relator who is an original source is guaranteed a minimum award of fifteen percent of the judgment or settlement if DOJ intervenes, and twenty-five percent if DOJ does not intervene.).

52. Bucy, *Private Justice*, *supra* note 24, at 51.

government were filed by whistleblowers as relators under the FCA qui tam provisions.⁵³ The “dual-plaintiff” structure of the FCA provides an efficient way for private litigants to supplement DOJ resources and reserves for DOJ a substantial gatekeeping role for private qui tam litigation.⁵⁴ It also encourages a highly competent private bar to litigate qui tam cases.⁵⁵ Since relators are most likely to prevail with DOJ intervention, the FCA rewards specialized counsel who can persuade DOJ of the merits of the FCA claim.⁵⁶

State FCAs adopt a similar administrative design and are often enforced by state attorneys general.⁵⁷ State FCAs have broad variation and have encouraged employment law claims by aggrieved parties that also allege fraud on the state. New York, for example, lowered the threshold value of state FCA relator claims and expanded their scope to include employment-related tax fraud,⁵⁸ leading labor unions in the construction industry to file qui tam claims against employers in prevailing wage projects that misclassify or underpay employees.⁵⁹

53. DEP’T OF JUSTICE, PRESS RELEASE: JUSTICE DEPARTMENT RECOVERS OVER \$3.7 BILLION FROM FALSE CLAIMS ACT CASES IN FISCAL YEAR 2017 (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>.

Pamela Bucy attributes this to the jurisdictional bar limiting relators to original sources, which filters out frivolous and redundant claims, while the large bounty offered to successful whistleblowers encourages true insiders who may otherwise remain silent to come forward. Bucy, *Private Justice*, *supra* note 24, at 53–54. In the past two years, this proportion of qui tam to total recovery seems to have dropped, in fiscal year 2019 to \$2.1 billion of the \$3 billion total. DEP’T OF JUSTICE, PRESS RELEASE: JUSTICE DEPARTMENT RECOVERS OVER \$3 BILLION FROM FALSE CLAIMS ACT CASES IN FISCAL YEAR 2019 (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

54. Bucy, *Private Justice*, *supra* note 24, at 52–53.

55. An empirical survey of 4,000 qui tam claims by David Engstrom found that specialized qui tam attorneys “enjoy[] higher litigation success rates and surfac[e] larger frauds compared to less experienced firms.” David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1249 (2012).

56. Bucy, *Private Justice*, *supra* note 24, at 58.

57. *See, e.g.*, N.Y. FIN. LAW. §§ 187 *et seq.* (McKinney 2018) (adopting same filing and intervention requirements as the FCA, and vesting enforcement in the New York Attorney General).

58. *See* N.Y. FIN. LAW § 189.4(a).

59. Prevailing wage laws require employers to file certified payroll records with the state showing payment of statutory wage rates and impose criminal and civil sanctions for underreporting workers and falsifying wages. *See, e.g.*, *Wall v. Circle C Constr.*, 2014 WL 4477367 (6th Cir. 2012) (FCA claim for violation of federal prevailing wage law for failure to list employees in certified payroll reports); *Thompson Pac. Constr., Inc. v. City of Sunnyside*, 66 Cal. Rptr. 3d 175 (2007) (same under California FCA); *New York v. Express Hosp. Grp.*, No. 100789/2015, Settlement Agreement (N.Y. Sup. Ct. Sept. 7, 2017) (settling claim in which employer failed to report employees in tax forms); *see also* PRESS RELEASE, A.G. SCHNEIDERMAN ANNOUNCES \$255,000 SETTLEMENT WITH GENERAL CONTRACTOR AND DEVELOPER FOR FAILURE TO PAY WORKERS REQUIRED PREVAILING WAGE, <https://ag.ny.gov/press-release/ag-schneiderman-announces-255000-settlement-general-contractor-and-developer-failure> (Construction worker union, as relator, filed qui tam claim with New York Attorney General, which resolved allegation that a contractor underpaid twenty-eight workers in a state prevailing wage project.).

2. *Aggrieved Party Qui Tam Statute*

The California Private Attorneys General Act of 2004 (PAGA),⁶⁰ creates state penalties for violations of the California Labor Code⁶¹ and “authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed” in the previous year.⁶² Similar to the FCA, PAGA provides a bounty of twenty-five percent of the collected penalties to aggrieved employees and reasonable attorney’s fees and costs. But unlike FCA, which limits the assignment to individuals with unique knowledge of illegal conduct, PAGA limits the state assignment to those employees of the defendant who were injured by the claimed violation. Also unlike FCA, which constrains redundant claims with significant oversight, PAGA calls for limited state agency authority to intervene in or dismiss claims in order to incentivize private enforcement.⁶³ In 2016 California amended PAGA, funding the California Labor and Development Workforce Agency (LWDA) staff to oversee PAGA claims through a PAGA filing fee,⁶⁴ although PAGA has no mechanism for LWDA to intervene in PAGA litigation after the initial period has elapsed.

In addition to its looser agency oversight, the California legislature encourages private enforcement of PAGA by removing some of the jurisdictional bars of the FCA whistleblower qui tam claim. There is no minimum dollar threshold to exclude low-value claims as with the FCA, and PAGA may be filed in a regular complaint alongside related claims. The employment bar may draw from the same facts and form as a standard employment complaint to allege a PAGA violation. Prior to *Epic Systems*, many employment law class action claims in

60. CAL. LAB. CODE § 2698 *et seq.*

61. CAL. LAB. CODE § 2699(e). The penalties range from \$100-\$500 per violation, which the statute defines as any violation of the California Labor Code, per employee, per pay period. *Id.*

62. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015) (quoting *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014)).

63. Aggrieved employees must notify the California Labor and Development Workforce Agency (LWDA) about the claim within ten days of filing it and the agency may intervene to investigate the alleged violation within sixty-five days of notice. State issuance of a citation for health and safety violations precludes aggrieved employee PAGA enforcement, as does timely employer correction of some violations, such as incomplete wage statements, and PAGA excludes relatively minor violations, such as conspicuous posting of employee rights. If LWDA does not intervene, the aggrieved employee must provide the agency with any post-filing proposed settlement, which requires judicial approval. CAL. LAB. CODE § 2699. Aggrieved employees must notify the state workforce agency via an internet portal. *See* CAL. DEP’T OF INDUS. RELATIONS, PRIVATE ATTORNEYS GENERAL ACT (PAGA) – FILING (Jan. 2019), <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>.

64. S.B. 836, 2016 Leg. (Cal. 2016).

California resolved PAGA claims for penalties alongside class claims for damages related to the substantive law violation.

As with whistleblower claims, PAGA has been effective in encouraging aggrieved party enforcement of state penalties for violations of state employment laws. Like FCA enforcement, PAGA is now a greater proportion of enforcement of state penalties than inspections by the public agency. A legislative report found an average of 4,000–7,000 PAGA notices per year in California, over twice the number of inspections conducted by the California Bureau of Field Enforcement (BOFE).⁶⁵ Private enforcer recovery of penalties via PAGA has grown dramatically since 2012, from about \$4.5 million to over \$41 million per year.⁶⁶ BOFE collection of penalties from affirmative inspections ranges between \$8.4 and \$11 million per year during the same period.⁶⁷

The whistleblower and aggrieved party *qui tam* claims have become the subject of legislative interest by states after *Epic Systems*. The next Part will explain why. It will first explore the expanding reach of the FAA to include aggregate litigation of wage-and-hour law with *Epic Systems* as driven by the Court's elevation of liberty of contract as the dominant due process interest protected by the FAA. It will then explain that mandatory arbitration with class waivers has undermined deterrence and access to justice, especially for low-value and complex employment law claims. Recent state interest in *qui tam* enforcement seeks to substitute for the loss of deterrence of employment law violations after *Epic Systems*.

65. CAL. LEGISLATIVE ANALYST'S OFF., LABOR CODE PRIVATE ATTORNEYS GENERAL ACT RESOURCES 2 (Mar. 25, 2016). The California Bureau of Field Enforcement reported having conducted 2,424 inspections in FY 2015-2016. CAL. DEP'T OF INDUS. RELATIONS, 2015-2016 FISCAL YEAR REPORT ON THE EFFECTIVENESS OF THE BUREAU OF FIELD ENFORCEMENT 3 (2016) [hereinafter BOFE 2016 REPORT], https://www.dir.ca.gov/dlse/BOFE_LegReport2016.pdf.

66. Response by California Private Attorney General Act Custodial Official to Public Records Act Request of Andrew Elmore (Mar. 6, 2020) (on file with author). This recent decline in the employment class action may have accelerated this growth. California reports \$63.7 million in PAGA penalties collected in the six months from July 2019 to January 2020. *Id.*

67. BOFE 2016 REPORT, *supra* note 65, at 3. This is not to suggest that aggregate number of claims and inspections, or penalties collected, are accurate measures of deterrence. As explained in detail *infra* Part III.B., private enforcers have an economic incentive to seek out the wealthiest targets with the greatest number of penalties to aggregate, while public agencies may be more likely to seek out noncompliant, undercapitalized firms or more severe violations involving smaller groups of employees. Public enforcement directed to particular low-compliance sectors or egregious conduct may have a greater deterrent effect even if it yields a lower total number of inspections and penalties collected. Making this assessment will require further research into the particular sectors and employers that public and private enforcers target.

II. THE FEDERAL ARBITRATION ACT (FAA) AND THE IMPACT OF *EPIC SYSTEMS* ON DETERRENCE OF EMPLOYMENT LAW VIOLATIONS AND ACCESS TO JUSTICE

To those well-versed in the Supreme Court's FAA jurisprudence, the formal holding of *Epic Systems*—finding that the FAA requires individual arbitration of class and collective FLSA claims notwithstanding National Labor Relations Act (NLRA) protection of concerted activities by workers—treads familiar ground.⁶⁸ This Part, however, argues that *Epic Systems* is a new, potent threat to deterrence and access to justice for employees seeking to assert employment claims.

Even as the Court broadly interpreted the FAA in the 1990s to require enforcement of mandatory arbitration provisions, it did so with the assumption that private arbitration can advance access to justice and deterrence goals by providing a fast, inexpensive route to adjudicate disputes.⁶⁹ Due process retains vitality in this analysis to supervise arbitration agreements for unconscionable terms that undermine substantive law.⁷⁰

This Part argues that *Epic Systems*, while continuing a steady march of cases that have expanded the reach of the FAA, represents a new threat to the aggregation of employment law claims for two reasons. First, it narrows the scope of NLRA protection of concerted activities to skirt any potential conflict with the FAA. Second, it expressly cautions against new devices that would permit the aggregation of employment claims despite a forced arbitration provision with class waiver. This has important implications for state innovations, such as *qui tam* statutes, which seek to use the partial assignment of state

68. See Sergio J. Campos, *The Uncertain Path of Class Action Law*, 40 CARDOZO L. REV. 2223, 2293–94 (2019) (explaining that the *Epic Systems* “majority opinion has a conservative (small c) bent, appealing not to policy but to the constraints of precedent”).

69. So long as access to justice can be equally achieved in an arbitral forum, substantive law “will continue to serve both its remedial and deterrent function.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985)) (internal quotations omitted) (holding that FAA required arbitration of ADEA despite collective action provision in statute because individual rights could be efficiently met in arbitral forum); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3063 (2015).

70. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (holding that due process prohibits conditioning employment on requiring employee to pay for an arbitrator's compensation in order to assert a Title VII claim); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940–41 (4th Cir. 1999) (striking down one-sided arbitration procedures on breach of contract grounds because they were “a sham system unworthy even of the name of arbitration,” which demonstrated an abuse of power); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 256, 272 (3d Cir. 2003) (restricting remedies, forbidding attorneys fees and requiring losing party to pay arbitration costs procedurally and substantively unconscionable).

claims to private individuals to counteract the loss of deterrence of and access to justice for employment law.

This Section will only briefly recite *AT&T Mobility LLC v. Concepción*,⁷¹ *American Express Co. v. Italian Colors Restaurant*,⁷² and *Epic Systems Corp. v. Lewis*,⁷³ to summarize the Court's elevation of the parties' interest in liberty of contract as the dominant concern in FAA jurisprudence. It will then show how this liberty of contract turn has eroded access to justice and deterrence of employment law violations.

A. *The Liberty of Contract Turn of the Federal Arbitration Act (FAA)*

The Supreme Court's turn to liberty of contract in FAA jurisprudence begins with *Concepción*, in which AT&T unilaterally required customers to agree to arbitration and to waive participation in class action litigation.⁷⁴ Reversing the Ninth Circuit's ruling that the class waiver provision was unconscionable under California law, *Concepción* found that the FAA preempts a state unconscionability doctrine that prohibits class action waivers because this disfavors individual arbitration. While minimizing the impact of class action waivers on deterrence and access to justice, the Court did not cast doubt on its previous rulings that distinguished between "procedural rights," which can be waived in arbitration agreements, and "substantive rights," including essential, operative protections of a statute, which cannot.⁷⁵ Taken on its face, then, *Concepción* could be seen as a determination that individual (or bilateral) arbitration is, at least in theory, in the interests of both parties—preserving the possibility that FAA preemption might yield to procedural waivers that fundamentally alter substantive law.

Italian Colors, however, in narrowing the effective vindication doctrine, signaled a more radical shift, requiring waiver of procedural devices notwithstanding its de facto erosion of substantive law. While the \$30 claim in *Concepción* could still theoretically be brought in individual arbitration, *Italian Colors* presented a different sort of claim, which the parties agreed could only be brought in the aggregate be-

71. 563 U.S. 333 (2011).

72. 570 U.S. 228 (2013).

73. 138 S. Ct. 1612 (2018).

74. In *Concepción*, the plaintiffs sought to certify a class action alleging that AT&T's offer of a free phone with the price of the servicing agreement violated consumer protection law in failing to disclose the consumer's required payment of \$30 in sales tax on the phone. *Concepción*, 563 U.S. at 337.

75. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

cause of the projected \$1 million in required expert fees.⁷⁶ The Court acknowledged that waiving a statutory right or imposing arbitration fees “so high as to make access to the forum impracticable” is not enforceable.⁷⁷ But the allegation that arbitration “is not worth the expense involved in *proving* a statutory remedy”⁷⁸ is insufficient to show a waiver of a substantive right. While preserving the effective vindication doctrine for individual rights, it requires enforcement of class waivers even if aggregation is the only effective means to vindicate the claim. For J. Maria Glover, FAA preemption, thus, “had fully evolved from one that had eroded the public realm to one that now also eroded the substantive law.”⁷⁹ According to Professor Glover, the Court in overruling the effective vindication doctrine in *Italian Colors* “subtly but definitely abandoned its descriptive and normative premise that freedom of contract was justified in the arbitration context because it would result in more cost-effective procedures for ‘settling’ disputes and, accordingly, effective enforcement of the federal statutory regime.”⁸⁰

The Supreme Court in *Epic Systems* extended this interpretation by resolving a tension between the FAA and NLRA decidedly in favor of a liberty of contract version of due process in the workplace. While *Concepción* and *Italian Colors* would seem to make this outcome inevitable, employment law’s complicated relationship with mandatory arbitration created some doubt. Employment contracts are rarely the product of meaningful bargaining, and private-sector, non-union employers have an incentive to impose one-sided mandatory arbitration provisions on employees. The Supreme Court acknowledged this reality in *Gilmer v. Interstate/Johnson Lane Corp.*, holding that while the FAA required enforcement of mandatory arbitration provisions for age discrimination claims, safeguards would protect deterrence and access to justice.⁸¹ The Court reasoned these interests would be preserved because the FAA’s savings clause expressly permits state contract defenses, arbitration can accommodate class claims, and the

76. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013).

77. *Id.* at 236. The Missouri Supreme Court found unenforceable a mandatory arbitration clause that required the consumer to bear the costs of arbitration and permitted the lender to seek attorney’s fees from the consumer on this ground. See *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012).

78. *Italian Colors*, 570 U.S. at 236.

79. Glover, *supra* note 69, at 3072.

80. *Id.* For Justice Elena Kagan, *Italian Colors* is not subtle at all: “The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse,” to which the majority opinion replies: “Too darn bad.” *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

81. 500 U.S. 20 (1991).

government agency (the Equal Employment Opportunity Commission (EEOC)) can also seek class-wide and equitable relief.⁸² Employers began adopting mandatory arbitration provisions after *Gilmer*, but it was an open question whether requiring employees to waive collective grievances conflicts with the NLRA's protection of collective process.⁸³

The Supreme Court resolved this question in *Epic Systems*. *Epic Systems* consolidated a number of cases in which the employer sought to force arbitration of wage-and-hour law claims under the FLSA on FAA grounds. The three consolidated, underlying claims brought by employees in *Epic Systems* all alleged that the employer either misclassified them as exempt or kept work entirely off the books to avoid paying required hourly wages under the FLSA.⁸⁴ Like the Sherman Act claim in *Italian Colors*, because of the FLSA proof requirements and the small individual recovery, none of these cases could be brought efficiently in bilateral arbitrations.

Rejecting the argument that the NLRA's protection of concerted activities prevents enforcement of class waivers, the Court found that the FAA requires enforcement of waiver of FLSA collective actions. In elevating liberty of contract in its FAA jurisprudence involving employment law claims, *Epic Systems* did not describe the particular arbitration procedures put in place by the defendant employers. Nor did it argue that bilateral arbitration is (even plausibly, as in *Concepción*) more effective and efficient than class action litigation. Rejecting the dissent's reference to the NLRA's legislative history and the practical

82. *Id.* at 32–34.

83. After *Concepción*, in 2012 the NLRB announced in the *D.R. Horton* rule that the NLRA guarantees the right to redress workplace grievances collectively, “for mutual aid and protection.” 29 U.S.C. § 157 (2012). See *In re D.R. Horton*, 375 N.L.R.B. 2277, 2278 (2012). The Board relied, in part, on Supreme Court precedent stating that federal labor law “protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.” *Id.* at 2278 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978)). The Seventh and Ninth Circuits affirmed the *D.R. Horton* rule, but the Second, Fifth and Eighth Circuits rejected it. See Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEG. FORUM 205, 227–28 (2017).

84. In *Ernst & Young LLP v. Morris [E&Y]*, and in *Lewis v. Epic Systems Corp.*, the employees alleged that the employer misclassified them as exempt from the Fair Labor Standards Act to avoid paying overtime premiums. *Epic Sys.*, 584 U.S. at 3 (2018); *Lewis v. Epic Sys. Corp.*, 15-cv-82, 2015 WL 5330300, at *1 (W.D. Wis. Sept. 11, 2015), *aff'd* *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), *rev'd*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). In *Murphy Oil*, gas station personnel also alleged overtime violations, this time concealed by required off-the-clock work “driving to the[ir competitors’] fuel stations . . . to monitor fuel prices and the accuracy of their signage.” *Murphy Oil USA, Inc.*, 361 NLRB No. 774, 776 (Oct. 28, 2014), *overruled by* *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015), *aff'd* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

consequences of its decision as mere “policy arguments,”⁸⁵ it embraced a formalist⁸⁶ interpretation of the NLRA, as it has previously done in expanding the FAA’s reach to most workplaces.⁸⁷ Applying the interpretive canon of *eiusdem generis*, *Epic Systems* limited the NLRA’s protection of “concerted activities” to self-help activities in the workplace, and not activities in the courtroom or arbitral forum.⁸⁸ The Court’s formal division between workplace self-help protected by the NLRA and a courtroom and arbitral forum governed by the FAA permitted the Court to conclude that there is no tension between the NLRA and the FAA’s enforcement of class waivers. In *Epic Systems*, the Court held that however “debatable” the wisdom of class waivers, the FAA requires that “arbitration agreements like those before us must be enforced as written.”⁸⁹

Epic Systems also evinces a hostility to legal theories that would permit end runs around class waivers. It cautioned that courts “must be alert to new devices and formulas” that would disfavor individual arbitration.⁹⁰ The Supreme Court dismissed its previous consideration of the NLRA’s protection of collective grievances as encompassing access to judicial forums as dicta, and the argument that the NLRA can overcome a FLSA class waiver under the FAA as an “interpretive triple bank shot.”⁹¹ The Court held that statutes must express “a clear and manifest congressional command” to override the FAA’s enforcement of class waivers in mandatory arbitration provisions.⁹² Shortly after *Epic Systems*, the Supreme Court dispelled any doubt about its strong preference for individual arbitration in *Lamps Plus v. Varela*, in which the Court held that ambiguous arbitration agreements must be interpreted to require individual, and not class arbitration.⁹³

But, while this signals the fall of the class action in employment law, it stops short of enforcing all waivers of aggregate litigation. In its sub-

85. *Epic Sys.*, 138 S. Ct. at 1630–32.

86. By formalist, I mean a method of interpretation that favors canons of construction and dictionary definitions to discern the original legislators’ meaning over other forms of authority, such as statutory purpose, legislative history and practical consequences.

87. In 2001 the Court in *Circuit City v. Adams*, 532 U.S. 105 (2001) considered whether § 1 of the FAA, which exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” excludes employment in interstate commerce. The Court, invoking *eiusdem generis*, limited this clause to occupations similar to seamen and railroad employees. *Id.* at 114–15, 121.

88. *Epic Sys.*, 138 S. Ct. at 1625.

89. *Id.* at 1632.

90. *Id.* at 1623.

91. *Id.* at 1624, 1627.

92. *Id.*

93. 139 S. Ct. 1407, 1418–19 (2019).

sequent FAA decision, *New Prime Inc. v. Oliveira*, the Supreme Court found that transportation workers who are independent contractors are exempt from the FAA.⁹⁴ The Court reached this outcome by discerning the original meaning of “contract for employment” for legislators at the time of the FAA’s enactment.⁹⁵ As *Oliveira* suggests, aggregate employment claims supported by a formalist interpretation may yet survive *Epic Systems*.⁹⁶

The states, moreover, continue to retain two important roles in FAA jurisprudence. The FAA’s savings clause⁹⁷ permits state contract defenses, including limits on waiver of substantive rights (as opposed to procedural rights such as participation in class or collective actions) under state unconscionability doctrine.⁹⁸ The FAA likewise provides for judicial review of arbitrator misconduct and bias.⁹⁹ And, importantly, *Epic Systems* did not disapprove of *Waffle House*, which permits the EEOC to seek “victim-specific” relief in litigation pursuant to its statutory authority, despite a mandatory arbitration provision that, under the FAA, would bind the claimant alleging a statutory violation.¹⁰⁰ The Supreme Court’s holding that the EEOC’s claim is not “merely derivative” hinges on its independent authority under Title VII to litigate claims involving violations of individual rights, and Title VII’s specific grant to the EEOC of “exclusive authority over the choice of forum and the prayer for relief once a charge has been filed.”¹⁰¹ State agencies¹⁰² with similar statutory powers as the EEOC

94. 139 S. Ct. 532, 538 (2019).

95. *Id.* at 539–41 (reasoning that the legislators who enacted the FAA would have understood “contracts for employment” to include independent contractors).

96. This Article expresses no opinion regarding the survival of *qui tam* or similar vehicles for aggregate litigation should the Court adopt a more functionalist reading of the FAA.

97. 9 U.S.C. § 2 (2012) (making agreements to arbitrate “valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*”) (emphasis added).

98. *See, e.g.*, *Circuit City Stores, Inc. v. Adams* (Adams II), 279 F.3d 889, 892 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002).

99. *See, e.g.*, *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (vacating arbitrator’s decision under FAA for failure to disclose financial relationship between arbitrator and defendant).

100. *E.E.O.C. v. Waffle House Inc.*, 534 U.S. 279, 291–92, 294–96 (2002).

101. *Id.* at 297–98; *see also* *Iskanian v. CLS Transp. Los Angeles*, 59 Cal. 4th 348, 386 (Cal. 2014) (reasoning that the FAA did not prevent the EEOC from suing on behalf of an employee as the EEOC is not “a proxy” for individuals and can prosecute action “without the employee’s consent” and without any employee control over the litigation).

102. Whether a state agency can rely on *Waffle House* to seek victim-specific relief despite a private nonparty’s waiver under the FAA was not squarely addressed in *Waffle House*, although courts have extended *Waffle House* to state agencies with similar authority. *See* *Rent-A-Center v. Iowa Civil Rights Com’s*, 843 N.W.2d 727, 736–38 (Iowa 2014) (finding that similar statutory purpose of Iowa civil rights law and Title VII, and similar state agency power as EEOC, compel result that state agency is not bound to private agreement in vindicating victim-specific rights

may, therefore, continue to aggregate claims of victim-specific relief after *Epic Systems*.

Despite the availability of unconscionability limitations on employment contracts and public agency enforcement of employment laws, *Epic Systems* represents a substantial delegation of regulation of the workplace to employers. The workplace is rarely the site of a bargained-for exchange between parties, and as Professor Glover argues, forcing class waivers on workers confers power “akin to lawmaking” to employers that draft contracts of adhesion to “significantly reduce or even remove [their] substantive legal obligations by eliminating claiming.”¹⁰³ After *Epic Systems*, employers may avoid class and collective actions by requiring that employees accept mandatory arbitration with class waivers in employment contracts as a condition of employment. The next Section will briefly describe empirical evidence of the sharp drop in claims by employees subject to mandatory arbitration and conclude that the FAA after *Epic Systems* is likely to erode private enforcement of employment law claims.

B. *The Impact of FAA Jurisprudence on Access to Justice and Deterrence of Employment Law Violations*

Mandatory arbitration with class waivers in employment contracts have become increasingly common. The share of employees subject to mandatory arbitration has risen from two percent in 1992 to over fifty-five percent today. Many of these mandatory arbitration agreements expressly require waiver of class claims.¹⁰⁴ Even those that do not, likely require individual arbitration after *Lamps Plus*. Mandatory arbitration is most likely in the workplaces with the lowest average income.¹⁰⁵

under FAA); *E.E.O.C. v. Ralphs Grocery Co.*, 300 F. Supp. 2d 637, 639–40 (N.D. Ill. 2004) (reasoning that *Waffle House’s* reasoning extends to state agencies “working in tandem with the EEOC”). The authority of an agency to seek victim-specific relief is separate from its authority to seek penalties, the issue presented in aggrieved party qui tam claims, which will be discussed *infra* Part III.

103. Glover, *supra* note 69, at 3054 (emphasis removed); see also Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 Sw. L. Rev. 131, 152 & n.131 (2012) (“There are many reasons why businesses might wish to include arbitration clauses in adhesion contracts: One of them is to avoid class action lawsuits.”).

104. ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 6 MILLION AMERICAN WORKERS* (2018).

105. *Id.* at tbl. 4; (showing that nearly two-thirds of workplaces that pay less than \$13 per hour require mandatory arbitration).

The backdrop of FAA preemption litigation is the necessity of private enforcement for deterrence, particularly of substantive law violations that harm vulnerable individuals. Deterrence is a recurring concern for the dissenting voices in the Supreme Court's FAA jurisprudence. As Justice Ruth Bader Ginsburg warned in *Epic Systems*, "The inevitable result of today's decision will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."¹⁰⁶ Scholars have similarly raised the under-enforcement alarm.¹⁰⁷

The debate about whether mandatory arbitration with class waivers will suppress claims or instead channel would-be class action members into individual, or bipartite, arbitration is now the subject of considerable inquiry. This Section will first summarize studies strongly suggesting that the rise of mandatory arbitration has degraded deterrence and access to justice for claimants. It will then highlight types of low-value and difficult-to-prove workplace claims that *Epic Systems* is particularly likely to foreclose.

1. *Mandatory Arbitration Undermines Access to Justice for and Deterrence of Employment Law Violations*

Until recently, it was unclear whether mandatory arbitration agreements with class waivers undermine employment law compliance by dissuading employees with legitimate claims from filing them. If, as the Supreme Court has assumed, arbitration provides "for efficient, streamlined procedures tailored to the type of dispute,"¹⁰⁸ employees with low-value claims who would otherwise have participated as class members (or perhaps who have been locked out of courts entirely because of their cost and hassle) will instead opt for individual arbitration.¹⁰⁹

Recently, two strands of research questioned these assumptions. The first examines the fairness of individual arbitration. Despite state unconscionability doctrines that will not enforce mandatory agreements that violate public policy, an investigation of 25,000 arbitrations by the *New York Times* in 2015 "uncovered many troubling cases,"

106. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting).

107. Glover, *supra* note 69, at 3054.

108. *AT&T Mobility LLC v. Concepción*, 563 U.S. 333, 344 (2011).

109. See, e.g., Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiaid on the Costs of Arbitration*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 8, 14 (arguing that arbitration is a more realistic route for the general public to assert claims than court); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

including arbitrary procedures, substantial employee arbitration fees, and financial relationships between employers and arbitrators.¹¹⁰ According to the investigation, arbitration “proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favor. A hearing that lasted six hours cost the plaintiff \$150,000. . . . To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.”¹¹¹ Interviews with dozens of arbitrators revealed that when issuing decisions they are concerned about “the threat of losing business.”¹¹² The picture that emerges is that employers may prize arbitration not for its efficiency, but because of their substantial advantage as repeat players, while employees face steep financial disincentives to arbitrate claims.

Empirical evidence supports the view that individual arbitrations favor employers. Alexander Colvin—comparing employment arbitrations and comparable employment federal and state litigation—found that employment claims in arbitration had a lower win rate than litigation, and that those employee claimants who prevailed were awarded a fraction of analogous, prevailing claims in court.¹¹³ Similar studies of consumer protection arbitrations have arrived at the same conclusion.¹¹⁴

These data suggest that the proliferation of mandatory arbitration agreements (MAAs) likely restricts access to justice. To be sure, whether arbitrations are more or less fair or effective than litigation

110. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015).

111. *Id.*

112. *Id.*

113. Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STU. 1, 6 (2011) [hereinafter Colvin, *An Empirical Study of Employment Arbitration*] (finding that employee win rate and median award amount are lower in arbitration than litigation, and lower still if the employer is a repeat player). *But see* NDP ANALYTICS, *supra* note 19 (Chamber of Commerce-funded study comparing individual, federal employment claims and employment arbitrations found higher awards and win rates in arbitration.). The NDP Analytics study does not cite or discuss the Colvin study (or any previous studies), and excludes class and state claims from its analysis, which according to the Colvin study tend to have higher awards and win rates. *Id.* at 4–5, 15.

114. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57, 99 (2015) (One study of consumer arbitrations found that companies amassed far higher win rates by gaining expertise in the arbitral forum, compared with the consumer-side bar.). As an example, a 2015 Consumer Financial Protection Bureau report found that while 29 million account holders received \$1 billion from class claims of illegal overdraft fees, no more than 32 of the 341 account holders who arbitrated overdraft fees prevailed in individual arbitration. Alison Frankel, *‘Most revealing’ CFPB evidence on class actions? Overdraft fee case study*, REUTERS (Mar. 13, 2015), <http://blogs.reuters.com/alison-frankel/2015/03/13/most-revealing-cfpb-evidence-on-class-actions-overdraft-fee-case-study/>.

for any particular claim remains contestable. Even if arbitration is, on balance, less fair than litigation, one might plausibly argue that deterrence may be preserved so long as claimants bring forward an equal number of meritorious claims in an arbitral forum. This has led to a second strand of research about the impact of MAAs on deterrence. Recent empirical evidence by Cynthia Estlund shows that MAAs almost certainly suppress employment claims.

To test the hypothesis that employees subject to MAAs are dissuaded from filing claims, Professor Estlund compared 2016 employment claims data in federal and state court and in arbitration proceedings.¹¹⁵ During this period, the forty-four percent of private-sector, non-union employees who are not subject to MAAs filed 31,000 federal and 195,000 state individual and class employment law cases, representing approximately 550,000 individual employee claims.¹¹⁶ In contrast, the fifty-six percent of private-sector, non-union employees who are subject to MAAs filed only 5,126 notices of employment law arbitrations.¹¹⁷ This leaves, assuming equivalent levels of employment law violations, “[b]etween 315,000 and 722,000 ‘missing’ arbitration cases.”¹¹⁸ As Professor Estlund cautions, the secrecy of arbitration confines any quantitative analysis to no more than an estimate.¹¹⁹ But the fact that employees in private-sector, non-union workplaces subject to MAAs, who are over half of employees in the United States, file only about one percent (or fewer) of the claims filed by other half, leaves little doubt that MAAs reduce the threat of private adjudication as a deterrent of employment law violations.

Even if the immediate impact of *Epic Systems* is discouraging, any predictions about the future of access to justice and deterrence is contingent on how stakeholders—namely arbitration associations, the states, class action attorneys, employees, unions, and worker associations—react. First, arbitration associations can voluntarily impose due process requirements on arbitrations to improve their fairness.¹²⁰ But the empirical evidence suggests a strong repeat player effect in favor

115. Estlund, *supra* note 21.

116. *Id.*

117. *Id.*

118. *Id.* at 689, 696–97.

119. *Id.* at 680. Employees subject to MAAs, for example, may be more likely to settle potential claims before filing a notice of arbitration than before filing a summons and complaint. Given that arbitration is less expensive and more efficient than litigation, one would expect the reverse to be true. But even if true, the vast difference in claiming suggests that any difference this might make to overall claiming is likely to be small and will not impact Professor Estlund’s bottom-line conclusion that MAAs adversely affect deterrence.

120. The American Arbitration Association has, for example, addressed the problem of unreasonable arbitration fees by capping fees for employees at \$300. See AMERICAN ARBITRATION

of employers, regardless of the formal due process protections that apply.¹²¹ It is also unclear why employers, emboldened by a strong federal policy that does not condition its preference for arbitration on due process protections, will not respond to the robust due process guarantees of some arbitration associations by selecting associations without them.¹²²

State unconscionability standards remain an important safeguard against this race to the bottom, by protecting against one-sided arbitration terms in contracts of adhesion.¹²³ States with strong unconscionability standards may respond by striking down and limiting one-sided arbitration terms in ways that improve the fairness of the arbitral forum.¹²⁴ After *Epic Systems*, however, states may not prohibit waivers of employment class claims. As a result, state public policy standards that require procedural and substantive fairness cannot preserve employment law claims that cannot be effectively vindicated in individual arbitration.

Next, class action employment attorneys may adapt and become “arbitration entrepreneurs,”¹²⁵ substituting lost class actions with mass arbitrations. Martin Malin predicts that plaintiff-side employment

ASSOCIATION (AAA), EMPLOYMENT/WORKPLACE FEE SCHEDULE (Oct. 1, 2017), <https://go.adr.org/rs/294-SFS-516/images/Employment%20Arbitration%20Fee%20Schedule.pdf>.

121. See, e.g., Colvin, *An Empirical Study of Employment Arbitration*, *supra* note 113.

122. See, e.g., Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019) (reporting that one employer responded to demands by 6,000 claimants to arbitrate claims at AAA by switching to a smaller arbitration association that permits employers to delay the arbitration process longer than AAA does).

123. To this point, state qui tam statutes are only effective if they are nonwaivable. State public policy, reflected in the contract defense of unconscionability, plays a central role in qui tam enforcement in invalidating MAAs that require waiver of qui tam enforcement. See *Iskanian v. CLS Transp. Los Angeles*, 59 Cal. 4th 348, 383 (Cal. 2014) (finding that “an employee’s right to bring a PAGA action is unwaivable”). Unconscionability doctrine also invalidates waivers of the right to a remedy from qui tam enforcement on the same ground. See, e.g., *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 493 (Fla. 2011) (finding limitation of liability that “frustrate the remedies created by” statute void as contrary to public policy); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 103–04 (2000) (“The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed.”); *In re Poly-Am., L.P.*, 262 S.W.3d 337, 352 (Tex. 2008) (“Permitting an employer to contractually absolve itself of this statutory remedy would undermine the deterrent purpose of the Workers’ Compensation Act’s anti-retaliation provisions.”).

124. Kentucky after *Epic Systems* amended its laws to require that MAAs have fair procedures to select arbitrators and conduct hearings, and to ban unreasonable fees and disqualify conflicted arbitrators. KY. REV. STAT. ANN. § 336.700(3) (West 2019). New Jersey recently enacted a law declaring enforceable as against public policy the waiver in an MAA “any substantive or procedural right or remedy relating” to a state employment discrimination claim. S.B. 121, 218th Leg. (N.J. 2019).

125. Horton & Chandrasekher, *supra* note 114, at 63 (referring to consumer class action attorneys who “have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company”).

lawyers will adapt to *Epic Systems* by filing “hundreds, and in some cases thousands, of individual arbitration demands,” which could eliminate the employer’s strategic advantage in the arbitral setting.¹²⁶ There is some evidence of this. After *Epic Systems*, the Ninth Circuit decertified *O’Connor v. Uber*—a 240,000-member class action that alleged that Uber failed to reimburse drivers for tips and expenses—from class action attorneys who filed thousands of notices of arbitration on behalf of class members after the decertification of their class.¹²⁷ After the decertification, Uber agreed to pay that class of drivers a fraction of its previous potential liability to resolve their claims,¹²⁸ but 60,000 class members rejected the settlement and instead filed notices of individual arbitration.¹²⁹ Uber, facing \$18.7 million in fees for the individual arbitrations, instead resolved the individual drivers’ claims for at least \$146 million.¹³⁰ This is less than the estimated value of the claims, particularly the PAGA claim with an estimated worth of \$1 billion, but is significantly more than a proposed settlement of \$100 million rejected by the court in *O’Connor*.¹³¹ Attorneys representing employees have pursued a similar strategy in wage claims involving other high-profile companies.¹³²

While the individual arbitrations after *O’Connor* shows the potential of mass arbitration to assert a collective grievance, it is unclear whether they can substitute for the deterrence of class claims. As Charlotte Garden argues, the *O’Connor* plaintiffs’ counsel’s pledge following class decertification to represent class members in arbitration “is likely an artifact of the investment of time and money that class counsel has already made in the case.”¹³³ That is, assuming that the value of individual claims exceed the costs of arbitration, class counsel who have already invested resources in developing and litigat-

126. See Martin Malin, *Where Have All the Claims Gone?*, JOTWELL (Oct. 18, 2018), <https://worklaw.jotwell.com/where-have-all-the-claims-gone/> (reviewing Estlund, *supra* note 21).

127. *O’Connor v. Uber Tech. Inc.*, 904 F.3d 1087, 1091–92 (9th Cir. 2018); *Abadilla v. Uber Technologies*, 3:18-cv-7343, Pet. Or. Compelling Arbitration ¶ 1 (N.D. Cal. Dec. 5, 2018).

128. Heather Somerville, *Uber to Pay \$20 Million to Settle Long-Running Legal Battle with Drivers*, REUTERS (Mar. 12, 2019).

129. Joel Rosenblatt, *Uber’s Arbitration Addiction Could be Death by 60,000 Cuts*, BLOOMBERG, May 8, 2019.

130. Andrew Wallender, *Uber Settles ‘Majority’ of Arbitrations for at least \$146M*, BLOOMBERG, May 9, 2019.

131. David Fisher, *Judge Rejects Uber Settlement, Saying It Lowballs California Labor Claims*, FORBES (Aug. 18, 2016).

132. See Frankel, *supra* note 122 (reporting over 6,000 individual arbitration notices of wage-and-hour claims against DoorDash and over 6,000 against Postmates); Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claim Flood In*, BLOOMBERG (Feb. 11, 2019) (3,420 arbitration claims against Lyft).

133. Garden, *supra* note 83.

ing a class claim have little to lose by notifying class members and expressing a willingness to represent them individually and file notices on their behalf. For these decertified claims, filing mass arbitration notices is a rational attempt by class counsel to recoup sunk costs. In contrast, the costs and risks entailed in developing a mass arbitration from scratch seem far greater.¹³⁴ This would require (a) identifying mass numbers of claimants with claims that can be effectively vindicated in individual arbitration, and (b) taking a calculated risk that a sufficient number of them will be willing to submit a claim (despite attorney solicitation restrictions, substantial arbitration fees, and the possibility of having to pay for individualized discovery and proceedings).¹³⁵ These costs, then, pose a significant barrier for class attorneys seeking to become arbitration entrepreneurs, particularly for low-value and difficult-to-prove claims that could previously be aggregated in a class claim.

The history of class action consumer protection cases after *Concepción* instructs why this is likely to be the case. Like the *Uber* plaintiffs' counsel after *Epic Systems*, *Concepción* led those class-action attorneys to represent many former AT&T class members in arbitration.¹³⁶ But the over-1,000 arbitration notices filed by AT&T class members after *Concepción* was a short-term trend. David Horton and Andrea Cann Chandrasekher found that, excluding the AT&T class members from the sample, post-*Concepción* consumer protection filings show a modest increase in arbitrations from about fifty to eighty arbitrations per month, but do not approach the loss of class claims after *Concepción*.¹³⁷ While some "arbitration entrepreneurs" specialize in batches of consumer protection arbitrations, "unlike traditional class action attorneys, who frequently represent thousands of plaintiffs, arbitration entrepreneurs string together a few dozen consumers at most."¹³⁸ This post-*Concepción* history of consumer protection claims suggests that

134. As one attorney representing employees in individual arbitrations after the decertification of their class action explains, "Had the claimants not already been in a collective action, the mass arbitration strategy likely wouldn't have been possible," because of the low value of the individual claims and the high cost of coordinating arbitration filings. Wallender, *supra* note 130.

135. In this way, arbitrations impose greater costs than FLSA collective actions. Compared to class actions, the opt-in requirement of collective actions imposes a significant cost on attorneys in obtaining written consent and on plaintiffs in exposing themselves to the possibility of retaliation. But collective actions are far more efficient than individual arbitrations in affording a collective means to discover and introduce evidence and to aggregate claims in a single proceeding.

136. Horton & Chandrasekher, *supra* note 114, at 92.

137. *See id.*

138. *Id.* at 93–95 (reporting that nearly half of all consumer arbitration filings in 2012 came from a single law firm representing consumers against AT&T after the Supreme Court held in *Concepción* that their collective claim required individual arbitrations).

pledges to represent class members in arbitration are likely contingent on the willingness of plaintiff-side counsel to invest *ex ante* resources in identifying class claims. This appears unlikely to replace the loss of class claims after *Epic Systems*.

Lastly, there is also the possibility that employees will successfully persuade their employers to drop mandatory arbitration through public pressure. Google, for example, recently eliminated its mandatory arbitration requirements after several high-profile campaigns by employees in protest of them.¹³⁹ But Uber did not react to the mass arbitrations following *O'Connor* by dropping mandatory arbitration, even though it had previously eliminated sexual harassment from its scope in response to public criticism.¹⁴⁰ This suggests that a company's decision to eliminate forced arbitration is guided by collective employee and public pressure rather than the economic risk of mass arbitration. Unless public pressure ultimately yields legislation limiting mandatory arbitration for all employees, public pressure is most likely to impact the workplaces of employees who have significant bargaining power. This would still leave incentives in place for employers of low-wage, unorganized employees to adopt mandatory arbitration with class waivers to reduce labor costs.

Enforcement of class waivers is particularly likely to undermine deterrence of and access to justice for low-value or difficult-to-litigate employment and employment discrimination claims. A low-wage worker stands little chance of persuading an attorney to represent her low-value minimum wage claim individually in arbitration. The misclassification claims at issue in *Epic Systems* suffer the additional disadvantage of being factually complex, requiring application of an unstructured, multi-factor test to determine if the individual is an independent contractor or employee.¹⁴¹ *Epic Systems* is also likely to erode deterrence and access to justice for employment discrimination claims that, because they require representative or expert evidence, are inefficient, or impossible, to individually arbitrate. The Second Circuit, for example, has held that the FAA requires class waiver for claims asserting a "pattern-or-practice" of discrimination in violation of Title VII, because this claim cannot be maintained by individual

139. Kim Elsesser, *Google Ditches Mandatory Arbitration Policy*, FORBES (Feb. 22, 2019).

140. See Daisuke Wakabayasi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018).

141. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (listing ten factors to determine an agency relationship, including, for example, (a) right to control the details of the work; (b) whether the putative agent is employed in a distinct business or occupation; (c) the method of payment; and (d) whether the agency supplies the instrumentalities of the job).

complainants.¹⁴² Disparate impact claims similarly require representative evidence and expert reports that are inefficient or impossible to obtain in individual arbitration.

In short, MAAs are likely to foreclose claims that cannot be effectively vindicated in an individual arbitration. State public policy standards, class action attorney adaptation, and employee self-help are unlikely to reverse this trend. Whatever the exact extent of the decline in claiming after *Epic Systems*, it seems beyond serious dispute that MAAs with collective and class waivers have and will increasingly distort the private enforcement of employment laws.

In addition to eroding deterrence and access to justice, the lack of litigation of these claims may make future resolution of them more uncertain. To take the example of resolving the emergent debate about whether Uber and Lyft drivers are employees or independent contractors, fashioning rules to govern the work relationships in the platform economy will require transparent, sophisticated determinations of these claims. After *Epic Systems*, this is highly unlikely absent a dramatic expansion of public enforcement or broader legislative change.¹⁴³ As with the settlement of individual arbitrations by Uber drivers after the decertification of the *O'Connor* class claim, any claims that proceed are likely to be resolved in confidential settlement agreements or via individual arbitrations in cursory, conflicting decisions that have no precedential weight.

2. *The State Response of Privatizing Public Enforcement in Qui Tam Claims Can Improve Access to Justice for and Deterrence of Employment Law Violations*

Since *Epic Systems*, seven states—Connecticut, Maine, Massachusetts, New York, Oregon, Vermont, and Washington—have contemplated qui tam claims to partially assign the state’s interest in penalties

142. See *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 147 (2d Cir. 2012); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013) (“Since private plaintiffs do not have a right to bring a pattern-or-practice claim of discrimination, there can be no entitlement to the ancillary class action procedural mechanism.”). Justice Ginsburg disagreed with this interpretation of the FAA in her *Epic Systems* dissent. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting) (“I do not read the Court’s opinion to place in jeopardy discrimination complaints asserting disparate impact and pattern-or-practice claims that call for proof on a group-wide basis.”).

143. Expanded, systemic enforcement is contingent on public agency capacity and resistance to capture by the regulated entities. As an example of the latter, California recently enacted A.B. 5, which presumes that contract workers such as drivers for Uber are employees under state employment laws. See CAL. LAB. CODE § 2750.3(a); Conger & Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html>.

to individuals to deter employment law violations. These bills track PAGA in partially assigning state claims for penalties to aggrieved parties but have sought to expand upon its ability to provide access to justice and to deter employment law violations while protecting state qui tam claims from potential threats. All bills, like PAGA, would assign the state's interest in employment law penalties to employees as aggrieved parties and also to other whistleblowers with independent knowledge of violations, including subcontractors and former employees and managers.¹⁴⁴ Most bills would also permit labor organizations and nonprofit corporations that regularly advocate on behalf of employees and that enforce labor standards to file qui tam claims by designation of aggrieved parties and whistleblowers, which would permit individual relators to proceed confidentially.¹⁴⁵ To address employer objections that relators will over-enforce employment laws, most states have contemplated expressly exempting some posting, reporting, and paystub violations from qui tam enforcement.¹⁴⁶ The bills of Massachusetts, Oregon, and Washington would also expressly prevent employers from evading qui tam enforcement through self-help, by prohibiting the contractual impairment of qui tam enforcement through waiver.¹⁴⁷ Lastly, and importantly for this Article, all bills adopt a FCA approach to state intervention, permitting the state agency to intervene in qui tam litigation even after the initial period has elapsed, upon a showing of good cause.¹⁴⁸

144. H.B. 5381, 2020 Gen. Assemb., Feb. Sess. § 1(a)(5) (Conn. 2020); S.B. 1066, 191st Gen. Assemb. § 10 (Mass. 2019); S.P. 558, 129th Leg., 1st Reg. Sess. No. 1693 §§ 840(A)(1), (6) (Me. 2019); Assemb. B. A2265, 2019 Gen. Assemb., Reg. Sess. § 10 (N.Y. 2019); S.B. 750, 80th Leg. Assemb., Reg. Sess. §§ 1(1), (7) (Or. 2019); S.B. 139, 2019 Leg. § 51(1), (8) (Vt. 2019); H.B. 1965, 66th Leg., Reg. Sess. § 2(2) (Wash. 2019).

145. Conn. H.B. 5381 § 1(a)(4); Mass. S.B. 1066 § 10; Me. S.P. 558, No. 1693 § 840(A)(4); N.Y. Assemb. B. A2265 § 10; Or. S.B. 750 § 1(4); Vt. S.B. 139 § 51(7); Wash. H.B. 1965 §§ 2(2), 3(9).

146. Conn. H.B. 5381 § 1(m); Mass. S.B. 1066 § 10; Me. S.P. 558, No. 1693 §§ 840(A)(1)-(3); Vt. S.B. 139 § 52(g)(2); Wash. H.B. 1965 § 3(5)(a).

147. Mass. S.B. 1066 § 10; Or. S.B. 750 § 2(6); Wash. H.B. 1965 § 3(7). I thank Anthony Sebok for raising this possibility. Under the unconscionability doctrine of many states, an arbitration agreement that is a “prospective waiver of a party’s right to pursue statutory remedies” is unenforceable as against public policy. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see, e.g., Blair v. Rent-A-Ctr., Inc.*, No. 17-17221, 2019 WL 2701333, at *6–7 (9th Cir. June 28, 2019) (upholding on public policy grounds a state prohibition on waivers of public injunctions against FAA preemption challenge). California courts have rejected mandatory arbitration of PAGA claims on similar grounds. *See Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 622 (Cal. Ct. App. 2019) (“Without the state’s consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement.”).

148. Conn. H.B. 5381 § 1(s); Mass. S.B. 1066 § 10; Me. S.P. 558, No. 1693 § 840(F)(7); N.Y. Assemb. B. A2265 § 10; Or. S.B. 750 § 5(7); Vt. S.B. 139 § 53(d)(1)(b); Wash. H.B. 1965 § 6(b).

If not subject to waiver in mandatory arbitration provisions, state qui tam statutes may replace some of the state employment law claims lost after *Epic Systems*.¹⁴⁹ Aggrieved party, whistleblower, and representative organization qui tam claims create low barriers to entry for workers, unions, and worker organizations to assert—and plaintiff-side attorneys to identify and litigate—employment claims that are otherwise under-enforced after *Epic Systems*. Qui tam claims may facilitate mass arbitrations in what Professor Gilles calls an “arbitration-enabler model,” in which an enforcer “obtains in court a liability determination that can serve as a predicate for the application of non-mutual offensive collateral estoppel in subsequent one-on-one arbitrations by consumers and employees.”¹⁵⁰ Permitting representative third-party intermediaries, such as nonprofit corporations, to file claims on behalf of confidential relators may further improve access to justice by lowering the risk of retaliation against individual complainants. As the California agency tasked with monitoring PAGA filings has concluded, qui tam notices may provide agencies with “high quality leads identifying serious violations that in many cases would otherwise have remained underground.”¹⁵¹ Qui tam statutes can focus on particular types of employment laws to encourage complaints about violations that public agencies lack the resources (or leads) to enforce themselves.

While qui tam statutes can improve access to justice and deterrence after *Epic Systems*, their use by states raises pressing doctrinal and normative concerns. The next Part will first evaluate the risk of FAA preemption, finding that *Epic Systems* presents a new threat that qui tam statutes in aggregating low-value penalties are preempted under the FAA as an end run around class waivers. It will then assess extant due process limitations to qui tam enforcement, finding that they fail to address this threat or the principal-agent problems that can result

Some states also permit the state agency to disqualify relator counsel based on past unprofessional conduct or for failure to adequately represent relators. *See, e.g.*, Mass. S.B. 1066 § 10; Me. S.P. 558, No. 1693 § 840(F)(6).

149. Most states have wage-and-hour laws, and all states have employment discrimination laws, at least as protective as FLSA and Title VII. *See* DEP’T OF LABOR, WAGE AND HOUR DIVISION, CONSOLIDATED MINIMUM WAGE TABLE (2019), <https://www.dol.gov/whd/minwage/mw-consolidated.htm> (29 states and the District of Columbia have minimum wage rates higher than the federal minimum wage in FLSA); NAT’L CONFERENCE OF STATES LEGISLATURES, STATE EMPLOYMENT-RELATED DISCRIMINATION STATUTES (July 2015), <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf>.

150. Gilles, *supra* note 24, at 2234–36.

151. DEP’T OF LABOR STANDARDS ENF’T, BUDGET CHANGE PROPOSAL FY 2019-20 3 (2019), [hereinafter *Dlse Budget Proposal 2019*], https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

from loose state agency oversight over private qui tam enforcement. It concludes that addressing these risks will require measures to ensure that qui tam enforcement serves a distinct, public purpose and adequately represents the interests of the states and affected employees.

III. DOCTRINAL THREATS TO QUI TAM STATUTES AFTER *EPIC SYSTEMS* AND THE RISK OF PRIVATE ENFORCER MISUSE OF QUI TAM ENFORCEMENT

This Part will first evaluate doctrinal threats to state qui tam statutes. It then turns to the risks of private enforcer misuse of qui tam enforcement.

There is little chance that qui tam statutes modeled on the federal FCA will be found unconstitutional or entirely preempted by the FAA. For a formalist Supreme Court, the FAA gains no purchase in qui tam claims because the government holds the interest in a qui tam claim and the government is not a party to the employment contract. The long history of qui tam statutes, the Court's favorable view of privatizing enforcement, and the presumption against preemption of state laws that regulate the workplace all suggest that *Epic Systems* leaves undisturbed state qui tam statutes that partially assign the state's interest in employment law penalties.

But *Epic Systems* suggests a new threat to qui tam statutes. *Epic Systems* displays a hostility to claims that would provide an end run around the Court's enforcement of mandatory arbitration and class waivers, and aggrieved party qui tam statutes can permit a private party to aggregate penalties in a manner that closely resembles a class claim.¹⁵² PAGA, additionally, provides no express means for the state to intervene in qui tam claims after an initial period, and yet binds the state to the private enforcer's resolution of the claim. PAGA's loose oversight and aggregation of penalties that closely track victim-specific violations has led to significant challenges of PAGA as a class action in disguise.

The Ninth Circuit, partially relying on *Waffle House*, has upheld PAGA against this challenge by concluding that state penalties are conceptually distinct from and do not present the same procedural complexity as victim-specific relief.¹⁵³ But the state qui tam vehicle can place considerable pressure on the distinction between public and

152. As Professor Gilles and Mr. Friedman argue, the aggrieved party qui tam jurisdictional bar provides "an avenue for redress of private harms, even as it also furthers public objectives, [and as a result] . . . begins to look a lot like a class action." Gilles & Friedman, *The New Qui Tam*, *supra* note 25, at 520.

153. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435–38 (9th Cir. 2015).

private interests in an enforcement action. Reinforcing this distinction will be necessary to avoid destabilizing *Waffle House*, which permits public agencies to enforce private claims notwithstanding a mandatory arbitration agreement.¹⁵⁴ While current due process limitations on qui tam penalties deter some forms of private enforcer abuse, they do little to preserve the boundary between public and private enforcement or to ensure that qui tam enforcement advances the public interest.¹⁵⁵ This Part will conclude that new constraints, many of which exist in state constitutional law and in bills by states contemplating qui tam expansion, are in order to preserve qui tam enforcement from FAA preemption.

A. *Previous Constitutional and FAA Challenges of Qui Tam Statutes*

Qui tam statutes have proven surprisingly resilient in resisting constitutional and FAA challenges. Attacks on state delegations to private enforcers must overcome several hurdles, beginning with a judicial tolerance of privatization. Gillian Metzger, in her account of judicial scrutiny of federal privatization, concludes that “[a]lmost all private delegations are upheld.”¹⁵⁶ Professor Metzger attributes this tolerance to the sanctioning of broad power to the executive for economic and social regulation in the post-*Lochner* era.¹⁵⁷ While the Supreme Court continues to draw a distinction between public and private in the state action doctrine, “its private delegation cases signal the Court’s acceptance of the difficulty in singling out a category of private delegations for special constitutional scrutiny.”¹⁵⁸

There is no shortage of cases in which courts have upheld the state delegation of public functions to private individuals, from the privatization of law enforcement¹⁵⁹ to the FAA’s privatization of the judiciary. Given the judiciary’s tolerance of private delegations for economic and social regulation,¹⁶⁰ it is unsurprising that there is no serious federal separation of powers challenge to qui tam claims. The

154. I thank Margaret Lemos for raising this concern.

155. The claim here is not that class actions necessarily advance a public interest, but rather that a qui tam claim need not meet class requirements because it belongs to the state and not private individuals. But in order to belong to the state, it must advance a distinct public interest.

156. Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1440 (2003).

157. *Id.*

158. *Id.* at 1443.

159. Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 273–75 (2010).

160. *See, e.g.,* Beary Landscaping, Inc. v. Costigan, 667 F.3d 947, 951 (7th Cir. 2012) (rejecting nondelegation doctrine challenge to state delegation of prevailing wage rates to private parties).

FCA, in which DOJ retains the authority to intervene as the primary litigator, and to move to dismiss or settle the action, appears to reserve sufficient power for the agency to withstand separation of powers scrutiny.¹⁶¹ The Fifth, Sixth, Ninth, and Tenth Circuits have taken this position.¹⁶² The partial nature of the FCA assignment, then, does not violate federal separation of powers.¹⁶³

Federal constitutional standing presents a more complicated question, despite the Supreme Court's instruction in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹⁶⁴ that there is "no room for doubt that a qui tam relator under the FCA has Article III standing."¹⁶⁵ While the state suffers a cognizable injury in an FCA claim, under familiar Article III standing doctrine it is "*the complaining party*"¹⁶⁶ that must allege facts sufficient to satisfy the case-or-controversy requirement. The Court rejected the argument that the relator acts as an agent of the state, noting that the relator has too much discretion in an FCA claim to constitute a mere agent. Qui tam claims confer upon the relator an interest in the suit, which the relator may litigate without the state's involvement, and even if the state intervenes the relator remains a party to the claim. Nor is the relator's interest in the bounty sufficient to confer standing, unless related to the state's injury in fact. Nevertheless, standing is satisfied in a qui tam claim where the state has effected "a partial assignment of the Government's damages claim."¹⁶⁷ Recognizing the qui tam vehicle as a form of "representational standing," the Court held that the state's "injury in fact suffices to confer standing" on the relator.¹⁶⁸

161. See *United States v. Shasta Servs., Inc.*, 440 F. Supp. 2d 1108, 1113–14 (E.D. Cal. 2006); *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 25–26 (D.D.C. 2001); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 771–72 (E.D. Penn. 2001) ("Therefore, even if it initially declines to intervene, the Government retains a significant right to influence and participate in a qui tam action."); Myriam E. Gilles, *Representational Standing: United States ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 367 (2001).

162. See *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 806 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (finding that "significant control over litigation pursued under the FCA by a qui tam relator" satisfies the Take Care Clause); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 755 (9th Cir. 1993).

163. Gilles, *supra* note 161, at 346. Federal courts have declined to strike down delegations to private entities since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). I will argue in Part IV, *infra*, that state nondelegation doctrine often imposes greater constraints on the privatization of public enforcement.

164. 529 U.S. 765 (2000).

165. *Id.* at 773–779.

166. *Id.* at 771.

167. *Id.* at 773.

168. *Id.*

Vermont Agency of Natural Resources leaves little doubt that harm to the state is sufficient to satisfy federal constitutional standing for a relator to litigate a qui tam claim. It establishes that a relator has standing to assert an injury in fact of the state where a statute effects a partial assignment to the relator. It, however, left open the question of what specific types of harmed state interests are properly the subject of a qui tam claim.

Because the FCA primarily concerns the state's proprietary interest in deterring financial fraud against the state, one might reasonably limit the holding in *Vermont Agency of Natural Resources* to the partial assignment of state pecuniary harm.¹⁶⁹ The Supreme Court's formalist approach, however, is likely to find state sovereign interests in creating and enforcing public law sufficient to satisfy Article III standing requirements despite the lack of state pecuniary harm and the de facto advancement of private interests. Supreme Court jurisprudence is relaxed in identifying state interests sufficient to satisfy the injury-in-fact requirement, so long as the state alleges "an invasion of a legally protected interest."¹⁷⁰ As the Supreme Court reasoned in *Massachusetts v. Environmental Protection Agency*,¹⁷¹ "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction,"¹⁷² which does not demand an involved analysis of state interests. This is why *Vermont Agency of Natural Resources*, despite its careful analysis of the qui tam claim as a partial assignment, does not distinguish between the sovereign and pecuniary interests in FCA claims.¹⁷³

This "special position and interest" of the states in federal court,¹⁷⁴ and the "long and unbroken tradition" of the qui tam statute in the

169. Myriam Gilles has previously argued that Article III standing would not permit the partial assignment of a state's interest in enforcing a civil penalty. Gilles, *supra* note 161, at 341–45. Professor Gilles and Mr. Friedman also appear to reach this conclusion in limiting qui tam claims "grounded in a theory of assignment" to those in which "the government has suffered injury to its property," while arguing in favor of a more restrictive "agency model" for "the government's general enforcement powers, and not on any injury-in-fact the government happens to have suffered in its proprietary capacity." Gilles & Friedman, *The New Qui Tam*, *supra* note 25, at 522–23.

170. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* *Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007).

171. *Massachusetts*, 549 U.S. at 518–21.

172. *Id.* at 518. In that case, the "well-founded desire to preserve" their sovereign territory suffices to establish their Article III standing to sue the EPA to regulate heat-trapping gasses. *Id.*

173. 529 U.S. 765, 771 (2000) (identifying as separate injuries to the state "the injury to its sovereignty arising from the violation of its laws . . . and the proprietary injury resulting from the alleged fraud") (emphasis added).

174. *Massachusetts*, 549 U.S. at 498.

United States,¹⁷⁵ all strongly suggest that a qui tam claim grounded in state sovereign interests meets Article III standing requirements. This is because intangible harms such as state sovereign interests are legally protected if the injury is traditionally regarded as a basis for a suit and if the legislature identifies it as such.¹⁷⁶ The Supreme Court has previously found “the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, including] the power to create and enforce a legal code,” to constitute a state sovereign interest.¹⁷⁷ This interest extends with special force to employment law, as states have “broad authority under their police powers to regulate the employment relationship to protect workers within the State.”¹⁷⁸ The Supreme Court’s relaxed standing requirements for states is likely satisfied for qui tam statutes enacted to protect the state’s sovereign interest in deterring the growth of the underground economy, harm to vulnerable workers, and loss of tax revenue. The California Supreme Court reached this conclusion in upholding PAGA, finding that the agency may properly assign its sovereign interests in penalties to deter employment law violations that threaten the health and well-being of its residents.¹⁷⁹ This holding seems consistent with *Vermont Agency of Natural Resources*. The partial assignability of sovereign interests in penalties is demonstrated in the FCA itself, which also permits recovery of penalties.¹⁸⁰ In permitting FCA penalties as a component of the relator’s bounty, *Vermont Agency of Natural Resources* strongly suggests that the state may partially assign proprietary and sovereign interests in penalties to deter violations of public law. Challenges to FCA partial assignment of penalties on this ground have been rejected by the Fourth, Fifth, and Tenth Circuits.¹⁸¹ Courts since then have consistently relied on *Vermont Agency of Natural Resources* to find

175. *Sprint Commc’ns Co. v. APCC Servs.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting).

176. *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016).

177. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

178. *Id.*

179. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 388 (2014) (“There is no question that the enactment and enforcement of laws concerning wages, hours, and other terms of employment is within the state’s historic police power.”) (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). *See generally* Margaret S. Thomas, *Parens Patriae and the States’ Historic Police Power*, 69 SMU L. REV. 759, 806 (2016).

180. 31 U.S.C.A. § 3730(b)(4) (West 2017).

181. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 404 (4th Cir. 2013); *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 804 (10th Cir. 2002), *rev’d on other grounds*, 549 U.S. 457, 479 (2007); *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 752 n.3 (5th Cir. 2001) (en banc).

that private enforcers have standing to seek civil penalties from their assigned interest by the state.¹⁸²

Even if Article III were to require financial harm of the state necessary to support a partial assignment for federal standing, standing in state court is not controlled by Article III. Claimants enforcing state qui tam statutes, like California's PAGA, need not satisfy Article III standing if litigated in a state court with looser standing requirements.¹⁸³ The Ninth Circuit has held that PAGA suits are not removable under the Class Action Fairness Act¹⁸⁴ and that PAGA penalties may not be aggregated for the purposes of diversity jurisdiction because "[t]he state, as the real party in interest, is not a 'citizen' for diversity purposes."¹⁸⁵ As Zachary Clopton explains, assuming no other grounds for removal, state qui tam claims "can be maintained in state court even if a federal court found no standing."¹⁸⁶ Qui tam private enforcers, then, appear to have standing—at least in state court—to vindicate the partially assigned states' interest in civil penalties.

A formalist interpretation of the FAA would similarly find that qui tam statutes do not implicate the FAA since, as the Ninth Circuit held in *United States ex rel. Welch v. My Left Foot Children's Therapy*,¹⁸⁷ the state is not a party to the contract. In *Welch*, the defendant challenged an FCA claim by an employee that her employer made false Medicaid claims on the ground that the FAA requires enforcement of the employment agreement, which required arbitration of any claim that the relator may "have against" the defendant.¹⁸⁸ But since "FCA fraud claims always belong to the government, [the relator] cannot be said to own or possess them," and the FCA claim was not arbitrable despite the government's election not to intervene.¹⁸⁹ No court has held that a defendant can enforce an FCA waiver.

182. See *United States ex rel. Bunk*, 741 F.3d at 404 (holding that "relators seeking solely civil penalties enjoy standing to sue"); *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1327 (Fed. Cir. 2010) (same); *United States v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272, 1277 (M.D. Fla. 2014) (rejecting argument that *Vermont Agency of Natural Resources* does not permit relators to seek civil penalties).

183. Clopton, *supra* note 25, at 438 (observing that "under current law, state courts may entertain state and federal suits even if plaintiffs would lack Article III standing in federal court").

184. *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014) (holding that "PAGA actions are also not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction").

185. *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1123 (9th Cir. 2013).

186. Clopton, *supra* note 25, at 451, 459.

187. 871 F.3d 791 (9th Cir. 2017).

188. *Id.*

189. *Id.* at 798.

Nonetheless, aggrieved party qui tam statutes like PAGA resemble class claims to the extent that they aggregate penalties based on substantive law violations that affect groups of individuals.¹⁹⁰ This is particularly the case for areas such as employment law, in which individual and state interests heavily overlap. While some form of state oversight over aggrieved party claims for aggregated penalties is certainly a requirement for qui tam claims, *Iskanian v. CLS Transportation Los Angeles* and *Sakkab v. Luxotica Retail North America* declined to undertake the project of explaining how to sufficiently distinguish the aggregation of penalties from class claims. This is a concern to which I will return. But states have broad authority to enforce laws to vindicate their sovereign interests, including by limiting the delegation of public enforcement to specific types of claimants. And, so long as the claim belongs to the state, it is unclear how limiting qui tam statutes to individuals harmed by the defendant's conduct runs afoul of the FAA's intent to curtail judicial hostility toward individual arbitration.

Skepticism about this form of state experimentation must consider the Supreme Court's recognition of federalism interests weighing against FAA preemption of it. There is a presumption against preemption of state qui tam statutes that enforce state labor protections "unless that is Congress' clear and manifest purpose"¹⁹¹ Consistent with these federalism concerns, California and the Ninth Circuit have upheld PAGA against FAA preemption challenges. In 2014, the California Supreme Court in *Iskanian*, found that the FAA does not require enforcement of a PAGA waiver.¹⁹² The *Iskanian* Court first affirmed the dismissal of the plaintiff's class claims, finding that the FAA required enforcement of a class waiver after *Concepción*.¹⁹³ Pre-saging *Epic Systems*, it held that the NLRA does not protect class claims from waiver under the FAA.¹⁹⁴ But a PAGA claim is brought on behalf of the state and asserts the state interest in addressing systemic and documented under-enforcement of state labor protections, particularly in the under-regulated sectors of the economy.¹⁹⁵ PAGA

190. PAGA permits any aggrieved employee to aggregate penalties associated not only with the violation of that aggrieved employee's rights, but any aggrieved employee. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 761 (Cal. Ct. App. 2018), *reh'g denied* (June 13, 2018), *review denied* (Aug. 8, 2018).

191. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

192. 59 Cal. 4th 348, 384 (Cal. 2014).

193. *Id.* at 360–61.

194. *Id.* at 372–73.

195. The distinct public interest advanced by a PAGA claim distinguishes it from a class claim. The Supreme Court in *Waffle House* placed great weight on this distinction. This is different from the issue in *Gade v. Nat'l Solid Wastes Mgmt.*, 505 U.S. 88 (1992), in which a state sought

reflects a legislative choice to delegate public enforcement to private enforcers because agency enforcement alone cannot deter “serious and ongoing wage violations,”¹⁹⁶ which harm vulnerable employees and deprive the state of billions in tax revenue.¹⁹⁷ The civil penalties authorized under PAGA are, therefore, “distinct from the statutory damages to which employees may be entitled in their individual capacities.”¹⁹⁸ Relying on *Waffle House*, the *Iskanian* Court found that the FAA does not limit qui tam claims, like PAGA, which do not displace bilateral arbitration of private interests, but rather “enforce the state’s interest in penalizing and deterring employers who violate California’s labor laws.”¹⁹⁹

The California Supreme Court’s holding that PAGA actions cannot be privately waived became known as the *Iskanian* rule. A split soon developed between state courts, which applied the *Iskanian* rule, and some federal trial courts, which rejected it. In 2015, the Ninth Circuit, in a two-to-one panel, resolved the dispute in *Sakkab*, affirming the *Iskanian* rule that the FAA did not require California to enforce PAGA waivers.²⁰⁰ It held that FAA preemption was not required because of the strong presumption against preemption and because PAGA enforcement presents no obstacle to the FAA.²⁰¹ The court rejected concerns that PAGA claims are procedurally complex since, unlike class action claims, the only due process requirements are those of the defendant, relator, and state; and any factual complexities can be addressed by limiting discovery.²⁰² Agreeing with *Iskanian* that PAGA is a qui tam action, the Ninth Circuit held that the FAA did not intend to preempt qui tam statutes that enforce state employment laws.²⁰³

Epic Systems suggests that the FAA preempts any vehicle that aggregates claims unless conceptually distinct from the class claim that the individual would assert but for a contractual waiver. PAGA jurisprudence resolves this tension by requiring arbitration of “victim-spe-

to avoid Occupational Safety and Health Act (OSHA) preemption by asserting a non-preempted purpose. As the Supreme Court held in *Gade*, “[t]he key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted under the Act.” *Id.* Here, the question is whether the state retains an independent, public interest in a PAGA claim. If it does, the claim does not implicate the FAA.

196. *Iskanian*, 59 Cal. 4th at 379.

197. *Id.*

198. *Id.* at 381.

199. *Id.* at 387 (emphasis in original).

200. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 437 (9th Cir. 2015).

201. *Id.*

202. *Id.*

203. *Id.* at 439–40.

cific relief” while permitting PAGA enforcement of state penalties.²⁰⁴ As the Ninth Circuit reasoned in *Sakkab*, penalty aggregation does not present the same FAA obstacle preemption argument as aggregation of individual damages would.²⁰⁵ A determination about state penalties does not bind individuals regarding their individual substantive rights. Claiming penalties under PAGA is substantially the same as a whistleblower qui tam claim that calculates a penalty based on the total monetary harm of the conduct, or for the number of fraudulent certifications, and presents no obstacle to enforcing the FAA regarding class waiver for individual claims. Aggregating state penalties for multiple violations of the same statute is precisely the type of claim that the public has an independent interest in enforcing. By itself, then, aggregating penalties appears to be sufficiently distinct from a class claim aggregating individual claims of substantive law violations to survive *Epic Systems*.

In sum, the careful identification in *Vermont Agency of Natural Resources* of “both a legal right to assert the claim *and* a stake in the recovery,” in a qui tam claim,²⁰⁶ is sufficient to uphold whistleblower qui tam statutes against constitutional and FAA preemption challenges. *Epic Systems* is unlikely to require FAA preemption of qui tam statutes generally, and a formalist interpretation would not require FAA preemption of PAGA either.²⁰⁷ Like the FCA, PAGA is a qui tam claim because it belongs to California, and the FAA is not implicated because California is not a party to the contract. Requiring waiver of state aggrieved party qui tam statutes, moreover, must also overcome the strong federalism concerns that animate *Sakkab*. Despite the divided panel in *Sakkab*, it remains good law.²⁰⁸ *Sakkab*, which took account of the Supreme Court’s current due process turn to liberty of contract analysis in *Italian Colors*, is the only appellate authority on FAA preemption of state aggrieved party qui tam claims. No court has enforced a waiver of representative PAGA claims on

204. See *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228, 1243 (Cal. Ct. App. 2017), *review denied* (Nov. 15, 2017) (finding that “victim-specific relief” is not subject to PAGA).

205. *Sakkab*, 803 F.3d at 435–36.

206. *Sprint Commc’ns Co. v. APCC Servs.*, 128 S. Ct. 2531, 2550–57 (2008) (Roberts, C.J., dissenting) (joined by Justices Thomas and Alito) (emphasis in original).

207. It is unclear whether *Epic Systems* would require FAA preemption of aggrieved party qui tam statutes like PAGA using a different interpretive approach.

208. Courts after *Sakaab* have limited the *Iskanian* rule to civil penalties recoverable by the state and not individuals. *Mandviwala v. Five Star Quality Car, Inc.*, 723 Fed. Appx. 415, 417–18 (9th Cir. 2018) (finding that plaintiff claims of unpaid wages must be arbitrated under FAA).

FAA grounds,²⁰⁹ and the Supreme Court has subsequently declined review of the issue.²¹⁰

B. The Post-Epic Systems Doctrinal Threat to and Risk of Private Enforcer Misuse of Qui Tam Enforcement

While *Epic Systems* is unlikely to require enforcement of waivers of all qui tam claims, *Sakkab* did not address at what point aggrieved party qui tam claims, without agency authority to intervene in the litigation, are artfully styled class claims. *Iskanian* and *Sakkab* assumed without discussion that a PAGA claimant is a “proxy or agent of the state’s labor law enforcement agencies.”²¹¹ This description is belied by the discretion that claimants have to bring and resolve PAGA claims, and the Supreme Court’s description of qui tam claims in *Vermont Agency of Natural Resources* as “effecting a *partial* assignment” of a state’s claim.²¹² This distinction is an important one because the relator in a qui tam claim has no standing to litigate a qui tam claim unless the state maintains an interest in the suit. Loosening agency oversight requirements to encourage private enforcer claims risks challenge that these statutes are end runs around the FAA. A plausible extension of *Epic Systems* would hold qui tam claims that lack significant state oversight waived as class actions in disguise.²¹³

This has significant implications for states that seek to expand enforcement of employment laws through the qui tam vehicle. To avoid FAA preemption, the states’ expansion of qui tam must ensure the state has a distinct interest from the harmed individual in vindicating public law. *Vermont Agency of Natural Resources* seemed to assume a comparably distinct federal interest in DOJ’s oversight of FCA claims. While the California Labor and Development Workforce Agency (LWDA) has significant gatekeeping powers over PAGA, particularly

209. See *Mandviwala*, 723 Fed. Appx. at 417; *Canela v. Costco Wholesale Corp.*, 13-CV-03598, 2018 WL 2331877, at *7 (finding that government agency “is always the real party in interest in the [PAGA] suit”) (quoting *Iskanian v. CLS Transp. Los Angeles*, 59 Cal. 4th 348, 382 (Cal. 2014) (quotation marks omitted)).

210. *Prudential Overall Supply v. Betancourt*, 138 S. Ct. 556, 556 (2017) (denying petition for writ of certiorari seeking review of California decision upholding *Iskanian* rule).

211. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015) (quoting *Iskanian*, 59 Cal. 4th at 380).

212. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (emphasis added) (internal quotations omitted).

213. Professor Gilles and Mr. Friedman argue that lack of agency control over PAGA claims, along with “its relator-injury requirement [and] its compensation for similarly injured unnamed parties . . . all but begs the current Supreme Court to look past the qui tam provisions as a sort of sheep’s clothing and locate inside a class action wolf.” Gilles and Friedman, *The New Qui Tam*, *supra* note 25, at 523.

after the 2016 amendments, DOJ has greater oversight over the FCA—especially the authority to move to settle or dismiss claims during litigation. State experimentation that would remove all agency supervision from qui tam claims may bring such claims outside of *Waffle House*, requiring enforcement of qui tam waiver provisions.

The stakes of ensuring that qui tam statutes advance a public interest extend beyond qui tam enforcement. This places pressure on the holding in *Waffle House* that the EEOC has a distinct interest from individuals because of its significant independent authority. The Supreme Court in *Waffle House* stressed the importance of the EEOC's ability to prosecute a claim without the private individual's consent or control over the claim. The EEOC's unquestioned control over the claim enables it, "as master of its own case . . . to evaluate the strength of the public interest at stake."²¹⁴ Blurring the distinction between public agency and individual interests may place *Waffle House* at risk. If public agencies lack any control over a claim to protect a distinct public interest apart from the private enforcers asserting the claim, then the private parties whose rights public agencies vindicate may be parties after all. And if these individuals are parties who are subject to mandatory arbitration agreements, then all affirmative enforcement of public laws that harm victims may require individual arbitration. This outcome would fundamentally distort public agency enforcement of employment laws by limiting victim-specific relief.

Setting aside the constitutional and FAA analysis, agency oversight is necessary to avoid the risk of private, for-profit litigators abusing public enforcement powers.²¹⁵ While a modest expansion of qui tam enforcement is unlikely to cause an explosion of frivolous lawsuits,²¹⁶ the growth of PAGA filings in California suggests that state agencies will only be able to intervene in a small proportion of them. This may create incentives for private attorneys to file and resolve qui tam

214. *E.E.O.C. v. Waffle House Inc.*, 534 U.S. 279, 291 (2002).

215. See Margaret H. Lemos, *Privatizing Public Litigation*, 104 *GEO. L.J.* 515, 537–56 (2016) (The risk of private abuse of public enforcement is most salient for private firms hired by government to prosecute criminally or to engage in wide-ranging civil litigation with the vast resources and sanctions of the state.).

216. As the California Supreme Court explained in *Iskanian*, the risk of meritless PAGA claims is low compared to private attorneys hired by agencies as agents of the state because "The qui tam litigant has only his or her own resources and may incur significant cost if unsuccessful." *Iskanian v. CLS Transp.* Los Angeles, 59 Cal. 4th 348, 391 (Cal. 2014). Empirical analysis of FCA claims by David Freeman Engstrom "points decisively away from widespread claims that qui tam enforcement efforts are in the midst of an inefficient 'explosion.'" David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 *COLUM. L. REV.* 1913, 1963 (2014).

claims in ways that are inconsistent with the agency's enforcement priorities and the interests of the affected employees.

Private enforcement can depart from the public interest in two different directions: (1) by diverting public enforcement tools to target violations that cause little harm to employees, such as inadvertent, harmless errors on paystubs or required postings, rather than to reveal illegal conduct “that is prohibitively costly for public regulators to discover or dislodge[.]”²¹⁷ and (2) by colluding with the regulated entities to settle qui tam claims cheaply because of their binding effect on the state and other affected employees. The former can be easily addressed legislatively by exempting technical violations from the scope of qui tam statutes, as PAGA does and most states have proposed in their qui tam bills.

But while qui tam statutes can effectively tamp down on over-enforcement, the binding nature of a qui tam claim makes under-enforcement a more pressing, and complex, concern. In particular, private enforcers may file qui tam claims and resolve them cheaply in a “reverse auction,” in which plaintiff's attorneys settle qui tam claims on substandard terms to avoid being outbid by more pliant plaintiff's attorneys. LWDA's involvement in the unsuccessful resolution of the PAGA claim in *O'Connor* and its later resolution by a different set of attorneys illustrates the complexity of the problem. While LWDA does not, under PAGA, have the right to intervene in the litigation of PAGA claims after the initial period, courts often seek agency guidance about whether PAGA settlement requests satisfy the state's interests. Like standard agency actions, LWDA evaluates these PAGA settlements based on the strength of the claim and the extent to which the settlement amount achieves its deterrence goal. The preclusive effect of a PAGA settlement, both on the state and other aggrieved parties, has led the agency to object to low PAGA settlement amounts on the ground that these factors suggest a reverse auction.²¹⁸ LWDA raised concerns about settlement proposals by both sets of private attorneys, which the *O'Connor* Court relied on in rejecting the propo-

217. Engstrom, *supra* note 216, at 1978 (providing as one example of private enforcers “exploit[ing] regulatory ambiguities,” FCA “boosting” claims that “targeted an ambiguity in federal royalty regulations as to whether compression at the tailgate of the plant was within the confines of the plant [and subject to royalty, or] . . . outside the plant, and thus exempt from royalty as part of the ‘marketing’ process”).

218. *See, e.g.,* Alonzo v. Clarke, LWDA Amicus Curiae Br., BC433932, at 15 (2nd App. Dist. Cal. Mar. 14, 2018). LWDA has also objected to settlement requests that fail to calculate the maximum value of released claims, making an objective assessment of the settlement impossible. *See* Price v. Uber Technologies, Cal. Lab. Comm. Amicus Curiae Br., BC554512, at 5 (Sup. Ct. L.A. Cty. June 16, 2017).

sal, but which a later court, considering a similar PAGA claim by a second set of attorneys, did not find persuasive.²¹⁹

Prior to the decertification of the class claim by the Ninth Circuit, the parties agreed in *O'Connor* to resolve all claims for up to \$100 million, including \$1 million to resolve a PAGA claim. The LWDA, estimating that the PAGA penalties were worth \$1 billion, could discern “no rationale” for settling the PAGA claim for such a low amount.²²⁰ The court, agreeing with the agency, rejected the parties’ motion for preliminary approval of class settlement.²²¹ Months later, however, over LWDA’s objections on similar grounds, a different state judge approved resolution of the same PAGA claim in *Price v. Uber*. That PAGA settlement, negotiated by different attorneys, was for a larger amount than in *O'Connor*, \$7.75 million, but provided no remedy for Uber’s failure to pay owed wages. A small fraction of the total \$1 billion value of the claim, the proposed settlement in *Price* additionally purported to release any claim by “the State of California . . . [of] all PAGA claims *known or unknown* related to the claims being released.”²²² According to the LWDA, the *Price* settlement terms suggest a reverse auction. Its approval may have undermined deterrence and deprived the state of a final judicial determination regarding the correct classification of the drivers.

The states that have proposed qui tam enforcement along the lines of PAGA have addressed this concern by permitting the state to intervene upon good cause shown, and, in some states, by permitting the state agency to disqualify qui tam counsel who fail to adequately represent relators. This Article agrees with this approach, and argues that PAGA should be amended along these lines to reduce incentives for private enforcer misuse of qui tam enforcement. Permitting state agency intervention even after an initial period will also be necessary to prevent FAA preemption, by constraining qui tam enforcement in ways that advance a distinct, public purpose.

The next Section will explore the primary alternative to state agency supervision—judicial supervision via due process limitations to qui tam enforcement. It concludes that extant due process protections are imperfect guardrails because they only protect defendants and do

219. *Price v. Uber Technologies*, Order Granting Approval of PAGA Settlement and J. Thereon, BC554512, at 1 (Sup. Ct. L.A. Cty. Jan. 13, 2018).

220. *O'Connor v. Uber Technologies*, Cal. LWDA Comments on Proposed PAGA Settlement, 13-CV-03826-EMC, at 3 (N.D. Cal. July 29, 2016).

221. *O'Connor v. Uber Tech.*, 201 F. Supp. 3d 1110, 1135–36 (N.D. Cal. 2016).

222. *Price v. Uber Technologies*, Cal. Lab. Comm. Amicus Curiae Br., BC554512, at 6 (Sup. Ct. L.A. Cty. June 16, 2017) (emphasis added).

not adequately protect the interests of the states or affected employees.

C. Due Process and Excessive Fines Are Insufficient Guardrails to Constrain Qui Tam Enforcement

Courts constrain the states' power to impose penalties under the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment which, after *Timbs*, extends to the states. The Due Process Clause and Excessive Fines Clause are overlapping due process protections for defendants against arbitrary and unreasonable penalties. Qui tam civil sanctions and treble damages awards are at least partially punitive and therefore susceptible to due process and excessive fines review.²²³ As the Court reasoned in *Vermont Agency of Natural Resources*, qui tam claims are "essentially punitive in nature,"²²⁴ even though they also serve a remedial purpose.

Under familiar due process analysis, courts limit the imposition of qui tam penalties based on the factors set forth by the Supreme Court in *State Farm Mutual Automobile Insurance v. Campbell*:²²⁵ "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."²²⁶ Similarly, a fine is unconstitutionally excessive if the payment "is grossly disproportional to the gravity of a defendant's offense."²²⁷ The appellate courts that have considered the question find that an excessive fines analysis of qui tam

223. The Due Process Clause imposes substantive limits on punitive but not compensatory damages. While civil sanctions are always punitive, the treble damages portion of a False Claims Act claim is in part compensatory because it compensates the state for "the costs, delays, and inconveniences occasioned by fraudulent claims," *Cook Cty., Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003), and it compensates relators with a portion of the award. See *United States v. Mackby (Mackby I)*, 261 F.3d 821, 830 (9th Cir. 2001). The Fourth, Eighth and Ninth Circuits have held that qui tam penalties are fines subject to eighth amendment scrutiny because they are primarily punitive and seek to deter. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408 (4th Cir. 2013); *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003); *Mackby I*, 261 F.3d at 831. Cf. *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2011) (declining to rule on whether FCA penalties are fines under the Eighth Amendment but reasoning that excessive fines scrutiny of FCA penalties "would [not] differ dramatically" from due process analysis); see also Bucy, *Private Justice and the Constitution*, *supra* note 24, at 967–69.

224. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

225. 538 U.S. 408 (2003).

226. *Id.* at 416.

227. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

penalties tracks the reprehensibility and disparity *State Farm* factors.²²⁸

Courts rarely find that FCA penalties violate defendants' due process rights. This is not surprising, as the FCA treble damages award is well within the *State Farm* "4[:]1 ratio"²²⁹ due process rule of thumb, and courts defer to legislative guidance that a penalty is necessary to deter a substantive law violation.²³⁰

States can increase due process protections for defendants by statute beyond this constitutional minimum. California incorporates a version of these due process requirements in PAGA, by permitting courts to lower civil penalty amounts if the award would be "unjust, arbitrary and oppressive, or confiscatory,"²³¹ an approach also taken by other states in proposing their own version of qui tam statutes.²³² California courts have relied on these limitations to reduce awards because the employer's obligations are unclear, that the employer sought to comply after becoming aware of their obligations, or that the employee suffered no injury as a result of the violation. In *Fleming v. Cavidien, Inc.*,²³³ for example, a trial court reduced a judgment of PAGA penalties for inadequate wage statements from \$2.8 million to \$500,000 because "the aggrieved employees suffered no injury due to the erroneous wage statements," and the defendants took active steps

228. There is a reasonable argument that *Timbs* stands for the proposition that heightened Eighth Amendment scrutiny is in order where the enforcer has a personal interest in the prosecution. But the risk of abusive fines in qui tam enforcement is lower than the civil forfeiture fine at issue in *Timbs*, because the penalties are set by the legislature and are directly related to violations of public law. For this reason, courts generally find that the excessive fines analysis merges with the *State Farm* due process factors. See, e.g., *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 388–90 (4th Cir. 2015) (finding that excessive fines analysis of an FCA penalty tracks the *State Farm* due process factors); *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008) (reasoning that even if the Excessive Fines Clause imposed a greater restraint on punitive damages than the Due Process Clause, that "a fine expressly authorized by statute could be higher than a penalty selected *ad hoc* by a jury").

229. *State Farm*, 499 U.S. at 23–24 (instructing that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety").

230. See *United States ex rel. Drakeford*, 792 F.3d at 389 (finding that an FCA award did not violate due process because Congress's judgment about the illegal conduct, strong interests in deterring fraud on the government, and prescription of FCA damages and penalties, and the defendant's knowing violations were evidence of the reprehensibility of the defendant's conduct, and "the ratio of punitive damages to compensatory damages is approximately 3.6:1, which falls just under the ratio the Court deems constitutionally suspect").

231. CAL. LAB. CODE § 2699(e)(2). See, e.g., *York v. Starbucks Corp.*, No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *10 (C.D. Cal. Nov. 1, 2012) ("[S]ection 2699(e)(2) provides the Court with the ability to fashion an appropriate penalty in this case that will not offend notions of due process.").

232. See, e.g., S.P. 558, 129th Leg., 1st Reg. Sess., No. 1693 §§ 840(B)(1)(2)(e) (Me. 2019); Assemb. B. A2265, 2019 Gen. Assemb., Reg. Sess. § 10 (N.Y. 2019).

233. No. (OPX), 2011 WL 7563047 (C.D. Cal. Aug. 12, 2011).

to comply in good faith.²³⁴ California also protects the due process rights of defendants by precluding redundant PAGA judgments. Hence, a PAGA judgment “is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.”²³⁵

These due process protections seem adequate to deter private enforcers from abusing qui tam enforcement in ways that unreasonably penalize defendants. They also preserve the distinction between private and public interests in pursuing employment law penalties by delegating to the judiciary the authority to reduce qui tam penalties that do not serve the public interest. But they reveal two important weaknesses to the current due process framework for qui tam enforcement.

First, there are information asymmetries that courts face in determining whether qui tam enforcement advances the public interest and which courts can be ill-equipped to resolve. California’s “suitable seating” regulation illustrates the problem.²³⁶ The regulated community has objected to the increasing use of PAGA to seek penalties for violations of a California regulation requiring employers to provide “suitable seating” for employees when reasonable.²³⁷ For decades, retailers and banks ignored the regulation and required their cashiers and tellers to stand during the work day, and LWDA has historically under-enforced the regulation.²³⁸ Beginning shortly after the enactment of PAGA, private enforcers began targeting large retailers for PAGA suitable seating claims, with substantial settlements, including a \$65 million settlement with Walmart.²³⁹ While increasing access to justice for these affected employees, and deterring violation of the suitable seating regulation, defendants protested that the private enforcers were misusing public enforcement tools by targeting a regulation that the public agency had not prioritized in its own investigations. In urging the dismissal of these actions, defendants argued that California’s “inaction in enforcing the seating requirement reflect[ed] a tacit conclusion that seats are not required for bank tellers and retail cashiers[]” and effectively nullified the regulation.²⁴⁰

234. *Id.* at *4.

235. *Arias v. Superior Court*, 46 Cal. 4th 969, 985 (Cal. 2009).

236. CAL. CODE REGS. tit. 8, § 11040.

237. *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1, 8 (Cal. 2016) (citing CAL. CODE REGS. tit. 8, §§ 11040, subd. 14(A) (Wage Order No. 4–2001), 11070, subd. 14(A) (Wage Order No. 7–2001)).

238. *See id.* at 22–23 (acknowledging “the DLSE’s inaction in enforcing the seating requirement”).

239. Braden Campbell, *Walmart to Pay \$65M to End Cashiers’ Seating Suit*, LAW360 (Oct. 11, 2018).

240. *Kilby*, 63 Cal. 4th at 8.

The California Supreme Court in *Kilby v. CVS Pharmacy, Inc.* correctly rejected defendants' evidence of agency inaction as "inconclusive"²⁴¹ because agency inaction is as likely to evince lack of public enforcement resources as a determination that the regulation has little public value.²⁴² Defendant's argument in *Kilby* ignores the legislative purpose of qui tam statutes to increase enforcement of labor provisions not adequately enforced by the state agency. From the standpoint of the legislature in enacting PAGA, the lack of public agency enforcement of the suitable seating regulation makes qui tam enforcement *more*, not less important. *Kilby*, nonetheless, shows the difficulties courts face in evaluating defendant claims that a qui tam action does not advance the public interest. Courts lack sufficient information to discern the meaning of agency action or inaction. Agency inaction could reflect (a) a reasoned determination that enforcement is not in the public interest; (b) under-enforcement driven by a lack of public resources; or (c) agency capture by the regulated entities. While courts may seek to resolve this ambiguity by reference to the legislative history of the qui tam statute, legislative intent is itself often ambiguous. PAGA suggests a legislative intent to deter "serious and ongoing wage violations" and address systemic under-enforcement of substantive law in the underground economy.²⁴³ But requiring private enforcers to show that claims advance these interests may unduly constrain qui tam enforcement, compromising the California's legislative intent "to achieve maximum compliance with state labor laws . . ."²⁴⁴ Agency guidance about the public value of "suitable seating" regulations may also reveal an under-discussed public interest, such as protection against repetitive stress injuries, or as a reasonable accommodation for people with disabilities and for pregnant employees in predominantly female occupations.²⁴⁵ Perhaps for these reasons, in *Kilby*, the California Supreme Court wisely found that agency inaction is an insufficient reason to constrain qui tam enforcement. But, as in *Kilby*, legislative guidance that qui tam statutes seek to increase the enforcement of under-enforced statutes has justifiably led courts to defer to the private enforcer's priorities over employer claims of over-enforcement.

241. *Id.* at 23.

242. *Id.*

243. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430 (9th Cir. 2015).

244. *Iskanian v. CLS Transp. Los Angeles, LLC.*, 59 Cal. 4th 348, 379 (Cal. 2014).

245. Women comprise 81.7% of bank tellers and 73% of cashiers. See Matt Rocheleau, *Chart: The Percentage of Women and Men in Each Profession*, BOSTON GLOBE (2016).

Second, while these due process protections can guide courts in evaluating excessive and arbitrary qui tam claims, they impose a one-way ratchet to lower penalties, not to raise inadequate penalties. They also ignore the role of the agency as gatekeeper of qui tam claims and leave unexamined a private enforcer's inadequate representation of affected employees. The binding nature of qui tam claims raises significant due process concerns, and the state and aggrieved parties lack sufficient ability to object to the adequacy of the private enforcer's qui tam award.²⁴⁶ A LWDA review of proposed private PAGA settlements, which found that most were insufficient, shows that this is a serious concern.²⁴⁷ Particularly with the fall of the employment law class action, judicial scrutiny of qui tam awards may provide an insufficient check on private enforcer misuse.

Thus, while current due process protections can guide private enforcers away from over-enforcement, they do not consider under-enforcement, or the interests of the states or the affected employees. Constraining qui tam claims via agency oversight is necessary to preserve the qui tam vehicle from FAA preemption and to reduce the risk of private enforcer misuse. The next Part proposes agency supervision, already required in many states' nondelegation doctrines and contemplated by states considering qui tam expansion, to impose agency oversight of qui tam enforcement beyond the initial stage of the qui tam filing. It also explores measures to represent the interests of affected employees outside class action procedure.

246. In arguing in favor of safeguards for affected employees in the resolution of qui tam claims, I do not claim that preclusion of aggrieved parties seeking to file subsequent qui tam claims violates due process. Normally successive litigation cannot be precluded unless adequate safeguards protect the interests of absentees because the application of claim and issue preclusion to nonparties must be consistent with due process. *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008). However, as the California Supreme Court in *Arias* reasons, a qui tam claim belongs to the government, and preclusion of the government's claim is necessary to safeguard defendants' due process rights. *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (Cal. 2009). In contrast, PAGA permits aggrieved employees to pursue any remedy other than PAGA penalties, CAL. LAB. CODE § 2699(g)(1), and aggrieved employees may invoke collateral estoppel to use a PAGA judgment to obtain remedies for the underlying employment law violations, the same way collateral estoppel may later apply to a government agency action seeking penalties. *Arias*, 46 Cal. 4th at 986; *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014).

247. The PAGA Unit of LWDA reviewed over 1,500 PAGA settlement agreements from 2016 through 2018 and found that seventy-five percent “received a grade of fail or marginal pass, reflecting the failure of many private plaintiffs’ attorneys to fully protect the interests of the aggrieved employees and the state.” DLSE BUDGET PROPOSAL 2019, *supra* note 151, at 6.

IV. PUBLIC AGENCY SUPERVISION OF QUI TAM ENFORCEMENT TO
PREVENT FAA PREEMPTION AND REDUCE THE RISK
OF PRIVATE ENFORCER MISUSE

The previous Part has shown that insufficient agency safeguards risks FAA preemption and can encourage private enforcer misuse, which current due process limitations insufficiently address. This Part first offers the guardrail of public agency oversight, often constitutionalized in state nondelegation doctrine, to require private enforcers to advance a distinct, public interest. While this constraint will improve deterrence, it may not check the incentives of private enforcers—and agencies—to advance and supervise qui tam enforcement in ways that can harm the interests of affected employees. Because qui tam enforcement may not mimic class actions without risking FAA preemption, attending to the due process interests of affected employees will require measures outside of class action procedure. This Part will propose that legislatures contemplating qui tam statutes track the states that have contemplated their own versions of qui tam statutes by permitting state agencies to intervene in a qui tam claim after the initial period of intervention has expired if there is a good cause, such as evidence of a reverse auction. State oversight over qui tam claim resolution will also afford the state agency with the ability to provide affected employees with a voice in resolving qui tam claims. It also proposes that legislatures permit nonprofit public interest organizations to enforce employment law standards under qui tam statutes as whistleblowers that are unlikely to abuse the delegation.

A. Attending to State Interests Through State Agency Oversight

The doctrinal threat of an insufficiently bounded qui tam statute, and attendant risks of private enforcer misuse identified in the previous Part, demonstrate the need for constraints on qui tam statutes beyond employer-focused due process protections. States may structure these constraints through agency oversight, either in legislation—as states that have contemplated qui tam statutes have considered—or in the nondelegation doctrine of many state constitutions.

State nondelegation doctrine attends to this principal-agent problem by requiring agency oversight. While federal nondelegation doctrine principally limits the delegation of power by the legislative branch to the executive branch,²⁴⁸ state nondelegation doctrine also constrains legislative grants to private entities, requiring sufficient

248. *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the

safeguards on private delegations to prevent abuse.²⁴⁹ By distinguishing the public and private interests in qui tam enforcement, the nondelegation doctrine serves as a constitutional guardrail to preserve the qui tam vehicle from FAA preemption and address the risk of private enforcer misuse of qui tam enforcement. Tracking the FCA, states with a strong nondelegation doctrine must permit the agency to move to intervene in a private enforcer's qui tam claim for good cause.²⁵⁰ States with weaker nondelegation doctrines, like California,²⁵¹ may require agency oversight whether or not required in their constitution. All seven states that have considered qui tam bills track these constraints, akin to the FCA, permitting agency intervention at any time after the filing of a qui tam claim upon motion, for good cause shown.²⁵² Most of these bills additionally authorize the state agency to disqualify qui tam counsel based on past misconduct.²⁵³ While not constitutionally required, to improve oversight over inadequate PAGA settlements, California could adopt the approach of other states in amending PAGA to permit the LWDA to intervene in or dismiss a PAGA claim after the initial period has elapsed upon a showing of good cause.

agency.”). Federal courts have declined to strike down delegations to private entities since *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). See Metzger, *supra* note 156, at 1438–40.

249. See Nester M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 622–24 (2017); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–1201 (1999).

250. See, e.g., *Int'l Game Tech., Inc. v. Second Judicial Dist. Court of Nevada*, 122 Nev. 132, 149–50 (Nev. 2006).

251. While California has a weak nondelegation doctrine, see *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 866 (Cal. Ct. App. 2017), *as modified on denial of reh'g* (Dec. 13, 2017), *review denied* (Feb. 14, 2018) (quoting *Iskanian*, 59 Cal. 4th 348, 391), PAGA permits the agency to intervene in a qui tam claim during an initial period despite the fact that California's nondelegation doctrine does not require it.

252. See H.B. 5381, 2020 Gen. Assemb., Feb. Sess. § 1(s) (Conn. 2020) (permitting public agency to intervene as of right within thirty days of filing of action, and afterward for good cause shown); S.P. 558, 129th Leg., 1st Reg. Sess., No. 1693 §§ 7(A)(3)-(4) (Me. 2019) (permitting state to dismiss or settle qui tam claim at any time upon notice and motion if “the court determines that such dismissal or settlement is fair, adequate, reasonable and in the public interest,” and so long as the resolution provides for “fair compensation for the attorney's fees and costs”); S.B. 1066, 191st Gen. Assemb. § 364(i) (Mass. 2019) (permitting intervention at any time “for good cause shown”); Assemb. B. A2265, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019) (same); S.B. 750, 80th Leg. Assemb., Reg. Sess. § 5(7)(b) (Or. 2019) (same); S.B. 139, 2019 Leg. § 52(d)(1)(B) (Vt. 2019) (same); H.B. 1965, 66th Leg., Reg. Sess. § 6(1)(b) (Wash. 2019) (same).

253. Me. S.P. 558, No. 1693 § 6 (permitting state attorney general after notice and hearing to disqualify qui tam counsel, based on past conduct showing that “the attorney does not meet the required professional standards of representatives or fails to zealously pursue the remedies” available in qui tam statute); Mass. S.B. 1066 § 355 (same); Or. S.B. 750 § 5(6) (same); Wash. H.B. 1965 § 5(4) (same).

Public agency supervision, whether through state nondelegation doctrine or by statute, clarifies the agency's distinct interest in advancing the public interest. The states' ongoing qui tam intervention rights, per *Waffle House*, "confers on the agency the authority to evaluate the strength of the public interest at stake."²⁵⁴ Such supervision addresses the *Epic Systems* concern that qui tam claims are end runs around the FAA by preserving the state's role as the party at interest in the claim. It also reduces the risk of court error in determining whether qui tam claims advance the public interest, by referring the question to the public agency. Taking the above example of *Price*, the court's approval of the *Price* settlement, notwithstanding LWDA's objections, appears to have contravened the intent of the qui tam statute and the agency's public enforcement priorities. Particularly in instances in which qui tam claimants act purely as representatives of the state (as opposed to the joined qui tam and class claims in *O'Connor*), the agency seems well positioned to determine whether the proposed resolution of the qui tam claim sufficiently advances state interests.²⁵⁵ Taking the state's interest seriously would permit the agency to move to intervene to resolve the claim itself or to dismiss the claim for good cause shown. Once the agency has chosen not to intervene, the court may more confidently conclude that the qui tam enforcement advances a distinct, public interest.

Providing for sufficient agency oversight over private enforcers to intervene in the resolution of qui tam claims that do not advance the public interest can improve deterrence and protect qui tam enforcement from FAA preemption. State agency supervision alone, however, will not ensure that private enforcers adequately represent the interests of the affected employees. The next Section takes up the interests of affected employees and proposes measures to encourage affected employees to participate in the resolution of qui tam claims.

B. Attending to Affected Worker Interests Through Agency-Administered or Delegated Qui Tam Claim Resolutions

Up until now, this Article has assumed that the greatest risk to qui tam enforcement is its loose oversight by state agencies. Doctrinally, this is because agency oversight can guard qui tam enforcement from

254. *E.E.O.C. v. Waffle House Inc.*, 534 U.S. 279, 291 (2002).

255. Legislatures, of course, may also have greater expertise than courts in identifying the public interest in qui tam enforcement, and may structure incentives in qui tam statutes to encourage private enforcers to enforce in specific industries or involving specific types of practices or employees. The legislature may also require agency intervention under specific circumstances, as I propose *infra*, Part IV.B.1.

FAA preemption. Making private enforcers accountable to public agencies that are charged with representing the public interest can also be an attractive model to deter unfaithful agents who would abuse qui tam enforcement in ways that harm the public interest.

But constraining qui tam enforcement with agency oversight can create incentives for public agency abuse and can be in tension with the goal of improving access to justice. Aggrieved parties, and private enforcers, may be less willing to assert qui tam claims if agency oversight is more likely or onerous. And whether placing the private enforcer under firmer agency control makes private enforcers more accountable to the interests of the affected employees is contestable.

Class action scholars, raising similar concerns, consider forms of participation to improve the accountability of class counsel to class members.²⁵⁶ But class action procedure for participation by affected employees in class claims are unavailable in state qui tam litigation. Qui tam statutes offer no participation to the affected class in litigation, as the claim belongs to the state and not the aggrieved parties. Exit rights are meaningless for qui tam claims, as most aggrieved employees are not parties to the claims. Nor could states improve affected employee participation by grafting class action procedure into qui tam statutes without courting FAA preemption, as this would further muddle the distinction between state and individual interests in a qui tam claim. Joinder of qui tam and class claims permits courts to consider the interests of the affected class in their resolution. But with the fall of the employment law class action after *Epic Systems*, class action procedure to encourage participation by the affected class will be beyond the reach of state qui tam statutes.

This Section argues that accounting for the interests of the affected employees could be accomplished through an agency-led process for affected employees to object to a claim resolution plan. This can also be accomplished by the legislative assignment of qui tam enforcement to nonprofit public interest organizations less likely to misuse qui tam enforcement than for-profit enforcers.

1. Agency-Administered Resolution of Qui Tam Claims

Agencies, upon identifying the inadequate representation of affected employees by private qui tam enforcers, may intervene in these claims to resolve them internally and seek both penalties and restitu-

256. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 438 (2000); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 833 (1997).

tion for victims as they would in any public enforcement action. As Michael Sant'Ambrogio and Adam Zimmerman demonstrated in a series of articles, government agencies often mimic class action procedures to adjudicate and resolve aggregate claims.²⁵⁷ *Waffle House* permits agencies to seek a wide range of victim-specific class relief despite mandatory arbitration.²⁵⁸ Public agencies, which can control the process and outcome of enforcement actions outside of a court proceeding, may be able to resolve qui tam claims more efficiently than private enforcers in court. After *Epic Systems*, public agencies can almost certainly resolve related employment law claims more efficiently as well, by virtue of their ability to aggregate claims notwithstanding mandatory arbitration with class waivers. Granting agencies the right to intervene in qui tam enforcement can not only protect the states' interests, but can also advance affected employees' interests in restitution for related employment law violations.

But as Professor Zimmerman argues in the context of class actions, the same principal-agent problem of misaligned interests that can affect private qui tam enforcers can also affect agencies. Many agencies lack basic due process protections afforded by the judiciary to encourage class member participation in class action settlements.²⁵⁹ This is particularly problematic to the extent that, as with PAGA, employees have no legally cognizable interest in penalties, yet are bound to qui tam judgments. In these circumstances, aggrieved employees lack standing to object to the sufficiency of the bounty even though the bounty may be the only realistic award that many aggrieved employees may receive after a harm caused by an employment law violation.²⁶⁰ Lacking these protections, agencies may resolve qui tam

257. Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 518 (2011) [hereinafter Zimmerman, *Distributing Justice*]; Michael Sant'Ambrogio and Adam Zimmerman uncover a pattern of federal agencies, including the EEOC, adopting internal procedures that mimic class action procedures. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1667–68 (2017); see also Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1999 (2012).

258. *Waffle House*, 534 U.S. at 297–98.

259. Zimmerman, *Distributing Justice*, *supra* note 257, at 540, 546–47 (Agencies do not require, as class action settlements do, that “all class members receive individualized notice, offer opportunities to members to intervene or object, and divide members with different interests into subclasses that are each entities to separate representation in settlement negotiation.”); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 531–42 (2012).

260. A bounty amount that is far lower than the harm caused by the aggrieved employees' attendant employment law claim is not be objectionable doctrinally or from a deterrence perspective, but is problematic from an access to justice standpoint, insofar as a qui tam bounty is the only realistic award available to a low-wage worker who has been harmed by an employment law violation.

claims without ensuring that the penalties sought are adequately keyed to the harm the violations caused aggrieved employees. As Margaret Lemos argues, addressing this due process concern will require safeguards to protect the interests of affected employees.²⁶¹ And yet, requiring public agencies to expend enforcement resources on qui tam safeguards seems at odds with the very purpose of qui tam enforcement, which is intended to supplement public agency enforcement resources.

To be sure, all class action settlement procedures are not necessary, and at times may not be desirable, to adequately represent the affected employees' interests.²⁶² Criticisms that the class action vehicle creates "monopoly power . . . over the representation of class members"²⁶³—requiring checks on the exercise of this power—do not apply here. Individually affected employees are not due the process afforded to them in class action proceedings, since qui tam claims do not resolve their individual rights. Affected employees retain their employment law rights, which they may assert in litigation or an arbitral forum. As argued in the previous Part, state agencies (prodded by the legislature) can be well-positioned to determine the public interest served in qui tam enforcement. If agencies abuse qui tam enforcement, they may be held publicly accountable in ways that class action attorneys cannot. Settlement of a qui tam claim may, additionally, pose fewer conflicts among affected employees, as penalties are easier to ascertain and distribute than individualized damages assessments.

Nonetheless, the state interest in qui tam claims and the political legitimacy of public enforcement do not diminish the importance of qui tam claims (and restitution for attendant employment law violations) to affected employees. This is especially true post-*Epic Systems*, after which many individual employment law claims cannot be effectively vindicated. States contemplating qui tam statutes should consider administrative procedures to encourage private enforcers of qui tam claims to represent aggrieved employees for their attendant employment law violations in individual arbitrations.²⁶⁴ They should also permit aggrieved parties to object to proposed settlements of qui tam

261. Lemos, *supra* note 259, at 542–48.

262. Opt-out rights, for example, are of little value for a qui tam claim in which the aggrieved parties are bound to any judgment.

263. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168 (2003).

264. Professor Zimmerman additionally proposes the appointment of a mediator to identify affected parties, which "could then develop a settlement distribution plan under a negotiated rulemaking process, subject to agency oversight" and judicial review. Zimmerman, *Distributing Justice*, *supra* note 257, at 564.

claims.²⁶⁵ State agencies may encourage these practices by declining to intervene in the resolution of *qui tam* claims in which the private enforcer follows them, and legislatures may require agencies to follow them internally when they do intervene.

2. *Assignment of Qui Tam Enforcement to Nonprofit Organizations*

While agency-led and -encouraged *qui tam* claim resolution can advance the interests of both the state and aggrieved employees in effective enforcement of employment law, this assumes that public agencies can correct incentives by private enforcers to misuse *qui tam* enforcement. This may be true in some circumstances, as the previous Part raised in its discussion of reverse auctions. But, applied more broadly, this is a contestable proposition.²⁶⁶ In addition to lacking accountability, state agencies may—or must, if we are to take due process seriously—consider the interests not only of victims, but also the defendants.²⁶⁷ Lacking formal procedural safeguards in agency claim resolution, state agency accountability to affected employees is attenuated by electoral politics, in which the priorities of state agencies may shift dramatically from one term to the next.²⁶⁸ Increased agency oversight may also increase the risk of agency abuse of the private delegation, particularly in state government. As Miriam Seifter cautions, state government can be anti-majoritarian in a way that opens state agencies to regulatory capture.²⁶⁹ Captured agencies with broad intervention rights may intervene in *qui tam* actions in order to voluntarily discontinue meritorious claims.²⁷⁰ These agency incentives sug-

265. *Id.*

266. The federal DOL recently signaled its intention not to enforce wage-and-hour law in workplaces subject to MAAs. Zachary Clopton & David Noll, *Trump Labor Officials Are Secretly Using Forced Arbitration to Get Corporations Off the Hook*, SLATE (May 10, 2019).

267. Margaret Lemos, *Three Models of Adjudicative Representation*, 1743 U. PENN. L. REV. 1743, 1754 (2017) [hereinafter Lemos, *Three Models of Adjudicative Representation*] (“[T]he relationship between representative and represented is far more attenuated in the context of government litigation than it is in the individual model.”); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

268. Agencies may change their previous positions, and switch sides in multi-term enforcement actions. Lemos, *Three Models of Adjudicative Representation*, *supra* note 267, at 1756–57.

269. According to Professor Seifter: “the confluence of limited openness, a limited and imbalanced monitoring community, and limited media attention . . . often redounds to the benefit of concentrated interests.” Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 112 (2018).

270. This is the concern raised by DOJ’s recent requirement that agency staff searchingly review relator claims and dismiss those that lack merit: that DOJ is seeking to reduce public enforcement with little public oversight rather than to weed out meritless claims. U.S. DEPT. OF JUSTICE, MICHAEL GRANSTON, *FACTORS FOR EVALUATING DISMISSAL PURSUANT TO 31 U.S.C. § 3730(c)(2)(A)* (Jan. 10, 2018), <https://www.fcadefenselawblog.com/wp-content/uploads/sites/>

gest, as David Freeman Engstrom argues, that qui tam statutes, by removing some agency control from public enforcement, “can improve, rather than degrade, democratic politics by offering a salutary counterweight to ‘capture’ and other patterns of political control within the legislative or administrative process.”²⁷¹

This analysis suggests that while for-profit, private enforcers may have a profit motive to misuse qui tam enforcement, state agencies can also distort qui tam enforcement in ways that under-deter and harm affected employees. For this reason, a strong nondelegation doctrine that would permit the agency to intervene and dismiss qui tam claims for any reason²⁷² may harm access to justice, while requiring the agency to show good cause in order to intervene may strike a better balance. Whatever the optimal level of agency oversight over qui tam enforcement to protect the states’ interests, states, in choosing the intervention rights of the agency, should consider their likely impact on deterrence and the interests of affected employees.

To the extent that the profit motive can distort public enforcement priorities, channeling qui tam enforcement to private enforcers that lack a profit motive may improve access to justice²⁷³ without threatening the states’ interests. Qui tam statutes may reduce the risk of private enforcer misuse, as most states considering qui tam statutes have contemplated, by assigning qui tam enforcement to nonprofit public interest organizations as representative organizations.²⁷⁴ The District

561/2018/01/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf. The bills proposed by Massachusetts, Oregon and Washington address this incentive for public agency abuse by conditioning private enforcer disqualification on a court’s determination of misconduct. See S.B. 1066, 191st Gen. Assemb. § 355 (Mass. 2019); S.B. 750, 80th Leg. Assemb., Reg. Sess. § 5(6) (Or. 2019); H.B. 1965, 66th Leg., Reg. Sess. § 5(4) (Wash. 2019).

271. Engstrom, *supra* note 216, at 2003–04.

272. The nondelegation doctrine of Florida, for example, requires that the state attorney general retain the power to dismiss a relator’s qui tam action for any reason, even if the state declined to previously intervene. *Barati v. State*, 198 So.3d 69, 82–83 (Fla. Dist. Ct. App. 2016), *review denied*, No. SC16-834, 2016 WL 4429843 (Fla. Aug. 22, 2016), *and cert. denied sub nom. Barati v. Fla.*, 137 S. Ct. 1085 (2017), *reh’g denied*, 137 S. Ct. 1618 (2017) (rejecting argument that state must first show good cause before intervening to dismiss an FCA claim).

273. Because restricting qui tam enforcement to nonprofit corporations would reduce access to justice by constraining it to the limited capacity of nonprofit corporations, nonprofit corporation qui tam enforcement supplements, and does not replace, public and for-profit enforcement.

274. See Mass. S.B. 1066 § 227(4) (defining as a representative organization “an organization that is tax-exempt . . . and that regularly advocates on behalf of employees or that regularly assists” in the enforcement of state employment law, and that has been designated by the aggrieved person); S.P. 558, 129th Leg., 1st Reg. Sess., No. 1693 § 840-A(4) (Me. 2019) (defining as a representative organization “a nonprofit corporation or union that regularly assists in enforcement [of state employment law] . . . and has been selected by an aggrieved person” to initiate a qui tam claim on her behalf); Assemb. B. A2265, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019) (same); Or. S.B. 750 § 1(4) (same); S.B. 139, 2019 Leg. § 51(7) (Vt. 2019) (same). Washington does not restrict representative organizations to non-profit organizations, but the term does in-

of Columbia enacted a version of this in permitting public interest organizations to sue on behalf of consumers to enforce consumer protection laws.²⁷⁵ Additionally, similar enforcement delegations have been enacted internationally.²⁷⁶ Following these examples, California should consider amending PAGA to provide for representative organization standing to assert qui tam claims as well.

Restricting qui tam claims to nonprofit corporations with a charitable purpose of advancing the interests of affected employees supplements agency oversight with nonprofit board governance. This is likely to improve access to justice, as nonprofits have an obligation to ensure that their activities do not violate their charitable mission. Assigning qui tam enforcement to nonprofits may also improve affected employee participation in the litigation. As Professor Lemos argues, these groups can improve the democratic accountability of enforcement by virtue of their accountability to the collective interests of the affected community.²⁷⁷ This is particularly the case for unions and worker-led organizations, which have a reputational interest in the participation of their members in qui tam enforcement as aggrieved employees.²⁷⁸ Permitting employees to remain confidential by designating representative organizations as relators also advances deterrence and access to justice by reducing the threat of retaliation.

Of course, claims about the motivations and democratic accountability of nonprofit corporations are also contestable. For-profit firms may seek to bypass these limitations by conducting qui tam litigation through non-profit organizations, and bona fide nonprofit corporations may be no more open to aggrieved employee participation than

clude “labor organization[s],” and requires the organization to “be one that regularly assists in enforcement” of state employment law. *See* Wash. H.B. 1965 §3(9).

275. *See* D.C. CODE ANN. § 28-3905 (West 2019); *see* Nat’l Consumers League v. Bimbo Bakeries USA, 46 F. Supp. 3d 64 (D.D.C. 2014) (The District of Columbia permits “a public interest organization” to sue “on behalf of the interests of a consumer or a class of consumers,” against “any person of a trade practice in violation of” consumer protection laws.).

276. *See* Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion: Appendix Only* (May 22, 2015), <https://ssrn.com/abstract=2609339> (listing Belgium and the Netherlands).

277. Lemos, *Three Models of Adjudicative Representation*, *supra* note 267, at 1761–64. Professor Lemos, while acknowledging that most nonprofit public interest organizations are not authorized by and accountable to the affected community, nonetheless notes that “nonprofits are accountable—to those who support and validate them.” *Id.* at 1761.

278. I have previously made this argument in the context of non-profit, public-interest organizations that collaborate with state agencies in assisting low-wage workers with employment law claims. *See* Elmore, *supra* note 35, at 122–29.

for-profit corporations.²⁷⁹ Resource-starved nonprofit corporations may be unable to allocate sufficient resources to resolve claims effectively. Vesting private enforcement in nonprofits that rely on attorney's fees for funding may make those entities more beholden to, and less likely to be effective watchdogs of public agencies. For these reasons, this Article agrees with the approach of most state bills: contemplating nonprofit organizations as relators of managing these risks by limiting representative organizations to those that regularly enforce state employment law, and by delegating the decision to disqualify representative organizations to courts and not the state agency. While these measures cannot contain all possible risks of nonprofit misuse, these risks are far outweighed by the risks of agency capture by employers and under-enforcement caused by the decline of aggregate litigation by employees after *Epic Systems*.

In short, while qui tam statutes cannot substitute for the participation that class members can have in a class action, the qui tam vehicle can be an effective substitute of class action claims to deter violations of employment law. It can also substantially improve access to justice for vulnerable employees who would not otherwise seek to vindicate a meritorious claim.

CONCLUSION

After *Epic Systems*, most workplaces require employees to waive participation in class claims. This undermines deterrence and access to justice, particularly for low-value and difficult-to-prove employment law claims. The state response of qui tam statutes that partially delegate the public interest in penalties to private enforcers can improve deterrence of and access to justice for these claims. But *Epic Systems* raises the possibility that courts will view state qui tam claims with loose agency oversight as a class action in disguise, requiring their preemption under the FAA. Privatizing public enforcement may also create incentives for private enforcers to misuse the delegation and does not adequately protect the interests of the states or affected employees. This Article argues that state agency oversight can protect state qui tam claims from FAA preemption, reduce the risk of private enforcer abuse, and permit public agencies to provide aggrieved parties to participate in the resolution of qui tam claims. Legislatures may further account for affected employee interests by requiring agency

279. See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 U.C.L.A. L. REV. 1300, 1338–49 (2016) (examining limitations on voice and exit rights in non-profit organizations that commonly interact with public agencies, which do not ensure public participation).

supervision of the resolution of qui tam claims and assigning them to nonprofit corporations, which are less likely to abuse the delegation.