

# UNWAIVABLE: PUBLIC ENFORCEMENT CLAIMS AND MANDATORY ARBITRATION

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## INTRODUCTION

In California, two foundational laws have framed the debate around waivers of contractual rights since their codification in 1872. The first—the “anti-waiver rule”—stated that while any citizen may contractually consent to “waive the advantage of a law intended solely for his benefit,” any “law established for a *public reason* cannot be contravened by a private agreement.”<sup>1</sup> An accompanying rule—the “anti-exculpation rule”—held that “[a]ll contracts which have for their object . . . to exempt anyone from responsibility for his own fraud . . . or violation of law . . . are against the policy of the law.”<sup>2</sup>

With these rules, California inaugurated a public policy of restraining parties’ ability to leverage bargaining power to exempt themselves from public legal obligations via private contracts. Early California courts often relied on the anti-waiver and anti-exculpation rules, later codified as sections 3513 and 1668 of the California Civil Code, respectively (together, “Sections 3513 and 1668”), when enforcing this public policy. So, for example, in *Grannis v. Superior Court of City and County of San Francisco*,<sup>3</sup> a party tried to waive the right to enforce a divorce decree.<sup>4</sup> The Supreme Court of California declared that “there can be no effectual waiv[ing] by the parties of any restriction established by law for the benefit of the public.”<sup>5</sup> Given the state’s interest “in the preservation and permanence of the marriage relation,” laws enacted to protect marriage could not be relinquished by private

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1. CAL. CIV. CODE § 3513 (West 2020) (emphasis added).
2. *Id.* § 1668.
3. 79 P. 891 (Cal. 1905).
4. *Id.* at 892.
5. *Id.* at 895.

agreement, nor could parties exculpate themselves from their legal obligations under the law.<sup>6</sup>

As time passed, laws “established for a public reason”<sup>7</sup> grew to fill volumes of California’s code, and courts continued to hold that such laws were unwaivable by private contract. For example, in the 1930s, the state enacted provisions mandating “formal foreclosure proceedings” to protect debtors bankrupted by the Great Depression.<sup>8</sup> In *Winklemen v. Sides*,<sup>9</sup> the California Supreme Court refused to enforce advance contractual waivers of these statutory protections, which it held were enacted “to benefit a large class of the inhabitants of the state,” specifically “the debtor class.”<sup>10</sup> In these and many other contexts, lawmakers and judges together shaped public policy by declaring rights enacted for the general welfare unwaivable.<sup>11</sup>

California’s anti-waiver policies took on special importance with the advent of the consumer rights revolution of the 1960s, an era in which many states enacted legislation to protect consumers from market abuses.<sup>12</sup> For its part, California extended its unfair competition law (UCL) to include an array of consumer claims<sup>13</sup> and passed a sweeping Consumer Legal Remedies Act<sup>14</sup> (CLRA). These laws offered the state’s citizens powerful tools to remedy widespread harms<sup>15</sup>—including the right to seek public injunctive

6. *Id.*

7. CIV. § 3513.

8. *See* *Winklemen v. Sides*, 88 P.2d 147, 156 (Cal. Dist. Ct. App. 1939) (dictum) (“California has enacted an exact system and a definite procedure for foreclosure of mortgages and deeds of trust. These laws in effect at the time of the execution of the mortgage or deed of trust enter into and become a part of such contracts.”).

9. 88 P.2d 147 (Cal. Dist. Ct. App. 1939).

10. *Id.* at 158 (citation omitted).

11. *See, e.g.*, *Am. Philatelic Soc’y v. Claibourne*, 46 P.2d 135, 140 (Cal. 1935) (declaring “the right of the public to protection from fraud and deceit”); *Friedman v. Pac. Outdoor Advert. Co.*, 170 P.2d 67, 69, 71 (Cal. Dist. Ct. App. 1946) (declaring a municipal law prohibiting “the burning of brush, waste material, dry grass and weeds on any lot not set aside for such purposes” to be “an ordinance enacted for the public good [that] cannot be contravened by private agreement”); *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983, 988 (Cal. Dist. Ct. App. 1944) (“The rights of employees as now declared by section 2855 of the Labor Code fall squarely within the prohibition of section 3513 of the Civil Code, that rights created in the public interest may not be contravened by private agreement.”).

12. *See, e.g.*, Robert M. O’Neil, *State Consumer Protection in a Federal System*, 1975 ARIZ. ST. L.J. 715, 716 (describing the “growth of concern and activity at the state level” with the enactment of consumer protection laws “since 1965 and many since 1970”).

13. Act Effective Aug. 21, 1933, 1933 Cal. Stat. 2482, ch. 953, § 1 (codified as amended in CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2020)) (“Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.”). The UCL was later moved to the Business and Professions Code and codified at sections 17200–17210. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1097 (Cal. 1998) (dictum).

14. 1970 Cal. Stat. 3157 (codified as amended in CAL. CIV. CODE §§ 1750–1785 (West 2020)).

15. An early version of the UCL was especially broad and authorized “any person” to act as a kind of “private attorney general” in bringing actions for injunctions in the name of the “general public.” *See* Act Effective July 8, 1977, 1977 Cal. Stat. 1202, ch. 299, § 1 (codified as amended in CAL. BUS. & PROF. CODE § 17204 (West 2020)). A 2004 referendum known

relief against “unlawful acts that threaten future injury to the general public.”<sup>16</sup> Recognizing that these remedies would be neutralized if consumers were forced to waive their rights in exchange for a product or service, legislators incorporated powerful anti-waiver language to prevent powerful market actors from leveraging their superior bargaining power to rob consumers of legal rights.<sup>17</sup>

The California public rights tradition was likewise on display in the late 1990s and early 2000s, as the state’s flourishing economy attracted an influx of workers in search of better employment opportunities.<sup>18</sup> This explosive job growth left the California Labor and Workforce Development Agency (LWDA) unable to monitor the state’s hundreds of thousands of workplaces.<sup>19</sup> Exploitative black-market labor and underground economies soon emerged in this unregulated environment, driving down “wages, eliminat[ing] benefits, and reduc[ing] job security” for many low-wage workers.<sup>20</sup> Seeking to address the widening enforcement gap and prevent employers from “violating the law with impunity,”<sup>21</sup> the state legislature enacted the Private Attorney General Act of 2004<sup>22</sup> (PAGA). The statute deputizes the state’s workers, authorizing them to bring suit “personally and on behalf of other current or former employees to recover civil penalties for

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as Proposition 64 limited the standing provision to injured persons. *See* CAL. BUS. & PROF. CODE. §§ 17204, 17535 (West 2020).

16. *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017) (first citing *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164 (Cal. 2003); and then citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 74 (Cal. 1999)) (dictum); *see also* § 1, 1933 Cal. Stat. at 2482.

17. *See, e.g.*, Consumer Legal Remedies Act, CAL. CIV. CODE § 1751 (West 2020) (“Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.”); *Id.* § 1670.5(a) (providing that courts may refuse to enforce any contract found “to have been unconscionable at the time it was made” or may “limit the application of any unconscionable clause as to avoid any unconscionable result”).

18. *See* James Sterngold, *A Changing California Emerges from Recession*, N.Y. TIMES (Mar. 29, 1995), <https://www.nytimes.com/1995/03/29/us/a-changing-california-emerges-from-recession.html> [<https://perma.cc/3Z8V-4XFS>] (describing “renewed growth” in the California economy and quoting experts as predicting net inflows of people).

19. *See* S. JUDICIARY COMM., BILL ANALYSIS, S.B. 796, 2003–2004 Reg. Sess., at 2 (Cal. 2003) (defining “underground economy” to mean “businesses operating outside the state’s tax and licensing requirements” and estimating that, in 2003, the state lost approximately \$3–6 billion in taxes from the lack of regulation).

20. ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 216 (2003).

21. ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS, S.B. 796, 2003–2004 Reg. Sess., at 3–4 (Cal. 2003).

22. 2003 Cal. Stat. 6628 (codified as amended in CAL. LAB. CODE §§ 2698–2699.6 (West 2020)); *see also* *Arias v. Superior Ct.*, 209 P.3d 923, 929–30 (Cal. 2009) (“In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.”).

Labor Code violations.”<sup>23</sup> Here again, where employers have demanded that workers relinquish these statutory enforcement rights as a precondition to employment, California courts have steadfastly held that “PAGA’s purpose as a law-enforcement mechanism” renders an employee’s right to bring a claim under the statute unwaivable by private agreement.<sup>24</sup>

In the enactment of PAGA and the inclusion of public injunction rights conferred by the UCL and CLRA, we see California’s embrace of the private attorney general model and, yet again, evidence of the state’s 150-year commitment to the unwaivability of actions to enforce public rights.

But now, the advent of mandatory arbitration clauses in standard-form contracts is putting California’s tradition of respect for unwaivable rights to a stress test. In 2011, the U.S. Supreme Court held that California’s judge-made rule that recognized an unwaivable right of workers and consumers to proceed collectively in resolving disputes, whether in court or arbitration,<sup>25</sup> was preempted by the Federal Arbitration Act<sup>26</sup> (FAA). The import of the Supreme Court’s arbitration jurisprudence for PAGA, public injunction cases, and other expressions of California’s policies against the private waiver of public rights warrants close scrutiny. In recent years, state and federal courts in California have upheld these provisions against preemption challenges, but efforts by the Chamber of Commerce and its allies to upend California’s tradition of respecting unwaivable public rights will not abate soon.<sup>27</sup>

This Essay is the first to examine the implications of California’s recent jurisprudence holding public enforcement claims unwaivable in standard-form contracts of adhesion and the inevitable clash with the Supreme Court’s interpretation of the FAA. With its rich history of rebuffing efforts to deprive citizens of public rights through private contract, California provides an ideal laboratory for exploring this escalating conflict. Indeed, as a number of other states are now on the verge of enacting statutes like PAGA and granting

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23. *Arias*, 209 P.3d at 930 (citing CAL. LAB. CODE § 2699(a) (West 2020)). An “aggrieved employee” is defined as an employee “against whom one or more of the alleged violations was committed.” CAL. LAB. CODE § 2699(c) (West 2020).

24. *See, e.g.*, *Plaisted v. Dress Barn, Inc.*, No. 12-cv-01679, 2012 WL 4356158, at \*1 (C.D. Cal. Sept. 20, 2012).

25. *See generally* *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005) (ruling that a class-banning arbitration clause was unenforceable under California law), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *see also infra* notes 38–46 and accompanying text.

26. 9 U.S.C. §§ 1–15. *See generally* *Concepcion*, 563 U.S. 333.

27. While arbitration advocates and corporate defense firms have sought review of these decisions as contravening *Concepcion*, the U.S. Supreme Court has remained silent on whether its FAA jurisprudence applies to waivers of public enforcement claims. *See, e.g.*, John B. Lewis & Dustin M. Dow, *The Supreme Court’s Denial of Certiorari in Iskanian Only Hardens the Federal-State Divide Over PAGA Claims*, LEXOLOGY (Jan. 21, 2015), <https://www.lexology.com/library/detail.aspx?g=5f5dbb2a-d9d8-4c50-b636-42096834feab> [https://perma.cc/64QS-7BRK].

public injunction remedies like those provided by the CLRA,<sup>28</sup> many eyes are on the viability of public enforcement claims.

A series of conflicts dating back a decade forms the backdrop for the impending conflict and the structure of this Essay. Round One begins by surveying the initial clash between California's policy prohibiting contractual waivers of the right to collective adjudication and the Supreme Court's interpretation of the FAA. In that early skirmish, a divided Supreme Court held that the FAA preempted state law rules that stand as an obstacle to the FAA's own objectives. In the intervening years, many forms of state regulation of arbitration clauses have been found preempted.<sup>29</sup> But not so in California, where the state's provision of collective remedies under PAGA and consumer protection laws have withstood FAA preemption challenges. As we show in the final two parts of this Essay, federal and state courts in California have repeatedly reaffirmed the state's long-standing prohibitions on private contractual waivers of substantive rights, even where those waivers are couched in otherwise enforceable arbitration agreements. We conclude by offering a set of predictions about the continued legal challenges that lie ahead, as well as inevitable efforts to "draft around" principles of unwaivable public rights.

#### I. ROUND ONE: THE WAIVABLE RIGHT TO COLLECTIVE ADJUDICATION

Mandatory arbitration provisions require parties to waive their right to resolve disputes in courts and to pursue claims in private arbitration instead.<sup>30</sup> These provisions may also demand that parties waive their rights to procedures and remedies that ordinarily attend public litigation, such as the right to seek punitive damages or enjoin future wrongdoing.<sup>31</sup> Perhaps most controversial are arbitration clauses containing collective action waivers, which prohibit parties from aggregating their claims in court or in arbitration. In instances involving small per-plaintiff damages, waivers of the right to proceed collectively render the substantive rights at issue unenforceable as a practical matter and release the defendant from any potential liability. Accordingly, class-banning arbitration clauses raise precisely the kind of

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28. See 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, 538 n.224 (2020) (reporting that qui tam bills have been formally introduced in Maine, New York, Vermont, and Washington).

29. See, e.g., *Kindred Nursing Homes Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426–28 (2017) (holding that the FAA preempted Kentucky's application of its judge-made "clear statement" rule in nursing home admissions contracts, which required additional assent to arbitration); *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 532–33 (2012) (per curiam) (holding that the FAA preempted reliance on public policy in refusing to enforce arbitration clauses in nursing home admissions documents).

30. See, e.g., Jean R. Sternlight, *Is the U.S. out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIA. L. REV. 831, 834–35 (2002) (noting that a hallmark of mandatory, binding arbitration is the "eliminat[ion of] the claimant's right to present claims to a judge or jury").

31. See generally SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 41–46 (2015) (stating that arbitration clauses have also been used to shorten statutes of limitation and restrict discovery).

public policy concerns that prompted Sections 3513 and 1668 of the California Civil Code.

As class-banning arbitration clauses began to proliferate in consumer and small business contracts in the late 1990s and early 2000s, litigants initially challenged their enforcement on unconscionability and public policy grounds.<sup>32</sup> California's courts were then asked to determine the enforceability of these class action waivers in light of the state's strong anti-waiver/anti-exculpation policies, on the one hand, and the "federal policy favoring arbitration" embodied in the FAA, on the other.<sup>33</sup> In a series of cases from that era, the courts made plain that state policy would take priority. For example, in 2002 a California intermediate appellate court declared in *Szetela v. Discover Bank*<sup>34</sup> that a collective action waiver in a standard-form consumer credit card contract was unconscionable and unenforceable in California.<sup>35</sup> Citing Sections 3513 and 1668, the panel held that the waiver "contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general."<sup>36</sup> Following almost immediately on the heels of *Szetela*, the Ninth Circuit adopted this interpretation of state law in holding similar collective action bans unenforceable.<sup>37</sup>

Two years later, the California Supreme Court in *Discover Bank v. Superior Court*<sup>38</sup> again confronted a collective action waiver imposed in a standard-form arbitration clause.<sup>39</sup> The provision at issue required cardmembers, as a condition of using their credit cards, to waive any rights to "consolidate claims in arbitration . . . or arbitrate any claim as a

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32. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 399 (2005) (describing "first-wave" unconscionability challenges under FAA § 2, which provides that a party may oppose arbitration on such "grounds as exist at law or in equity for the revocation of any contract" (quoting 9 U.S.C. § 2)).

33. See *id.* at 394; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (announcing a "federal policy favoring arbitration" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

34. 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

35. *Id.* at 867–68 (finding "manifest one-sidedness of the no class action provision at issue here . . . blindingly obvious" because "credit card companies typically do not sue their customers in class action lawsuits" and deducing that the provision was therefore "clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money, such as the \$29 [plaintiff] sought").

36. *Id.* at 868.

37. See *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (concluding that class action waivers in a CLRA claim violated California law, relying in part on *Szetela*); see also *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (holding the same).

38. 113 P.3d 1100 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

39. *Id.* at 1103. The plaintiff alleged that Discover Bank imposed a twenty-nine-dollar late fee on payments received on the payment due date but after its undisclosed 1:00 p.m. "cut-off time" in violation of the Delaware Consumer Fraud Act, which prohibits misrepresentations "of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale, lease or advertisement of any merchandise." *Id.* at 1104 (quoting DEL. CODE ANN. tit. 6, § 2513 (2020)).

representative or member of a class or in a private attorney general capacity.”<sup>40</sup> Stressing the importance of collective adjudication to the vindication of consumer rights,<sup>41</sup> the *Discover Bank* court held the waiver exculpatory under section 1668 and violative of state public policy.<sup>42</sup>

Cognizant that its ruling could invite FAA preemption challenges,<sup>43</sup> the *Discover Bank* court took pains to clarify that its decision did “not specifically apply to arbitration agreements, but to contracts generally.”<sup>44</sup> So while refusing to enforce the class action waiver, the court offered that class-wide arbitration remained available to the parties—underscoring that its decision did not discriminate against arbitration per se.<sup>45</sup> And, in the wake of *Discover Bank*, “at least fourteen states ha[ve] ruled class action waivers unenforceable on [similarly] broad public policy grounds.”<sup>46</sup>

In *AT&T Mobility LLC v. Concepcion*,<sup>47</sup> however, the U.S. Supreme Court abrogated the *Discover Bank* rule as preempted by the FAA.<sup>48</sup> Justice Antonin Scalia’s majority decision did not dispute that the *Discover Bank* rule was facially applicable to both litigation and arbitration.<sup>49</sup> But the Court recognized that the only way to accommodate both the FAA and the California policy against waiving class procedures was to demand that the

40. *Id.* at 1103 (typeface altered for readability) (quoting *Discover Bank*’s cardholder agreement arbitration clause).

41. *Id.* at 1109 (“Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. But as the . . . cases of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the ‘procedural’ label on such devices understates their importance and is not helpful . . .” (citations omitted)).

42. *Id.* at 1110. Specifically, the court held that the collective action waiver effectively denies litigants the ability to remedy violations of state laws under section 3513 and exculpates the defendant from liability for a violation of section 1668 involving:

a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . .

*Id.*

43. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA preempted section 229 of the California Labor Code).

44. *Discover Bank*, 113 P.3d at 1112. The court added that its holding “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.” *Id.*

45. *Id.* at 1112–13 (“The FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses. There is no such discrimination here with respect to California’s rule against class action waivers.” (citation omitted)).

46. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T v. Concepcion*, 79 U. CHI. L. REV. 623, 633 (2012); *see also id.* at 633 n.33 (citing cases).

47. 563 U.S. 333 (2011).

48. *Id.* at 352. For the five-member majority, the state’s refusal to enforce class action waivers had an undue effect on arbitration because it prescribed a procedure—collective actions—that the Court found incompatible with the arbitral process. *See id.* at 350 (“Arbitration is poorly suited to the higher stakes of class litigation.”).

49. *See id.* at 341–48.

arbitral arena play host to class actions.<sup>50</sup> And yet, to Justice Scalia and the majority, class action procedure is simply irreconcilable with arbitration.<sup>51</sup> To allow class procedures, *Concepcion* holds, would “interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.”<sup>52</sup> For that reason—and that reason alone—the Court refused to honor California’s anti-waiver policy under the Supremacy Clause.<sup>53</sup>

But the broad preemption principles set out in the Court’s FAA decisions have, thus far, been limited to class and collective action waiver. How then will the Court deal with agreements that both call for arbitration and would waive other interests that the state deems unwaivable? For example, where state law grants citizens the unwaivable right to act as a “private attorney general” in recovering penalties for violations of state law<sup>54</sup> or the right to seek public injunctive relief against “unlawful acts that threaten future injury to the general public,”<sup>55</sup> what is the import of *Concepcion*’s preemption analysis?

## II. ROUND TWO: THE UNWAIVABLE RIGHT TO BRING A PAGA ACTION: *ISKAMIAN AND SAKKAB*

### A. PAGA Background

Whistleblowers—those with inside knowledge of corporate fraud or illegality—have long featured in American law enforcement. Most prominently, the federal False Claims Act<sup>56</sup> (FCA) relies on whistleblowers with material knowledge of fraud to litigate claims on behalf of the government.<sup>57</sup> Additionally, “mini-FCA” statutes in twenty-nine states and the District of Columbia help to police fraud and obtain restitution of losses at the state level.<sup>58</sup> These statutes encourage cooperative public-private

50. *Id.* at 348.

51. *Id.* at 349 (explaining that class arbitration “requires procedural formality” and observing that “[t]he [American Arbitration Association]’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation”).

52. *Id.* at 344. A “principal advantage” of arbitration, according to the Court, is “its informality.” *Id.* at 348. “Requiring the availability of class-wide arbitration interferes with” this informality and is thus inconsistent with the FAA. *Id.* at 344. The Court listed three ways in which class-wide arbitration is “inconsistent with the FAA”: (1) it sacrifices informality and makes the arbitration process slower, more expensive, and more procedurally complex; (2) it requires procedural formalities to protect absent class members; and (3) its higher stakes increase the risk to defendants without appellate review. *Id.* at 348–50.

53. *Id.* at 341.

54. See CAL. BUS. & PROF. CODE § 17204 (West 2020).

55. See *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017) (dicta) (first citing *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164 (Cal. 2003); and then citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 74 (Cal. 1999)).

56. 31 U.S.C. § 3730(b)(1).

57. *Id.* (providing for suits brought “for the person and for the United States Government”).

58. See *State False Claims Act*, PIETRAGALLO, <https://www.falseclaimsact.com/states-municipalities-fcas/> [<https://perma.cc/KE7N-CNMD>] (last visited Oct. 3, 2020); see also, e.g., CAL. GOV’T CODE § 12652 (West 2020); DEL. CODE ANN. tit. 6, § 1203(b) (2020); D.C. CODE § 2-381.03 (2020); HAW. REV. STAT. §§ 661-21 to 661-31 (2020); 740 ILL. COMP. STAT 175/4

enforcement by creating financial incentives for relators (i.e., parties bringing qui tam actions on the government's behalf) to come forward to prosecute fraud claims, as well as by providing public enforcers opportunities to intervene and engage with their private counterparts.<sup>59</sup> For their part, public enforcers report that relator-initiated false claims act claims have been an effective aid in deterring unlawful activity.<sup>60</sup>

In the employment space, California's PAGA replicates many of the FCA's essential qui tam features by providing that civil penalties ordinarily assessed and collected by California's LWDA can be recovered through a civil action brought by an aggrieved employee on behalf of the employee and other current or former employees.<sup>61</sup> If the PAGA claim is successful, the plaintiff and other injured employees receive a portion of the recovered penalties, and the remainder goes to the state labor agency.<sup>62</sup> And, by many accounts, these employee-initiated suits have markedly improved employer compliance with statutory and regulatory mandates.<sup>63</sup>

But, predictably, PAGA has proven deeply unpopular with business interests in the state, and employers have repeatedly sought contractual waivers of PAGA rights from their workers.<sup>64</sup> Relying on the public

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(2020); MD. CODE ANN., GEN. PROVISIONS § 8-104 (LexisNexis 2020); MINN. STAT. § 15C.05 (2019); N.J. STAT. ANN. § 2A:32C-5 (West 2020).

59. 31 U.S.C. § 3730 (b)(2)–(d). Once a relator has filed a complaint under seal, the government has a statutory period to decide, based on the allegations and information in the relator's complaint, whether or not to pursue the claim. *Id.* § 3730(b)(2), (3). If the government declines to join the suit, relators may proceed on their own behalf and that of the government; if the government chooses to take the case, the relator has a right to remain a named party to the suit. *Id.* § 3730(b)(4)(B), (c)(3), (c)(1). Should the government intervene and continue the suit, the relator may receive between 15 and 25 percent of any judgment; if the government declines to intervene, the relator's share rises to between 25 and 30 percent. *Id.* § 3730(d)(4).

60. *See generally, e.g.,* James F. Barger Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005) (reporting on relatively low recoveries under various state false claims acts but also finding that prosecutors believe these laws have been helpful in law enforcement and deterrence); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012).

61. CAL. LAB. CODE § 2699 (West 2020). An "aggrieved employee" is defined as an employee "against whom one or more of the alleged violations was committed." *Id.* § 2699(c).

62. Of the civil penalties recovered under PAGA, 75 percent go to the LWDA, leaving the remaining 25 percent for the "aggrieved employees." *Id.* § 2699(i). A prevailing PAGA plaintiff is also entitled to an award of reasonable attorneys' fees and costs. *Id.* § 2699(g)(1).

63. *See* Laura Reathaforde & Eric Kingsley, *He Said, She Said: Employment Litigators Debate California's Private Attorneys General Act*, WESTLAW J. EMP. June 7, 2016, at 1, 1. The statute also nets the state treasury roughly upwards of \$4 million per year in penalties. *See* CAL. DEP'T OF INDUS. RELS., FISCAL YEAR 2016–2017 BUDGET CHANGE PROPOSAL: PRIVATE ATTORNEYS GENERAL ACT RESOURCES 1 (2016), [https://esd.dof.ca.gov/Documents/bcp/1617/FY1617\\_ORG7350\\_BCP474.pdf](https://esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf) [<https://perma.cc/UT8E-XU67>].

64. *See, e.g.,* Tom Manzo, Opinion, *California's Crazy 'PAGA' Law Costs Companies Millions*, TIMES OF SAN DIEGO (Apr. 14, 2019), <https://timesofsandiego.com/opinion/2019/04/14/opinion-californias-crazy-paga-law-costs-companies-millions/> [<https://perma.cc/8GAE-LPW2>] (featuring opinion piece authored by the chairman of the California Business and Industrial Alliance complaining that "[m]ore than 35,000 PAGA lawsuit notices have been sent out" since PAGA's inception and accusing trial lawyers of bringing these claims for a "big payday"); Ken Monroe, *PAGA Reform Would Help Grow Our Economy*, ORANGE CNTY.

enforcement character of PAGA claims and the well-established view expressed in section 3513 that laws “established for a public reason cannot be contravened by a private agreement,”<sup>65</sup> California state and federal courts refused to enforce PAGA waivers throughout the 2000s.<sup>66</sup> For example, in 2007, the Ninth Circuit ruled that “an arbitration agreement may not function so as to require employees to waive potential recovery for substantive statutory rights in an arbitral forum, especially for statutory rights established ‘for a public reason.’”<sup>67</sup> The California Supreme Court concurred in 2009, declaring that public enforcement claims brought by employees acting “as the proxy or agent of the state’s labor law enforcement agencies” were unwaivable.<sup>68</sup>

But in the immediate wake of *Concepcion*, employers seeking to exploit the U.S. Supreme Court’s FAA jurisprudence have tried a new tactic: inserting the PAGA waiver into the employee’s dispute resolution provision and linking this waiver of rights to the now accepted waiver of collective adjudication.<sup>69</sup> A standard clause might therefore prohibit “class action and

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REG. (July 5, 2019), <https://www.ocreger.com/2019/07/05/paga-reform-would-help-grow-our-economy/> [<https://perma.cc/9PRY-NL96>] (featuring opinion piece authored by the chairman of the Family Business Association of California asserting that PAGA “allows private attorneys . . . to sue employers over any and all [Labor Code] violations, even for incredibly trivial issues”).

65. CAL. CIV. CODE § 3513 (West 2020).

66. *See, e.g.*, *Arias v. Superior Ct.*, 209 P.3d 923, 933 (Cal. 2009) (holding that a waiver of PAGA rights was unenforceable because “[a]n employee plaintiff suing . . . under the [PAGA] does so as the proxy or agent of the state’s labor law enforcement agencies” and that “[i]n a lawsuit brought under the [PAGA], the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by” the state).

67. *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007), *overruled in part* by *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013); *see also Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 3d 539, 558–59 (Ct. App. 2009) (finding a waiver of PAGA claims unconscionable because it expressly prohibited the plaintiff “from performing the core function of a private attorney general,” undermining the very purpose and nature of a PAGA enforcement action aimed at protecting the public and penalizing the employer for past illegal conduct).

68. *Arias*, 209 P.3d at 933. As if anticipating *Concepcion*, the court also distinguished a class action from a PAGA action, noting that PAGA claims may but need not be brought as class action claims. *Id.* at 930 n.5; *id.* at 927 n.2 (stating that a “representative action” may be either a class or nonclass action); *see also Urbino v. Orkin Servs. of Cal., Inc.*, 882 F. Supp. 2d 1152, 1161 (C.D. Cal. 2011) (“[A] PAGA action is essentially a representative action brought by a group of aggrieved employees on behalf of the State. The primary beneficiary is the public at large, not the private individuals involved.”); *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C 08-2073, 2010 WL 1340777, at \*4 (N.D. Cal. Apr. 2, 2010) (stating that unlike a class action, the purpose of a PAGA suit “is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies”).

69. *See, e.g.*, *Smigelski v. PennyMac Fin. Servs.*, No. C081958, 2018 WL 6629406, at \*2 (Cal. Ct. App. Dec. 19, 2018) (“[B]oth you and PennyMac forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to by both you and PennyMac.” (quoting the employer-employee Mutual Arbitration Policy)); *Securitas Sec. Servs. USA, Inc. v. Superior Ct.*, 184 Cal. Rptr.

*representative* action procedures,” making clear that employees may “not seek to represent the interests of any other person” and specifying that, as a condition of employment, the employee waives the right to bring or make a PAGA claim.<sup>70</sup>

Initially, the enforceability of such PAGA waivers in light of the Court’s expansive view of the FAA was hotly litigated. In *Brown v. Ralphs Grocery Co.*,<sup>71</sup> decided just two months after *Concepcion*, a divided panel of the California Court of Appeal concluded that *Concepcion* did not govern waivers of the PAGA right to bring a representative action: the purpose of PAGA

contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to [*Concepcion*] may be waived by agreement so as not to frustrate the FAA—a law governing private arbitration. [*Concepcion*] does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.<sup>72</sup>

While numerous California state courts followed this reasoning,<sup>73</sup> the federal courts in California largely rejected *Brown*, finding *Concepcion* controlling and broadly enforcing PAGA waivers in employment contracts.<sup>74</sup> The California Supreme Court finally resolved this growing intrastate conflict in *Iskanian v. CLS Transportation Los Angeles, LLC*.<sup>75</sup>

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3d 568, 570 (Ct. App. 2015) (describing a PAGA waiver in an employee’s arbitration provision).

70. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 133 (Cal. 2014) (dicta) (emphasis added) (quoting an arbitration agreement); see also *Urbino*, 882 F. Supp. 2d at 1155 (quoting a contract provision providing that “any arbitration proceeding under this Agreement will not be consolidated or joined with any action or legal proceeding under any other agreement or involving any other employees, and will not proceed as a class action, private attorney general action or similar representative action”).

71. 128 Cal. Rptr. 3d 854 (Ct. App. 2011).

72. *Id.* at 860–63 (“[*Concepcion*] does not purport to deal with the FAA’s possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code . . . . If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified . . . . Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law.”); see also *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1070 (C.D. Cal. 2011) (agreeing with the *Brown* court’s reasoning that “class action waivers contained in arbitration agreements may not be used to divest plaintiffs of their right to bring representative actions under PAGA”).

73. Notably, because *Brown* held that the trial court had discretion to sever the PAGA waiver from the arbitration agreement and send the remaining claims to arbitration, numerous post-*Brown* decisions involve severed PAGA waivers. See, e.g., *Gomez v. Marukai Corp.*, No. B236623, 2013 WL 492544, at \*1 (Cal. Ct. App. Feb. 11, 2013).

74. See, e.g., *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (“[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA.”); see also *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011) (following *Quevedo*).

75. 327 P.3d 129 (Cal. 2014).

B. Iskanian

In *Iskanian*, the plaintiff filed both class action and PAGA claims against his employer for unpaid wages, although his employment contract featured a broad arbitration agreement that waived his right to bring “class and representative actions,” specifically including claims under PAGA.<sup>76</sup> The California Supreme Court affirmed the lower court’s dismissal of the wage and hour class action as *Concepcion* required but held that the plaintiff could not be forced to waive his right to bring a PAGA action.<sup>77</sup> Such waivers, the court declared, would thwart the state’s enforcement agenda as reflected in the PAGA statute itself—a law clearly “established for a public reason” within the meaning of section 3513.<sup>78</sup> Enforcing a PAGA waiver would therefore “exempt the employer from responsibility for its own violation of law” in contravention of the policies expressed in section 1668.<sup>79</sup>

Of course, it was not enough for the *Iskanian* court to observe that California policy prevented the waiver of PAGA rights—after all, the same was true for the policies against waiver of class treatment at issue in *Concepcion*. Nor was it sufficient to observe that the policy against PAGA waivers applied equally in arbitral and judicial contexts. That was true of *Concepcion* as well.<sup>80</sup> The question was how to deal with *Concepcion*.

And here, the California Supreme Court’s answer was to deny the existence of an arbitration agreement in the first instance, reasoning that the

PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code.<sup>81</sup>

The logic of *Iskanian* stems from *EEOC v. Waffle House, Inc.*,<sup>82</sup> where the Supreme Court held that the Equal Employment Opportunity Commission (EEOC) was not bound by an arbitration agreement between Waffle House and its employees, whose rights the agency was acting to vindicate in a public

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76. *Id.* at 133, 145 (“There is no dispute that the contract’s term ‘representative actions’ covers representative actions brought under the Private Attorneys General Act.”).

77. *Id.* at 133.

78. *Id.* at 149 (“The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state’s interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations.”).

79. *Id.*

80. *See id.* at 141 (“*Concepcion* makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice.”).

81. *Id.* at 151; *see also id.* at 149 (“[T]he FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the [California] Labor and Workforce Development Agency.”).

82. 534 U.S. 279 (2002).

enforcement action.<sup>83</sup> On this logic, a PAGA plaintiff (or a qui tam relator) stands in the shoes of the state, and her PAGA claim is therefore no more subject to arbitration than would be a claim by a state enforcement agency acting upon her report of wrongdoing.<sup>84</sup> Notably, the *Iskanian* court did not engage the question of whether PAGA actions were compatible with arbitration procedures or how the Supreme Court’s analysis in *Concepcion* might apply. Instead, the *Iskanian* court pretermitted preemption analysis altogether by holding at the outset that the arbitration clause did not apply to the PAGA claim.<sup>85</sup>

Essentially, the *Iskanian* majority put all of its eggs in the *Waffle House* basket. And that is fine so long as the U.S. Supreme Court does not overturn the core premise of *Iskanian*—that no arbitration agreement is implicated because a PAGA plaintiff stands in the shoes of the state.<sup>86</sup> So long as the *Iskanian-Waffle House* premise holds, there is no warrant to consider the application of FAA preemption in the context of PAGA. But what if the *Iskanian-Waffle House* rule does not hold up—which would hardly be shocking under the U.S. Supreme Court as presently constituted?<sup>87</sup> If the Court were to hold that, typically, broad arbitration agreements with employees *do* cover PAGA claims, then courts will need to grapple with preemption. Specifically, courts will need to consider whether the FAA preempts California’s policy against enforcing a waiver, contained in an arbitration agreement, of the right to bring a PAGA claim. What happens then?

### C. PAGA Preemption Analysis

One approach to analyzing preemption in the context of California’s policy against enforcing PAGA waivers is suggested by Justice Ming Chin’s concurrence in *Iskanian*.<sup>88</sup> After observing that, in his view, the arbitration agreement by its terms covered “any dispute” between the parties, including the plaintiff’s PAGA claim, Justice Chin turned to the merits.<sup>89</sup> The PAGA

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83. *See id.* at 282, 284–85 (holding that an employee’s arbitration clause did not bar the EEOC from bringing a claim in court seeking “victim-specific judicial relief, such as backpay, reinstatement, and damages” for violations of the Americans with Disabilities Act).

84. On this same basic logic, courts have likewise held that qui tam actions under the federal FCA are not subject to arbitration pursuant to a broad arbitration agreement between the qui tam relator and the defendant. *See, e.g.,* United States *ex rel.* Welch v. My Left Foot Children’s Therapy, LLC, 871 F.3d 791 (9th Cir. 2017).

85. *Iskanian*, 327 P.3d at 133 (“[W]e conclude that the FAA’s goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf.”).

86. *See id.* at 151.

87. In previous work, we have discussed the possibility that the current Supreme Court could “take a different view of whether a broad arbitration provision in the contract of an employee . . . may reach a qui tam action brought by that employee.” Gilles & Friedman, *supra* note 28, at 529.

88. *Iskanian*, 327 P.3d at 155 (Chin, J., concurring).

89. *Id.* at 158 (doubting “the majority’s suggestion that the FAA places no limit on ‘the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions’” (quoting *id.* at 152 (majority opinion))).

statute, he reasoned, provides a substantive remedial claim to the plaintiff.<sup>90</sup> And, Justice Chin noted, an arbitration agreement that explicitly waives the right to pursue that sort of statutory claim is unenforceable under the U.S. Supreme Court's arbitration case law.<sup>91</sup> Specifically, in *American Express Co. v. Italian Colors Restaurant*,<sup>92</sup> Justice Scalia's majority opinion made clear that the Court would not apply "a provision in an arbitration agreement forbidding the assertion of [such] statutory rights."<sup>93</sup> *Italian Colors* thus recognized the long-standing principle that statutory claims are only subject to arbitration in the first place "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."<sup>94</sup> Justice Chin would apply those vindication of rights principles to hold the arbitration agreement unenforceable to the extent that it contained an express waiver of the right to pursue a PAGA claim.<sup>95</sup>

A split panel of the Ninth Circuit took a very different approach in *Sakkab v. Luxottica Retail North America, Inc.*<sup>96</sup> As in *Iskanian*, the issue was whether California's policy against allowing waivers of PAGA claims was preempted by the FAA.<sup>97</sup> But unlike in *Iskanian*, the Ninth Circuit did not hold that the PAGA claim fell outside of an agreement to arbitrate "any dispute"—indeed, it never mentioned that core *Waffle House*-inflected holding of *Iskanian*.<sup>98</sup> Instead, the majority held that the California policy against the waiver of PAGA claims constitutes a generally applicable contract defense within the meaning of the FAA's § 2 "saving clause"—one equally applicable in the arbitral and judicial settings.<sup>99</sup> For this reason, the

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90. *Id.* at 156–57.

91. *Id.* at 157 ("Although the FAA generally requires enforcement of arbitration agreements according to their terms, the high court has recognized an exception to this requirement for 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights.'" (first quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013); and then citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985))).

92. 570 U.S. 228 (2013).

93. *See id.* at 236.

94. *Id.* at 235 (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

95. *See Iskanian*, 327 P.3d at 157 (Chin, J., concurring) (concluding that striking "the arbitration agreement [as] invalid insofar as it forbids *Iskanian* from asserting his statutory right under PAGA in any forum does not run afoul of the FAA").

96. 803 F.3d 425 (9th Cir. 2015). In so ruling, the panel resolved a growing intracircuit conflict over whether the FAA preempted *Iskanian*. *See, e.g., Lucero v. Sears Holdings Mgmt. Corp.*, No. 14-cv-1620, 2014 WL 6984220 (S.D. Cal. Dec. 2, 2014); *Fardig v. Hobby Lobby Stores Inc.*, No. SACV 14-00561, 2014 WL 4782618 (C.D. Cal. Aug. 11, 2014).

97. *Sakkab*, 803 F.3d at 427.

98. *See supra* notes 82–84 and accompanying text.

99. *Sakkab*, 803 F.3d at 432 ("To fall within the ambit of § 2's saving clause, the *Iskanian* rule must be a 'ground[.] . . . for the revocation of *any contract*.' We conclude that it is . . . . The rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." (first, second, and third alterations in original) (quoting 9 U.S.C. § 2)).

*Sakkab* court held that California’s policy does not conflict with arbitration.<sup>100</sup>

The *Sakkab* majority emphasized “‘fundamental[.]’ differences between PAGA actions and class actions” and held the “rule prohibiting waiver of representative PAGA claims”—unlike the rule prohibiting waiver of class actions—“does not diminish parties’ freedom to select informal arbitration procedures.”<sup>101</sup> The court stressed that in PAGA cases, unlike class actions, the plaintiff is not vindicating the rights of unnamed employees: “a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees.”<sup>102</sup> And as a consequence, the court held, “there is no need to protect absent employees’ due process rights in PAGA arbitrations.”<sup>103</sup> Accordingly, all of the due-process-driven features of class actions that the *Concepcion* Court held inimical to arbitration—including notice and opt-out rights and the right to object—are absent in the PAGA context.

The key point, for the *Sakkab* majority, was that “PAGA arbitrations . . . do not require the formal procedures of class arbitrations” and thus do not implicate the obstacle preemption concerns of *Concepcion*.<sup>104</sup> The dissent in *Sakkab* argued that PAGA actions are complex and will embroil arbitrations in “procedural morass.”<sup>105</sup> But the majority was unmoved—“even if there were evidence that representative PAGA actions take longer or cost more to arbitrate than other types of claims, the same could be said of any complex or fact-intensive claim,” such as an antitrust action.<sup>106</sup> And the court noted the “parties may streamline the resolution of complex PAGA claims” as they see fit, including “by agreeing to limit discovery in arbitration.”<sup>107</sup> In sum, the court held, there is no reason a PAGA claim cannot proceed in the arbitral forum.<sup>108</sup>

So what is the upshot here for other cases where public policy against enforcing the waiver of a state statutory right (such as the right to pursue public injunctive relief) collides with an arbitration agreement? The *Iskanian*

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100. *Id.* at 433–34, 439; see also Gilles & Friedman, *supra* note 28, at 530 (observing that “the California policy against allowing waiver of PAGA claims certainly appears to be a generally applicable defense to any contract that purports to effect such a waiver, whether as part of an arbitration clause or not”).

101. *Sakkab*, 803 F.3d at 435 (alteration in original) (quoting *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014)).

102. *Id.* at 436.

103. *Id.*

104. *Id.* (emphasis added).

105. *Id.* at 441–42 (Smith, J., dissenting) (“Arbitration is poorly suited to the higher stakes of class litigation . . .” (alteration in original) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011))).

106. *Id.* at 438.

107. *Id.* The court also noted that “whether arbitration of representative PAGA actions is likely to ‘generate procedural morass’ depends, first and foremost, on the procedures the parties select.” *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

108. *Id.* at 440 (“That [PAGA] actions can be difficult to arbitrate does not mean that the FAA requires courts to enforce private agreements opting out of the state’s chosen method of enforcing its labor laws.”).

and *Sakkab* decisions suggest a straightforward sequencing of questions: (1) Is the claim covered by the agreement to arbitrate? (2) Would the arbitration agreement expressly bar a plaintiff from asserting a statutory claim for relief, and thus run afoul of the vindication of rights principles reiterated in *Italian Colors*? (3) Would arbitration of the claim undermine the defining attributes of arbitration, such as by triggering obstacle preemption as in *Concepcion*?

With these principles in mind, we turn to the latest flash point in the conflict between unwaivable rights and mandatory arbitration: the public injunction.

### III. ROUND THREE: THE UNWAIVABLE RIGHT TO SEEK PUBLIC INJUNCTIVE RELIEF: *MCGILL* AND *BLAIR*

Various California consumer protection statutes authorize litigants to seek “public injunctive relief”—i.e., relief “designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff.”<sup>109</sup> California’s CLRA, for example, authorizes consumers injured by unfair or deceptive acts to seek a public injunction aimed at eliminating injury to future consumers.<sup>110</sup> So, too, may consumers who have “suffered injury in fact and [have] lost money or property as a result of” unfair competition seek public injunctive relief under California’s UCL.<sup>111</sup> Given that the “primary purpose” of claims is to stop “unlawful acts that threaten future injury to the general public,”<sup>112</sup> California courts have long held that the right to pursue a public injunction is unwaivable under section 3513. Indeed, in two pre-*Concepcion* decisions, *Broughton v. Cigna Healthplans of California*<sup>113</sup> and *Cruz v. PacifiCare Health Systems, Inc.*,<sup>114</sup> the California Supreme Court held that the right to seek public injunctive relief under the CLRA and UCL could not be waived via private arbitration agreement.<sup>115</sup>

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109. *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1165 (Cal. 2003).

110. CAL. CIV. CODE § 1780 (West 2020).

111. CAL. BUS. & PROF. CODE § 17535 (West 2020).

112. *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017) (dicta) (first citing *Cruz*, 66 P.3d at 1164; and then citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 74 (Cal. 1999)).

113. 988 P.2d 67 (Cal. 1999).

114. 66 P.3d 1157 (Cal. 2003).

115. In both cases, the California Supreme Court went further and held that claims for public injunctive relief are simply nonarbitrable. *Id.* at 1159; *Broughton*, 988 P.2d at 76; see also *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663, 2011 WL 1842712, at \*2 (N.D. Cal. May 16, 2011) (holding that the FAA “preempts California’s exemption of claims for public injunctive relief from arbitration, at least for actions in federal court”). To that extent, the Ninth Circuit has recognized that *Concepcion* overruled the *Broughton-Cruz* rule. See *Kilgore v. KeyBank, Nat’l Ass’n*, 673 F.3d 947, 965 (9th Cir. 2012) (“The FAA preempts California’s *Broughton-Cruz* rule that claims for public injunctive relief cannot be arbitrated.”); see also *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013) (“[W]e conclude that the *Broughton-Cruz* rule is preempted by the Federal Arbitration Act.”).

A. *McGill v. Citibank, N.A.*

More recently, and subsequent to *Concepcion*, the California Supreme Court had occasion to consider the enforceability of an arbitration clause that would waive the right to seek public injunctive relief, in *McGill v. Citibank, N.A.*<sup>116</sup> There, Sharon McGill had lost her job and sought to activate a “credit protect[ion] plan” that she had purchased under a Citibank credit card agreement in which Citibank agreed to defer payments if a “qualifying event” occurred, including job loss.<sup>117</sup> When Citibank refused her demand for benefits, McGill filed a class action suit alleging violations of California’s UCL, CLRA, and false advertising law.<sup>118</sup> McGill’s complaint sought, “among other things, an injunction prohibiting Citibank from continuing to engage in” allegedly fraudulent practices.<sup>119</sup>

Citibank responded by seeking to compel arbitration on the basis of an arbitration provision in its standard credit card agreement—a clause that also barred the arbitrator from awarding public injunctive relief.<sup>120</sup> The California Court of Appeal directed that all claims be sent to arbitration, but in April 2017, the California Supreme Court reversed the appellate court’s judgment in a unanimous decision written by Justice Chin.<sup>121</sup>

Key to *McGill* was that the contract foreclosed awards of public injunctive relief in any forum, and not just arbitration, bringing it within the saving clause of FAA § 2.<sup>122</sup> For Justice Chin, then, the contract prevented the plaintiff from vindicating a right vouchsafed by clear California policy—namely, the right to seek a “public injunction,” which the court defined as “relief that has ‘the primary purpose and effect of’ prohibiting unlawful acts that threaten future injury to the general public.”<sup>123</sup>

Framing the issue largely as he did in his *Iskanian* concurrence, Justice Chin’s decision is grounded in the effective vindication concept of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>124</sup> and *Italian Colors* and held that the contractual foreclosure of the right to pursue the public injunction remedy guaranteed by California law renders the arbitration agreement unenforceable.<sup>125</sup> Quoting Justice Scalia’s decision, Justice Chin explained

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116. 393 P.3d 85 (Cal. 2017).

117. *Id.* at 87.

118. *Id.* at 88.

119. *Id.*; see also David Lazarus, *Terms of Citibank Credit Insurance Not Well Disclosed*, L.A. TIMES (Nov. 10, 2011, 12:00 AM), <https://www.latimes.com/business/la-xpm-2011-nov-10-la-fi-lazarus-20111111-story.html> [<https://perma.cc/8TM5-B47C>].

120. *McGill*, 393 P.3d at 88.

121. *Id.* at 87.

122. The agreement made arbitration applicable to “any claim” and provided that the “arbitrator will not award relief for or against anyone who is not a party.” *Id.* at 88. The ban on public injunctions thus applies in any forum, and the California policy against enforcement of that ban is a “ground[] . . . ‘for the revocation of any contract’” under FAA § 2. *Id.* at 96 (first alteration in original) (quoting 9 U.S.C. § 2).

123. *Id.* at 90 (quoting *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 74 (Cal. 1999)).

124. 473 U.S. 614 (1984).

125. *McGill*, 393 P.3d at 94–95.

that *Italian Colors* “distinguished between the ‘waiver of a party’s *right to pursue statutory remedies*’—such as ‘a provision in an arbitration agreement forbidding the assertion of certain statutory rights’—and the waiver of a ‘*procedural path* to the vindication of every claim’—such as a provision forbidding class action arbitration.”<sup>126</sup> While the particular effective vindication argument made in *Italian Colors* was unsuccessful,<sup>127</sup> the majority in that case made clear that the principle is alive and well. Indeed, Justice Scalia noted that numerous Supreme Court cases have “asserted the existence of an ‘effective vindication’ exception”<sup>128</sup> to the requirements of the FAA, and he added that “we do so again here.”<sup>129</sup>

Like his *Iskanian* concurrence, Justice Chin’s analysis in *McGill* obviates any need to probe whether the arbitral forum would otherwise accommodate the procedures required for public injunctive relief. Once we accept that the arbitration agreement is unenforceable under the effective vindication principle, there is no warrant to apply *Concepcion*’s preemption inquiry.

#### B. Blair v. Rent-A-Center, Inc.

Just as it did when it followed *Iskanian* with *Sakkab*, the Ninth Circuit followed *McGill* with a case, *Blair v. Rent-A-Center, Inc.*,<sup>130</sup> that jumped directly into the *Concepcion* preemption fray by asking whether the procedures necessary for a public injunction are compatible with the arbitral forum.<sup>131</sup> And here again, on the merits of the preemption analysis, the *Blair* court followed *Sakkab* and found no basis to doubt that the arbitral arena can comfortably accommodate a public injunction suit.<sup>132</sup> And this makes sense. California law places no restraints on standing to seek public injunctive relief and does not require a public injunctive claim to be pursued on a class basis.<sup>133</sup> Thus, there is no basis to argue that public injunction claims entail

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126. *Id.* at 97 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 236 (2013)).

127. As Justice Chin noted, the *Italian Colors* Court rejected the argument that a class-banning arbitration clause runs afoul of the effective vindication rule where it so increases the cost of arbitration on the individual claimant that it precludes effective vindication of statutory rights in a given case. *Id.* (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013)).

128. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (first citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–74 (2009); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

129. *Id.* at 236.

130. 928 F.3d 819 (9th Cir. 2019).

131. *See id.* at 822. The *Blair* court was likely responding to a growing intradistrict conflict concerning whether the FAA preempted *McGill*. Compare *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850 (S.D. Cal. 2019) (holding that the FAA preempts *McGill*), with *Delisle v. Speedy Cash*, No. 18-CV-2042, 2019 WL 2423090 (S.D. Cal. June 10, 2019) (finding no preemption), *vacated and remanded*, No. 19-55794, 2020 WL 3057464 (9th Cir. June 9, 2020).

132. *Blair*, 928 F.3d at 828–30.

133. *See, e.g., McGill v. Citibank, N.A.*, 393 P.3d 85, 93 (Cal. 2017) (concluding that a claim for public injunctive relief “does not constitute the ‘pursu[it]’ of ‘representative claims or relief on behalf of others’” (alteration in original) (quoting CAL. BUS. & PROF. CODE

class procedures that are inimical to the arbitral arena.<sup>134</sup> To be sure, the individual nonclass plaintiff seeks broad relief in a public injunction suit. But so too do all manner of complex claims that ask an arbitrator to grant broad relief. And here, as in *Sakkab*, there are no constitutional notice, opt-out, or objection rights implicated.<sup>135</sup> In fact, as a matter of preclusion, the rights of other affected persons are not compromised in the event a plaintiff is unsuccessful in a bid to obtain public injunctive relief.<sup>136</sup>

The most consequential aspect of *Blair*, going forward, may be the Ninth Circuit's holding that not only must the plaintiffs' claim proceed in court insofar as it seeks a public injunction but also insofar as that claim seeks class action damages.<sup>137</sup> Under the operative severability clause in *Blair*, if any provision of the arbitration agreement were found unenforceable "as to a particular claim for relief, then that claim (and only that claim) must be severed from the arbitration and may be brought in court."<sup>138</sup> Defendant Rent-A-Center argued that this meant only the claim seeking the public injunction was for a court, while the damages claim should remain in arbitration, where the class action ban would apply.<sup>139</sup> But the Ninth Circuit took a contrary view, reasoning that a single "claim" underlay the requests for both injunctive and monetary relief and, under the severance clause, that "claim" in its entirety "may be brought in court."<sup>140</sup>

While the *Blair* litigation settled immediately following the Ninth Circuit's decision,<sup>141</sup> the defendants in two companion appeals—summarily resolved

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§§ 17203, 17535 (West 2020)); see also *id.* (observing that California courts have "never . . . imposed" a requirement that public injunctive claims be "brought as a class action").

134. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Arbitration is poorly suited to the higher stakes of class litigation."); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) (describing the "changes brought about by the shift from bilateral arbitration to class-action arbitration" as "fundamental").

135. See *Blair*, 928 F.3d at 828 (finding that, in contrast to *Concepcion's* finding that class-wide arbitration "'requires procedural formality' . . . [that] 'makes the process slower, more costly, and more likely to generate procedural morass than final judgment,'" arbitration of public injunctive relief claims give rises to neither "state law nor constitutional due process" concerns that "require[] procedural formality" (quoting *Concepcion*, 564 U.S. at 348–49)).

136. Because a judgment on a public injunction claim in a nonclass case is preclusive only as to the individual plaintiff, there are no due process concerns requiring collective procedures.

137. See *Blair*, 928 F.3d at 830 ("[A] public injunction may involve high stakes and could affect a lucrative business practice. But so could a private injunctive, declaratory, or damages action.").

138. *Id.* at 831. Notably, other companies employ arbitration provisions that do not contemplate severability if an arbitration clause is found unenforceable. See, e.g., Plaintiff-Appellee's Answering Brief at 4, *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019) (No. 17-17246), 2018 WL 3241117, at \*4 (quoting an arbitration clause, which stated, "[i]f this specific provision is found unenforceable, the entirety of this arbitration provision shall be null and void").

139. *Blair*, 928 F.3d at 823.

140. *Id.* at 831–32 ("A 'claim for relief,' as that term is ordinarily used, is synonymous with 'claim' or 'cause of action.' . . . We read the clause, as did the district court, to provide that the entire claim be severed for judicial determination." (citations omitted) (citing FED. R. CIV. P. 8(a)).

141. See *Rent-A-Center Customers Reach \$13M Price-Gouging Deal*, LAW360 (Sept. 6, 2019), <https://www.law360.com/articles/1196109/rent-a-center-customers-reach-13m-price-gouging-deal> [<https://perma.cc/Y7LU-MGKF>] (describing the \$13 million settlement).

by the same panel that decided *Blair*<sup>142</sup>—sought rehearings en banc and then certiorari review.<sup>143</sup> The Ninth Circuit denied rehearing<sup>144</sup> and then, on June 1, 2020, the Supreme Court denied review in the *Blair* companion cases.<sup>145</sup>

#### IV. ROUND FOUR: AFTER *BLAIR*, WHAT NOW?

The petitioners in the *Blair* companion cases and their amici, including the Chamber of Commerce and others, argued strenuously that the Ninth Circuit’s ruling—especially insofar as it allowed class action damages claims to proceed in court—blows a gaping hole in the otherwise impregnable wall of authority protecting class-banning arbitration clauses.<sup>146</sup> So long as a California plaintiff seeks broad injunctive relief, they complained, *Blair* allows the plaintiff to prosecute a damages class action in court notwithstanding the presence of an otherwise enforceable class-banning arbitration agreement.<sup>147</sup>

Given the enormous stakes and the focused involvement of the Chamber of Commerce, one might expect further cases petitioning for certiorari to challenge *Blair*. But we suspect the *Blair* ruling will prove durable, if only because corporate defendants can readily refashion their arbitration clauses to ensure that all issues relating to liability and damages remain in arbitration, even where the public injunction claim has been held nonarbitrable. And indeed, the Ninth Circuit anticipated as much in *Blair*: “Parties are welcome to agree to split decisionmaking between a court and an arbitrator in this manner. But they did not do so here.”<sup>148</sup> The ability of corporate defendants to save their bans on damages class actions through careful drafting makes future attacks on *Blair* unattractive candidates for Supreme Court review—a

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142. See *McArdle v. AT&T Mobility LLC*, 772 F. App’x 575 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020); *Tillage v. Comcast Corp.*, 772 F. App’x 569 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2827 (2020). Both cases featured arbitration clauses identical to the one in *Blair* and raised the same issue concerning the waivability of the right to seek public injunctive relief.

143. Petition for Panel Rehearing & Rehearing En Banc for Defendants-Appellants, *Tillage*, 772 F. App’x 569 (No. 18-15288); Defendants-Appellants’ Petition for Rehearing En Banc, *McArdle*, 772 F. App’x 575 (No. 17-17246); see also Allison Frankel, *Business Lobby Prods 9th Circuit to Revisit Decision Curbing Consumer Arbitration*, REUTERS (Aug. 20, 2019), <https://www.reuters.com/article/us-otc-mcgill/business-lobby-prods-9th-circuit-to-revisit-decision-curbing-consumer-arbitration-idUSKCN1VA24J> [<https://perma.cc/22LF-TDGC>].

144. See Nadia Dried, *9th Circ. Won’t Rethink Voiding AT&T Arbitration Agreement*, LAW360 (Jan. 21, 2020) <https://www.law360.com/articles/1235788/9th-circ-won-t-rethink-voiding-at-t-arbitration-agreement> [<https://perma.cc/Z2XM-5H6F>].

145. *McArdle*, 140 S. Ct. 2827; *Tillage*, 140 S. Ct. 2827.

146. Brief Amici Curiae of the Chamber of Commerce of the United States of America, the National Ass’n of Manufacturers & the California Chamber of Commerce in Support of Defendants-Appellants, *McArdle*, 772 F. App’x 575 (9th Cir. 2019) (No. 17-17246).

147. See *id.* at 20–21 (“Accordingly, to hold that the *McGill* rule escapes the preemptive sweep of the FAA would end run *Concepcion*. It would allow a plaintiff to evade *Concepcion* and FAA preemption in any case in which he or she could include a UCL claim for public-injunctive relief. Given the extraordinary breadth of California’s UCL, this is virtually every case.”).

148. *Blair v. Rent-A-Center*, 928 F.3d 819, 831 (9th Cir. 2019) (citation omitted).

point emphasized by the lawyers for Public Citizen, who successfully resisted the certiorari petitions in the *Blair* companion cases.<sup>149</sup>

Still, it remains to be seen exactly how companies will redraft their arbitration clauses and whether these next-generation provisions will be effective in suppressing class action damages suits. Of course, one foolproof option would be to remove any restrictions on arbitrators hearing claims for a public injunction. After all, if the arbitrator is empowered to grant public injunctive relief, then there is no basis under *McGill* for abrogating the arbitration provision.<sup>150</sup> Thus, Ticketmaster and other companies have responded to these rulings by providing in their arbitration clauses that “the arbitrator can award public injunctive relief.”<sup>151</sup>

But other corporate defendants, apparently uncomfortable allowing an arbitrator to make consequential decisions, have instead opted for clauses that would allow public injunctive relief to be decided by courts, while otherwise calling for arbitration of consumer claims.<sup>152</sup> Clauses of this type—adopted by Williams-Sonoma, H&R Block, Discover, and others in the wake of *Blair* and *McGill*—generally provide that all liability issues must be tried by an arbitrator.<sup>153</sup> Only then, after liability is established in arbitration, may the plaintiffs seek a public injunction in court. Damages requests would remain in arbitration, where they are subject to the class-banning arbitration clause.

But such a regime may not provide the panacea the Chamber of Commerce and its allies seek for several reasons. First, if the arbitral liability ruling is sufficient to serve as a predicate for injunctive proceedings in court, then it can presumably serve as a basis for damages arbitrations, which might then take the form of mere inquests to be processed on a mass scale.<sup>154</sup> Second,

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149. See, e.g., Respondent’s Brief in Opposition at 27, *McArdle*, 140 S. Ct. 2827 (No. 19-1078) (explaining numerous ways that “the defendant can write its [arbitration] agreement”).

150. See *supra* Part III.A.

151. Respondent’s Brief in Opposition, *supra* note 149, at 31–32 (describing arbitration clauses used by Ticketmaster and Bank of the West).

152. *Id.* at 3 (“*McGill* allows parties to agree that claims for public injunctive relief must be arbitrated, or to agree that all liability issues and other remedial issues must be arbitrated while deferring public injunctive relief for later judicial resolution. Many companies have crafted valid and enforceable agreements to provide for arbitration in one of those ways. *McGill* holds only that the parties cannot waive public-injunction claims altogether.”).

153. See *id.* at 3, 32. For example, H&R Block’s newly redrafted arbitration clause states:

If a court decides that applicable law precludes enforcement of any of this paragraph’s limitations as to a particular claim or any particular remedy for a claim (such as a request for public injunctive relief), then that particular claim or particular remedy (and only that particular claim or particular remedy) must remain in court and be severed from any arbitration.

*Id.* at 32 (quoting *H&R Block® Desktop Tax Software End User License Agreement*, H&R BLOCK 13, <https://www.hrblock.com/pdf/HRBlock-Software-License-Agreement.pdf> [<https://perma.cc/2VT6-8GPZ>] (last visited Oct. 3, 2020)).

154. Mass arbitrations require arbitrators to accord preclusive effect to prior arbitral decisions. Cf. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-class Action Era*, 63 DEPAUL L. REV. 447, 469 (2014). While there are generally reasons to question the existence of intra-arbitral preclusion, see generally Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, some

if the liability findings and underlying evidence from arbitration hearings are to serve as a predicate for a public judicial trial on equitable remedies, then the parties must agree to relinquish the strict confidentiality provisions that would otherwise attend the arbitrations. And this model—where arbitral liability rulings are a springboard for judicial remedial proceedings—raises the question of what happens if multiple arbitrations are filed. If several plaintiffs file one-on-one arbitrations before different arbitrators, which liability ruling provides the springboard for the judicial remedial class action?

Meanwhile, no matter how companies may redraft their arbitration provisions, there is one category of cases that will remain free under *Blair* to proceed in court with claims that seek both class damages and public injunctions—namely, cases that have been (or will be) filed before the companies institute their redrafted severance provisions. Courts have held that once a class action is on file, the unilateral change-in-terms mailers that companies rely on to engraft new terms into their contracts cannot rewrite the rules under which pending disputes are to be resolved. For example, as Judge William Pauley of the Southern District of New York noted in *In re Currency Conversion Fee Antitrust Litigation*,<sup>155</sup> “putative class members’ rights in this litigation were protected as of the filing date of the complaint.”<sup>156</sup> Thus, the court held that “arbitration clauses engrafted . . . on cardholder agreements after this litigation commenced are not enforceable. Conversely, [the] arbitration agreements entered into before this litigation are enforceable . . . .”<sup>157</sup> Other courts and commentators are in accord.<sup>158</sup>

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scholars maintain that arbitrators “can be contractually required to follow precedents.” *Id.* at 411 n.232 (quoting Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 746 (1999)). If those scholars are correct, then enterprising plaintiffs’ lawyers may find it profitable to aggregate a critical mass of individual arbitrations in the wake of a public injunctive ruling. See Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. (forthcoming 2021) (discussing methods by which entrepreneurial lawyers can scoop up sufficient numbers of claimants to cost effectively file individual damages claims in arbitration).

155. 361 F. Supp. 2d 237 (S.D.N.Y. 2005).

156. *Id.* at 251. This time-of-filing rule for assessing the applicable dispute resolution terms mirrors the familiar time-of-filing rules for purposes of determining diversity jurisdiction. Under 28 U.S.C. § 1332, federal jurisdiction based on diversity depends solely on the facts that exist at the time an action is brought—no matter the changes to the parties’ domiciles that may later occur. See *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (“[T]he jurisdiction of the court depends upon the state of things at the time of the action brought.”).

157. *In re Currency Conversion*, 361 F. Supp. 2d at 267.

158. See *Dasher v. RBC Bank (USA)*, 882 F.3d 1017, 1021–22 (11th Cir. 2018) (stating that arbitration terms that are “entered into mid-litigation” via a mass mailing “d[o] not evict a pending lawsuit from court” (citing *Russell v. Citigroup, Inc.*, 748 F.3d 677, 680–81 (6th Cir. 2014))); Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 433 (2018) (“Courts . . . have held that companies can impose arbitration clauses requiring that all claims—including those arising *before* the insertion of the arbitration clause into the consumer contract—must be arbitrated, so long as the arbitration clause is imposed before the commencement of the litigation.”). On the other hand, one court purported to distinguish *In re Currency Conversion* and held that a midlitigation change-in-terms mailer that amends an arbitration agreement is enforceable, as opposed to a change-in-terms mailer that introduces

In addition to identifying the time of filing as the point for identifying the rules that will govern dispute resolution, Judge Pauley provided two additional grounds for the ruling. First, unilateral change-in-terms mailers running from defendants to putative class members constitute proscribed communications with class members under Federal Rule of Civil Procedure 23(d), which demands judicial approval of communications that might “alter the status of [already filed] litigation and the available remedies.”<sup>159</sup> And second, to the extent class members are deemed to have “agreed” to the new arbitration terms without having been advised how those terms affect ongoing litigation, the resulting agreements are unenforceable under applicable state law unconscionability principles because “[t]here was no reasonable manner for cardholders to know that by failing to reject the arbitration clause, they were forfeiting their rights as potential plaintiffs in this litigation.”<sup>160</sup> But no matter how the argument is articulated, the point is the same: unilateral efforts to change the rules of the game midstream, via change-in-terms mailers, are likely to be met with deep judicial skepticism.

#### CONCLUSION

Long-standing California statutes declare that any “law established for a public reason cannot be contravened by a private agreement”<sup>161</sup> and further, that “[a]ll contracts which have for their object . . . to exempt any one from responsibility for his own fraud . . . or violation of law . . . are against the policy of the law.”<sup>162</sup> Early California lawmakers understood well that if laws enacted for the general welfare could be controverted by private agreement, then those with superior bargaining power in the market could force weaker parties to surrender their substantive legal rights. In the modern era, these anti-waiver and anti-exculpation principles have been employed for the protection of workers and consumers seeking public injunctive remedies benefitting the general public, even where these litigants are otherwise subject to arbitration clauses in standard-form contracts. While other forms of state regulation of arbitration clauses have been found impliedly preempted by the FAA, the Ninth Circuit and California Supreme Court have now repeatedly reaffirmed the state’s long-standing prohibitions on private contractual waivers of substantive rights, even where those waivers are couched in otherwise enforceable arbitration agreements.<sup>163</sup>

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arbitration for the first time. *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at \*6–7 (S.D. Cal. Aug. 11, 2008). The court offered no rationale for this distinction, and it appears to us arbitrary.

159. *In re Currency Conversion*, 361 F. Supp. 2d at 249 (quoting *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 570 (S.D.N.Y. 2004)). A “unilateral communications scheme,” the court noted, is especially “rife with potential for coercion. If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.” *Id.* at 253 (quoting *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985)).

160. *Id.* at 251.

161. CAL. CIV. CODE § 3513 (West 2020).

162. *Id.* § 1668.

163. *See supra* Part III.

What all of this portends for aggregate litigation is not entirely clear. On the one hand, these doctrinal developments are specific to California law. But on the other, California represents a huge swath of the litigation ecosystem, and its decisional law could potentially provide a template for other states.<sup>164</sup> In the near term, the most visible effect of these developments is likely to be damages class actions proceeding in California state courts where defendants cling to arbitration agreements that ban arbitrators from issuing public injunctions and are insufficiently nuanced in their treatment of severability. But as corporate drafting evolves to block future class actions seeking monetary damages, the most enduring legacy of *Iskanian*, *Sakkab*, *McGill*, and *Blair* may not be PAGA cases or public injunctive suits at all but, rather the unbowed commitment of California courts to principles of unwaivable public rights, even in an era of arbitration hegemony.

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164. See Gilles & Friedman, *supra* note 28, at 512 n.119 (describing PAGA-like bills currently pending in various states).