PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2021 | Issue 1 Article 2

3-15-2022

The PAGA Saga

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Abstract

Employees routinely enter into employment contracts that contain arbitration agreements and prohibit them from bringing class and/or representative actions. These employees may therefore only bring claims against their employers, whether contractual or statutory, in arbitration on an individual basis. Such arbitration agreements and the class/representative action waivers that they contain are enforced nationwide pursuant to the Federal Arbitration Act (FAA). In California, however, a judge-made rule (the Iskanian rule) prohibits the enforcement of representative action waivers found in arbitration agreements with respect to employees' claims of Labor Code violations under California's Private Attorney General Act (PAGA). A judicial battle is currently raging between the state and the federal courts in California concerning the tension between the FAA and PAGA created by the Iskanian rule. This PAGA saga—the split between the courts in California—is now before the United States Supreme Court.

This Article examines the state and federal courts' respective interpretations of the Iskanian rule and discusses the weaknesses in their approaches. The Article argues that unless the Supreme Court reverses its long-standing course, the Court's current precedent leads to the invalidation of the Iskanian rule under both the state and the federal judicial approaches because the rule is preempted by the FAA. The impact of the Supreme Court's decision with respect to PAGA will likely be felt far beyond California. The decision will be relevant to the interpretation and application of the FAA more generally, as well as to other private

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attorney general statutes that might intersect with the FAA.

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I. INTRODUCTION

A judicial battle is raging in the courts of California, one of many fought in the war against the Federal Arbitration Act (FAA)[1] and one with nationwide implications. The battle concerns a rule established by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*[2] according to which waivers of representative actions brought by employees pursuant to California's Private Attorney General Act (PAGA)[3] are unenforceable (the *Iskanian* rule).[4] PAGA authorizes an "aggrieved employee" to bring a civil action against an employer "on behalf of himself or herself and other current or former employees" for violation of any provision of the Labor Code that provides for a "civil penalty" otherwise collected by the Labor and Workforce Development Agency.[5] Both state and federal courts in California, as well as the United States Court of Appeals for the Ninth Circuit, agree that the *Iskanian* rule is not preempted by the FAA. In other words, all California courts have held that waivers of representative PAGA actions contained in arbitration agreements between employers and employees are unenforceable and that this does not violate the FAA or undermine its objectives.

State and federal courts in California have divided, however, on whether

1. 9 U.S.C. §§ 1–16.

2. Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 360 (2014), *cert. denied*, 574 U.S. 1121 (2015) ("[A]n arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy.").

3. Cal. Lab. Code §§ 2698–2699.8.

4. Employees routinely enter standard form employment contracts that contain arbitration agreements. These agreements typically provide that "any and all claims" arising out of the employment relationship, or similar language to the same effect, must be submitted to arbitration. In addition, these employment arbitration agreements increasingly prohibit employees from bringing class and/or representative actions in arbitration, known as class/representative action waivers. This means that employees may only bring claims against their employers, whether contractual or statutory, in arbitration on an individual basis.

5. Cal. Lab. Code § 2699. The "private attorney general doctrine" is "[t]he equitable principle that allows the recovery of attorney's fees to a party who brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a whole." *Private-Attorney-General Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). For general commentary on the doctrine, *see, e.g.*, Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321 (1998); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001); William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005).

the *Iskanian* rule prohibits only the *waiver* of representative PAGA claims or also their *arbitration*. On one side of the battlefield stand the California state courts. These courts have unanimously and consistently held that representative PAGA claims not only cannot be waived but also cannot be arbitrated in most cases.[6] On the opposite side of the battlefield stand the United States district courts in California and the Ninth Circuit. These courts have held that representative PAGA claims, while unwaivable, can nonetheless be resolved in arbitration.[7] After several unsuccessful attempts, the Supreme Court has now granted certiorari to resolve this split between the state and federal courts in California.[8]

To understand the PAGA saga—the tension between PAGA and the FAA—one must examine the broader context of the Supreme Court's FAA jurisprudence.[9] Almost forty years ago, the Court held that the FAA creates "a substantive rule applicable in state as well as federal courts" that "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."[10] Twenty years ago, the Court held that the FAA applies to arbitration clauses contained in employment contracts affecting interstate commerce.[11] A decade later, the Court held that the "saving clause" in Section 2 of the FAA[12] "permits agreements to arbitrate to be

6. Correia v. NB Baker Elec., Inc., 32 Cal. App. 5th 602, 621 (Cal. Ct. App. 2019) (stating that California Courts of Appeals have "uniformly held that an employee's predispute agreement to arbitrate PAGA claims is not enforceable without the state's consent").

7. Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 431–32 (9th Cir. 2015) (holding that the rule did not prohibit arbitration of PAGA claims).

8. *See, e.g.*, Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439 (2017), *cert. denied*, 138 S. Ct. 556 (2017); Provost v. YourMechanic, Inc., 55 Cal. App. 5th 982 (2020), *cert. denied*, 141 S. Ct. 2891 (2021); Rivas v. Coverall North America, Inc., 842 Fed. Appx. 55 (9th Cir. 2021), *cert. filed*, Aug. 20, 2021 (No. 21-268). On December 15, 2021, the Supreme Court granted certiorari in *Moriana v. Viking River Cruises, Inc.*, 2020 WL 5584508 (Cal. Ct. App. Sept. 18, 2020), *cert. granted*, 142 S. Ct. 734 (2012). There, "[t]he question presented [for certiorari is [w]hether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." Petition for Writ of Certiorari, *Viking River Cruises, Inc.*, 142 S. Ct. 734.

9. For a critique of this jurisprudence, *see, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015); Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L. J. 815 (2019).

10. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

11. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001). However, the FAA does not apply to employment contracts of workers engaged in interstate transportation., as per Section 1.

12. The "saving clause" in Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[13] Moreover, the Court held that even "generally applicable contract defenses" would be preempted by the FAA if they "stand as an obstacle to the accomplishment of the FAA's objectives."[14] Specifically, the Court held that requiring parties to conduct arbitration on a class basis where they have agreed to individual arbitration is such an "obstacle."[15] In short, the FAA preempts state law, including in the employment context, that directly targets arbitration agreements or indirectly undermines the FAA's objectives, for instance by rendering waivers of class actions unenforceable, "even if [the state law] is desirable for unrelated reasons."[16]

As noted above, both state and federal courts in California agree that the *Iskanian* rule, which prohibits waivers of representative PAGA actions, is not preempted by the FAA.[17] However, these courts have diverged in their interpretation of the rule and the reasons for its survival from FAA preemption. This split in approach has in turn led the state and the federal courts to contradictory conclusions regarding the arbitrability of representative PAGA claims under the *Iskanian* rule.

According to the state courts, the *Iskanian* rule is not preempted by the FAA because it falls outside the Act's scope.[18] The FAA applies only to disputes arising between parties to private contracts, while in a PAGA action the real party in interest is not the employee who entered into the private arbitration agreement but rather the state, a non-party to that agreement.[19] Thus, the FAA does not apply to PAGA claims at all and cannot preempt the *Iskanian* rule. In addition, the state courts have reasoned that because PAGA claims are brought on behalf of the state and the state is not a party to

revocation of any contract." 9 U.S.C. § 2.

13. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (referring to Section 2 of the FAA).

14. *Id*. at 343.

15. *Id*. at 352.

16. *Id*. at 351.

17. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 386–387 (Cal. 2014), *cert. denied*, 574 U.S. 1121 (2015); Sakkab v. Luxottica Retail North America, Inc., 803 F.3d 425, 439 (9th Cir. 2015).

18. *See, e.g.*, Correia v. NB Baker Electric, Inc., 32 Cal. App. 5th 602, 625 n.3 (Cal. Ct. App. 2019) (commenting that PAGA actions "fall outside of the scope of the FAA.")

19. Tanguilig v. Bloomingdale's, Inc., 5 Cal. App. 5th 665, 671 (Cal. Ct. App. 2016) (citing *Iskanian*, 59 Cal. 4th at 384).

any preexisting arbitration agreement signed by an individual employee, such claims cannot be arbitrated (unless the state consents to do so).[20] In the California state courts, therefore, representative PAGA claims will almost invariably be brought in court.

In contrast, the federal courts in California and the Ninth Circuit have reasoned that the *Iskanian* rule is not preempted by the FAA because the rule does not directly target arbitration agreements nor does it undermine the objectives of the FAA.[21] According to the federal courts, all that the *Iskanian* rule purports to do is to render waivers of representative PAGA claims unenforceable, and it does not prohibit the resolution of such claims in arbitration as a matter of principle.[22] In the federal courts, therefore, representative PAGA claims may, at least in principle, be resolved in arbitration. However, these courts have stopped short of compelling arbitration where the parties' agreement prohibits the arbitration of "representative" claims, allowing PAGA claims to proceed in court instead.

This Article argues that the interpretation of the *Iskanian* rule by both the state and the federal courts in California ultimately leads to its preemption by the FAA under current Supreme Court precedent.[23] The state courts' interpretation either places PAGA claims entirely outside the scope of the FAA or renders such claims non-arbitrable in most cases. It thereby "prohibits outright the arbitration of a particular type of claim," triggering FAA preemption.[24] As for federal courts, their interpretation of the *Iskanian* rule, while not as clearly in violation of the FAA, nonetheless ultimately runs afoul of it. The federal courts' reasoning leads to PAGA claims being litigated in many cases notwithstanding an otherwise valid and applicable arbitration agreement. This outcome renders arbitration agreements unenforceable and violates the FAA because it undermines "the enforcement of arbitration agreements according to their terms."[25] At the end of the day,

20. *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th at 621 (stating that "an employee's predispute agreement to arbitrate PAGA claims is not enforceable without the state's consent").

21. *See Sakkab*, 803 F.3d at 431–33 (9th Cir. 2015) (discussing whether the FAA preempts the *Iskanian* rule).

22. *Id.*

23. *See also* Myriam Gilles & Gary Friedman, *Unwaivable: Public Enforcement Claims and Mandatory Arbitration*, 89 FORDHAM L. REV. 451, 454 (2020) (noting the "inevitable clash" between California's "jurisprudence holding public enforcement claims unwaivable in standard-form contracts of adhesion" and the "Supreme Court's interpretation of the FAA").

24. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

25. *Id.* at 343–44.

the Supreme Court has held that a state "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons,"[26] including in the context of statutes giving rise to a private attorney general role for individual plaintiffs such as the PAGA.[27] Therefore, the fate of the *Iskanian* rule, unless the Supreme Court reverses its long-standing course, is FAA preemption.

Part I of the Article briefly introduces PAGA and its legislative purpose.[28] Part II explains the *Iskanian* rule, and Parts III and IV examine state and federal courts' interpretation of this rule, respectively.[29] In Part V, the Article discusses the weaknesses of the state and federal courts' approaches and argues that both ultimately lead to the preemption of the *Iskanian* rule by the FAA, at least under current Supreme Court precedent.[30] Part VI of the Article concludes that the impact of the Supreme Court's decision on the *Iskanian* rule will likely extend beyond California—it will be relevant to the interpretation and application of the FAA more generally, as well as to other private attorney general statutes that might intersect with the FAA.[31]

II. PAGA

The California legislature enacted PAGA in 2004 to remedy two problems associated with enforcing its Labor Code. First, many Labor Code provisions did not have civil penalties or sanctions attached to them, and their violation "rarely result[ed] in criminal investigations and

26. *Id.* at 351.

27. Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 242 (1987) (noting that although both RICO and antitrust plaintiffs have a private attorney general role, this does not render claims brought under these federal statutes non-arbitrable).

28. *See infra* Part I. For a detailed discussion of PAGA, *see, e.g.*, Matthew J. Goodman, *The Private Attorney General Act: How to Manage the Unmanageable*, 56 SANTA CLARA L. REV. 413 (2016); 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 (2018). On the positive impacts of PAGA *see, e.g.*, Rachel Deutsch ET AL., *California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations*, UCLA POLICY BRIEFS (Feb. 1, 2020), https://escholarship.org/uc/item/98f8556s. On the negative impacts of PAGA, *see, e.g.*, Ben Nicholson, *Labor/Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 MCGEORGE L. REV. 581 (2004).

29. *See infra* Part II–IV.

30. *See infra* Part V.

31. *See infra* Part VI.

prosecutions."[32] PAGA overcame this problem by enacting significant civil penalties for Labor Code violations. The second problem was a shortage of government resources to pursue enforcement. PAGA remedied this issue by allowing "aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations."[33] An "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."[34] Aggrieved employees are authorized to "bring a civil action personally and on behalf of other current or former employees."[35]

Such a civil action may be filed if the Labor and Workforce Development Agency decides not to investigate the employee's complaint, fails to respond to it within a prescribed period of time, or decides to investigate the complaint but does not issue a citation.[36] If the labor code does not specify a penalty for a violation, the civil penalty under PAGA is $100 "for each aggrieved employee per pay period for the initial violation" and $200 "for each aggrieved employee per pay period for each subsequent violation,"[37] as well as reasonable attorney's fees and costs.[38] 75% of the civil penalties recovered in a PAGA action go to the Labor and Workforce Development Agency and 25% to the aggrieved employees,[39] making a PAGA action "a type of *qui tam* action"[40]—"[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."[41]

32. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 379 (Cal. 2014), *cert. denied*, 574 U.S. 1121 (2015) (citing Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (Reg. Sess. 2003–2004) as amended Apr. 22, 2003, p.5).

33. *Id*.

34. Cal. Lab. Code § 2699(c).

35. *Iskanian*, 59 Cal. 4th at 380.

36. Cal. Lab. Code, § 2699.3(a).

37. *Id.* § 2699(f)(2).

38. *Id.* § 2699(g)(1).

39. In 2019, California recovered $88 million under PAGA. *California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations*, THE PARTNERSHIP FOR WORKING FAMILIES (Feb. 11, 2020), https://www.forworkingfamilies.org/resources/publications/california%E2%80%99s-hero-labor-law-private-attorneys-general-act-fights-wage-theft.

40. *Iskanian*, 59 Cal. 4th at 382.

41. *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

III. ISKANIAN V. CLS TRANSPORTATION LOS ANGELES, LLC

In the *Iskanian* decision, the California Supreme Court held that waivers of representative PAGA actions are unenforceable and that this rule, known since then as the *Iskanian* rule, is not preempted by the FAA.

The plaintiff in this case was employed as a driver by the defendant (a transportation company) from March 2004 to August 2005.[42] In December 2004, the plaintiff signed an arbitration agreement providing that "any and all claims" arising out of his employment were to be submitted to arbitration.[43] The arbitration agreement also contained a class and representative action waiver.[44] In August 2006, the plaintiff commenced an action against the defendant for Labor Code violations.[45] The defendant successfully moved to compel arbitration and the plaintiff appealed.[46] While the appeal was pending, the California Supreme Court decided in *Gentry v. Superior Court* that "class arbitration waivers should not be enforced if a trial court determines . . . that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."[47] The defendant then voluntarily withdrew its motion to compel arbitration and the parties proceeded to litigate the case.[48] The plaintiff "brought his claims as an individual and putative class representative seeking damages, and also in a representative capacity under the PAGA seeking civil penalties."[49]

In April 2011, the United States Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*,[50] which invalidated an earlier decision

42. *Iskanian*, 59 Cal. 4th at 360.

43. *Id.*

44. The waiver provided that "except as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." *Id*. at 360–361.

45. *Id.* at 361.

46. *Id.*

47. Gentry v. Superior Court, 42 Cal. 4th 443, 450 (Cal. 2007).

48. *Iskanian*, 59 Cal. 4th at 361.

49. *Id.*

50. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

of the California Supreme Court, *Discover Bank v. Superior Court*.[51] In *Discover Bank*, the California Supreme Court prohibited class action waivers in consumer arbitration agreements, which became known as the *Discover Bank* rule.[52] The United States Supreme Court held that the *Discover Bank* rule was preempted by the FAA because requiring the availability of classwide arbitration by holding class action waivers unenforceable "interferes with fundamental attributes of arbitration" and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53] The overarching purpose of the FAA, according to the United States Supreme Court "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[54] Since "class arbitration *requires* procedural formality" and "greatly increases risks to defendants," the United States Supreme Court held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[55] Moreover, a state cannot "require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[56]

After *Concepcion* was issued, the defendant in *Iskanian* proceeded to renew its motion to compel arbitration and dismiss the plaintiff's class claims, arguing that *Concepcion* also invalidated *Gentry*.[57] The trial court agreed, referring the case to individual arbitration and dismissing the class claims, and the court of appeal affirmed.[58] With respect to the plaintiff's representative PAGA claims, the court of appeal held that the FAA

51. *Id.* at 352.

52. Discover Bank v. Superior Court, 36 Cal. 4th 148, 162–63 (Cal. 2005). The rule established by the California Supreme Court in this case, known as the Discover Bank rule, provided that "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.*

53. *AT&T Mobility LLC*, 563 U.S. at 344, 352 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 (1941)).

54. *Id.* at 344.

55. *Id.* at 348–50.

56. *Id.* at 351.

57. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 361 (Cal. 2014), *cert. denied*, 574 U.S. 1121 (2015).

58. *Id.*

"precludes states from withdrawing claims from arbitration and that PAGA claims must be argued individually, not in a representative action, according to the terms of the arbitration agreement."[59]

The plaintiff appealed to the California Supreme Court, and the court answered two questions.[60] The first question concerned the class action waiver contained in the parties' arbitration agreement and whether *Gentry*'s refusal to enforce such a waiver was preempted by the FAA in light of *Concepcion*.[61] The court answered in the affirmative, noting that the United States Supreme Court in *Concepcion* had held that the FAA "prevent[s] states from mandating or promoting procedures incompatible with arbitration" and that class proceedings were incompatible with arbitration.[62] Therefore, pursuant to *Concepcion* "a class waiver is *not* invalid even if an individual proceeding would be an ineffective means to prosecute certain claims" and the contrary decision in *Gentry* could not stand.[63]

The second question before the California Supreme Court concerned the representative, rather than class, action waiver contained in the arbitration agreement as applied to the plaintiff's PAGA claim.[64] Specifically, whether an employee's right to bring a representative PAGA action was unwaivable under California law and, if so, whether this was preempted by the FAA.[65] The court held that an employment agreement that eliminates employees' right to bring a representative PAGA action "altogether" by way of a waiver "before any dispute arises" is contrary to public policy because it serves "to disable one of the primary mechanisms for enforcing the Labor Code."[66] Moreover, the court found that there was no difference in this respect between "representative" and "individual" PAGA claims, because the purposes of PAGA are not served where individual claims for Labor Code violations are brought in many separate proceedings.[67] Therefore, the court concluded that where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and

59. *Id.* at 362.
60. *Id.*
61. *Id.* at 364.
62. *Id.* at 364, 366.
63. *Id.* at 364.
64. *Id.* at 378.
65. *Id.*
66. *Id.* at 383.
67. *Id.* at 384.

unenforceable as a matter of state law."[68]

The court then proceeded to examine whether this prohibition on waivers of representative PAGA actions is preempted by the FAA.[69] The court concluded that the rule is not preempted because it does not stand "as an obstacle to the accomplishment of the FAA's objectives" within the meaning of *Concepcion*.[70] While the FAA "aims to ensure an efficient forum for the resolution of *private* disputes," the court reasoned, a PAGA action "is a dispute between an employer and the state Labor and Workforce Development Agency."[71] That the FAA was primarily intended to apply to private contractual disputes is evident, according to the court, from its reference to "[a] written provision . . . evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract or transaction*."[72] Moreover, the FAA's legislative history, the court noted, shows that "the FAA's primary object was the settlement of ordinary commercial disputes" rather than "disputes between the government in its law enforcement capacity and private individuals."[73]

Accordingly, the court concluded that:

> a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code.[74]

Indeed, the court emphasized that in a PAGA claim, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies" and that "an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself."[75] In other words, a PAGA litigant is "the proxy or agent of the

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* (referring to 9 U.S.C. § 2).
73. *Id.* at 385.
74. *Id.* at 386–87.
75. *Id.* at 387 (citing *Arias v. Superior* Court, 46 Cal. 4th 969, 986 (Cal. 2009)).

state[].”[76] Therefore,

> [r]epresentative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other. Instead, they directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws.[77]

The exception to FAA preemption established by the court was ultimately framed in the following terms:

> Our FAA holding applies specifically to a state law rule barring predispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers.[78]

Since the court held that the parties' arbitration agreement in this case was enforceable other than with respect to the waiver of representative PAGA actions, it directed the plaintiff to proceed with bilateral arbitration of his individual damages claims and the defendant to answer the representative PAGA claims “in some forum,” noting that “[t]he arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration.”[79]

While the California Supreme Court in *Iskanian* clearly held that waivers of representative PAGA claims are unenforceable and that the FAA does not preempt this unenforceability, it was less clear whether arbitration of such claims would be permissible. On the one hand, the court's decision seemed to only prohibit waivers of representative PAGA actions “in any

76. *Id.* at 388 (internal quotations omitted).

77. *Id.* at 387.

78. *Id.* at 388.

79. *Id.* at 391. The California Supreme Court remanded the case to address the following questions: “(1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed . . . ?” *Id.* at 391–92. Later, the employee successfully “filed a request to dismiss both his individual claims (proceeding in arbitration) and his PAGA claims with prejudice.” Iskanian v. CLS Transp. L.A., LLC, 2016 WL 10706257, at *1 (Super. Ct. Cal. 2016).

forum,"[80] leaving the possibility of such actions proceeding "in some forum," including in arbitration, at least where the applicable arbitration agreement so permits.[81] The court also seemed to limit the prohibition on waivers of representative PAGA actions to "predispute" agreements, although it did not define this term.[82] On the other hand, the decision could also be read as prohibiting PAGA claims from proceeding in arbitration altogether because of the court's clear position that "the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement" and a representative PAGA claim is "a public enforcement action" brought on behalf of the state.[83] After all, if "a PAGA claim lies outside the FAA's coverage,"[84] how could it ever be submitted to FAA arbitration? And if it can never be submitted to arbitration, how can the *Iskanian* rule escape FAA preemption for "prohibit[ing] outright the arbitration of a particular type of claim"?[85]

Indeed, it seems that if *Iskanian* is read as holding that the FAA does not apply to PAGA claims at all, it cannot survive FAA preemption under *Concepcion* or, for that matter, under earlier Supreme Court precedent.[86] As a result, both state and federal courts in California have avoided interpreting *Iskanian* in this way. As discussed in the next Part, state courts have limited *Iskanian*'s holding to "predispute" arbitration agreements on the basis of agency principles.[87] Taking a different approach, as will be discussed in Part IV, federal courts have restricted *Iskanian*'s holding to *waivers* of representative PAGA claims, noting that *Iskanian* was silent on the *arbitration* of such claims.[88] In Part V, this Article will explain why both of these approaches to the interpretation of the *Iskanian* rule ultimately violate the FAA and result in the rule's preemption, at least under current Supreme

80. *Iskanian*, 59 Cal. 4th at 360.

81. *Id.* at 391.

82. *Id.* at 388 ("Our FAA Holding applies specifically to a state law rule barring *predispute* waiver of an employee's right to bring an action." (emphasis added)).

83. *Id*. at 388.

84. *Id*. at 386.

85. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

86. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) (holding that the FAA ensures that arbitration agreements are enforced according to their terms "even if a rule of state law would otherwise exclude such claims from arbitration").

87. *See infra* Part III.

88. *See infra* Part IV.

Court jurisprudence.[89]

IV. CALIFORNIA STATE COURTS POST-*ISKANIAN*

Recognizing that *Iskanian* did not, in fact, "decide the issue of whether courts have the authority to order a PAGA representative action into arbitration,"[90] state courts in all six California appellate districts have nonetheless read *Iskanian* as prohibiting not only the predispute waiver of representative PAGA claims but also their arbitration.[91] Most of these courts, however, have not relied on *Iskanian* for its conclusion that the FAA as a whole is inapplicable to such claims. Instead, they have found that particular arbitration agreements, namely "predispute" agreements, cannot bind the state to arbitrate PAGA actions on the basis of agency principles.[92]

The basic reasoning of the California state courts is as follows: even though plaintiffs-employees are acting as proxies or agents of the state when bringing a PAGA action, they cannot bind the state to an arbitration agreement that they entered into "before any dispute has arisen."[93] When an

89. *See infra* Part V.

90. Correia v. NB Baker Electric, Inc., 32 Cal. App. 5th 602, 609 (Cal. Ct. App. 2019). *See also* Galarsa v. Dolgen California, LLC, 2021 WL 5411013, at *4 (Cal. Ct. App. 2021) ("*Iskanian*'s anti-waiver rule prevents employer from avoiding PAGA and does not directly address arbitration agreements, private or otherwise.").

91. *See, e.g.*, Ely v. Walnut Creek Assocs. 2, Inc., 2019 WL 5654368, at *3 (Cal. Ct. App. 2019) ("*Iskanian* exempted from arbitration those actions where the state is the real party in interest."); Esparza v. KS Indus., L.P., 13 Cal. App. 5th 1228, 1246 (Cal. Ct. App. 2017) (referring to the *Iskanian* rule as a "rule of nonarbitrability"). Some California state courts prohibited arbitration of representative PAGA claims pursuant to a "predispute" arbitration agreement but left open the possibility of such arbitration taking place pursuant to a post-dispute agreement. *See, e.g.*, Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439, 448 (Cal. Ct. App. 2017) ("We have not interpreted *Iskanian* as prohibiting arbitration of all PAGA claims. Hypothetically, a PAGA plaintiff might consent to arbitration after the filing of a complaint.").

92. Several courts have nonetheless noted or relied on *Iskanian*'s holding regarding the scope of the FAA. *See, e.g.*, Galarsa v. Dolgen California, LLC, 2021 WL 5411013, at *4 (Cal. Ct. App. 2021), where the court found that the PAGA waiver was not preempted by the FAA because "the FAA cannot be frustrated when the matter in question lies outside its scope." In *Herrera v. Doctors Medical Center of Modesto*, 67 Cal. App. 5th 538, 542 (Cal. Ct. App. 2021), the court concluded that "the FAA does not reach the PAGA claims alleged in this case," while nonetheless recognizing that PAGA claims are subject to arbitration "if the state, or the state's authorized representative, consents to arbitration." In *Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602, 625 n.3 (Cal. Ct. App. 2019), the court noted in a footnote that "[b]ecause PAGA actions are public enforcement actions, they generally fall outside the scope of the FAA," but did not decide the case on this basis.

93. *Correia*, 32 Cal. App. 5th at 624. *See also, e.g.*, Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439, 446 (Cal. Ct. App. 2017) ("The state is not bound by [an employee's] predispute

arbitration agreement ceases to be "predispute"—*i.e.*, when it will be binding on the state even if entered into by an individual employee—is not entirely clear. The state courts initially referred to the point in time when plaintiff-employees qualify as "'aggrieved employees' entitled to bring the PAGA action on the state's behalf" as determinative of their status as agents of the state capable of binding it to an arbitration agreement.[94] As already noted, PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."[95] On its face, this definition does not require employees to actually file a PAGA claim or to comply with any procedural requirements in order to be considered "aggrieved employees."

Nonetheless, state courts have not allowed "aggrieved employees" to bind the state to arbitration agreements without more. Rather, they have required that an aggrieved employee also meet the statutory procedural requirements for commencing a PAGA action as set out in the Labor Code,[96] namely that the state "does not investigate, does not issue a citation, or fails to respond to the notice within 65 days."[97] Only at that point, according to these courts, has the state provided the employee "with implicit or explicit authority to bring the claim," so that the employee is capable of binding the state to an arbitration agreement.[98] The rationale is that until this occurs the

agreement to arbitrate."); *Herrera*, 67 Cal. App. 5th at 549 ("[O]ur legal conclusion 'that PAGA *representative* claims for *civil penalties* are not subject to arbitration' is necessarily limited to arbitration pursuant to a predispute arbitration agreement."); Contreras v. Superior Court of L.A, Cnty., 61 Cal. App. 5th 461, 472 (Cal. Ct. App. 2021) ("[A]n employer cannot rely on an employee's predispute arbitration agreement to compel arbitration of a PAGA claim." (internal citations omitted)). The court expressly noted that "an agreement to arbitrate the PAGA claims would not be enforceable unless it was made *after* the former employee became a PAGA authorized aggrieved employee (i.e., an agent of the state)." *Herrera*, at 551 n.3.

94. *Correia*, 32 Cal. App. 5th at 622, 624 ("[U]nder the PAGA statutory scheme, the plaintiff does not assume this proxy role until it is an 'aggrieved employee.'").

95. Cal. Lab. Code, § 2699(c).

96. California Labor Code § 2699.3(a) sets forth the procedures with which an aggrieved employee must comply in order to commence a representative PAGA action.

97. Mondragon v. Santa Ana Healthcare & Wellness Ctr., LP, 2021 WL 4436388, at *7 n.3 (Cal. Ct. App. 2021) (citing *Kim v. Reins Int. Cal., Inc.*, 9 Cal. 5th 73, 81 (Cal. 2020)).

98. *Correia*, 32 Cal. App. 5th at 622. *See also, e.g.*, Pote v. Handy Techs., Inc., 2021 WL 3615916, at *9 (Cal. Ct. App. 2021) (quoting *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 866 (2017). The court found that the arbitration agreement was entered into by the plaintiff-employee "predispute" notwithstanding that it was concluded after the employee provided his PAGA notice to the employer and the state agency. Some state courts have also held that no part of a PAGA claim may be submitted to arbitration pursuant to a "predispute" agreement, including the question of whether the plaintiff-employee is an "aggrieved employee" within the meaning of PAGA. *See, e.g.*,

state "retains control of the right underlying the employee's PAGA claim,"[99] and therefore the employee can only conclude the arbitration agreement "as an individual, rather than as an agent or representative of the state"[100] and the agreement cannot bind the state.[101] Nor can theories such as assumption[102] and equitable estoppel[103] result in a "predispute" arbitration agreement binding the state.

According to the state courts, this reasoning is consistent with other *qui tam* statutes that prohibit the enforcement of an arbitration agreement entered into by an individual against the non-party state and with the legal principle that "a person who signs an agreement in a particular capacity is not necessarily bound when acting in a different capacity."[104] Nor is this reasoning displaced by the United State Supreme Court's decisions in *Epic Systems Corp. v. Lewis*[105] and *Lamps Plus, Inc. v. Varela*.[106] In *Epic Systems*, the Supreme Court held that the National Labor Relations Act should not be read as prohibiting waivers of class actions in employment contracts because such a prohibition would attack "(only) the individualized

Williams v. Superior Court of L.A. Cnty., 237 Cal. App. 4th 642, 649 (Cal. Ct. App. 2015); Provost v. YourMechanic, Inc., 55 Cal. App. 5th 982, 987–988 (Cal. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2891 (2021) and cases cited therein at 994.

99. *Correia*, 32 Cal. App. 5th at 622–23.

100. Julian v. Glenair Inc., 17 Cal. App. 5th 853, 872 (Cal. Ct. App. 2017). *See also, e.g.*, Collie v. Icee Co., 52 Cal. App. 5th 477, 482 (Cal. Ct. App. 2020).

101. Ahlmann v. ForwardLine Fin., LLC, 2021 WL 5275771, at *4 (Cal. Ct. App. 2021). *See also, e.g.*, Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439, 447 (Cal. Ct. App. 2017) ("[T]he fact that [the employee] may have entered into a predispute agreement to arbitrate does not bind the state to arbitration."); *Collie*, 52 Cal. App. 5th at 483 (concluding that the employee's "predispute arbitration agreement is unenforceable" because the employer "cannot enforce a contractual provision to bind a nonparty").

102. Galarsa v. Dolgen California, LLC, 2021 WL 5411013, at *7 (Cal. Ct. App. 2021) (holding that mere inaction on behalf of the state in not commencing a PAGA action against an employer after receiving a complaint from an employee does not constitute assumption of the employee's pre-existing arbitration agreement).

103. *Id.* at *9 (noting that since a PAGA cause of action concerns alleged violations of the Labor Code, such statutory violations do not depend upon the underlying employment contract containing the arbitration agreement. Therefore, in order to successfully argue equitable estoppel, a plaintiff-employee would have to rely on "a particular provision of the employment agreement . . . to establish a Labor Code violation." (original emphasis omitted)).

104. *Correia*, 32 Cal. App. 5th at 622–23 (referring to the federal False Claims Act (31 U.S.C. § 3729 et seq. and quoting *Mikes v. Strauss*, 889 F. Supp. 746, 755 (S.D.N.Y. 1995) and *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 2016 U.S. Dist. Lexis 76490 (D. Nev. 2016).

105. *See generally* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

106. *See generally* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

nature of the arbitration proceedings," thereby seeking "to interfere with one of arbitration's fundamental attributes."[107] In *Lamps Plus*, the Supreme Court held that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis" because "[c]lass arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration."[108] The California state courts have uniformly held that the *Iskanian* rule (which, according to these courts, prohibits both waivers of representative PAGA claims and most agreements to arbitrate such claims) remains un-preempted by the FAA notwithstanding these recent United States Supreme Court decisions.[109] As one California state court of appeal has summarized:

> [A]n aggrieved employee's pursuit of a PAGA action in a judicial forum does not frustrate the FAA's "principal purpose of ensuring that *private* arbitration agreements are enforced according to their terms" any more than the Labor and Workforce Development Agency's pursuit of the PAGA claim in court would frustrate the FAA. [T]he class action claim pursued in *Epic Systems* "differs fundamentally from a PAGA claim" because a PAGA claim is brought on behalf of the state, not on behalf of other employees.[110]

V. FEDERAL COURTS IN CALIFORNIA AND THE NINTH CIRCUIT POST-ISKANIAN

In contrast to the state courts, federal courts in California have interpreted *Iskanian* narrowly as prohibiting only the complete waiver of representative PAGA claims and have therefore purported to allow for such claims to proceed in arbitration. For present purposes, this line of authority begins with the Ninth Circuit's decision in *Sakkab v. Luxottica Retail North*

107. *Epic Systems Corp*., 138 S. Ct. at 1622.

108. *Lamps Plus, Inc*., 139 S. Ct. at 1415–19.

109. *See, e.g.*, Collie v. Icee Company, 52 Cal. App. 5th 477, 483 (Cal. Ct. App. 2020); *Correia*, 32 Cal. App. 5th at 619–620; Olson v. Lyft, Inc., 56 Cal. App. 5th 862, 872 (Cal. Ct. App. 2020); Malaspina v. Maplebear Inc., 2021 WL 3561359, at *4 (Cal. Ct. App. 2021); Mondragon v. Santa Ana Healthcare & Wellness Ctr., LP, 2021 WL 4436388, at *5–6 (Cal. Ct. App. 2021); Winns v. Postmates Inc., 66 Cal. App. 5th 803, 811 (Cal. Ct. App. 2021).

110. Galarsa v. Dolgen California, LLC, 2021 WL 5411013, at *4 (Cal. Ct. App. 2021) (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) and *Correia v. NB Baker Electric, Inc*., 32 Cal.App.5th 602, 619 (2019)).

America, Inc.[111]

Sakkab involved an employee who filed a putative class action against his employer as well as a representative claim for civil penalties under PAGA.[112] The employer moved to compel individual arbitration pursuant to the parties' arbitration agreement, which contained a class and representative action waiver.[113] The district court, rendering its decision prior to *Iskanian*, granted the employer's motion to compel individual arbitration and the employee appealed.[114] *Iskanian* was rendered in the interim, and the question presented to the Ninth Circuit in *Sakkab* was whether the FAA preempted the *Iskanian* rule barring the waiver of representative PAGA claims.[115]

The Ninth Circuit answered this question in the negative. The court first found that the *Iskanian* rule applies to "any contract" as required under the "saving clause" of Section 2 of the FAA[116] because it "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement."[117] Therefore, the *Iskanian* rule does not target arbitration agreements specifically in violation of the FAA. The Ninth Circuit then reasoned that the *Iskanian* rule also does not conflict with the FAA's two purposes.[118] First, the FAA was intended to "overcome judicial hostility to arbitration."[119] The Ninth Circuit found that this purpose does not conflict with the *Iskanian* rule, because the rule "provides only that representative PAGA claims may not be waived outright" and "does not prohibit the arbitration of any type of claim."[120]

Second, the FAA was intended to "'ensur[e] that private arbitration agreements are enforced according to their terms.'"[121] The Ninth Circuit found that this purpose does not conflict with the *Iskanian* rule either

111. *See generally* Sakkab v. Luxottica Retail North America, Inc., 803 F.3d 425 (9th Cir. 2015).
112. *Id.* at 428.
113. *Id.*
114. *Id.*
115. *Id.* at 429.
116. The "saving clause" of Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
117. *Sakkab*, 803 F.3d at 432.
118. *Id.* at 433.
119. *Id.* at 434.
120. *Id.*
121. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011)).

because the rule "does not diminish parties' freedom to select informal arbitration procedures" as a ban on class action waivers does.[122] A class action, according to the court, is "a procedural device for resolving the claims of absent parties on a representative basis."[123] In contrast, a representative PAGA action is a "statutory action for penalties" brought "as the proxy or agent of the state's labor law enforcement agencies."[124] By bringing a representative PAGA action to obtain civil penalties for an employer's Labor Code violations, the employee-plaintiff "does not vindicate absent employees' claims."[125] Therefore, there is no need to protect such employees' "due process rights in PAGA arbitrations" and such arbitrations "do not require the formal procedures of class arbitrations."[126] The Ninth Circuit emphasized that it is a "critically important distinction" between the *Iskanian* rule and the *Discover Bank* rule invalidated by the Supreme Court in *Concepcion* that "[n]othing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims."[127]

Finding the *Iskanian* rule was not preempted by the FAA, the Ninth Circuit held that the waiver of the employee's representative PAGA claim in this case could not be enforced and remanded the case to the district court to determine where this claim should be resolved—in arbitration (together with the employee's non-PAGA claims) or in litigation.[128]

In subsequent decisions, the Ninth Circuit continued to diverge from the California state courts' jurisprudence. The court repeatedly affirmed that PAGA claims may be compelled to arbitration in accordance with the terms of preexisting arbitration agreements entered into by individual employees

122. *Id.* at 435.

123. *Id.*

124. *Id.* at 435–36 (internal quotations omitted) (quoting *Iskanian*, 59 Cal. 4th at 380).

125. *Id.* at 435.

126. *Id.* at 436. Such formal requirements include notice to unnamed aggrieved employees, opt-out options for such employees, class counsel's ability to fairly and adequately represent unnamed employees, and numerosity, commonality, or typicality. *Id.*

127. *Id.* The Ninth Circuit noted that "the amount of civil penalties the PAGA authorizes could make arbitration a less attractive method than litigation for resolving representative PAGA claims," but found that this was insufficient for a finding that the FAA preempts the *Iskanian* rule. *Id.* at 437. The court further accepted that PAGA actions are "complex" but noted that there are not "necessarily 'procedurally' complex." *Id.* at 438. The court cautioned, however, that a state law limiting parties' right to use informal procedures "could run afoul of the Court's decision in *Concepcion* by requiring a degree of formality that is inconsistent with traditional arbitration procedures." *Id.* at 439.

128. *Id*. at 440. No further proceedings took place before the district court.

and employers because this does not "run afoul of *Sakkab* and *Iskanian.*"[129] *Iskanian*, according to the Ninth Circuit, "does not require that a PAGA claim be pursued in the judicial forum; it holds only that a complete waiver of the right to bring a PAGA claim is invalid."[130] Because a plaintiff-employee bringing a PAGA claim acts as an agent or proxy of the state and the judgment in a representative PAGA action is also binding on the state, the plaintiff-employee "can agree to pursue a PAGA claim in arbitration."[131]

More in line with the California state courts, the Ninth Circuit has also rejected the argument that *Sakkab* and *Iskanian* have been overruled by the United States Supreme Court's decisions in *Epic Systems*[132] and *Lamps Plus*.[133] According to the Ninth Circuit, the Supreme Court in these cases simply "reiterated and reapplied," but did not expand the *Concepcion* rule that the FAA "preempts state laws that interfere with arbitration's 'fundamental attributes,' including, primarily, its procedural informality."[134]

A long line of California federal district court decisions has faithfully applied the Ninth Circuit's interpretation of the *Iskanian* rule. These courts have refused to enforce waivers of representative PAGA claims contained in arbitration agreements and have either compelled such claims to arbitration[135] or stayed them pending the arbitration of other arbitrable claims.[136]

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129. Wulfe v. Valero Refining Co.-California, 641 Fed. App'x 758, 760 (9th Cir. 2016). Whether a PAGA claim may be compelled to arbitration in turn depends on whether it falls within the scope of the arbitration clause. Valdez v. Terminix Int'l Co. Ltd. P'ship, 681 Fed. App'x 592, 594 (9th Cir. 2017).

130. *Valdez*, 681 Fed. App'x at 594.

131. *Id.*

132. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

133. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

134. Rivas v. Coverall N. Am., Inc., 842 Fed. App'x 55, 56 (9th Cir. 2021).

135. *See, e.g.*, Orozco v. Gruma Corp., 2021 WL 4481061, at *6 (E.D. Cal. 2021) (noting that the court did not mention the Ninth Circuit's holding in *Sakkab* and instead referred to Porter v. Nabros Drilling USA, L.P., 2015 WL 13323135, *2 (E.D. Cal. 2015), issued a week before *Sakkab*, in which the district court concluded that "the FAA preempts the rule announced in *Iskanian* . . . [the] undisputed waiver of the right to bring a representative or class action is enforceable."); Burmudez v. Dragados USA, Inc., 2021 WL 5417658, at *6 (E.D. Cal. 2021) (noting that "[w]hile the law at issue is slightly muddled," plaintiff's "categorical statement" that "PAGA claims cannot be compelled to arbitration under California law" is "not correct," and ordering arbitration of the plaintiff's PAGA claims on an individual basis).

136. *See, e.g.*, Cardenas v. Aaron's, Inc., 2021 WL 2355942, at *3 (E.D. Cal. 2021) ("[C]onsidering the derivative nature of Plaintiff's PAGA claim, the Court exercises its discretion and stays the entire action pending arbitration of Plaintiff's individual claims in the interest of judicial efficiency."); Bell v. Redfin Corp., 2021 WL 5444791, at *5 (S.D. Cal. 2021) ("[B]ecause

VI. THE *ISKANIAN* RULE—PREEMPTED BY THE FAA AFTER ALL?

As the previous two Parts demonstrate, federal and state courts in California diverge on the scope of the *Iskanian* rule.[137] Specifically, the courts disagree on whether it prohibits only waivers of representative PAGA claims that would prevent such claims from proceeding "in any forum" (as per the federal courts), or also prohibits such claims from proceeding in arbitration, at least pursuant to a "predispute" agreement entered into by an individual employee (as per the state courts). While both state and federal courts have thus far agreed that the FAA does not preempt the *Iskanian* rule, they also differ on the rationale underlying this conclusion. According to the state courts, the FAA does not preempt the *Iskanian* rule because PAGA claims are brought by employees as agents on behalf of the state and an individual employee cannot bind the state to a "predispute" arbitration agreement.[138] According to the federal courts, the FAA does not preempt the *Iskanian* rule because the rule applies to any contract and does not undermine the objectives of the FAA.[139] This Part of the Article argues that, despite the efforts of the state and federal courts in California to avoid FAA preemption of the *Iskanian* rule, both lines of authority ultimately foreclose arbitration of a particular category of claims and therefore cannot escape

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the PAGA claims and the arbitrable claims are interconnected, efficiency counsels in favor of a stay."); Musolf v. NRC Env't Servs., Inc., 2021 WL 1696282, at *3 (E.D. Cal. 2021) ("Given the entanglement of the non-arbitrable PAGA claim for civil penalties with the other claims for damages . . . the court stays the entire action here in the interests of efficiency, pending completion of arbitration."); Gonzales v. Emeritus Corp., 407 F. Supp. 3d 862, 868 (N.D. Cal. 2019) ("[B]ecause plaintiff's PAGA claims are derivative of the substantive claims which will proceed to arbitration, the representative PAGA claims are hereby [stayed] pending the results of the arbitration proceeding."); Maharaj v. Charter Commc'n, Inc., 2021 WL 5014352, at *11 (S.D. Cal. 2021) ("[W]here, as here, the factual and legal overlap between arbitrable wage-and-hour claims and nonarbitrable PAGA claims is considerable, courts are well-within their discretion to stay the PAGA claims pending arbitration of the individual claims, as it would serve the Court's interest in efficiency and give proper effect both to the principles enshrined in Rule 1 of the Federal Rules of Civil Procedure and the parties' agreement to arbitrate."). *But see* Harper v. Charter Commc'n, LLC, 2021 WL 4784417, at *10 (E.D. Cal. 2021) (refusing to stay the plaintiff's PAGA claims "because a stay would impede vindication of California's interests in enforcing the Labor Code through representative PAGA actions . . . and because the PAGA claim represents a distinct 'action' in this case").

137. *See supra* Part III–IV.

138. *See* Tanguilig v. Bloomingdale's, Inc., 5 Cal. App. 665, 678 (Cal. Ct. App. 2016) (stating that PAGA plaintiffs act as a proxy for the state).

139. *See* Sakkab v. Luxottica Retail North America, Inc., 803 F.3d 425, 432 (9th Cir. 2015) (holding that the FAA does not preempt *Iskanian* because it does not conflict with the FAA's objectives).

preemption under current United States Supreme Court jurisprudence.[140]

A. The State Courts' Rationale Leads to Preemption

Recall that the California Supreme Court in *Iskanian* held that the newly-established rule rendering representative PAGA waivers unenforceable survives FAA preemption because the FAA is not applicable to PAGA claims *at all*.[141] Therefore, if *Iskanian* is read as prohibiting arbitration of PAGA claims because such claims fall outside the scope of the FAA, this prohibition would apply to all arbitration agreements entered into by employees at any point in time, including after they have become agents of the state for the purpose of brining a PAGA claim.[142] Such a rule would prohibit "outright the arbitration of a particular type of claim," clearly resulting in FAA preemption.[143]

Indeed, by seemingly allowing employees to bind the state to "post-dispute" arbitration agreements with respect to PAGA claims, the lower state courts have effectively rejected a reading of *Iskanian* as categorically prohibiting arbitration of such claims. However, the result of the approach adopted by the lower state courts is no less damning to arbitration agreements.[144] These courts have held that an aggrieved employee can only bind the state to an arbitration agreement after all of the procedural requirements for the employee to bring a PAGA claim are satisfied.[145] But

140. *See infra* Section V.A–V.B.

141. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 386–87 (Cal. 2014), *cert. denied*, 574 U.S. 1121 (2015).

142. *See* Green v. Shipt, Inc., 2021 WL 4901523, at *6 n.6 (Cal. Ct. App. 2021) ("*Iskanian*'s underlying public policy rationale does not turn on how the employer and worker entered into the agreement, or its mandatory or voluntary nature. Rather, it turns on the fact that a PAGA claim provides a remedy that inures to the state and that private agreements seeking to waive such public rights are precluded." (citing Winns v. Postmates Inc., 66 Cal. App. 5th 803, 810–11 (Cal. Ct. App. 2021); Provost v. YourMechanic Inc., 55 Cal. App. 5th 982, 993–94 (Cal. Ct. App. 2020); Williams v. Superior Court, 237 Cal. App. 4th. 642, 647–48 (Cal. Ct. App. 2015)).

143. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011). This was recognized by Justices Chin and Baxter's concurring opinion in *Iskanian*, finding that the majority's decision that "the FAA completely inapplicable to PAGA" was "a novel theory, devoid of case law support." *Iskanian*, 59 Cal.4th at 396 (Chin and Baxter, JJ., concurring).

144. Diaz v. First Class Vending, Inc., 2020 WL 563904, at *5 (Cal. Ct. App. 2020) (noting that where "parties *have* agreed to arbitrate PAGA claims . . . such claims might still avoid arbitration on California public policy grounds under *Iskanian*, even where the FAA applies").

145. Pote v. Handy Tech., Inc., 2021 WL 3615916, at *9 (Cal. Ct. App. 2021) ("The predispute/postdispute boundary is crossed when the pertinent employee is authorized to commence a PAGA action as an agent of the state." (quoting *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 870

even this threshold has been increasingly pushed by the courts to the point of turning practically all arbitration agreements entered into by individual employees into "predispute" agreements that are incapable of binding the state to arbitration of PAGA claims.

For instance, one state court held that even if a plaintiff-employee chooses *not* to opt-out of a previously concluded arbitration agreement *after* all of the procedural requirements for bringing a PAGA claim are satisfied, the arbitration agreement still cannot apply to PAGA claims.[146] The court reasoned that the employee had originally entered into the arbitration agreement "in his individual capacity only. His corresponding right to opt out of the arbitration agreement was similarly an individual one."[147] In other words, an employee can only bind the state to an arbitration agreement as its agent if the agreement is *entered into* after all procedural requirements for bringing a PAGA action have been met by that employee. This would require an independent arbitration agreement between the employer and the employee that is separate from the original employment contract and concluded at the time that the employee is commencing the PAGA action, which is very unlikely to happen.

Therefore, if the state courts' reasoning is taken to its logical conclusion, then many valid arbitration agreements entered into by employers and employees will not be enforced with respect to PAGA actions. These include, for instance, an arbitration agreement entered into "predispute" that the plaintiff-employee reaffirms in some way "post-dispute," an agreement to arbitrate future PAGA claims on a representative basis (i.e., there is no waiver of such claims "in any forum"), and a "predispute" arbitration agreement contained in an employment contract with a severability clause allowing a court to sever the offending representative PAGA waiver and enforce the arbitration agreement.[148] Indeed, it is difficult to imagine an

(Cal. Ct. App. 2017)).

146. *Pote*, 2021 WL 3615916 at *10.

147. *Id.* at *9. The arbitration agreement in this case waived representative actions and the employer sought to arbitrate the employee's PAGA claims on an individual basis. *Id.* at *1. It is unclear whether the court would have compelled the claims to arbitration on a representative basis had the arbitration agreement so permitted.

148. *See, e.g.*, Correia v. NB Baker Electric, Inc., 32 Cal. App. 5th 602, 621 (Cal. Ct. App. 2019) (finding that the court was "satisfied that the parties agreed (through the agreement's severance clause) that if any provision (such as the representative claim waiver in all forums) is found to be invalid, the finding does not preclude the enforcement of any remaining portion of the agreement") Nonetheless, the *Correia* court held that the agreement to arbitrate a PAGA representative action was unenforceable. *Id.* at 624–25.

employment arbitration agreement that would satisfy the state courts' increasingly demanding definition of a "post-dispute" agreement.

The state courts' reasoning may also implicate employment arbitration agreements beyond representative PAGA claims. For instance, in some cases plaintiffs-employees included in a PAGA action victim-specific remedies in addition to civil penalties,[149] which if accepted would allow them to circumvent entirely the arbitration agreement they would otherwise be bound by in bringing individual claims. In other cases, plaintiffs-employees filed a single cause of action pursuant to PAGA,[150] at times

149. In ZB, N.A. v. Superior Court, 8 Cal. 5th 175 (Cal. 2019), the California Supreme Court clarified what relief employees could claim in a PAGA action. At issue in ZB was section 558 of the Labor Code, which contemplates civil penalties for unpaid wages. *Id.* at 181. Section 558 "lacks a private right of action" and "[a]n aggrieved employee can make use of section 558's remedy only when she acts as the state's proxy—and that's a role she can play only through a PAGA action." *Id.* at 188. However, the California Supreme Court concluded that "the amount for unpaid wages referenced in section 558 is not part of that section's civil penalty and is not recoverable through a PAGA action." *Id.* Rather, it "represents compensatory damages" that may be recovered by an employee in other ways. *Id.* According to the court, an action for "civil penalties" under the PAGA is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties" and such civil penalties are "additional to actual losses incurred" that are "intended 'to punish the employer' for wrongdoing." *Id.* at 185–86 (internal citations omitted). In contrast, "[s]tatutory damages . . . primarily seek to compensate employees for actual losses incurred," such as unpaid wages. *Id.* at 186 (internal citations omitted). Therefore, "[p]ursuing civil penalties does not prevent an employee from separately or concurrently pursuing unpaid wages and other remedies already available to her." *Id.* at 187. In other words, while "[a]n employee's predispute agreement to individually arbitrate her claims is unenforceable where it blocks an employee's PAGA claim from proceeding," a PAGA claim does not include all possible remedies under the Labor Code. *Id.* at 198. The court ultimately upheld the Court of Appeal's decision to deny the employer's motion to compel arbitration, however it did so because the employee lacked a cause of action under section 558. *Id.* Notwithstanding the California Supreme Court's holding in *ZB*, some plaintiff-employees attempt to present individual claims or claims for victim-specific relief as PAGA claims or as part of a PAGA action. *See, e.g.*, McCray v. Wireless World, LLC, 2019 WL 6123766, at *4, 7 (Cal. Ct. App. 2019) (holding that although the plaintiffs-employees described their lawsuit as a "PAGA-only representative action," their "sole cause of action contain[ed] numerous allegations supporting non-PAGA individual claims, and correspondingly their prayer s[ought] relief that is unavailable in a representative action under PAGA"; therefore, "any claims for 'individualized (i.e., victim-specific) relief' are unaffected by *Iskanian* and should be resolved by arbitration"); Ely v. Walnut Creek Assoc. 2, Inc., 2019 WL 5654368, at *1 (Cal. Ct. App. 2019) (stating that the plaintiff-employee brought claims under PAGA for underpaid wages under section 558); Diaz v. First Class Vending, Inc., 2020 WL 563904, at *1 (Cal. Ct. App. 2020) (stating that the plaintiff-employee brought claims under PAGA for underpaid wages under section 558); Pote v. Handy Tech., Inc., 2021 WL 3615916, at *9 (Cal. Ct. App. 2021) (stating that the plaintiff-employee originally filed PAGA representative claims seeking civil penalties, including unpaid wages, but later removed the claim for unpaid wages pursuant to *ZB*).

150. *See, e.g.*, Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439, 442 (Cal. Ct. App. 2017); Contreras v. Superior Court of L.A. Cnty., 61 Cal. App. 5th 461, 466 (Cal. Ct. App. 2021);

amending their original complaint to remove any individual or class claims.[151] This is not surprising. Aggrieved employees stand to receive 25% of what could be a hefty civil penalty,[152] PAGA claims "might be easier to prove than common law claims,"[153] and employees may then, "by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations."[154] Therefore, there may be strategic advantages to bringing a single PAGA cause of action instead of an action for victim-specific damages, including avoiding individual arbitration.[155]

So, while the California state courts have not read *Iskanian* as outright prohibiting arbitration of PAGA claims, a reading that would clearly be preempted by the FAA, they have applied an increasingly higher threshold for an arbitration agreement to qualify as a "post-dispute" agreement that could bind the state. Therefore, the state courts' reasoning has the same ultimate effect as if they had directly prohibited arbitration of representative PAGA claims—practically no PAGA claim will be arbitrated. Because this outcome frustrates the objectives of the FAA as articulated by the United States Supreme Court, the state courts' reasoning cannot save the *Iskanian* rule from preemption.

Nor, it seems, can the *qui tam* nature of PAGA save *Iskanian* from its

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Collie v. Icee Co., 52 Cal. App. 5th 477, 479 (Cal. Ct. App. 2020); Ahlmann v. Forwardline Fin., LLC, 2021 WL 5275771, at *1 (Cal. Ct. App. 2021); Mondragon v. Santa Ana Healthcare & Wellness Ctr., LP, 2021 WL 4436388, at *1 (Cal. Ct. App. 2021); Williams v. RGIS, LLC, 70 Cal. App. 5th 445, 448 (Cal. Ct. App. 2021); Provost v. YourMechanic, Inc., 55 Cal. App. 5th 982, 987 (Cal. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2891 (2021).

151. *See, e.g.*, Green v. Shipt, Inc., 2021 WL 4901523, at *2 (Cal. Ct. App. 2021) (stating that the plaintiff-employee "amended her complaint to dismiss her individual and class claims, leaving only a single cause of action for civil penalties under the PAGA"); Malaspina v. Maplebear Inc., 2021 WL 3561359, at *2 (Cal. Ct. App. 2021) (stating that the plaintiff-employee amended his complaint from putative class action to a single cause of action for civil penalties under PAGA).

152. Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1165 (2015) ("PAGA suits may substitute for regular lawsuits to the extent that their recovery approaches what they would receive in compensatory damages.").

153. Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J. L. REFORM 1203, 1238 (2013).

154. Arias v. Superior Court, 46 Cal. 4th 969, 987 (Cal. 2009).

155. This argument was put forward by the employer in Galarsa v. Dolgen California, LLC, 2021 WL 5411013, at *3 (Cal. Ct. App. 2021) and rejected by the court. The employer asserted that the plaintiff-employee was "patently abusing the PAGA device to avoid her arbitration agreement and is utilizing the *Iskanian* rule to frustrate the FAA's objectives." *Id.* The court rejected this argument and concluded that "pursuing a PAGA representative action instead of arbitrating individual causes of action is not a device or formula for frustrating the FAA." *Id.*

preemption fate[156] because the statute does not in fact make the state the *only* real party in interest in a PAGA action. As one California state court noted:

[T]here are different ways of viewing a qui tam lawsuit regarding the true claim owner and whether the state *and* the employee can both be considered to be real parties in interest in the lawsuit for purposes of evaluating an employee's authority to waive rights to bring claims in court.[157]

Indeed, the Ninth Circuit has found that a PAGA action is not a "traditional" *qui tam* action.[158] First, "PAGA explicitly involves the interests of others besides California and the plaintiff employee—it also implicates the interests of nonparty aggrieved employees."[159] PAGA therefore "creates an interest in penalties, not only for California and the plaintiff employee, but for nonparty employees as well."[160] According to the Ninth Circuit, this feature of PAGA "conflicts with *qui tam*'s underlying assignment theory—that the real interest is the government's, which the government assigns to a private citizen to prosecute on its behalf."[161] Second, "PAGA represents a permanent, *full* assignment of California's interest to the aggrieved employee" and "once California elects not to issue a citation, the State has no authority under PAGA to intervene in a case brought by an aggrieved employee."[162] In contrast, a traditional *qui tam* action "acts only as 'a *partial* assignment' of the Government's claim" and the government "remains the real party in interest throughout the litigation

156. Correia v. NB Baker Electric, Inc., 32 Cal. App. 5th 602, 609 (Cal. Ct. App. 2019) ("We are aware the federal courts have reached a different conclusion regarding the arbitrability of a PAGA representative claim, but find these decisions unpersuasive because the courts did not fully consider the implications of the qui tam nature of a PAGA claim on the enforceability of an employer-employee arbitration agreement."). *See also* Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims under the False Claims Act*, 15 PEPP. DISP. RESOL. L. J. 203, 207 (2015) (arguing with respect to the federal False Claims Act that "*qui tam* claims are arbitrable under prevailing Supreme Court precedent")

157. *Correia*, 32 Cal. App. 5th at 624.

158. Magadia v. Wal-Mart Assoc., Inc., 999 F.3d 668, 675 (9th Cir. 2021) (noting that this case did not involve an arbitration agreement, but concerned the plaintiff-employee's Article III standing to bring a representative PAGA claim); *see also* Nanavati v. Adecco USA, Inc., 99 F. Supp. 3d 1072, 1082–83 (N.D. Cal. 2015) (distinguishing a representative PAGA claim from *qui tam* actions in the context of enforcing an arbitration agreement).

159. *Magadia*, 999 F.3d at 676.

160. *Id.* The court also stated that "[w]hile California may be *a* 'real party in interest,' a PAGA suit also implicates the interests of other third parties." *Id*. at 676–77 (internal citations omitted).

161. *Id.* at 676.

162. *Id.* at 677.

and 'may take complete control of the case if it wishes.'"[163] The Ninth Circuit accordingly concluded that:

> PAGA prevents California from intervening in a suit brought by the aggrieved employee, yet still binds the State to whatever judgment results. A complete assignment to this degree—an anomaly among modern *qui tam* statutes—undermines the notion that the aggrieved employee is solely stepping into the shoes of the State rather than also vindicating the interests of other aggrieved employees.[164]

The fact that employees bringing PAGA claims are vindicating, at least in part, their own interests seems fatal to the California state courts' reasoning. If a PAGA action is not a traditional *qui tam* action brought solely on behalf of the state, much of *Iskanian*'s justification for holding that it falls outside the scope of the FAA disappears. The lower state courts' reasoning that a plaintiff-employee cannot bind a state to a "predispute" arbitration agreement to which the state is not a party also unravels if the plaintiff-employee is bringing the PAGA claims also in his or her own right and not only on behalf of the state. It is certainly true that the FAA "does not purport to place any restriction on a nonparty's choice of a judicial forum"[165] and it is indeed "difficult to see how a private individual could contract away the state's right to enforce its law."[166] But striking down the *Iskanian* rule does not place any restriction on the state's right to enforce its law. Where the state pursues an employee's claim against an employer for Labor Code violations, it remains unbound by any arbitration agreement that it did not enter into itself.[167]

163. *Id.* (internal citations omitted).

164. *Id.*

165. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002).

166. Alexander, *supra* note 153, at 1233.

167. Waffle House, Inc., 534 U.S. at 296 (holding that the Equal Employment Opportunity Commission may pursue victim-specific judicial relief in an enforcement action alleging that the employer has violated the Americans with Disabilities Act notwithstanding an agreement between an employer and an employee to arbitrate employment-related disputes); Charter Commc'n, Inc., v. Jewett, 2021 WL 5332121, at *5 (N.D.N.Y. 2021) (holding that the New York State Division of Human Rights may "prosecute employee-filed complaints of employment discrimination" in a public hearing notwithstanding an arbitration agreement between the employee and the employer that covers the discrimination claims); Scalia v. CE Security LLC, 2021 WL 3774198, at *3 (E.D.N.Y. 2021) (holding that the United States Department of Labor may prosecute violations of the Fair Labor Standards Act notwithstanding an arbitration agreement between the employee and the employer); NC Fin. Sol. of Utah, LLC v. Commonwealth ex rel. Herring, 299 Va. 452, 461

However, the situation in the PAGA context is precisely the reverse—it is not the state vindicating the rights of employees, but rather "aggrieved employees" vindicating *their own rights* as well as those of the state by bringing PAGA claims on the state's behalf. PAGA itself does not explicitly state that PAGA claims are pursued by aggrieved employees on behalf of the state, but rather that such an employee may bring PAGA claims "on behalf of himself or herself and other current or former employees."[168] Indeed, such an employee might collect "a greater proportion of potential recoveries in PAGA-type actions than is the norm in class action settlements."[169] Where the state is not the party enforcing the PAGA statute either on its own behalf or on behalf of an employee, the "mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."[170]

The state's independent authority to enforce the PAGA statute, then, remains unfettered by a private arbitration agreement entered into by an individual employee. But, when the state is authorizing "aggrieved employees" who have personally suffered from their employers' Labor Code violations to bring PAGA claims on its behalf, such employees may do so in a manner and in a forum of their choosing. A PAGA action is brought by the plaintiff-employee, is captioned in his or her name only, does not involve the state's attorneys, and the plaintiff-employee can unilaterally withdraw the action at any time, settle it, or choose not to commence it at all.[171] In

(2021) (holding that the Virginia The Attorney General, acting on behalf of the Commonwealth, may enforce the provisions of the Virginia Consumer Protection Act notwithstanding an arbitration agreement between the defendant and individual consumers).

168. Cal. Lab. Cod. § 2699(a). *See also* Alexander, *supra* note153, at 1235 (suggesting that the PAGA should be framed "more clearly as a traditional *qui tam* provision in which recovery goes to the state with an incentive share to the plaintiff, rather than as a private attorney general action in which a private plaintiff stands in the shoes of the state as *parens patriae* representing a group"); 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, 520 (2020) (suggesting that statutes such as PAGA should not have a "relator-injury requirement" because such a requirement "can be read to suggest that the purpose of the qui tam statute is not entirely public, but rather operates more like a private right of action, providing an avenue for redress of private harms, even as it also furthers public objectives. And, if the statute is understood to authorize a lead plaintiff who shares injury in fact with absent aggrieved persons to pursue redress on their behalf—and distribute lawsuit proceeds to them no less—it begins to look a lot like a class action.").

169. Alexander, *supra* note 153, at 1237–38.

170. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28–29 (1991).

171. Charter Commc'n, Inc., v. Jewett, 2021 WL 5332121, at *10–11 (N.D.N.Y. 2021) (noting that the situation is the opposite in the case of the New York State Division of Human Rights, which is why the private arbitration agreement between the employer and the employee "is unlikely to be a

these circumstances, it is difficult to see how the repudiation of an otherwise valid and enforceable arbitration agreement covering claims of Labor Code violations on the basis of a strained application of agency principles could avoid FAA preemption.

B. The Federal Courts' Rationale Leads to Preemption

The interpretation of the federal courts in California and the Ninth Circuit of the *Iskanian* rule seems less offensive to the FAA because it allows for arbitration of representative PAGA claims, at least in principle. These courts have also relied on more traditional reasons for holding that the *Iskanian* rule is not preempted by the FAA, focusing on Section 2 of the Act and on its objectives.[172] This approach raises its own difficulties, however, and ultimately also leads to preemption.

First, the Ninth Circuit's reliance on Section 2's "saving clause" may have been implicitly overruled by the Supreme Court in *Epic Systems*.[173] In *Sakkab*, the Ninth Circuit held that the "saving clause" saves the *Iskanian* rule from preemption because the rule applies "regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement."[174] As noted above, in *Epic Systems* the Supreme Court reversed a Ninth Circuit decision holding that class action waivers violated the federal National Labor Relations Act and that this outcome was not preempted by the FAA.[175] The Ninth Circuit's reasoning was that "[w]hen an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality."[176] The Supreme Court disagreed. The Court held that even if the illegality defense is applicable to "any contract," a party challenging an arbitration agreement cannot rely on a generally applicable

basis on which to effectively bar the NYSDHR, which is not a party to the Agreement, from acting in accordance with its statutory authority to prosecute the complaint").

172. Sakkab v. Luxottica Retail N. Am., Inc., 803 F. 3d 425, 433 (9th Cir. 2015) ("We apply ordinary conflict preemption principles to determine whether a state-law rule conflicts with a federal statute containing a saving clause.").

173. *See generally* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

174. *Sakkab*, 803 F. 3d at 432.

175. *Epic Systems Corp.*, 138 S. Ct. at 1632.

176. Morris v. Ernst & Young, LLP, 834 F.3d 975, 985 (9th Cir. 2016) (citing 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The court even relied on *Sakkab* for this reasoning. *Id.*

defense to target arbitration "either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[177] As a federal court in California has noted, "[i]f a federal law . . . that applies regardless of the existence of an arbitration provision does not implicate the FAA's saving clause to avoid preemption, presumably a state law . . . that applies regardless of the existence of an arbitration provision does not implicate the saving clause either."[178]

At the same time, *Epic Systems* (and *Concepcion*) may not be fatal to the Ninth Circuit's decision in *Sakkab* if the *Iskanian* rule does not interfere with "fundamental attributes of arbitration."[179] In this regard, the Ninth Circuit found that representative PAGA actions are sufficiently different from class action so that they do not attack the "individualized nature of the arbitration proceedings"[180] and thereby trigger FAA preemption.[181] If representative PAGA claims are indeed sufficiently different from class actions, and because the Ninth Circuit (unlike the California state courts) allows such claims to proceed in arbitration as a matter of principle, the *Iskanian* rule may be saved from preemption notwithstanding Supreme Court precedent. There seems to be merit to the distinction drawn by the Ninth Circuit between class and PAGA actions, a distinction that has been applied in non-arbitration contexts as well.

For instance, representative PAGA actions are distinguished from class actions in the context of federal subject-matter jurisdiction. In several cases involving removal of representative PAGA actions based on the Class Action Fairness Act ("CAFA"),[182] federal courts have found that they lacked subject-matter jurisdiction and remanded these actions to the state court.[183] A "class action" is defined by CAFA as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute . . . authorizing an action to be brought by 1 or more representative persons as a class action."[184] The question in the context of a representative PAGA

177. *Epic Systems Corp.*, 138 S. Ct. at 1622 (internal citations omitted).
178. McGovern v. U.S. Bank N.A., 362 F. Supp. 3d 850, 862 n.5 (S.D. Cal. 2019).
179. *Epic Systems Corp.*, 138 S. Ct. at 1622.
180. *Id.*
181. Sakkab v. Luxottica Retail N. Am., Inc., 803 F. 3d 425, 435–37 (9th Cir. 2015).
182. 28 U.S.C. § 1332(d).
183. *See generally* Yocupicio v. PAE Group, LLC, 795 F. 3d 1057, 1060 n.7 (9th Cir. 2015) (reviewing whether the court lacked subject matter jurisdiction and should accordingly remand the case to state court).
184. 28 U.S.C. § 1332(d)(1)(B).

action is whether PAGA is a "similar State statute" to Federal Rule of Civil Procedure 23 to establish the original jurisdiction of a federal court under CAFA. Federal courts have answered this question in the negative,[185] for much of the same reasons that they have found PAGA and class actions to be sufficiently different in the arbitration context:

> PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees . . . . PAGA contains no requirements of numerosity, commonality, or typicality. . . . [T]he finality of PAGA judgments differs distinctly from that of class action judgments. . . . PAGA expressly provides that employees retain all rights 'to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.' '[I]if the employer defeats a PAGA claim, the nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not bound by the judgment as to remedies other than civil penalties.' . . . The employee's recovery is thus an incentive to perform a service to the state, not restitution for wrongs done to members of the class.[186]

Yet, these differences between PAGA and class actions may not save the *Iskanian* rule from FAA preemption after all. Even if PAGA actions are distinguishable from class actions, this does not necessarily mean that they are procedurally identical to individual actions. As Judge Smith noted in his dissenting opinion in *Sakkab*, "an arbitrator overseeing a representative PAGA claim would have to make specific factual determinations regarding (1) the number of other employees affected by the labor code violations, and (2) the number of pay periods that *each* of the affected employees worked."[187] Such information would have to be obtained through discovery

185. *See, e.g.*, Pineda v. Sun Valley Packing, L.P., 2021 WL 5755586, at *2 (E.D. Cal. 2021) (citing cases); Echevarria v. Aerotek, Inc., 814 Fed. App'x 321, 322 (9th Cir. 2020) (holding that the district court correctly determined that CAFA jurisdiction did not apply to the remaining PAGA claim).

186. Baumann v. Chase Inv. Serv. Corp., 747 F.3d 1117, 1122–23 (9th Cir. 2014) (internal citations omitted).

187. Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 445 (9th Cir. 2015) (Smith, J.,

that "would be significant and substantially more complex than discovery regarding only the employee's individual claims."[188] Finally,

> the arbitration of representative PAGA claims greatly increases the risk to employers. Rather than awarding damages for Labor Code violations for just one employee, representative PAGA claims award damages for all affected employees. A representative PAGA claim could therefore increase the damages awarded in arbitration by a multiplier of a hundred or thousand times (depending on the size of the company).[189]

Ultimately, the fate of the *Iskanian* rule does not hang on whether representative PAGA claims survive *Concepcion*'s and *Epic System*'s prohibition on "[r]equiring the availability of classwide arbitration."[190] Even if the Ninth Circuit's reasons for salvaging the *Iskanian* rule from preemption are accepted—that is, even if the rule applies to "all contracts" within the meaning of Section 2 of the FAA and does not undermine the individualized nature of arbitration—the practical outcome of the court's reasoning would still result in preemption by the FAA. While the Ninth Circuit, as well as federal district courts, allow for arbitration of representative PAGA claims in principle, they have stopped short of compelling such claims to arbitration in the face of agreements waiving all "representative claims." Indeed, because PAGA claims are "representative" claims, the courts are unable to compel them to arbitration in the face of such waivers without running afoul of the Supreme Court's admonition that arbitration agreements are to be enforced "according to their terms."[191] Therefore, the outcome of the federal courts' attempt to reconcile the *Iskanian* rule with the FAA is that many arbitration agreements are compromised where representative PAGA claims are raised or rendered completely unenforceable where PAGA is the sole cause of action. As Judge Bumatay recently noted in his concurring opinion in *Rivas v. Coverall North America, Inc.*, another case involving PAGA and FAA arbitration, "[w]e now creep closer to the day that a party may always sidestep an

dissenting).

188. *Id.* at 446–47 (Smith, J., dissenting).

189. *Id.* at 447–48 (Smith, J., dissenting) (internal citations omitted).

190. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018).

191. *Concepcion*, 563 U.S. at 343–44.

arbitration agreement simply by filing a PAGA claim."[192] Because the *Iskanian* rule, as applied by the federal courts, effectively "requires that the parties not arbitrate a claim *at all*,"[193] it undermines the FAA's goal of enforcing valid arbitration agreements according to their terms and is therefore preempted by the FAA, at least under current Supreme Court precedent.

VII. CONCLUSION

The *Iskanian* rule is unlikely to survive FAA preemption either on the reasoning of the California Supreme Court in *Iskanian* or on the subsequent reasoning of lower California state courts. The suggestion that the FAA does not apply at all to PAGA claims clearly runs afoul of *Concepcion* and cannot be sustained on the basis of the quasi-*qui tam* nature of PAGA. The continuous expansion of the meaning of "predispute" arbitration agreements by state courts and their strained reliance on agency principles ultimately violates *Concepcion* as well, leading to FAA preemption of the *Iskanian* rule. As for federal courts, while they have attempted to avoid FAA preemption by explicitly allowing for arbitration of representative PAGA claims, they have stopped short (as they must) of compelling such claims to arbitration in the face of agreements that prohibit representative actions. The result in the federal courts is therefore akin to that in the state courts—very few PAGA claims, if any, end up in arbitration, notwithstanding the presence of valid agreements to arbitrate employment-related claims, including statutory PAGA claims, on an individual basis.

Even if the *Iskanian* rule's prohibition on representative PAGA waivers does not survive FAA preemption, not all is lost in California's quest to enforce its Labor Code. The California Supreme Court in *Iskanian* considered all PAGA claims to be "representative,"[194] but it did not hold that PAGA claims may not be brought on an individual basis by a plaintiff-

192. Rivas v. Coverall North America, Inc., 842 Fed. App'x 55, 58 (9th Cir. 2021) (Bumatay J., concurring). The concurrence further noted that "California courts have already said as much." *Id.* at 58 n.1 (Bumatay J., concurring) (quoting Collie v. Icee Co., 52 Cal. App. 5th 477, 481 (2020). The concurrence states that this suggests "that an otherwise valid arbitration agreement does not provide a basis to compel arbitration of a PAGA claim." *Id.*

193. *Id.* at 59 (Bumatay J., concurring).

194. Iskanian v. CLS Transp. L. A., LLC, 59 Cal. 4th 348, 384 (Cal. 2014), *cert. denied*, 574 U.S. 1121 (2015).

employee.[195] It may be less efficient, from a penalty collection perspective, to prosecute employers' violations of the Labor Code in an individual proceeding, be it litigation or arbitration. But, such individual proceedings still serve to hold employers accountable for Labor Code violations, albeit one employee at a time, and can faithfully enforce *Iskanian*'s prohibition of PAGA waivers "in any forum."[196] To be sure, PAGA claims are "not merely a private matter" and a PAGA plaintiff "may be likened to a 'private attorney general' protecting the public interest."[197] At the same time, however, the lack of state oversight over representative PAGA actions commenced by individual employees opens the door to "private enforcer misuse" that may undermine PAGA's public interest in enforcement.[198] Moreover, the PAGA statute:

> does not create property rights or any other substantive rights. Nor does it impose any legal obligations. It is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.[199]

In any event, current Supreme Court precedent seems to invalidate both state and federal courts' jurisprudence in the PAGA saga because "[a] state

195. Sakkab v. Luxottica Retail North America, Inc., 803 F.3d 425, 449 (9th Cir. 2015) (Smith, J., dissenting) ("Although the existence of 'individual' PAGA claims is disputed, see *Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119, 1123, 135 Cal.Rptr.3d 832 (2011) (holding that a PAGA claimant may not bring an individual PAGA claim), the *Iskanian* court expressly chose not to decide the issue.").

196. *Iskanian*, 59 Cal. 4th at 360. For instance, post-*Epic* individual plaintiffs have started filing hundreds or thousands of individual arbitration demands that would have otherwise likely been pursued as a class action. The same would be possible with PAGA claims. *See* Gilles & Friedman, *supra* note 168, at 534; Tamar Meshel, *Mobile-Based Transportation Employment Disputes: Corporate Chutzpa and the Potential Resurrection of Class Arbitration*, 2020 U. CHI. L. REV. ONLINE 1 (2020).

197. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 224 (1987) (discussing RICO); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (regarding antitrust claims).

198. Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357, 361 (2020). Elmore states that "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." *Id*. at 401. *See also* Gilles & Friedman, *supra* note 168, at 536 (arguing that "PAGA revenues are artificially—and we believe monumentally—depressed" by plaintiff lawyers in settlement agreements).

199. Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Court, 46 Cal. 4th 993, 1003 (Cal. 2009).

may not insulate causes of action from arbitration by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action. If the rule conflicts with the objectives of the FAA, the state rule must give way."[200] At bottom, the *Iskanian* rule conflicts with the objectives of the FAA because it "prohibits outright the arbitration of a particular type of claim"[201] under the state courts' reasoning and stands in the way of enforcing otherwise valid and applicable arbitration agreements "according to their terms"[202] under the federal courts' reasoning.

To uphold the *Iskanian* rule, the Supreme Court would have to depart from its long-standing FAA precedent or create an exception for private attorney general statutes. Alternatively, the Court could issue a narrow decision and invalidate the *Iskanian* rule on the basis of the unique nature of PAGA,[203] while leaving the door open for other statutes to survive FAA preemption if, for instance, they make clear that individuals are authorized to privately vindicate a right that belongs *only* to the state, avoid a complete assignment of that right to an individual plaintiff, and allow the state to retain control over the private representative action. Either way, the impact of the Supreme Court's decision on the *Iskanian* rule is likely to extend beyond PAGA and California. It will be relevant to the interpretation and application of the FAA more generally,[204] as well as to other private attorney general statutes that might intersect with the FAA.[205]

200. *Sakkab*, 803 F.3d at 450 (Smith, J., dissenting).

201. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

202. *Id.* at 343–44.

203. *See* Gilles & Friedman, *supra* note 168, at 523 (noting that the "architecture of [PAGA] . . . 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").

204. *See* Alexander, *supra* note 153, at 1233 (stating that whether the *Iskanian* rule can survive FAA preemption "raise[s] grave federalism concerns").

205. *See, e.g.*, Federal False Claims Act, 31 U.S.C. § 3729; Oregon Unlawful Trade Practices Act, O.R.S. § 646.638; New York Wage Theft Prevention Act, N.Y. LAB. LAW § 215; *see also*, Alexander, *supra* note153, at 1234–35 (suggesting that "[s]tatutes regulating unfair competition, insurance, environmental protection, and other subjects where contracts of adhesion are common" "could be amended to provide a statutory penalty for violations and to authorize private attorney general or *qui tam* actions similar to those in PAGA."); Elmore, *supra* note 198, at 359 (noting "seven states—Connecticut, Maine, Massachusetts, New York, Oregon, Vermont, and Washington—[that] have contemplated qui tam statutes" modeled after the California PAGA); Elizabeth J. Kennedy, *Deputizing the Frontline: Enforcing Workplace Rights in a Post-Pandemic Economy*, 38 HOFSTRA LAB. & EMP. L. J. 203, 241 (2021) (noting that "[t]hirty-one states have a version of the federal False Claims Act").