The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era

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The present Administration has made clear it has no interest in enforcing statutes designed to protect workers, consumers, voters, and others. And, as we have chronicled in prior work, the ability of private litigants to enforce these laws has been undercut by developments in the case law concerning class actions—particularly class-banning arbitration clauses. As these critical enforcement methods recede, will alternative methods of prosecuting claims arise? How might they work? Are they politically and fiscally sustainable? We focus here on a promising approach just now coming into view: qui tam legislation authorizing private citizens to bring representative claims on behalf of consumers, workers, and others. Progressive advocates have recently begun working with legislators in a handful of states to provide a qui tam mechanism for enforcing state statutory rights. The form these new laws might take remains uncertain, and their enforceability is sure to be hotly contested by corporate interests and others. This article examines the legal and policy challenges that will face "new qui tam" legislation and considers arguments for and against enlarging the role of citizens in prosecuting claims—an inquiry that requires us to determine the legitimacy and limits of the private-attorney-general model in its starkest form.

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Introduction

The federal executive and judicial posture towards rights enforcement has grown increasingly hostile. Certainly, the present Administration has openly repudiated its role in enforcing the federal statutory rights of consumers, voters, workers, and students. It has done so in myriad ways, directly and indirectly reversing course on the prior Administration's robust enforcement policies. Meanwhile, an increasingly conservative federal judiciary has hamstrung the ability of private litigants to enforce laws through class and representative litigation.[1] Federal judges today routinely enforce class-banning mandatory arbitration clauses[2] and impose hard-to-meet class-certification requirements,[3] among other limitations on collective litigation. With Congress paralyzed by partisanship, the hostility of the Executive and Judicial Branches all but forecloses the possibility of rights vindication for entire swaths of the population.

At the federal level then, the prospects for vigorous public or private enforcement of statutorily protected rights look awfully bleak. And state-level enforcement has its own problems. In the consumer affairs area, for instance, state enforcers are struggling to resolve more complaints with fewer resources.[4] We can reasonably expect that these developments do not go unnoticed by corporate actors, and that the deterrent force of laws designed

1. The judicial dismantling of private adjudication began in the 1980s and has only intensified since. *See, e.g.*, Stephanie Mencimer, *False Alarm*, WASH. MONTHLY (Oct. 1, 2004), https://washingtonmonthly.com/2004/10/01/false-alarm-2/ [https://perma.cc/VR7C-S7NZ] (reporting that beginning in the 1980s, small government conservatives sought to "fill the federal bench with pro-business jurists [who would] roll back [the enforcement of] government regulations [through private litigation]").

2. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–25, 1632 (2018) (upholding class-banning arbitration clause over the objection that the National Labor Relations Act § 7 guarantees workers the right to collective action); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233–34 (2013) (upholding class-banning arbitration clause over objection that, lacking ability to pool resources to mount antitrust challenge, plaintiffs could not vindicate their rights under the Sherman Act); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (finding the FAA preempts state laws that stand as an obstacle to the accomplishment of the FAA's objectives, and enforcing class-banning arbitration clause).

3. *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (finding plaintiffs' damages theory lacked the predominance required for certification of a class); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) (finding plaintiffs lacked commonality required for certification of a class).

4. *See infra* notes 108–10 and accompanying text (examining resource constraints faced by state enforcement agencies).

to protect consumers, workers, and small businesses is fast losing steam. Recent scandals involving blatant and systemic violations of consumer protections, privacy protocols, and sexual-abuse reporting practices only reinforce this concern.[5]

As traditional enforcement methods recede—as federal enforcers signal disinterest in the rights of vulnerable communities, and as the federal judiciary forecloses private avenues for enforcing those rights—we are left with an enforcement gap. So we must ask, what are the alternative methods for enforcement? How might they work? Are they politically and fiscally sustainable? And can new or restructured methods of rights enforcement generate the deterrent and information-forcing effects of traditional agency enforcement actions and private class/collective litigation?

This Article closely examines one promising avenue for filling the enforcement gap: state legislation authorizing private citizens to bring actions on behalf of the state in the interests of consumers, workers, and other vulnerable communities.[6] The mechanism for authorizing private enforcement is familiar: qui tam is an ancient device for citizen-assisted law enforcement that encourages "whistleblowers" to come forward with information of wrongdoing and authorizes them to sue on behalf of the state.[7] Qui tam allows the state to conserve resources by tapping the powerful force of the citizenry as a direct agent in enforcing its laws through the courts. By offering a bounty for successful prosecution of a claim, qui tam actions promise more and better rights enforcement, providing greater deterrence against wrongdoing and adding to the state's coffers in the form of statutory penalties.[8]

5. As just one example, the Wells Fargo "sham account" scandal involved widespread misconduct by bank employees that remained hidden from public view thanks to the company's enforceable arbitration clause. Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES (Dec. 6, 2016), http://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html [https://perma.cc/T9EK-VCPN].

6. *See, e.g.*, MODEL STATE CONSUMER & EMP. JUSTICE ENF'T ACT intro. at 6–9 (DAVID SELIGMAN 2015), https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf [https://perma.cc/24PR-QXPG] (explaining the necessity of private enforcement to fill the enforcement gap); Janet Cooper Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislature Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203, 1208 (2013) (discussing possible statutory reforms meant to "correct the Court's policy of 'over-preemption'").

7. Qui tam is a shortening of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," or "he who sues in this matter for the king as well as for himself." *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) ("*Qui tam* actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf." (citations omitted)).

8. Aaron Jordan, *Whistleblowing Is a Key Regulatory Tool*, REG. REV. (Feb. 5, 2018), https://www.theregreview.org/2018/02/05/jordan-whistleblowing-key-regulatory-tool/ [https://perma.cc/TJ7B-BVSH].

On this model, state policy makers actively monitor litigation brought on behalf of the government to ensure its deputies are acting in the best interests of the state and its citizens. Accordingly, special procedures apply to qui tam suits to ensure the state retains the requisite control over actions brought in its name.[9] The classic model is the federal False Claims Act (FCA), which authorizes whistleblowers—i.e., those with special knowledge of a public fraud, known as "relators"—to bring lawsuits in the name of the government seeking damages.[10] When a relator initiates such an action, she must deliver a copy of the complaint and any supporting evidence to the government, which then has sixty days to investigate the allegations and decide whether to intervene in the action.[11] If it does so, the government assumes primary responsibility for prosecuting the lawsuit or moves to dismiss, effectively putting the kibosh on the action.[12] If the government declines to intervene, the relator has the exclusive right to prosecute the action[13]—but the government retains a significant role in the way the action is conducted.[14] In either event, if the claim is successful, the relator shares in any financial recovery.[15]

In addition to the federal FCA, qui tam enforcement provisions appear in the "mini-FCAs" of twenty-nine states and the District of Columbia.[16]

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9. United Seniors Ass'n v. Philip Morris USA, 500 F.3d 19, 25 (1st Cir. 2007) (citing Manning v. Utils. Mut. Ins. Co., 254 F.3d 387, 394 (2d Cir. 2001)).

10. 31 U.S.C. § 3730(b)(1) (2012) (providing for suits brought "for the person and for the United States Government").

11. *Id.* § 3730(b)(2), (4).

12. *Id.* § 3730(b)(4), (c)(1). The relator may continue as a "party of interest" in the government's case and is accordingly entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement. *Id.* § 3730(c)(2)(A)–(B).

13. *Id.* § 3730(c)(3).

14. *See id.* (stipulating that the government "shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts," and may later intervene in the action upon a showing of "good cause"). Also, for example, the action can be dismissed only with the written consent of the court and the Attorney General. *Id.* § 3730(b)(1).

15. *See id.* § 3730(d)(1)–(2) (articulating the calculation for the private plaintiff's qui tam award in the event of a successful claim). Should the government intervene and continue the suit, the relator may receive between 15% and 25% of any judgment; if the government declines to intervene, the relator's share rises to between 25% and 30%. *Id.*; *see also* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 51 (2002) (observing that FCA claims are more likely to prevail when the government intervenes).

16. *E.g.*, CAL. GOV'T CODE § 12652(c)(1) (West 2018); DEL. CODE ANN. tit. 6, § 1203(b) (2013); D.C. CODE § 2-381.03(b)(1) (2001); FLA. STAT. ANN. § 68.083(2) (West 2012); GA. CODE ANN. § 49-4-168.2(b) (2013); HAW. REV. STAT. ANN. §§ 661-21, -25(a) (LexisNexis 2018); 740 ILL. COMP. STAT. ANN. 175/4(b) (West 2010); IND. CODE ANN. § 5-11-5.7-4(a) (West 2017); IOWA CODE ANN. § 685.3(2)(a) (West 2016); MD. CODE ANN., GENERAL PROVISIONS § 8-104(a) (LexisNexis 2018); MASS. GEN. LAWS ANN. ch. 12, § 5C(2) (West 2017); MINN. STAT. ANN. § 15C.05(a) (West, Westlaw through 2019 Legis. Sess.); MONT. CODE ANN. § 17-8-406(1) (West 2017); NEV. REV. STAT. § 357.080(1) (2017); N.J. STAT. ANN. § 2A:32C-5(b) (West 2010); N.M. STAT. ANN. § 27-14-7(B) (LexisNexis 2007); N.C. GEN. STAT. § 1-608(b) (2017); 9 R.I. GEN. LAWS § 9-1.1-4(b)(1) (2017); TENN. CODE ANN. § 4-18-104(c)(1) (2015); VT. STAT. ANN. tit. 32,

Some state FCAs apply only to fraudulent claims made on Medicaid or other healthcare funds, while others apply to a broader range of state programs.[17] And some states have experimented with qui tam in areas beyond false claims. For example, Illinois and California "allow private parties to bring suit in the name of the state in order to punish fraud against private insurers"[18] and the District of Columbia provides qui tam enforcement of specified trade-practices acts.[19] At least four states are currently considering qui tam enforcement of tax code violations.[20] And perhaps most prominently, California in 2004 enacted a "Private Attorneys General Act" (PAGA) to aid in the enforcement of state workplace-protection laws.[21] In each of these contexts, legislatures have determined, as a matter of public policy, that private citizens are best situated to uncover wrongdoing.[22] State enforcers

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§ 632(b)(1) (2018); VA. CODE ANN. § 8.01-216.5(A) (2015). A handful of states do not contemplate private enforcement in these actions, authorizing only the AG or other public official to bring civil actions alleging false claims or fraud on the government. *E.g.*, ARK. CODE ANN. § 20-77-903(a) (2018); KAN. STAT. ANN. § 75-7504 (2015); MISS. CODE ANN. § 43-13-221 (2015); NEB. REV. STAT. § 68-945 (2009); OR. REV. STAT. § 180.760(1) (2017); UTAH CODE ANN. § 26-20-13 (LexisNexis 2013). Fourteen states have not adopted an FCA or a statute containing a qui tam provision similar to the federal FCA—including Alabama, Alaska, Arizona, Idaho, Kentucky, Maine, Missouri, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, West Virginia, and Wyoming.

17. Nine states limit qui tam enforcement under their FCA to fraud on Medicaid and healthcare funds, including: ARK. CODE ANN. § 20-77-911(c)(1) (2018); COLO. REV. STAT. ANN. § 25.5-4-306 (West 2017); CONN. GEN. STAT. ANN. §§ 4-275, 4-277 (West Supp. 2019); LA. STAT. ANN. § 46:439.1 (2015); MICH. COMP. LAWS ANN. § 400.610a (West 2008); N.H. REV. STAT. ANN. § 167:61-c (2014); OKLA. STAT. ANN. tit. 63, §§ 5053.1–.2 (West 2016); TEX. HUM. RES. CODE ANN. §§ 36.002, 36.101 (West 2019); WASH. REV. CODE ANN. §§ 74.66.010–.120 (West 2013). Under Health and Human Services (HHS) guidelines, only states whose FCA laws appropriately mirror the federal statute—including the provision of qui tam enforcement—can share in federal FCA recoveries. *See* 71 Fed. Reg. 48552, 48552 (Aug. 21, 2006) (listing HHS guidelines for determining whether a state's FCA provisions qualify for an additional share of recoveries).

18. Aaron Blumenthal, *Circumventing* Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 735 (2015) (citing CAL. INS. CODE § 1871.7(e)(1) (West 2011); 740 ILL. COMP. STAT. 92/15(a) (2002)).

19. Specifically, its code provides that:

> An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

D.C. CODE ANN. § 28-3905(k)(1)(B) (West, Westlaw through 2019 Legis. Sess.).

20. Michael J. Bologna, *States Eye New York Whistle-Blower Law as Tax Fraud Tool*, BLOOMBERG LAW (May 11, 2017), https://www.bloomberglaw.com/product/blaw/document/XFMI4HES000000 [https://perma.cc/8V9E-BH2Y].

21. CAL. LAB. CODE §§ 2698–99 (West 2011); *see also infra* note 152 and accompanying text.

22. *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1256–57 (2012) (discussing instances when private enforcers have sufficient expertise about various violations); Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, L. & CONTEMP. PROBS., Autumn 1997, at 167, 196 (discussing

report that these "million eyes on the ground" have been especially potent in deterring unlawful activity.[23]

Applying this basic model to a broader array of state statutory protections would authorize private citizens with knowledge of wrongdoing to bring public enforcement actions against those who violate designated provisions of state law. In advancing qui tam claims under state labor, consumer, or other statutes, the relator would assume the state's *parens patriae* interest in litigating the case, pursuing statutory penalties on behalf of all the state's residents injured by the illegality. The state attorney general or other relevant public official would retain broad authority to take control over the action, direct major litigation decisions, and approve proposed settlements. And, of course, in exchange for her efforts, the relator would be entitled to a designated portion of the civil penalties recovered, and her lawyer would be entitled to make an application for attorneys' fees.

The "new qui tam"—a term we use to distinguish this emerging model from other statutory variants—aims to fill the enforcement gap created by current federal policies. For one, using private actors as frontline enforcers of state law violations shifts the costs of investigation and litigation onto those parties. California enacted PAGA in the employment realm precisely because severe understaffing of its public enforcement agencies allowed employers to "violate the law with impunity."[24] Faced with shortfalls in enforcement and with no funds to hire additional staff, the state legislature decided to deputize the state's workers, authorizing them to help enforce Labor Code violations. According to at least some attorneys who practice in

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the benefits of private enforcement, including "the unique access and insight of *qui tam* plaintiffs"). Relatedly, the FCA specifically provides that counsel may recover reasonable fees and costs. 31 U.S.C. § 3730(d)(1) (2012).

23. *See* James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 485–86 (2005) (reporting on relatively low recoveries under the various state FCAs, but also finding that prosecutors believe these laws have been helpful in law enforcement and deterrence).

24. ASSEMB. JUDICIARY COMM., COMM. ANALYSIS OF S.B. 796, S.2003–2004-796, 1st Extraordinary Sess., at 3–4 (Cal. 2003); *see also* CAL. LAB. CODE § 2699(a) (West 2011) (codifying PAGA within California's Labor Code). The California Supreme Court has expressly recognized such a legislative purpose, no less:

> In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Arias v. Superior Court, 209 P.3d 923, 929–30 (Cal. 2009) (citations omitted).

the area, PAGA has markedly improved employer compliance with statutory and regulatory mandates over the past decade.[25]

The form these new qui tam laws might take remains contested, however, and the goal of this Article is to consider the risks and rewards of various legislative approaches. Part I begins with a high-level, aerial survey of the gap—the federal abandonment of rights-enforcement policies, the judicial restrictions on private collective action, and the challenges facing state enforcers. We also describe efforts taking shape across the country to fill the enforcement gap as progressive advocates and policy makers shift their focus to state legislatures, governors, and attorneys general as partners in countering harmful federal policies. In this way, the new qui tam resembles other "blue federalism" protections of immigrants, environmental standards, access to affordable health care, and LGBTQ rights—reflecting the newfound centrality of state legislatures in the Trump era.

Part II examines the critical legislative choices at issue in creating a workable and legally defensible qui tam regime.[26] That Part will consider the issues involved in negotiating this complex terrain—including knotty questions of relator standing and the representative nature of qui tam suits—using California's PAGA as a comparator and guide. But perhaps the greatest challenge facing any state legislative effort to vest citizens with broad enforcement authority is the Federal Arbitration Act (FAA).[27] The Supreme Court has consistently read the FAA as preempting state policies that allow individuals to initiate lawsuits against companies with whom they have valid arbitration agreements. Part III examines the case for and against FAA preemption of new qui tam laws.

Party politics will obviously play a large role in determining the viability of the new qui tam, as we discuss in Part IV. Because aggregate litigation has often worked in service of protecting rights that might otherwise go unremedied, we would naturally expect progressives to be on board—along with some traditional conservatives championing qui tam to the extent it privatizes enforcement and reduces the role of government.[28] But we should also expect fierce litigation and lobbying as business interests, led by the

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25. Laura Reathaford & Eric Kingsley, *He Said, She Said: Employment Litigators Debate Caifornia's Private Attorneys General Act*, WESTLAW J. EMP., June 7, 2016, at 1. The statute also nets the state treasury roughly $4 million per year in penalties. *See* CAL. DEP'T OF INDUS. RELATIONS, BUDGET CHANGE PROPOSAL 1 (2016).

26. Disclaimer: one of the authors has been involved in drafting and advocacy in support of new qui tam bills currently being considered by various state legislatures. *E.g.*, *The Model State Consumer Justice Enforcement Act: Hearing on S. 105 Before the S. Judiciary Comm.*, 2017–2018 Sess. (Vt. 2018) (statement of Myriam Gilles, Professor of Law).

27. 9 U.S.C. §§ 1–16 (2012).

28. *See, e.g.*, Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007) (discussing how private attorneys general "free[] up civil rights enforcement from any conservative political agenda or administration").

Chamber of Commerce and allied groups, seek to obstruct efforts to restore robust rights enforcement. While their legal arguments will largely rest on FAA preemption and relator standing, their political claims will appeal to legislators' fear of too-close an association with plaintiffs' lawyers and a concern about the impact of increased litigation on in-state businesses. And because qui tam threatens the business model of plaintiff-side legal practice, many plaintiffs' lawyers will resist—a form of guild protectionism that could prove difficult to dislodge.

The Conclusion pans out to examine the new qui tam from a broader perspective—one that implicates the legitimacy and limits of the private-attorney-general model itself.[29] In qui tam, private citizens are authorized by the legislature to perform the public function of law enforcement via litigation. But, unlike traditional public enforcers, these citizens are politically unaccountable and their actions are unlikely to be calibrated to optimize deterrence or balance competing state interests.[30] Accordingly, the new qui tam should be sensitive to claims of overreach. We close with some thoughts on structuring the new qui tam to ensure it is financially self-sustaining and can be effectively monitored by the state, which will serve as an effective check against concerns of abuse.

I. Relocating Rights Enforcement in the States

On paper, or parchment, the federal Executive is supposed to take care that congressional enactments are faithfully executed.[31] But in practice, presidential administrations have wide latitude to turn their back on laws they disfavor, if only as a function of administrative prioritization and prosecutorial discretion.[32] Whether based on shifting political philosophies,

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29. *See generally* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004) (explaining anxieties surrounding private-attorneys-general legitimacy and the scope of private-attorneys-general powers).

30. John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1455 (2005) (observing that private litigants can "perform the antidemocratic function of usurping the role traditionally entrusted to expert regulatory agencies and state attorneys general"); *see also* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 17 (2015) ("Entrepreneurial enforcement is . . . seldom constrained by the same principles of prosecutorial discretion that guide public enforcers.").

31. U.S. CONST. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").

32. The effect of the Take Care Clause on notions of prosecutorial discretion is the subject of much-watched litigation that is currently working its way through the federal courts in *Texas v. United States* regarding the so-called Deferred Action for Childhood Arrivals (DACA) immigration policy. 328 F. Supp. 3d 662 (S.D. Tex. 2018). The baseline rule, as expressed in *Kendall v. United States ex rel. Stokes* has always been that federal agencies—there, the postmaster—could be mandamused to execute congressional enactments that the Executive chose to ignore. 37 U.S. 524, 609–10 (1838); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."). But more recent jurisprudence

resource restraints, intense lobbying, or concerns about overdeterrence, presidential administrations have the practical prerogative of adjusting agency enforcement policies to suit their tastes. But executive discretion has its limits. For one, private rights of action themselves protect congressional enactments from executive hostility.[33] And so too does federalism, insofar as state actors are empowered to enforce either federal laws or state laws that cover similar terrain. And in fact, the vast majority of federal laws that protect workers and consumers, along with federal civil rights, antitrust, and tort victims, both allow for robust private enforcement *and* have analogues in state law. But private action and state action are constrained in their ability to remedy the broad harms that have traditionally been a focus of federal enforcement actions. Private class actions are on the decline as the result of an onslaught of restrictive judicial rulings over the past decade, and state public enforcement actions are severely resource-constrained, even in the wealthiest states.[34]

A. *Federal Executive Withdrawal from Rights Enforcement*

Far from the constant and clamorous public scandals and distractions, the Trump Administration has been quietly reshaping the very nature of federal enforcement of statutorily protected rights—particularly rights conferred on consumers, students, voters, workers, and minorities.[35] The

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immunizes prosecutorial discretion from constitutional attack by locating that discretion in the Take Care Clause itself. *See* Texas v. United States, 328 F. Supp. 3d at 710 ("[T]he Supreme Court has held that the Take Care Clause is the source of the President's (and the Executive Branch's) power of prosecutorial discretion." (citing United States v. Armstrong, 517 U.S. 456, 464 (1996); Heckler v. Chaney, 470 U.S. 821, 832 (1985))). *See generally* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1837–38 (2016) (arguing the "Take Care Clause precludes presidential lawmaking" but is "the source of the President's prosecutorial discretion").

33. COFFEE, *supra* note 30, at 6 ("Private enforcement thus plays a failsafe function, arguably protecting society against the danger that important legal rules . . . may, from time to time, be quietly underenforced.").

34. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 668 n.205 (2012) (observing that "state attorneys general face resource constraints that limit the scope of possible enforcement actions" (quoting Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 761 (2011))). Even in wealthy states like California, state-enforcement-agency budgets and staffing are premised on the assumption that active federal regulators would carry the water in many enforcement areas.

35. Despite the mainstream inattention to many of the actions described here, the President regularly touts his deregulatory accomplishments. *See, e.g.*, Massimo Calabresi, *While Trump Is Tweeting, These 3 People Are Undoing American Government as We Know It*, TIME (Oct. 26, 2017), https://time.com/magazine/us/4998244/november-6th-2017-vol-190-no-19-u-s/ [https://perma.cc/4M9U-NPMR] (quoting Hope Hicks, then-White House communications director: "No President or Administration has deregulated or withdrawn as many anticipated regulatory actions as this one in this short amount of time").

Administration's sharp turn towards nonenforcement can be glimpsed in both informal decisions and official directives by Administration personnel.[36]

Informally, the White House has sought to destabilize federal regulatory agencies from within by installing outspoken critics at their helm.[37] The President's nominees—many of whom squeaked through Congress despite "ethical problems, inexperience, [and] hostility to the missions" of the agencies they were being called to lead—have corroded the morale of professional staffers dedicated to bringing enforcement actions.[38] The best example may be Scott Pruitt, the ex-head and avowed opponent of the Environmental Protection Agency (EPA), who was strikingly effective in ridding his agency of committed staffers by messaging his disdain for climate science and his close ties to industry.[39] Similarly, Mick Mulvaney, during his brief tenure as director of the Consumer Financial Protection Bureau (CFPB), made clear to the Bureau's employees that he planned to curtail actions that might be harmful to business interests.[40] Mulvaney even went so far as to change the CFPB's mission statement to emphasize financial *de*regulation.[41]

36. To be fair, nonenforcement has been used as a strategy by both Republican and Democratic presidents. *See* Peter L. Markowitz, *Prosecutorial Discretion at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 491 (2017) (discussing President Obama's nonenforcement of immigration laws).

37. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/49T4-8UFH] (quoting Stephen K. Bannon: "[Many Cabinet nominees] were selected for a reason, and that is deconstruction").

38. Paul Waldman, *Donald Trump Has Assembled the Worst Cabinet in American History*, WASH. POST: THE PLUM LINE (Jan. 19, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/19/donald-trump-has-assembled-the-worst-cabinet-in-american-history/ [https://perma.cc/HR46-HWZQ]; Calabresi, *supra* note 35 ("[The] White House is stocked with former executives and industry insiders who have power over issues in which former clients have hundreds of millions of dollars at stake.").

39. Michael Grunwald, *The Myth of Scott Pruitt's EPA Rollback*, POLITICO (Apr. 7, 2018), https://www.politico.com/magazine/story/2018/04/07/scott-pruitt-epa-accomplishments-rollback-217834 [https://perma.cc/LH77-PRSW] (reporting that Pruitt "sent a clear message throughout the agency to be more accommodating to businesses, a message that has helped persuade hundreds of its career public servants to retire").

40. As of this writing, Mulvaney is serving as Director of the Office of Management and Budget, as well as acting White House Chief of Staff. Alan Rappeport, *Mick Mulvaney Calls for 'Humility' from Consumer Financial Protection Bureau*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/us/politics/mick-mulvaney-consumer-financial-protection-bureau.html [https://perma.cc/G6D8-KWNE] (discussing how "Mulvaney made clear that . . . the consumer bureau would be more reluctant to target companies without overwhelming evidence of wrongdoing and suggested that the effect on a business should be weighed more heavily when considering cracking down on potential consumer abuses").

41. Catherine Rampell, *How Mick Mulvaney Is Dismantling a Federal Agency*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/opinions/mick-mulvaney-cant-legally-kill-the-cfpb-so-hes-starving-it-instead/2018/01/25/4481d2ce-0216-11e8-8acf-ad2991367d9d_story.html [https://perma.cc/8L6A-4WCU] (reporting that Mulvaney changed the mission statement to read,

Formal nonenforcement policy directives have also been issued by these agency heads as part of Trump's "deregulation" agenda. For example, in his first few weeks as Attorney General in 2017, Jeff Sessions announced that DOJ would engage in a comprehensive review of ongoing investigations and prosecutions of local police departments,[42] with an eye toward shutting them down.[43] When Mulvaney took over the CFPB, he immediately halted all pending enforcement actions against shady payday lenders, subprime auto lenders, and other consumer predators.[44] Meanwhile, Education Secretary Betsy DeVos began her rocky tenure by blocking more than 1,200 pending civil rights investigations and scaling back dramatically on the agency's investigations into "disparate treatment of students based on race, disability or other factors."[45] Her agency repeatedly delayed implementing a rule requiring for-profit colleges to disclose data on student outcomes,[46] and sought to quash a rule that would allow student-loan debts to be discharged where there is fraud by the school.[47]

"the bureau 'helps consumer finance markets work' [by] 'regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations'").

42. Memorandum on Supporting Federal, State, Local and Tribal Law Enforcement from U.S. Att'y Gen., Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (Mar. 31, 2017), https://www.justice.gov/opa/press-release/file/954916/download [https://perma.cc/GY6C-3DKG].

43. Weeks later, AG Sessions sought to delay a consent decree aimed at reforming systemic abuse by the Baltimore Police Department. David A. Graham, *Can Trump's Justice Department Undo Police Reform?*, ATLANTIC (Apr. 4, 2017), https://www.theatlantic.com/politics/archive/2017/04/the-beginning-of-the-end-of-federal-police-reform/521847/ [https://perma.cc/HPE3-9J7P]. U.S. District Judge James K. Bredar ultimately denied DOJ's request for a stay on April 7, 2017, and ordered the decree effective. United States v. Balt. Police Dep't, 249 F. Supp. 3d 816, 820 (D. Md. 2017).

44. Ken Sweet, *Enforcement Actions at Watchdog Agency Halt Under Trump*, CHI. TRIB. (Apr. 10, 2018), http://www.chicagotribune.com/business/ct-biz-cfpb-enforcement-action-20180410-story.html [https://perma.cc/YE9R-58NG] (reporting that the CFPB has brought no enforcement actions under Mulvaney, compared to an average of 50 actions each year under the leadership of Rich Cordray—actions that "returned $3.97 billion in cash back to American consumers through enforcement actions and an additional $7.93 billion in other types of relief, such as lower loan balances or debt relief, based on the CFPB's records").

45. Erica Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html [https://perma.cc/AU2Q-TP8Y] (discussing critics who argued DeVos's policies "undermined the mission of the office" and "clos[ed] off the pathways for students to have their rights enforced by the federal government"); Annie Waldman, *DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited from Obama*, PROPUBLICA (June 21, 2018, 10:00 AM), https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama [https://perma.cc/ART7-ZFP7].

46. Catherine Rampell, *Why Do Republicans Hate Consumers?*, WASH. POST (July 16, 2018, 5:52 PM), https://www.washingtonpost.com/opinions/why-do-republicans-hate-consumers/2018/07/16/0398840c-8933-11e8-85ae-511bc1146b0b_story.html [https://perma.cc/5583-A2JW].

47. Michael Stratford, *Trump and DeVos Fuel a For-Profit College Comeback*, POLITICO (Aug. 31, 2017, 4:58 AM), https://www.politico.com/story/2017/08/31/devos-trump-forprofit-college-education-242193 [https://perma.cc/TD8H-S55Y].

Similar accounts of nonenforcement protocols and regulatory abandonment have emerged from many corners of the federal bureaucracy—including the Housing and Urban Development Agency,[48] the Federal Trade Commission,[49] and the Department of Agriculture.[50] Morale is low at numerous agencies: at the DOJ alone, "many yearslong department veterans . . . wh[o] worked under both the Bush and Obama administrations" have withdrawn from cases or resigned due to policies aimed at undermining the agency's enforcement priorities.[51] Longtime professional staff across the federal bureaucracy have been offered inducements to leave public service, further eroding enforcement efforts.[52] And the Administration's 2019 budget proposed massive cuts in many federal agencies with enforcement responsibilities, including the EPA, Agriculture, Housing and Urban Development, Labor, and Education.[53]

Of course, it is not unusual for a Republican administration to curtail enforcement efforts as part of a pro-business agenda, just as Democrats typically expand agency enforcement. Ronald Reagan and both Bushes

48. *See* Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html [https://perma.cc/2BJ3-4FXN] (reporting that the Trump Administration is "freezing enforcement actions against local governments and businesses" and "roll[ing] back the Obama administration's attempts to reverse decades of racial, ethnic and income segregation in federally subsidized housing and development projects").

49. *See* Jeff Overley, *FTC on Ropes as Courts Wallop Suits over Past Conduct*, LAW360 (Oct. 17, 2018, 9:17 PM), https://www.law360.com/articles/1092734/ftc-on-ropes-as-courts-wallop-suits-over-past-conduct [https://perma.cc/62UT-JTRW] (reporting on a recent decision in *FTC v. Hornbeam Special Situations, LLC*, 308 F. Supp. 3d 1280 (N.D. Ga. 2018), which required the agency to identify "ongoing violations" when it challenges prior behavior). To be fair, decisions such as *Hornbeam* are not examples of agency inaction, but rather of judicial suspicion of agency enforcement actions.

50. Lydia Wheeler, *Trump Officials Quash Litigation for Farms*, HILL (Oct. 24, 2017, 6:00 AM), http://thehill.com/regulation/356802-trump-officials-quash-litigation-rule-for-farms [https://perma.cc/5UZ2-PQGM] (reporting that the Agriculture Department rescinded an interim final rule that allowed independent livestock farmers to more easily sue big food companies for deceptive practices and other abuses).

51. Katie Benner, *Justice Dept. Rank-and-File Tell of Discontent Over Sessions's Approach*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/jeff-sessions-justice-department.html [https://perma.cc/6XK4-9VN2].

52. *See, e.g.*, Joel A. Mintz, *Decline in EPA Enforcement Won't Keep Climate Bill from Coming*, HILL (Apr. 21, 2018, 3:30 PM), http://thehill.com/opinion/energy-environment/384284-the-decline-in-epa-enforcement-wont-keep-the-climate-bill-from [https://perma.cc/8RFN-EJGX] (explaining how "buy-out" packages have led experienced administrators to leave, depleting the EPA of institutional experience, which weakens enforcement productivity).

53. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2019 23, 39, 63, 75, 103 (2018), https://www.govinfo.gov/content/pkg/BUDGET-2019-BUD/pdf/BUDGET-2019-BUD.pdf [https://perma.cc/W23D-GVGN]; *see also* Yuka Hayashi, *Trump Budget Plan Cuts CFPB's Budget, Restricts Its Enforcement Power*, WALL ST. J. (Feb. 12, 2018, 4:37 PM), https://www.wsj.com/livecoverage/trumps-2019-budget-proposal-live-analysis/card/1518471424 [https://perma.cc/A46X-VRC5] (reporting that budget cuts were planned for the CFPB).

clamped down on enforcement actions swiftly upon taking office,[54] while Obama and Clinton moved in the opposite direction.[55] All of this is part of the normal yin and yang of a republic with two ideologically distinct parties.[56] And ordinarily, these periodic ebbs in enforcement activity do not engender calls for the deployment of entirely new enforcement paradigms insulated from the political tides. But the current moment (here in 2020) is different. The Trump Administration's approach seeks, in the words of former chief White House strategist Steve Bannon, a "deconstruction of the administrative state."[57] This is not about readjusting agency priorities; it is about obliterating agency power. And the enforcement gap under Trump is not a by-product of reducing federal expenditures or reallocating resources. It is a permanent goal and it cries out for a structural solution.

B. Judicial Distrust of Private-Rights Enforcement

Faced with the Executive's refusal to provide robust enforcement of statutorily protected rights, we might be well advised to look to private

54. *See, e.g.*, John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters: Probes and Prosecutions Have Declined Sharply*, WASH. POST (Sept. 30, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092901759_pf.html [https://perma.cc/8FEY-6BVH] (noting a decline in enforcement during the George W. Bush Administration); *see also* Myriam Gilles, *Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card Wars*, 83 U. CHI. L. REV. 1001, 1033 (2016) (describing the "eight-year torpor" of George W. Bush's Antitrust Division, during which no conduct cases were initiated); Joseph Stiglitz, *A Crisis of Confidence*, GUARDIAN (Oct. 22, 2008, 1:00 PM), https://www.theguardian.com/commentisfree/cifamerica/2008/oct/22/economy-financial-crisis-regulation [https://perma.cc/7JSE-N2EW] (explaining that George W. Bush appointed "regulators . . . who d[id] not believe in regulation" with the inevitable outcome that they did not do a very good job of regulating).

55. *See, e.g.*, Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2113–14 (2015) (describing upswing of agency enforcement actions by the Commodities Futures Trading Commission, Treasury, and other agencies under President Obama).

56. An October 2017 Pew Research Center report found that 66% of Democrats believe government regulation of business is necessary to protect the public interest, compared with 31% of Republicans. PEW RESEARCH CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 19 (2017), https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf [https://perma.cc/L5ZL-6AEN].

57. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/W6U8-QBNN]. As Goodwin Liu has noted:

> In our constitutional system, the delegation of law enforcement discretion is not an authorization to act on political whim. It instead assumes a degree of evenhandedness rooted in professional expertise and institutional tradition, as well as the operation of checks and balances that subject enforcement priorities to public scrutiny and that maintain the rule of law.

Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81–82 (2009).

citizens to bring lawsuits challenging wrongful behavior.[58] After all, hundreds of federal and state statutes provide private rights of action and include financial incentives (such as attorney fee-shifting and enhanced damages provisions) to entice citizens to aid in rights enforcement.[59] Tapping private attorneys general to help enforce public laws is potentially efficient[60] and also sidesteps politically motivated nonenforcement policies.[61]

Indeed, in past eras, federal Executive abdication of enforcement has inevitably led to upticks in private litigation. For example, during Clarence Thomas's eight-year reign as head of the Equal Employment Opportunity Commission (EEOC), he failed to act on thousands of complaints from older workers alleging they had been subject to discrimination in employment.[62] The agency's neglect helped empower and politicize numerous groups—notably the American Association of Retired Persons (AARP)—to bring and win lawsuits on behalf of its members.[63] Similarly, when George W. Bush's

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58. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 216 (2010) (asserting that Congress actively encourages private litigation as an enforcement mechanism because it doesn't trust enforcement to the Executive branch).

59. *E.g.*, 15 U.S.C. § 26 (2012); 33 U.S.C. § 1365(a) (2012); 42 U.S.C. §§ 2000a–3, 7604 (2012).

60. *See* Trevor W. Morrison, *Private Attorneys General and The First Amendment*, 103 MICH. L. REV. 589, 601 (2005) ("[G]iving private parties a financial interest in enforcing public law is an efficient way to promote the public interest."); *see also* Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (quoting Justice Jackson: "[N]o prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate.").

61. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 224, 227 (1983) (recognizing that empowering the private attorney general can circumvent agency capture and other political vagaries endemic to public enforcement).

62. The EEOC failed to act on more than 13,000 age-discrimination claims during Thomas's tenure. William M. Welch, *Thomas Presided over Shift in Policy at EEOC, Records Show*, AP NEWS (July 25, 1991), https://www.apnews.com/b419883e871b5117649d1f3fdacf6f95 [https://perma.cc/KP58-AJRW] (quoting a civil rights attorney who claimed that "[w]hile [Thomas] was in federal government he took a view of civil rights laws that was so narrow as to be ineffective" and that Thomas "refused to recognize the affirmative role of the government in protecting against discrimination"). More generally, Thomas's tenure was marked by an increase in "no cause" resolutions and a significant decrease in agency litigation, particularly class suits attacking systemic discrimination. Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 16–19 (2001); *see* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 14–15 (1996) (describing how the policies Thomas instituted at the EEOC contributed to low settlement rates and a low percentage of successful conciliations).

63. *See Bush Nominates Thomas to Appeals Court Seat*, 45 CONG. Q. ALMANAC 288, 288 (1990) (quoting a representative of the AARP as criticizing the outcomes of age-discrimination claims brought before the EEOC during Thomas's tenure); FREDERICK R. LYNCH, ONE NATION UNDER AARP: THE FIGHT OVER MEDICARE, SOCIAL SECURITY, AND AMERICA'S FUTURE 133, 136 (2011) (discussing the rising political and legal consciousness of the 40-million member AARP since 1995, but particularly since 2001).

Civil Rights Division apparently halted enforcement of several major antidiscrimination and voting-rights laws,[64] the Administration's indifference reenergized civil rights groups all around the country to bring private suits seeking relief.

But in order for private citizens to be effective rights enforcers, courts must be willing to hear their claims and remedy their harms. And, in a host of ways over many decades, our federal courts have evinced diminishing regard for private litigation as a means of protecting statutory entitlements—in particular, class and representative actions.[65]

1. Class-Banning Arbitration Clauses.—Enforcement of class action-banning arbitration clauses is a prime example of this judicial clampdown on private class actions.[66] In 2011, the Supreme Court in *AT&T Mobility LLC v. Concepcion*[67] broadly upheld the use of forced-arbitration clauses containing bans on class and collective litigation.[68] Subsequent rulings have only reaffirmed the conservative Justices' view that forced-arbitration clauses are enforceable even where claimants are unable to vindicate their federal or state statutory rights in a one-on-one arbitration.[69] For the current majority, the FAA preempts not only state-law rules that ban arbitration in some categories of cases, but also any rule that requires the availability of collective procedures for the resolution of disputes. That is, in a case covered by an arbitration agreement, a state-law rule or statute providing for collective-dispute resolution is preempted on the theory that class action-like procedures are inconsistent with arbitration as provided for by FAA § 2.[70] This reading

64. *See generally, e.g.*, CITIZENS' COMM'N ON CIVIL RIGHTS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION (William L. Taylor et al. eds., 2007) (reporting that, during the Bush years, enforcement actions alleging race discrimination—particularly on behalf of African-Americans—and voting-rights cases declined dramatically).

65. *See* COFFEE, *supra* note 30, at 130 ("[C]lass action may be dying the death of the one thousand cuts. No one judicial decision is fatal to it, but the cumulative impact of many decisions may prove to be.").

66. *See* Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537, 542 (2013) (asserting that the Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), "disabled effective private enforcement of many laws made to protect citizens").

67. 563 U.S. 333 (2011).

68. *Id.* at 348, 351–52 (striking down a California rule finding arbitration clauses unconscionable unless they allowed for class proceedings, and dismissing the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

69. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2307, 2312 (2013) (enforcing class action bans in arbitration clauses, even where proving the violation of a federal statute in an individual arbitration would be so costly that no rational claimant would undertake it).

70. *Cf.* 9 U.S.C. § 2 (2012) (providing that an arbitration agreement is not enforceable "upon such grounds as exist at law or in equity for the revocation of any contract").

of the statute has preempted numerous attempts by states to regulate arbitration clauses in consumer and employment contracts.[71]

Most recently, in *Epic Systems Corp. v. Lewis*,[72] putative class members brought wage-and-hour claims under the Fair Labor Standards Act (FLSA).[73] Each of these employees was subject to a class-banning arbitration clause, and a five–four Supreme Court upheld these clauses[74] notwithstanding the federally guaranteed right to "collective action" protected by the National Labor Relations Act (NLRA).[75] Justice Gorsuch's majority opinion observed that the Court has previously "rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes."[76] Accordingly, the majority held that whether a defense to forced arbitration "would render an agreement 'illegal' as a matter of federal statutory law rather than 'unconscionable' as a matter of state common law . . . makes [no] difference in light of *Concepcion*[]" because both defenses "impermissibly disfavor[] arbitration."[77]

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71. *See, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424–25, 1429 (2017) (rejecting as preempted a decision by the Kentucky Supreme Court invalidating an arbitration clause on the grounds that it violated the right to a jury trial). Cases raising possible preemption issues constantly appear on the horizon. For example, the Supreme Court of Kentucky recently upheld a state statute that prohibits employers from forcing new employees to sign arbitration agreements. N. Ky. Area Dev. Dist. v. Snyder, 570 S.W.3d 531, 537 (Ky. 2018), *superseded by statute*, KY. REV. STAT. ANN. § 336.700(2)–(3) (2019). Observers predict that, given the chance, the Supreme Court could easily strike down the statute on preemption grounds. *See* Lauren Weber, *Supreme Court to Weigh Workers' Right to Sue Their Employers*, WALL ST. J. (Oct. 24, 2018, 9:00 AM), https://www.wsj.com/articles/supreme-court-to-weigh-workers-right-to-sue-their-employers-1540386000 [https://perma.cc/ZC4P-MM3V] (discussing experts who believe that the Kentucky court's "decision could be overturned if it is challenged and lands in front of the U.S. Supreme Court").

72. 138 S. Ct. 1612 (2018) (plurality opinion).

73. Three FLSA cases were consolidated by the Supreme Court, all alleging employer misclassification and/or failure to pay hourly wages in violation of the statute. Lewis v. Epic Sys. Corp., No. 15-cv-82-bbc, 2015 WL 5330300, at *1 (W.D. Wis. Sept. 11, 2015), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. at 1612 (technical writers); Morris v. Ernst & Young LLP, No. C-12-04964 RMW, 2013 WL 3460052, at *1 (N.D. Cal. 2013), *rev'd*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom. Epic Sys.*, 138 S. Ct. at 1612 (accountants); Murphy Oil USA, Inc., 361 N.L.R.B. 774, 776 (2014), *rev'd in part sub nom.* Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013 (5th Cir. 2015), *aff'd sub nom. Epic Sys.*, 138 S. Ct. at 1612 (2018) (gas station workers).

74. *Epic Sys.*, 138 S. Ct. at 1612, 1632.

75. The NLRA affords workers the "full freedom of association" to pursue "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 151, 157 (2012).

76. *Epic Sys.*, 138 S. Ct. at 1627 ("[We] ha[ve] rejected *every* such effort to date . . . with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act . . . , the Securities Exchange Act . . . , and the Racketeer Influenced and Corrupt Organizations Act.").

77. *Id.* at 1623. Recently, the Justices agreed in *New Prime v. Oliveira* that transportation workers—independent contractors and employees alike—are exempt from the FAA. 139 S. Ct. 532, 536–38 (2019). The Court also held that it is for a court, not an arbitrator, to determine whether the FAA applies in the first place. *Id.* at 537. *New Prime* is the sole Supreme Court decision limiting arbitration in nearly a decade. *See* Mark Joseph Stern, *The Supreme Court Just Handed a Big,*

Unsurprisingly, corporate actors have responded to these rulings—which sanction near-total immunity from class liability in cases involving modest per-claimant damage amounts[78]—by implementing class-banning arbitration clauses on an unprecedented scale.[79] In the consumer area, for example, the CFPB found that "[s]even of the eight largest . . . mobile wireless providers . . . , covering 99.9% of subscribers," required arbitration in their customer agreements.[80] Likewise, credit-card issuers representing more than 90% of all credit-card debt impose arbitration clauses in their contracts with consumers.[81] And in the checking-account market, banks representing 44% of insured deposits have arbitration clauses in their customer contracts.[82] In the employment area, over half the country's workforce is now subject to mandatory arbitration provisions that almost invariably ban class actions.[83] And in light of the recent *Epic Systems*

Unanimous Victory to Workers. Wait, What?, SLATE (Jan. 15, 2019, 3:52 PM), https://slate.com/news-and-politics/2019/01/gorsuch-arbitration-labor-new-prime-oliveira.html [https://perma.cc/4MQW-Q9JC] (noting the "remarkable win for labor rights from a court that typically favors corporate interests over working people").

78. *E.g.*, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 5 n.6 (2015) [hereinafter ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/ZKY9-SSRG] (reporting that fewer than 400 individuals arbitrated claims during the period studied).

79. We have explained in prior work that:

> [A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of "early adopter" credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday. After all, the incremental burden of including magic words in dispute resolution boilerplate—or even on point-of-sale purchase receipts or box-stuffer notices—is surely minimal in relation to the benefit of removing oneself from potential exposure to aggregate litigation.

Gilles & Friedman, *supra* note 34, at 631.

80. ARBITRATION STUDY, *supra* note 78, at 7.

81. *Id.* app. A at 22–23. Specifically, the CFPB noted that, at the time of its study, four major credit-card issuers agreed to settlements from an antitrust class action under which they were temporarily barred from imposing their mandatory arbitration clauses. *See id.* (citing the various settlement agreements arising out of *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217 (2d Cir. 2008)). If those four credit-card issuers had continued their policy of requiring arbitration during the CFPB's study period, the percentage of outstanding loans subject to mandatory arbitration would have risen to over 93%. *Id.* And indeed, a casual web check of those four issuers' terms and conditions today shows they have reinstated their arbitration requirements.

82. ARBITRATION STUDY, *supra* note 78, app. A at 25–26.

83. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2018), https://www.epi.org/files/pdf/144131.pdf [https://perma.cc/HG8Z-EMKU]; *see also* CARLTON FIELDS & JORDEN BURT, THE 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY 12, 26 (2015), https://classactionsurvey.com/pdf/2015-class-action-survey.pdf [https://perma.cc/6CQ7-CNBC] (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% in 2014); SEYFARTH SHAW LLP, 15TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 10, 13 (2019), https://www.seyfarth.com/dir_docs/publications/2019_WCAR_Chapters_1-2.pdf [https://perma.cc/WG4T-UYMB] (reporting that employment-discrimination class actions were

decision, we expect that number to climb substantially higher in coming years.[84]

2. Other Restraints on Class and Collective Litigation.—Additional judicial assaults on collective-action litigation take the form of raising barriers to class certification. For example, whereas courts previously avoided any "preliminary inquiry into the merits" at the class-certification stage, recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence—just as they would at trial—any fact necessary to meet the requirements of Rule 23.[85] The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[86] redefined the previously easy-to-satisfy commonality requirement of Rule 23(b)(3) and raised questions about whether individualized damages issues may preclude certification altogether.[87] The Court's decision in *Comcast Corp. v. Behrend*[88] went further, demanding lower courts perform a "rigorous analysis" of class-certification issues—even when they go to the merits of the case.[89] And in recent years, the Court has questioned the legitimacy of so-called "no-injury" class actions, raising fundamental concerns regarding class-member standing that strike at the core of representative litigation.[90]

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certified in only 27% of cases in 2019, the lowest rate in a decade); Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB (July 11, 2017), https://www.citylab.com/equity/2017/07/the-fine-print-that-keeps-you-from-suing-youremployer/533145/ [https://perma.cc/GU23-NRAQ] (reporting that Amazon, Applebee's, AT&T, Citibank, Comcast, Lyft, Macy's, Olive Garden, Target, T.G.I. Friday's, Time-Warner Cable, Uber, and Wells Fargo all impose arbitration and class action bans in employment contracts).

84. Jess Bravin, *Supreme Court Imposes Limits on Workers in Arbitration Cases*, WALL ST. J. (May 21, 2018, 7:24 PM), https://www.wsj.com/articles/supreme-court-imposes-new-limits-on-workers-in-arbitration-cases-1526916858 [https://perma.cc/M3ZV-XWKP] (reporting that lawyers expect that companies will now impose forced arbitration clauses "on millions more" workers, and that the *Epic Systems* decision could affect "worker claims against Amazon.com, Grubhub, Lyft and Uber," among other large companies).

85. *E.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316, 320 (3d Cir. 2008); *see also id.* at 316 ("An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.").

86. 564 U.S. 338 (2011).

87. *See id.* at 350 (stating that plaintiffs' claims "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

88. 569 U.S. 27 (2013).

89. *Id.* at 33–34.

90. *See* Frank v. Gaos, 139 S. Ct. 1041, 1043–44 (2019) (per curiam) (failing to decide whether "*cy pres* settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate,'" and instead vacating and remanding based on standing); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (rejecting the premise that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right").

At the circuit level, some courts have grafted an "implicit requirement" of ascertainability onto the Rule 23(a) certification analysis. Ascertainability prohibits certification in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs"[91]—rendering most actions arising from small retail purchases un-classable.[92] Relatedly, a spate of recent circuit court rulings raise questions about the proper treatment of uninjured class members at the class-certification stage. Numerous courts have declined certification where even a small portion of the class may later be shown not to have suffered injury as a result of the defendant's misconduct.[93] In addition, a number of courts have recently dealt a major blow to multistate class actions by declaring that idiosyncratic variations in state consumer law may defeat the predominance inquiry of Rule 23.[94]

And, of course, class action practice has been further restricted by the impediments that courts have erected in recent years to civil litigation more generally. Heightened pleading requirements,[95] refusals to imply private rights of action under federal statutes,[96] cramped views on personal

91. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010).

92. *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 303–04 (3d Cir. 2013) (vacating class-certification order based on lack of ascertainability for consumers who purchased diet supplements).

93. *See, e.g.*, *In re* Asacol Antitrust Litig., 907 F.3d 42, 45, 52–53 (1st Cir. 2018) (denying class certification where some class members would have continued purchasing the brand-name drug even with a cheaper generic option available and the defendant expressed an intent to challenge injury at later stages in the litigation); Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778, 780 (8th Cir. 2013) (denying class certification due to a failure of predominance where some class members may have paid the "usual and customary" insurance rate and would not have suffered an injury). *See generally* Amanda Bronstad, *Defense Bar Gives 1st Circuit an 'A+' for Its Order on Uninjured Class Members*, NAT'L L.J. (Oct. 23, 2018, 1:17 PM), https://law.com/nationallawjournal/2018/10/23/defense-bar-gives-1st-circuit-an-a-for-its-order-on-uninjured-class-members/ [https://perma.cc/CA3U-4PZG] (describing the holding of *In re Asacol Antitrust Litigation* and how it tightens down on class-certification availability). Other courts, however, have refused to put the damages cart before the certification horse, certifying a damages class where there was some possibility that some members of the class had not been injured. *E.g.*, Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1137 (9th Cir. 2016); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 676–77 (7th Cir. 2009).

94. *See, e.g.*, *In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 702 (9th Cir. 2018) (finding predominance is defeated by variations in state law); Mazza v. Am. Honda Motor Co., 666 F.3d 581, 590–92 (9th Cir. 2012) (same). *But see In re* Mex. Money Transfer Litig., 267 F.3d 743, 747 (7th Cir. 2001) ("[N]ationwide classes are certified routinely even though every state has its own . . . law[s] . . . ."); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022–23 (9th Cir. 1998) (stating that a nationwide class action cannot be decertified simply because there are "differences between state consumer protection laws").

95. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (expanding the plausibility standard to encompass all civil actions); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (adopting a heightened plausibility standard for pleadings). *See generally* SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? (2013) (lamenting that heightened pleading standards after *Twombly* and *Iqbal* drive up the costs of litigation and cause meritorious cases to be dismissed).

96. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that no private right of

jurisdiction,[97] and expanded immunity doctrines[98]—among other jurisprudential developments over the past decades—restrict ordinary litigants' access to courts and reduce the power of litigation to serve as a regulatory force.

By all accounts, the conservative judicial project of limiting private litigation has been hugely successful in recent years, especially in the class action arena. Certainly, class-banning arbitration clauses have driven entire areas of class action practice into obsolescence, including consumer class cases against financial institutions and employment cases in entire industries.[99] And the available data cannot even capture the declining quality of the class cases that *are* filed. We suspect (albeit unverifiably) that class action filing numbers are inflated by low-quality cases that the class action plaintiffs' bar must take on in order to keep its inventory and employment levels relatively constant. And, while plaintiffs' lawyers cite restrictions on class actions as their primary concern, corporate defense counsel and their clients are less worried about class liability than they have been in many years.[100] The diminished deterrent effect of private litigation, and especially collective actions, surely reduces the efficacy of federal statutory law by signaling to violators that there is no sanction for wrongdoing.[101] At

action exists to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964).

97. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017) (holding that "a defendant's general connections with the forum" are not sufficient to establish specific personal jurisdiction); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885–86 (2011) (holding that although the defendant intended to serve the U.S. market, it did not "purposely avail[] itself of the New Jersey market," and that, therefore, suit could not be brought against it in New Jersey).

98. *See, e.g.*, Wood v. Moss, 134 S. Ct. 2056, 2066–67 (2014) (requiring a plaintiff to plead facts showing the government defendant "violated a statutory or constitutional right" that "was clearly established at the time of the challenged conduct"); *see also* Cornell v. Burke, 559 F. App'x 577, 579 (7th Cir. 2014) (relying on *Wood v. Moss* in affirming dismissal of civil rights suit on qualified immunity grounds, and finding officers were "entitled to qualified immunity because [plaintiff's] complaint [did] not contain allegations that [the officers] violated a clearly established constitutional right").

99. *See, e.g.*, Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018) (estimating that, as a result of implementation of forced arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned); *see also* text accompanying notes 78–82 (discussing CFPB Arbitration Study showing prevalence of forced arbitration clauses in consumer financial products).

100. CARLTON FIELDS, THE 2018 CARLTON FIELDS CLASS ACTION SURVEY 2–3 (2018), https://classactionsurvey.com/pdf/2018-class-action-survey.pdf [https://perma.cc/7TE8-WE3Z] (reporting that companies are reducing the number of in-house lawyers responsible for class action defense, and that many general counsel were "cautiously optimistic" about the impact of Supreme Court rulings on class litigation on their future litigation risks).

101. *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 413 ("[I]n a post-*Concepcion* and post-*Italian Colors* world, where companies have unprecedented incentives and latitude to deploy arbitration clauses, we must ask: What implications are there for the law as we know it?"); *see also* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (warning against restricting the availability of class actions lest we "impair the deterrent effect of

minimum, then, consumers, employees, and other vulnerable groups have lost a primary avenue of recourse for rights violations, while corporate actors have found significant refuge against the legislative will.

C. The Resurgence of State-Based Rights Enforcement

In the Trump era, progressives have begun to look to states—particularly the most heavily Democratic states—as bulwarks against unpopular federal policies.[102] And states have risen to the occasion.[103] Over the first two years of the Trump Administration, states enacted a number of laws that counter federal policy—such as legislation protecting sanctuary cities,[104] extending legal aid guarantees to immigrants,[105] restoring environmental protocols,[106] and protecting LGBTQ rights,[107] among other things.[108]

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the sanctions which underlie much contemporary law").

102. Numerous observers have pointed out that this shift requires reformers to "discard conventional assumptions regarding the relationship between federal enforcers and recalcitrant states," a "point [that] falls in tension with certain political dogmas." Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 533 (2019).

103. *See generally* Jelani Cobb, *Post-Election, Liberals Invoke States' Rights*, NEW YORKER (Nov. 19, 2016), https://www.newyorker.com/magazine/2016/11/28/post-election-liberals-invoke-states-rights [https://perma.cc/H4QC-7G7N] (highlighting examples of state resistance to the federal government).

104. Thirty-six states have enacted laws protecting localities that refuse to comply with federal requests to detain undocumented immigrants for deportation. Four states—California, Illinois, Nebraska, and New Jersey—have passed resolutions supportive of refugees or opposing Trump's efforts to block resettlement of refugees from Muslim-majority nations. And numerous localities have declared themselves "freedom cities"—places where police officers are instructed "to arrest fewer people for minor crimes like possessing a small amount of marijuana and driving without a valid license, as well as taking steps to protect undocumented immigrants." Adam Edelman, *The Crackdown on Sanctuary Cities Gives Birth to 'Freedom Cities,'* NBC NEWS (Sept. 15, 2018, 7:08 AM), https://www.nbcnews.com/politics/immigration/crackdown-sanctuary-cities-gives-birth-freedom-cities-n909606 [https://perma.cc/M2XT-F3FJ] (reporting that freedom cities include Austin, TX, Madison, WI, Portland, OR, and Ann Arbor, MI, along with dozens more).

105. Sophia Tareen et al., *LA, Other Municipalities Plan Immigrant Legal Aid After Trump's Win*, SCPR.ORG (Dec. 19, 2016), http://www.scpr.org/news/2016/12/19/67350/la-other-municipalities-plan-immigrant-legal-aid-a/ [https://perma.cc/GZH9-ANX9].

106. David Shepardson & Valerie Volcovici, *17 U.S. States Sue Trump Administration Over Vehicle Emissions*, REUTERS (May 1, 2018), https://www.reuters.com/article/us-autos-emissions/17-u-s-states-sue-trump-administration-over-vehicle-emissions-idUSKBN1I241H [https://perma.cc/P5HN-RE2L].

107. For example, the New York State Division of Human Rights recently enacted a rule explicitly extending the state's sex-discrimination protections to include protections for gender identity. N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13(c) (2016).

108. This litany of state legislative efforts may not fully capture the combativeness of the new "blue federalism," which aspires to be as pugnacious as the federal executive whose policies it resists. Litigation by states against the federal government, or against Trump, the Trump Organization LLC, or the Trump Foundation, has become commonplace. *E.g.*, Associated Press, *State Attorney General Races Gain Attention in Trump Era*, L.A. TIMES (June 2, 2018, 4:30 PM), http://www.latimes.com/politics/la-na-pol-2018-attorneys-general-20180602-story.html# [https://

But rights-granting is the easy part. As a protector of consumer, worker, and other rights, a state legislature can always "increase the rights it affords its own citizens."[109] Effective *enforcement* of those rights, on the other hand, is far harder work because it requires resources—both financial and human. Stepped-up state enforcement generally requires the expansion of publicly funded enforcement mechanisms—for example, hiring more investigators, lawyers, and staff to manage the expected increase in the work of state attorney-general offices, labor commissioners, consumer-protection agencies, and other offices. But this option is currently unavailable in most states, which continue to struggle with budget shortfalls and are often unable to meet current enforcement targets, much less add thousands more.[110]

In prior work, we proposed that states might overcome these resource restraints by retaining private attorneys under contingent-fee arrangements to augment their existing staffs and budgets.[111] Under the current law of most states, AGs are authorized to hire private law firms on a contingent-fee basis to help the state pursue monetary claims to redress injuries to state

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perma.cc/E96V-4WSE]. California, for example, has filed at least 29 lawsuits challenging various Trump Administration policies. Adam Liptak, *Trump v. California: The Biggest Legal Clashes*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/us/politics/trump-california-lawsuits.html [https://perma.cc/Q4GB-9GGL]. Maryland and the District of Columbia have led litigation to enforce the Emoluments Clause of Art. II, § 9, and Hawaii and Washington State led challenges to the President's travel ban. *E.g.*, District of Columbia v. Trump, 291 F. Supp. 3d 725, 735 (D. Md. 2018). And notably, for present purposes, much of this litigation activity has been accomplished by states using outside private litigation firms. For example, the state plaintiffs in the Emoluments Clause cases have been represented by the firm of private lawyer Deepak Gupta, and the State of Hawaii engaged former Acting Solicitor General Neal Katyal. *Emoluments Clause Litigation*, GUPTA WESSLER PLLC (2019), http://guptawessler.com/emoluments/ [https://perma.cc/XG5B-P3AN] (describing representation of Maryland and D.C.); *Georgetown Law Professor Neal Katyal, Counsel in* Trump v. Hawaii, *Issues Statement after SCOTUS Decision*, GEO. L. (June 26, 2018), https://www.law.georgetown.edu/news/professor-neal-katyal-counsel-of-record-in-trump-v-hawaii-issues-statement-after-scotus-travel-ban-decision/ [https://perma.cc/2KCR-9GE4] (describing Neal Katyal's representation of the State of Hawaii).

109. Elliot Spitzer, *Utilize the Courts*, *in 10 Ways to Take on Trump*, NEW REPUBLIC (Feb. 1, 2017), https://newrepublic.com/article/140187/10-ways-take-trump-congress-streets [https://perma.cc/YF3Z-9WAX]. Of course, states must govern within the framework of a dual-sovereign system in which federal law may preempt state-based efforts to increase or decrease rights granted to state citizens—particularly in areas such as labor, antitrust, bankruptcy, and immigration.

110. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, NSCL FISCAL BRIEF: STATE BALANCED BUDGET CONDITIONS 9 (Oct. 2010), http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf [https://perma.cc/K74W-B29Z] (explaining that states develop budget shortfalls that need to be resolved); *see also infra* Part IV.

111. Gilles & Friedman, *supra* note 34, at 669.

residents,[112] subject to some limitations.[113] And in recent years, a handful of state AGs have taken this approach, hiring private lawyers to represent the state's citizens in complex litigation.[114] But we fear this hiring-private-counsel model, in many jurisdictions, suffers from a fatal political flaw: the appearance of a too-close relationship between an elected state AG and the local plaintiffs' bar can be politically damaging.[115] Private interest groups determined to oust or defeat left-leaning AGs have weaponized these contractual arrangements in savage political ads.[116] For politically ambitious candidates, the threat posed by these political attacks may be too great a risk.[117]

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112. Many cases discuss upholding contingency-fee agreements between AGs and private counsel. *See* City of Grass Valley v. Newmont Mining Corp., No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238, at *1 (E.D. Cal. Nov. 20, 2007) (discussing outside counsel's agreement with a city); Sherwin-Williams Co. v. City of Columbus, No. C2-06-829, 2007 WL 2079774, at *2–3 (S.D. Ohio July 18, 2007) (discussing city contracts with private counsel); City & Cty. of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) (discussing how the government can make contingent-fee arrangements with outside counsel under special circumstances); State *ex rel.* Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 136 (Mo. 2000) (en banc) (discussing how AGs have the ability to employ outside counsel); State v. Hagerty, 580 N.W.2d 139, 148 (N.D. 1998) (discussing how AGs have the authority to employ outside attorneys on a contingent-fee basis). *But see* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 101–06 (2010) (asserting constitutional problems with AGs hiring private counsel on contingency).

113. The principal legal constraint is the requirement that the AG must maintain total control over all key decision making, lest the retainer agreement violate public policy as an unlawful delegation of the AG's authority. *See infra* section II(B)(2). In addition, a number of state legislatures have placed nominal limits on the ability of AGs to hire outside counsel. *See, e.g.*, KAN. STAT. ANN. § 75-37,135(a)(1) (Supp. 2015) (requiring any fee agreement between the AG and a private lawyer where the fees "reasonably may exceed $1,000,000" to be disclosed to the legislative budget committee for public hearing and approval); N.D. CENT. CODE § 54-12-08.1 (2014) (requiring an "emergency commission" to approve any contingency-fee contract between the AG and outside counsel where the amount in controversy exceeds $150,000).

114. *See, e.g.*, Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html [https://perma.cc/SCF5-5BK5] (discussing how private attorneys work with attorneys general in exchange for a portion of the settlement).

115. *See* Gilles & Friedman, *supra* note 34, at 673 (observing that in the post-*Citizens United* era, some elected officials may rightly worry about the "ability of business groups to amass war chests targeting consumer-friendly AGs"); Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html [https://perma.cc/Z6RD-3A52] (observing that the staggering fees some states paid to outside contingent-fee counsel in lawsuits against cigarette manufacturers in the 1990s—nearly $14 billion in total—led to a spate of adverse publicity).

116. Ben Wieder, *Big Money Comes to State Attorney-General Races*, ATLANTIC (May 8, 2014), https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/ [https://perma.cc/26CF-WPBD] (observing that "[a] particular concern for the Chamber, and the wide assortment of businesses it represents" are efforts by plaintiffs' lawyers to "ally themselves with state attorneys general . . . to continue to pursue speculative but lucrative litigation against a wide range of industries").

117. *Id.* (observing that "the joke is that 'AG' stands for 'almost governor' in the 43 states where

What we need is an enforcement approach that retains the main virtues of the hiring-private-counsel model without the political baggage that comes with a state AG retaining members of the private bar. And what we have in the new qui tam legislation discussed below may be precisely that.

II. Legislative Choices

Qui tam requires implementing legislation.[118] As with other statutes, a new qui tam law might begin with an explanation of the policy choice to deputize state citizens in the enforcement of public rights. A statement of purpose would presumably reflect the expectation that statutory incentives will encourage private parties to recover civil penalties for the government that otherwise may not have been successfully assessed by overburdened state enforcement agencies.[119]

Other general scaffolding provisions should outline the process for initiating and maintaining a qui tam suit. Some of these provisions can reliably be patterned after the federal FCA. So, for example, a state might provide that a relator can initiate a qui tam action by giving sixty-days written notice to the relevant state agency before filing suit and granting the state a certain amount of time to then determine whether it will intervene.[120] If the state does intervene, it assumes day-to-day responsibility for prosecuting the action.[121] If the state declines to take over prosecution of the claim, the relator proceeds more or less on her own, subject to the state's ability to supervise

they are elected, as many go on to higher elected office. . . . Eight current governors and eight current U.S. senators were previously state attorneys general").

118. Legislation is necessary because there is no common law right to bring a qui tam case, and courts have no power to create a qui tam cause of action where none exists. *See, e.g.*, United Seniors Ass'n v. Philip Morris USA, 500 F.3d 19, 23–24 (1st Cir. 2007) (defining the right to bring a qui tam action as "strictly a creature of statute" that may only be created by Congress, not the court).

119. Versions of qui tam are currently being considered in various states, including New York, Maine, Oregon, Vermont, and Washington. A number of these bills include preamble language explaining the policy choice to enact qui tam. *See, e.g.*, S.B. 750, 80th Legis. Assemb., Reg. Sess. ll. 2–13 (Or. 2019) (declaring that, among other reasons, limits on the availability of public enforcement allow abuses to go uncorrected). *See also id.* at ll. 15–17 (declaring one purpose of the Act is to "benefit employers that comply with [state] law by protecting them from unfair competition from companies that reduce costs by disregarding the law"); *id.* at ll. 22–24 (declaring the Act is "consistent with a history . . . of laws enabling private citizens to aid in detection of false claims for public funds").

120. *Compare* S.B. 750, 80th Leg. Assemb., Reg. Sess. § 5(1) (Or. 2019) (stating that no person may commence a qui tam action before a thirty-day written notice to the responsible official and the attorney general), *with* 31 U.S.C. § 3730(b)(2), (b)(4) (2012) (providing the government with a sixty-day window to intervene in federal cases).

121. *Compare* S.B. 750, 80th Leg. Assemb., Reg. Sess. § 8 (Or. 2019) (granting primary prosecutorial responsibility to the state attorney general if the attorney general elects to intervene), *with* § 3730(c)(1) (granting the same responsibility to the government in the federal cases).

as it sees fit and, ultimately, its absolute right to approve any proposed resolution or settlement of the matter.[122]

Other procedures lend themselves to a more bespoke approach. State legislatures will want to set the level of relator compensation—typically providing that the relator is entitled to a specified share of the proceeds of the action if the state does not intervene, and a lower share if the state does.[123] States may also wish to include provisions limiting qui tam to suits based on information that is not publicly known or not already under investigation by the state,[124] explicitly prohibiting retaliation against whistleblower relators,[125] and denying the enforceability of contractual waivers of the right to bring a qui tam claim.[126] States may require that relevant agencies gather and maintain data on the costs and benefits of the new qui tam regime, and might earmark a percentage of qui tam revenues to cover all of the burdens of monitoring the qui tam program.[127] None of these provisions should be particularly controversial and many are standard operating measures for implementing a fair and workable qui tam regime.

Beyond these issues, state policy makers face two fundamental questions: (a) which state laws should be covered by qui tam legislation, and (b) who may act as the qui tam relator? The first question will determine the scope, size, and political viability of the qui tam enforcement model, and the second—we argue below—will likely determine the constitutional and operational viability of the new qui tam.

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122. *Compare* S.B. 750, 80th Leg. Assemb., Reg. Sess. § 9(a)–(b) (Or. 2019) (allowing the relator to continue the action if the attorney general declines to intervene, subject to limitations), *with* § 3730(c)(2)(A)–(B) (allowing the government to dismiss or settle the action, notwithstanding the objections of the person initiating the action).

123. *Compare* S.B. 750, 80th Leg. Assemb., Reg. Sess. § 4 (Or. 2019) (providing that where the state has not intervened, a successful relator is entitled to 30% of any recovery; where the state has intervened, the relator is entitled to 20%), *with* § 3730(d)(1)–(2) (providing that should the government intervene and continue the suit, the relators receive between 10% and 25% of any judgment, whereas their share rises to between 25% and 30% if the United States declines participation).

124. *Compare* S.B. 750, 80th Leg. Assemb., Reg. Sess. § 3(1)(a) (Or. 2019) (prohibiting a public enforcement action if a state agency takes enforcement action), *with* § 3730(e)(4)(A) (providing that a court shall dismiss public enforcement claims if the allegations were publicly disclosed in a prior setting).

125. S.B. 750, 80th Leg. Assemb., Reg. Sess. § 4 (Or. 2019); *see also infra* note 133 (listing existing state whistleblower-protection statutes).

126. *See infra* subpart II(B) (discussing enforceability of a statutory prohibition against qui tam waivers under current law).

127. *See* S.B. 750, 80th Leg. Assemb., Reg. Sess. §§ 2(4), 7(1) (Or. 2019) (providing for the allocation of funds collected through the program); *see also infra* notes 211–13 and accompanying text (discussing political benefits of a new self-funding qui tam regime, where the penalties recovered by the state are employed in assessing and monitoring ongoing claims).

A. *Which State Laws Are Covered?*

The new qui tam is adaptable in numerous respects—most prominently, it can be tailored to authorize citizen enforcement of just about any state statute that public agencies have authority to enforce.[128] Accordingly, the first issue for legislators is the scope of enforcement authority—or, put differently, what statutory rights should qui tam relators be authorized to enforce? As a technical matter, qui tam legislation should explicitly enumerate the state statutes that are subject to its citizen-enforcement provisions—a common convention in enforcement legislation and necessary to ensure efficient implementation of the new qui tam regime.[129]

We can expect that States will be cautious in defining the scope of relator authority, particularly at the outset.[130] Initial discussions with state policy makers—political realists, all—strongly indicate that we needn't worry here about risk-seeking legislators passing sweeping grants of qui tam authority that might alter the very complexion and structure of state enforcement. Rather, states are likely to proceed cautiously in conferring this authority, using the new qui tam to bolster accountability and deterrence in a few key areas that are understaffed by public enforcers.

A number of states currently considering qui tam have focused primarily on expanding qui tam to help enforce violations of worker protection and employment laws that are currently left underenforced owing to inadequate state resources and the radically diminished threat of private collective litigation, as discussed above in Part I.[131] In the employment space, the new qui tam effectively serves to deputize employees to enforce state laws intended to protect worker's rights. And the employment field makes sense for several reasons. First, employment falls squarely within the state's authority to regulate.[132] To those ends, many states already rely on employees to come forward with information about code violations, fraud, and other wrongdoing—and nearly all states broadly protect these whistleblowers from

128. Indeed, a dynamic state legislature might take the opportunity to expand the authority of the public enforcer more generally. In other words, if the state AG does not currently possess legal authority to enforce particular statutory entitlements, legislators might consider conferring that power so that it may be shared with private relators where appropriate.

129. Enumeration reduces uncertainty about the scope of statutory enforcement, so legal /political battles can be waged during legislative drafting and lobbying, rather than in court.

130. States might wish to remedy underenforcement in specific areas, but might also be alert to areas where existing public enforcers seem adequate for the job or where these enforcers may be too stretched to properly monitor qui tam litigation. In addition, there may be areas—such as privacy claims—where states are uneasy sharing enforcement authority with private actors.

131. *See, e.g.*, H.B. 1965, 66th Leg., Reg. Sess. (Wash. 2019) (showing proposed qui tam statute to enforce state employment-discrimination law).

132. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (quoting De Canas v. Bica, 424 U.S. 351, 356 (1976))).

retaliation.[133] Expanding this approach to include claims of sexual harassment, discrimination, wage violations, and leave benefits will therefore not impress state legislators (or their constituents) as unusual. Relatedly, the culture of labor commissioners' offices and other state employment-protection agencies—all quite accustomed to operating alongside the private bar—is likely to be more hospitable than other bureaucracies to qui tam as an extension (rather than a subversion) of their public authority.[134]

Second, workers—and the collectives to which they belong—make great relators. Employees often find themselves "at the right place at the right time": their internal positions within a workplace provide a unique vantage from which to detect wrongdoing that would otherwise be impossible to discern from any other perch.[135] Given these practical realities, it's no surprise that the number of whistleblower complaints lodged by workers under the federal Occupational Safety and Hazards Act (OSHA) has increased markedly over the past decade.[136]

Finally, touting the new qui tam as a measure to help working Americans should make this legislation politically saleable. The past few years have witnessed important legislative victories at the state and local level on a range of workplace protection standards, including increases in minimum wage and paid sick and family leave.[137] Politicians keen on ensuring effective enforcement of these hard-won gains should support qui

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133. Most states have whistleblower-protection legislation on the books to protect public employees who report fraud, waste, and abuse in government agencies. *See, e.g.*, CAL. GOV'T CODE §§ 53296–53299 (West 2012) ("No local agency officer, manager, or supervisor shall take a reprisal action against any employee or applicant for employment who files a complaint pursuant to Section 53297."); FLA. STAT. ANN. § 448.102 (West 2013) ("An employer may not take any retaliatory personnel action against an employee because the employee has . . . [d]isclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice that is in violation of a law, rule, or regulation.").

134. State labor-agency budgets are premised on the notion that private enforcement will supplement their efforts. *See, e.g.*, Andrew Elmore, *The State Qui Tam After* Epic Systems, DEPAUL L. REV. (forthcoming 2019) (manuscript at 5 n.16) (on file with authors) (observing that "[m]ost states have fewer than ten investigators to enforce a wide range of workplace laws, and five states do not engage in any labor or safety and health regulation at all").

135. *Id.* at 9 (describing hard-to-detect violations of employment law, such as shifting "employees off payroll entirely," or using "timekeeping software to round down, automatically deduct or otherwise shave small increments of time from workdays"); Aaron R. Petty, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 872–73 (2006) (observing that relators provide "access to high-level, detailed, inside information about wrongdoing" and supplement public resources (citations omitted)).

136. OCCUPATIONAL SAFETY AND HEALTH ADMIN., CASES RECEIVED: FY2007–FY2017, https://www.whistleblowers.gov/sites/default/files/3DCharts-FY2007-FY2017.pdf [https://perma.cc/S2QM-CYFE].

137. For example, eleven states enacted higher minimum-wage laws that became effective in 2018. *State Minimum Wages | 2019 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (Jan. 7, 2019), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [https://perma.cc/2KZH-JB4D].

tam. And fiscally conservative politicians wary of increased enforcement budgets should be drawn to legislation that would ensure enforcement of popular workplace regulations without requiring any significant cash outlay by the state.[138]

Another area that is ripe for qui tam is consumer protection—a field left especially vulnerable by federal agency inaction and the judicial gelding of class actions. As with employment, "there are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement [of consumer rights] cannot do the job alone."[139] As a result, public enforcers in the consumer space have a long tradition of working in parallel with private attorneys in class actions. As the availability of the class mechanism recedes, the new qui tam provides a more direct way for public enforcers to tap the eyes and ears of consumers and consumer rights organizations, as well as the litigation resources and experiences of those groups and the private bar.[140] And just as qui tam has been held up as an efficient and effective means of uncovering and prosecuting fraud perpetrated on the government, the same policy justifications support reliance on qui tam in the context of consumer fraud.

In applying the new qui tam to consumer-protection law, state drafters will need to carefully delineate the specific consumer-protection statutes that will be subject to qui tam enforcement.[141] The simplest approach would be to authorize consumers to bring qui tam claims for all violations of state "UDAP" statutes—the laws governing unfair and deceptive acts and practices.[142] Most states' UDAP laws authorize enforcement by the state

138. *See infra* Part IV (discussing political coalitions that may come together to support new qui tam legislation).

139. CAROLYN CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 32–33 (2018), http://www.nclc.org/images/pdf/udap/udap-report.pdf [https://perma.cc/R7GG-CDRM].

140. There exists some legislative precedent authorizing public interest suits on behalf of consumers. *See, e.g.*, Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 452 (2018) (observing that the "District of Columbia permits, and California used to permit, private-attorney-general enforcement for some consumer laws" (citations omitted)).

141. Furthermore, unlike employment (where numerous federal statutes regulate conditions of employment), there are no federal statutes that broadly prohibit unfair or deceptive acts that are enforceable by consumers.

142. A model UDAP statute was first developed by the National Conference of Commissioners on Uniform State Laws in 1964. The Model Act enumerated twelve deceptive trade practices, such as false advertising and misleading trade identification, and included an open-ended prohibition against "any other conduct which similarly creates a likelihood of confusion or of misunderstanding." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 253, 258–62 (1964); *see, e.g.*, CAL. BUS. & PROF. CODE § 17200 (West 2017) (providing the California version of UDAP); HAW. REV. STAT. ANN. § 480-2 (LexisNexis 2012) (same for Hawaii); MASS. GEN. LAWS ch. 93A, § 2 (West 2019) (same for Massachusetts). Some UDAP laws enumerate specific state and federal legislation, the violation of which constitutes an unfair and deceptive practice within that state. *See, e.g.*, HAW. REV. STAT. ANN. § 480-2(b)

attorney general[143] and provide for per-violation penalties in specified dollar amounts.[144] And all states grant consumers a private right of action to enforce UDAP laws by seeking compensatory damages and injunctive relief.[145] Accordingly, swapping the UDAP enforcer through a qui tam mechanism would seem fairly uncontroversial as a matter of existing legal infrastructure.

And yet, for reasons that may have more to do with politics than law, we can expect resistance from some quarters to expanding qui tam to authorize UDAP enforcement. Some background: in recent years, corporate groups and trade associations have convinced numerous state legislators that UDAP laws are drafted too broadly—potentially fostering frivolous lawsuits and harming local businesses.[146] This campaign has given rise to numerous amendments narrowing the scope of UDAP laws or granting sweeping exemptions to particular industries.[147] During the same period, corporate

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(LexisNexis 2012) (listing violations of the federal Truth in Lending Act as grounds for UDAP claims); 73 PA. STAT. AND CONS. STAT. ANN. § 201–3 (West 2008) (enumerating seventeen specific acts that constitute unfair or deceptive acts or practices).

143. CARTER, *supra* note 139, at 11. Further:

> The typical UDAP statute allows a state enforcement agency, usually the Attorney General, to obtain an order prohibiting a seller or creditor from engaging in a particular unfair or deceptive practice. The Attorney General can also ask the court to impose civil penalties of a certain dollar amount for violations, and to order the seller or creditor to return consumers' payments.

Id. Carter also notes that "Rhode Island is the only state that does not authorize the state agency to seek civil penalties when a business violates the UDAP statute." *Id.* at 30.

144. The per-violation penalties vary significantly by state:

> [T]he District of Columbia, Maryland, Missouri, Pennsylvania, and Tennessee allow civil penalties of just $1,000 per initial violation. By contrast, Alaska allows a civil penalty of $25,000 per violation, without requiring proof of any special factors such as willfulness. Iowa allows a civil penalty of $40,000 per violation, and Illinois allows up to $50,000 per violation if intent to defraud is shown. (Several states allow larger civil penalties if the unfair or deceptive act was committed against an elderly or disabled person.)

Id. at 30.

145. For example:

> The typical statute also allows consumers to seek similar remedies - return of payments or compensation for other losses, often with some sort of enhancement to account for intangible or hard-to-document losses and to act as a deterrent. In some states consumers can seek an injunction against repetition of the fraudulent practices, and, in most states, they can ask that the fraudulent seller or creditor be ordered to reimburse them for their attorney fees.

Id. at 11.

146. *See, e.g.*, AM. TORT REFORM FOUND., PRIVATE CONSUMER PROTECTION LAWSUIT ABUSE 4 (2006) (warning that state consumer-protection laws have engendered aggressive plaintiffs' lawyers).

147. For example, utility companies in fourteen states enjoy immunity from UDAP laws, as do insurance companies in twenty-one states. CARTER, *supra* note 139, at 22–23. Banks and other financial institutions have secured the broadest exemptions from UDAP laws in many states. *See, e.g.*, ALA. CODE § 8-19-7(3) (2002) (exempting any bank or affiliate regulated by a state or federal agency); FLA. STAT. ANN. § 501.212(4) (West 2016) (exempting federal and state banks and savings and loan associations); LA. STAT. ANN. § 51:1406 (2019) (exempting all federally insured or state-

defendants have been aggressively challenging the scope of UDAP statutes in state courts, resulting in a series of decisions that severely limits the reach of these laws and the ability of consumers to use them.[148] This decade-long crusade to gut UDAP laws has rallied business interests in various states, and these existing alliances will be strongly opposed to and well organized against any effort to reinvigorate UDAP enforcement through qui tam.

As an alternative to broad UDAP enforcement, drafters could authorize relators to enforce a smaller set of discrete consumer protections, such as violations of state consumer-finance laws, fair-credit-reporting acts, false-advertising laws, unfair debt-collection practices, telephone-solicitation restrictions, and disclosure requirements. Creating a smaller universe of relator authority won't completely defang the opposition. It should, though, help to dissolve alliances among disparate interest groups and provide consumers workable options for putting the new qui tam to use.

Other fields are good qui tam candidates for idiosyncratic reasons. In the area of nursing homes, for example, public enforcers' ability to police abusive practices—ranging from fraud to physical abuse—is hamstrung by contractual provisions that require elderly residents and their families to resolve any dispute in highly secretive arbitrations.[149] The new qui tam would provide an avenue for these harms to be treated as *public* wrongs, subject to enforcement in public forums.[150] Likewise in antitrust, where state enforcement budgets tend to be woefully inadequate to detect and prosecute conduct that harms marketplace competition, and where small businesses and other victims of price-fixing and similar schemes are banned from mounting collective challenges, qui tam offers a promising avenue for the vindication of quintessentially *public* rights.[151]

licensed financial institutions); ME. REV. STAT. ANN. tit. 9-B, § 244 (2009) (exempting all state-chartered banks and credit unions from the UDAP statute); NEB. REV. STAT. § 59-1617(1) (2010) (exempting regulated lenders); N.H. REV. STAT. ANN. § 358-A:3(I) (2009) (same); OHIO REV. CODE ANN. § 1345.01(A), (K) (West 2016 & Supp. 2019) (exempting financial institutions and lenders); VA. CODE ANN. § 59.1-199 (2014) (exempting "banks, savings institutions, credit unions, small loan companies, . . . and mortgage lenders," and any aspects of consumer transactions that are regulated by the Federal Consumer Credit Protection Act).

148. *See, e.g.*, Najieb v. Chrysler-Plymouth, No. 01 C 8295, 2002 WL 31906466, at *6–7 (N.D. Ill. Dec. 31, 2002) (adopting an interpretation of the Truth in Lending Act that immunizes lenders from UDAP liability for a wide range of deception and nondisclosure); Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 676–77 (R.I. 2004) (interpreting UDAP statute to provide a blanket exclusion to creditors).

149. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (per curiam) (finding the FAA preempts a state-law rule that would invalidate an arbitration clause in a nursing home contract on public policy grounds).

150. *See, e.g.*, Gilles, *supra* note 101, at 413 (arguing that claims alleging violations of public laws should be heard in public courts).

151. *See id.* at 414–16 (observing that, had the Roberts Court's antitrust decisions been diverted into private arbitration rather than subject to public adjudication, "critical questions concerning regulatory policies, the role of private enforcement, and doctrinal line drawing would be lost," and

B. Who Can Be a Relator?

The second critical question for drafters of qui tam legislation is: Who should the statute authorize to act as a relator? Specifically, in order to bring a qui tam action, should the relator herself be required to have suffered injury—e.g., as an aggrieved employee or a defrauded consumer? Or should her status as relator rest solely on the authority vested in her by the state?

A great deal turns on the answer. For the reasons discussed below, we believe that, under a new qui tam statute that has no relator-injury requirement and that fully subordinates the relator to the state attorney general, the relator has Article III standing. But where the statute requires relator injury or vests substantial control in the relator, we believe that standing will be found lacking. And, as we will explain below, the presence or absence of Article III standing is hugely consequential.

To examine these issues, we will begin by considering whether a qui tam regime that includes a relator-injury requirement confers Article III standing upon the relator.

1. Article III Standing Where the Statute Requires Relator Injury.—A good place to start this discussion is with PAGA, where California staked out a clear position: the 2004 law authorizes only "aggrieved employee[s]" to bring suit "on behalf of himself or herself and other current or former employees" to recover penalties for violations of the Labor Code.[152] Presumably, the relator-injury requirement was attractive to the framers of PAGA for several reasons. By designating only employees who have suffered actual injury, PAGA defines a known universe of potential relators and—at least arguably—promotes lawsuit quality by making it more likely that relators' knowledge about code violations is credible. But mostly, a relator-injury requirement mitigates the political opposition to any regime that would allow a broader class of relators.[153] As David Engstrom notes, opponents of qui tam have long portrayed relators as "opportunistic profit-seekers" and parasites of the law.[154] And avoiding political headwinds is an important value.

"consequential precedent" would be lacking); *see also* Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.").

152. CAL. LAB. CODE § 2699(a) (West, Westlaw through ch. 333 of 2019 Reg. Sess.). An "aggrieved employee" is defined as an employee "against whom one or more of the alleged violations was committed." *Id.* at § 2699(c); Arias v. Superior Court, 209 P.3d 923, 930 (Cal. 2009).

153. *See infra* Part IV (discussing political considerations in crafting a qui tam regime).

154. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1275–77 (2012).

But allowing only injured parties to act as relators has potentially serious implications for Article III standing. In fact, our concern is that a relator-injury requirement could be fatal.

At the outset, if the idea behind the new qui tam is that the state is vindicating a *public* interest in deterring violations of its laws, it is not clear why the state's agent should have to show *private* injury. On the contrary, a relator-injury 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. It becomes very tempting for courts to conclude that standing to represent the claims of others must be found in the class action device—i.e., that Rule 23 must be satisfied for Article III standing to exist. After all, as the Supreme Court has repeatedly recognized, "the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[155]

And indeed, a number of California district courts, albeit a minority,[156] have "decided that a plaintiff lacks standing to assert PAGA claims on behalf of absent employees without obtaining Rule 23 class certification."[157] The

155. Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (restating the rule supplied by *Califano*, 442 U.S. at 700–01).

156. A majority of district courts in California have adopted an opposing view. *See* Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1122 (9th Cir. 2014) ("PAGA actions are . . . not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction."); Zayers v. Kiewit Infrastructure W. Co., Case No. 16–CV–06405 PSG (PJW), 2017 WL 7058141, at *8 (C.D. Cal. Nov. 11, 2017), *on reconsideration in part*, 2018 WL 582318 (C.D. Cal. Jan. 18, 2018) ("[T]he majority of federal courts have determined that class certification under Rule 23 is not required to maintain a cause of action under PAGA."); Achal v. Gate Gourmet, Inc., 114 F. Supp. 3d 781, 810 (N.D. Cal. 2015) ("The Court will follow the view of the majority of courts in this district in holding that because PAGA claims are not class actions, . . . there are no Article III . . . issues precluding [the plaintiff] from pursuing his representative non-class PAGA claims."); Willner v. Manpower Inc., 35 F. Supp. 3d 1116, 1135 (N.D. Cal. 2014) ("[T]he vast majority of courts in this district . . . have held that 'representative PAGA claims need not be certified under Rule 23 to proceed' . . . ." (quoting Gallardo v. AT&T Mobility, LLC, 937 F. Supp. 2d 1128, 1137 (N.D. Cal. 2013))); Plaisted v. Dress Barn, Inc., No. 2:12–cv–01679–ODW (SHx), 2012 WL 4356158, at *1 (C.D. Cal. Sept. 20, 2012) ("[T]he majority of federal courts facing these claims have relied heavily on PAGA's purpose as a law-enforcement mechanism . . . and held that PAGA actions, though representative, need not be brought as class actions in which Rule 23's requirements are necessarily applicable."); Moua v. Int'l Bus. Mach. Corp., No. 5:10–cv–01070 EJD, 2012 WL 370570, at *3 (N.D. Cal. Jan. 31, 2012) ("Indeed, '[t]here are two forms of representative actions: those that are brought as class actions and those that are not.' The California Supreme Court has found that PAGA claims fall into the latter category. This court will defer to the interpretation of the state's highest court." (citations omitted) (quoting *Arias*, 209 P.3d at 977 n.2)).

157. Canela v. Costco Wholesale Corp., No. 13-cv-03598-BLF, 2018 U.S. Dist. LEXIS 88037, at *12 (N.D. Cal. May 23, 2018) (citing Raphael v. Tesoro Ref. & Mktg. Co., No. 2:15-cv-02862-

logic of this minority view is that Article III prohibits a person from bringing suit on behalf of a third party in the absence of a recognized exception to the usual rule, such as the federal class action rule. And, while a PAGA plaintiff may argue that the statute should be read to represent just such an exception authorizing a specific form of "representative action,"[158] this California minority view reasons that a state legislature cannot create a new representative action pathway to federal standing: "California state law cannot alter federal procedural and jurisdictional requirements."[159]

We believe it likely that, if presented the chance, the U.S. Supreme Court as presently constituted would endorse the California minority view and hold that the representative action authorized by PAGA, or any qui tam statute with a relator-injury requirement, must satisfy the class action "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[160] Such a ruling would be perfectly consistent with the current majority's expansive view of the FAA and dim view of private class action litigation.

But what about a qui tam statute that does not require that the relator have suffered injury and does not direct the distribution of recovered money to similarly aggrieved persons—on what basis does *that* relator have Article III standing? We address that question immediately below.

2. Qui Tam Standing: Agency vs. Assignment Theories.—Another recognized exception to the "usual rule" of nonrepresentative litigation, in addition to the class action exception, is qui tam. There are two potential bases for relator standing in qui tam: agency and assignment. On the agency model, the relator inhabits the government enforcer's shoes and prosecutes the claim for the government, as its subordinate agent. Article III standing on

ODW, 2015 WL 5680310, at *2 (C.D. Cal. Sept. 25, 2015); Taylor v. W. Marine Prods., Inc., No. C 13–04916 WHA, 2014 WL 1248162, at *2 (N.D. Cal. Mar. 26, 2014); Ivey v. Apogen Techs., Inc., No. 11CV366 DMS NLS, 2011 WL 3515936, at *3 (S.D. Cal. Aug. 10, 2011); Adams v. Luxottica U.S. Holdings Corp., No. SA CV 07-1465 AHS (MLGx), 2009 WL 7401970, at *6 (C.D. Cal. July 24, 2009)) (discussing the defendant's motion for partial summary judgment based on the plaintiff's lack of Rule 23 class certification).

158. After all, PAGA authorizes an aggrieved employee to sue "on behalf of . . . herself and other current or former [injured] employees" and it allocates a share of penalties to "aggrieved employees." CAL. LAB. CODE § 2699(g)(1), (2)(i) (West 2011); *see also* Arias v. Superior Court, 209 P.3d 923, 933–34 (Cal. 2009) (holding PAGA is a form of "representative action" on behalf of unnamed injured parties). In *Arias*, the defendant made a due process challenge claiming the statute works a "one-way intervention" because nonparty employees would not be bound by an adverse judgment. The court rejected the premise: "the judgment in such an action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias*, 209 P.3d at 933.

159. Raphael v. Tesoro Ref. & Mktg. Co., No. 2:15-cv-02862-ODW, 2015 WL 5680310, at *2 (C.D. Cal. Sept. 25, 2015) (quoting Adams v. Luxottica U.S. Holdings Corp., No. SA CV 07-1465 AHS (MLGx), 2009 WL 7401970 (C.D. Cal. July 24, 2009)).

160. *Califano*, 442 U.S. at 700–01.

the agency model is predicated on the government's general enforcement powers, and not on any injury-in-fact the government happens to have suffered in its proprietary capacity. Alternatively, in cases where the government has suffered injury to its property, relator standing might be grounded in a theory of assignment, where the government partly assigns its claim—and its injury-in-fact, as the aggrieved party—to the relator.

The Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*[161] grappled with these theories of relator standing in the FCA context.[162] The Court recognized that it could "perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name* . . . the suit is brought."[163] But the agency lens, it held, was inappropriate because the FCA expressly provides that the relator remains a party, even where the Government takes the case over, and the relator may challenge any settlement or dismissal of the action.[164] In the Court's view, such provisions are inconsistent with framing the relator's role as that of agent.[165] Rather, the *Stevens* Court determined that the relationship between the government and the relator under the FCA was best explained as one of assignment—i.e., the government is itself the aggrieved party and it assigns (at least in part) its claim to redress its injury to the relator, who acquires standing on that basis just like any assignee.[166]

New qui tam, on our conception, fits easily into the agency mold and distinguishes itself from the FCA by acknowledging the AG's ultimate control over the litigation and omitting any right on the part of the relator to challenge a settlement or dismissal or to remain a nominal party in the event the state intervenes to take over the action. The touchstone is control. The FCA relator retains too much control over the litigation to satisfy an agency test under *Stevens.* And the same is true for PAGA plaintiffs; indeed, courts have observed that PAGA suits are different from qui tam actions under the False Claims Act in that an aggrieved employee has complete control over his or her PAGA action.[167] Relators under the new qui tam, on the other hand,

161. 529 U.S. 765 (2000).

162. *Id.* at 773 ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized 'representational standing' on the part of assignees, we have routinely entertained their suits." (citations omitted)).

163. *Id.* at 772.

164. *See id.* (finding that an agency relationship is not established by the FCA because "the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery").

165. *Id.*

166. *Id.* at 773. A related challenge—also roundly rejected by courts—asserts that qui tam enforcement of the FCA violates separation-of-powers principles. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 758 (9th Cir. 1993) ("We have concluded that the Executive Branch retains 'sufficient control' of relators such that their exercise of authority to sue on behalf of the United States does not 'impermissibly undermine' executive functions.").

167. Nanavati v. Adecco USA, Inc., 99 F. Supp. 3d 1072, 1082–83 (N.D. Cal. 2015).

are agents in the true sense. Unlike PAGA, where the relator acts "on behalf of" similarly aggrieved others, and even collects penalties for their benefit,[168] the new qui tam relator acts only for the government, to vindicate its public interests.

In the end, we think it would be a mistake for progressive legislators to take comfort from lower court cases suggesting that PAGA plaintiffs have standing because, to some extent, they stand in the shoes of the government.[169] Whatever the Ninth Circuit may decide when finally confronted with the issue of Article III standing under PAGA, the architecture of that statute—with its relator-injury requirement, its compensation for similarly injured unnamed parties, and its aggressive defense of the relator's ability to control the litigation—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.

On the axis of standing, therefore, our prescription would be for state legislators in enacting a new qui tam statute to hew carefully to traditional agency principles in defining the relationship between the relator and the state. That means not just avoiding relator-injury requirements and earmarks for the distribution of penalties to injured nonparties, but also jettisoning any notion of a relator "representing" aggrieved others. And it means ensuring that control remains with the state attorney general. The philosophy of the new qui tam—not just for purposes of standing but also vis-à-vis preemption and the FAA as discussed below—must be that the relator represents the *state*, in its law enforcement capacity, and no one else.

3. Why Standing Matters.—Why is Article III standing important here? Two reasons. First, the laws of many states impose standing requirements that mirror the federal requirements to varying degrees.[170] So Article III standing is not only a prerequisite to proceeding in federal court, but similar standing requirements will govern access to many state court systems.

Second, where the relator and the defendant are diverse, a qui tam suit filed in state court may well be removable and thus subject to Article III. At the outset, the relator may argue that the state is the real party in interest in a qui tam action and that removal is defeated for that very reason—i.e., because the state is not a "citizen" for purposes of diversity jurisdiction under 28

168. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 146 (2014) (quoting Arias v. Superior Court, 209 P.3d 923, 930 (Cal. 2009)).

169. *See, e.g.*, *id.* at 147 (suggesting such a theory).

170. *See generally* Thomas Bennett, The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims (2019) (unpublished manuscript) (on file with author) (illustrating the tension between current individual Article III standing law and various state standing doctrines that leads to high litigation costs and asymmetries in federal law).

U.S.C. § 1332, the relator should be regarded accordingly.[171] But that argument may prove unpersuasive. Qui tam statutes, including PAGA, give the state the right to *intervene*. And, unless and until the state *does* intervene, it is not a party and the relator's citizenship will control the diversity and removal analysis, as numerous courts have recognized.[172]

Further, properly understood, the amount in controversy under 28 U.S.C. § 1332(a) should be the total amount of penalties sought in the qui tam case, and not the portion of those penalties attributable to actions that happened to affect the relator. The statute makes no provision for individualized penalties—it gives no individual relator or aggrieved party an economic interest in the penalties attributable to any specific violation.[173] The point here is not that individual damages claims should be aggregated, as under CAFA.[174] Rather, there *are* no individual damages claims; there is only a single claim brought by the state or its agent for penalties in a statutorily prescribed amount—a figure that is determined based on the number of violations.[175] The jurisdictional basis is not CAFA; it is traditional diversity. And the jurisdictional cutoff is not $5 million, under 28 U.S.C. § 1332(d)(2); it is $75,000, under § 1332(a). Accordingly, where the relator and defendant are diverse, it is likely that actions under a new qui tam statute will be removable to federal court.

171. *See* Moor v. County of Alameda, 411 U.S. 693, 717 (1973) (recognizing "that a State is not a 'citizen' for purposes of the diversity jurisdiction"); *see also* Louisiana v. Union Oil Co. of Cal., 458 F.3d 364, 366 (5th Cir. 2006) ("Ordinarily '[i]n an action where a state is a party, there can be no federal jurisdiction on the basis of diversity of citizenship because a state is not a citizen for purposes of diversity jurisdiction.'").

172. *See* Archila v. KFC U.S. Props., Inc., 420 F. App'x 667, 668–69 (9th Cir. 2011) ("Although California may be a real party in interest to a PAGA action, this does not convert California into an actual party to all PAGA litigation." (citation omitted) (citing United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 935 (2009) ("[W]hen . . . a real party in interest has declined to bring the action or intervene, there is no basis for deeming it a 'party' . . . ."))).

173. In non-CAFA context, amount in controversy is measured by the value of the named plaintiff's claim and not the aggregated value of the putative class's claim. 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 102.108[2] (Daniel R. Coquillette et al. eds., 3d ed. 2016). Accordingly, the Ninth Circuit has held that potential PAGA penalties against an employer may not be aggregated to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a). Urbino v. Orkin Servs. of Cal., 726 F.3d 1118, 1120 (9th Cir. 2013).

174. 28 U.S.C. § 1332(d)(6) (2012) (in determining whether the amount in controversy exceeds $5 million, the "claims of the individual class members shall be aggregated").

175. Courts sometimes get the jurisdictional amount in controversy wrong in the PAGA context—mainly because that statute allows a relator to combine its claims for statutory penalties with individual damages claims. *See, e.g.*, CAL. LAB. CODE § 2699(g)(1) (West 2011) ("Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."); *see also* Chavez v. Time Warner Cable LLC, No. CV 12-5291-RGK (RZx), 2016 WL 1588096, at *2 (C.D. Cal. Apr. 20, 2016) ("Plaintiff's own PAGA penalties may be combined with his other damages to satisfy the amount in controversy.").

So, what happens to a qui tam action upon removal? The answer depends upon whether the relator has clear Article III standing or not. If the qui tam statute contains no injury requirement and vests true control in the state attorney general, then the relator plainly has Article III standing and the qui tam action should proceed on the merits in federal court. But if the qui tam statute, like PAGA, requires relator injury and directs the distribution of lawsuit receipts to similarly aggrieved persons, then we see two plausible resolutions. First, the district court may simply remand the case to state court on the grounds that federal jurisdiction is lacking because there is no Article III standing.[176] And relators may well desire this remand outcome, which would effectively render the qui tam suit unremovable.

But we suspect savvy defendants will blaze a path to a second, less plaintiff-friendly resolution. They will argue that the relator—by necessity an "aggrieved person" under PAGA—has plainly alleged injury-in-fact and has Article III standing. And, as for the jurisdictional minimum of § 1332(a), the defendant will argue, the complaint on its face seeks penalties far in excess of the threshold, and the relator may well be entitled to seek them—if only she is able to make out the requirements for class certification under Rule 23. Here, the defendant will point to the cases holding that a PAGA relator has Article III standing to represent others if only she can successfully certify a class.[177] And it makes no difference if a class-certification motion is later denied, the defendant will argue. Rather, on this theory, the PAGA case is no different than any case where courts recognize that "the post-removal denial of class certification does not divest federal courts of jurisdiction."[178]

176. *See* Collier v. SP Plus Corp., 889 F.3d 894, 895 (7th Cir. 2018) (holding that failure to remand was error where "the case was not removable, because the plaintiffs lack Article III standing—negating federal subject-matter jurisdiction"); La. Indep. Pharmacies Ass'n v. Catamaran Corp., No. 14–598–SDD–RLB, 2015 WL 1922599, at *5 n.8 (M.D. La. Apr. 27, 2015) ("Where a federal court lacks Article III standing in an action removed pursuant to 28 U.S.C. § 1441, such as this action, 'the remedy is remand, not dismissal.'" (citations omitted)).

177. *See, e.g.*, Canela v. Costco Wholesale Corp., No. 13-cv-03598-BLF, 2018 U.S. Dist. LEXIS 88037, at *12 (N.D. Cal. May 23, 2018) (acknowledging the minority view that PAGA plaintiffs should and must seek certification of class in order to have Article III standing); Raphael v. Tesoro Ref. & Mktg. Co., No. 2:15-cv-02862-ODW, 2015 WL 5680310, at *2 (C.D. Cal. Sept. 25, 2015) (requiring class certification for PAGA claims); Taylor v. W. Marine Prod., Inc., No. C 13-04916 WHA, 2014 WL 1248162, at *2 (N.D. Cal. Mar. 26, 2014) (refuting the view that PAGA claims "need not be brought as class claims"); Adams v. Luxottica U.S. Holdings Corp., No. SA CV 07-1465 AHS (MLGx), 2009 WL 7401970, at *5 (C.D. Cal. July 24, 2009) (recognizing that some courts have required class certification for PAGA actions).

178. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co., 602 F.3d 1087, 1091 (9th Cir. 2010) (citing Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806–07 (7th Cir. 2010)); *see also* Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009) (noting that failure to show numerosity for class certification does not divest federal courts of subject matter jurisdiction). And there is arguably no basis to distinguish a denial of class certification from the decision not to file such a motion. The guiding principle is a broad one: "[P]ost-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." *Shell Oil*, 602 F.3d at 1091–92.

And on top of all that, the jurisdictional threshold will surely be met if the complaint seeks equitable relief enjoining defendant's conduct, and maybe even where it seeks a judicial declaration that the defendant's conduct is illegal.[179]

It is unclear if this line of argument will find traction among federal courts addressing PAGA or any other qui tam statute that contains a relator-injury requirement. But the stakes should not be underestimated. If successful, this defense stratagem will force relators into federal court where they will be compelled to run the Rule 23 gauntlet in order to constitutionally press claims for violations of other people's rights. And class treatment may be infeasible for any number of reasons, including the demanding dictates of Rule 23 and the proliferation of class action waivers.

In fact, the use of class action-banning arbitration clauses is so prevalent that it is no overstatement to say that the entire utility of the new qui tam device will turn on the ability of relators to fend off motions to compel arbitration. And so we turn to this topic next.

III. Arbitration and Qui Tam

The goal of the legislation that is the subject of this paper is singular. It is neither to end-run the contractual bans on collective litigation that the Supreme Court has upheld, nor to provide alternative avenues for contractually bound parties to seek redress for their injuries. The goal is to fill the enforcement gap. But of course, the enforcement gap exists, in part, because the Supreme Court has so broadly endorsed collective-action-banning arbitration provisions.[180] And the efficacy of the legislation will depend, in large part, on whether the new qui tam actions can stay out of the crosshairs of collective-action bans. Accordingly, we need to take full stock of the effects that the Supreme Court's arbitration jurisprudence will have upon new qui tam actions.

At the outset, we need to know if the relator herself is party to a contract with the defendant that calls for arbitration. If the qui tam legislation requires that a relator must herself have suffered injury, then it is reasonably likely that any would-be relator will be party to a contract with the defendant that requires mandatory arbitration and bans collective action. Accordingly, to consider the effects of the Court's arbitration jurisprudence upon qui tam

179. Under the so-called "either-viewpoint rule," the jurisdictional threshold is met if *either* the value of the injunction to the plaintiff *or* the cost to the defendant of observing or implementing the injunction exceeds the statutory amount. *See, e.g.*, *In re* Ford Motor Co., 264 F.3d 952, 958 (9th Cir. 2001) (defining and applying the "either-viewpoint" rule).

180. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) ("The inevitable result of today's decision [upholding class-action-banning arbitration clauses] will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.").

legislation, we should specify whether the legislation contains a relator-injury requirement.

A. *Scenario A: No Relator-Injury Requirement*

Let's assume there is no relator-injury requirement in the qui tam legislation and that there exists no agreement—and hence no arbitration agreement—between a putative relator and the defendant. In this scenario, our relator is a contractual stranger to the defendant; it could be, for example, a labor union or consumer group. In that case, the answer seems simple: the arbitration case law is irrelevant, and the case is free to proceed in court.

But what if all of the injured persons—a group that does not include our relator—are themselves bound by arbitration agreements with the corporate defendant? The scenario is a likely one, especially in the employment and consumer areas that the legislation will presumably designate. Is the relator's qui tam case subject to the arbitration requirement that binds all of the injured employees or consumers?

Whether the relator acts as an agent of the government (as here, under the new qui tam statute) or assignee (as under the FCA, as analyzed by *Stevens*), the relator stands in the shoes of the government, which is not a party to any arbitration agreement with the defendant company.[181] And here it would not matter if the relator were a union, a consumer group, or an employee who serendipitously has no arbitration clause in her contract: a relator who herself has no arbitration agreement with the defendant would be no more bound to arbitrate with the defendant than the government would be in pursuing the same case. This raises the following question: might the government be bound to arbitrate where it takes action based upon harms inflicted on citizens who are themselves bound by arbitration agreements?

And on *that* question, the Supreme Court has taken a clear position. In *EEOC v. Waffle House, Inc.*,[182] the Supreme Court held that an employee's arbitration clause did not bar the EEOC from seeking "victim-specific judicial relief, such as backpay, reinstatement, and damages," for violations of the Americans with Disabilities Act.[183] The circuit courts had been divided on whether the EEOC could pursue victim-specific "make-whole relief" on behalf of an arbitration-bound employee,[184] and the Court, in a 6–3 decision,

181. *See* Vt. Agency of Nat'l Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.").

182. 534 U.S. 279 (2002).

183. *Id.* at 282.

184. *Compare* Equal Emp't Opportunity Comm'n v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 453, 455 (6th Cir. 1999) (holding that employee's agreement to arbitrate does not affect the EEOC's independent statutory authority to pursue an enforcement action for injunctive relief, backpay, and damages in federal court), *with* Equal Emp't Opportunity Comm'n v. Kidder, Peabody

held that it could. While today's Court might possibly reach a different conclusion—the *Waffle House* dissenters, after all, were Justice Thomas, Chief Justice Rehnquist, and Justice Scalia—no one in *Waffle House* contended that the EEOC was barred from pursuing *non*-victim-specific relief in federal court. Neither the dissent nor the circuit courts that were overruled by *Waffle House* ever made the argument, and it is hard to understand what the basis would be. Accordingly, whether the government is seeking broad injunctive changes across the workplace, as in *Waffle House*, or penalties, as under the new qui tam legislation, it seems clear that the government acting in its law enforcement capacity is unaffected by the employee's arbitration agreement.[185]

The upshot of Scenario A, then, is this: if the relator in a given action has no contractual obligation to arbitrate claims with the defendant, then the relator's pursuit of claims seeking penalties (as distinct from "make-whole type relief" or damages) should be able to proceed freely in court, even if 100% of the injured employees or consumers are bound by arbitration agreements and collective-action bans.

B. *Scenario B: Relator-Injury Requirement*

Now let's say our relator is herself subject to a contractual requirement to arbitrate any dispute she has with the corporate defendant, as will often be the case if the qui tam statute requires relator injury. May the relator nonetheless proceed with a new qui tam action in court, or must she arbitrate the claim? And, however one answers that question, would a contractual ban on collective or representative actions—or narrower yet, qui tam actions—be enforceable against her?

The current state of the law regarding these questions is favorable to qui tam plaintiffs. Most prominently, *Iskanian v. CLS Transportation*[186] addressed a PAGA claim brought by a relator whose employment contract featured a broad arbitration agreement that banned "representative actions," including claims under the state's PAGA.[187] The California Supreme Court focused on the text of the FAA, which protects a "provision in any . . . contract . . . to settle by arbitration a controversy . . . arising out of such contract."[188] The court held:

& Co., 156 F.3d 298, 300–01 (2d Cir. 1998) (allowing the EEOC to pursue injunctive relief in federal court but precluding "purely monetary relief").

185. *See, e.g.*, Gilles & Friedman, *supra* note 34, at 665 (concluding that class waivers in arbitration clauses are "unlikely to affect parens patriae suits"). The same should be true for qui tam suits where relator standing is grounded in a theory of agency.

186. 327 P.3d 129 (Cal. 2014).

187. *Id.* at 145.

188. *Id.* at 150 (emphasis omitted) (quoting 9 U.S.C. § 2 (2012)).

> [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.[189]

Likewise, in *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*,[190] a qui tam action under the FCA, the Ninth Circuit held that a typically broad arbitration clause was not triggered because the FCA claims did not "arise out of" the relator's employment relationship with the corporate defendant.[191]

And yet, we predict that the U.S. Supreme Court, as presently constituted, would take a different view of whether a broad arbitration provision in the contract of an employee (or consumer, but we will focus here on employees) may reach a qui tam action brought by that employee.[192] At least in the case of PAGA or any other qui tam statute that requires relator injury, it is necessarily true that the employee relator could not, as a matter of law, have brought the qui tam employment claim if she had not been an injured employee. To say that her qui tam claim does not "arise out of" her employment relationship seems jarringly out of step with the broad scope typically given "arising out of"-type language in the construction of arbitration agreements.[193] And the argument that the agreement does not reach the qui tam claim will be weaker yet as companies begin to draft

189. *Id.* at 151.

190. 871 F.3d 791 (9th Cir. 2017).

191. *Id.* at 794. In *Welch*, the Ninth Circuit did not focus on the "arising out of" limitation in FAA § 2, 9 U.S.C. § 2 (2012), but rather interpreted the contract before it to require that any dispute, to be arbitrable, must have arisen out of the contractual relationship. *Welch*, 871 F.3d at 798–99. But the analysis gets to essentially the same place as the more sophisticated discussion in *Iskanian*. The question boils down to the meaning of "arising out of" for purposes of triggering the arbitration clause. § 2; *see also* Mikes v. Strauss, 889 F. Supp. 746, 754–55 (S.D.N.Y. 1995) ("[P]laintiff's *qui tam* action is completely outside the scope of the Agreement, [and] it is not covered by the arbitration clause. . . . Even if plaintiff had never been employed by defendants, . . . she would still be able to bring a suit against them for presenting false claims to the government.").

192. In the words of Justice Kagan: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., dissenting).

193. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24–25 (1991) (interpreting "arising out of" broadly, such that an ADEA claim is covered by an arbitration agreement in a securities registration application); Southland Corp. v. Keating, 465 U.S. 1, 15 n.7 (1984) (rejecting plaintiff's claim that the arbitration clause did not reach state-law claims, and finding it covered "any controversy or claim arising out of" the agreement); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (upholding a broad arbitration clause, which provided that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration").

arbitration agreements to explicitly include qui tam actions in the litany of representative proceedings that they ban.[194]

But what if the state has a policy, presumably set forth in the qui tam statute itself, prohibiting the waiver of qui tam claims? The California Supreme Court upheld just such a state policy in *Iskanian v. CSL Transportation Los Angeles, LLC*, declaring that PAGA rights could not be waived via private contract because to allow waivers would thwart the state's enforcement agenda.[195] In analogous cases, state and federal courts in California have recently doubled down on their nonpreemption analysis.[196] Presumably, state legislatures enacting new qui tam statutes would include language to announce a similar policy objective, and make clear that the ability of any person to proceed as a qui tam relator is nonwaivable.

But even if the state policy holds qui tam rights nonwaivable, the question remains whether this policy is preempted by the FAA. The *Iskanian* court recognized that "a state law rule, however laudable, may not be enforced if it is preempted by the FAA."[197] In considering whether the state policy was preempted under FAA § 2, the court relied heavily on its view that the relator's PAGA case did not "arise out of" the agreement between the parties.[198] But if one rejects that particular analysis, for the reasons stated above, then we must look elsewhere for grounds, consistent with the FAA, for refusing to enforce a provision in an arbitration clause banning representative and qui tam actions.

The better basis for refusing to enforce a contractual ban on qui tam actions lies in FAA § 2 itself. Under the so-called "savings clause," arbitration agreements must be enforced as written "save upon such grounds as exist at law or equity for the revocation of any contract."[199] And the California policy against allowing waiver of PAGA claims certainly appears to be a generally applicable defense to any contract that purports to effect such a waiver, whether as part of an arbitration clause or not. On the other

194. Standard arbitration language already bans "any representative actions of any kind whatsoever," and the authors have seen contracts that ban qui tam by name as part of a litany. In any event, corporate legal advisers have shown that they quickly adopt arbitration language to reflect legal developments, and we can be sure that potential effects of new qui tam legislation will not be lost on this community.

195. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 148–49 (Cal. 2014); *see also* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 439 (9th Cir. 2015) (finding that the PAGA falls under the "historic police powers" delegated to the states by the Constitution and therefore cannot be preempted by federal law unless Congress clearly manifests such an intent).

196. In *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017), the California Supreme Court held unenforceable a contractual agreement purporting to waive a party's right to seek public injunctive relief under California law. In *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822 (9th Cir. 2019), the Ninth Circuit upheld the *McGill* rule, finding it was not preempted by the FAA.

197. *Iskanian*, 327 P.3d at 149.

198. *Id.* at 150–51.

199. 9 U.S.C. § 2 (2012).

hand, the Supreme Court has been known to find that seemingly "generally applicable" policies, much like this one, nonetheless pose undue obstacles to arbitration. Specifically, the California policy at issue in *Concepcion*—a policy against waiver of the right to proceed collectively—was also a generally applicable contract defense, often applied both in court cases and arbitrations.[200] And yet, the Supreme Court majority held that the policy had an undue effect on arbitration because it prescribed a procedure—collective actions—that the Court found incompatible with the arbitral process.[201] So the question becomes whether there is any conflict between qui tam and arbitration—i.e., whether the arbitral process could accommodate the qui tam device without sacrificing the core values of arbitration.

It is not immediately obvious why a qui tam case, whether under PAGA, a new qui tam statute, or the FCA for that matter, could not proceed in the arbitral forum. But then again, it was not obvious why class actions were inimical to arbitration until the Court so held in *Concepcion*.[202] It's possible the Court could hold, for example, that the qui tam device is too inherently public for arbitration, or that it requires a capacity to monitor broad injunctions that is incompatible with arbitration.[203] We would not be surprised either way.

In the end, then, where a relator is herself bound by a typically broad arbitration provision, our view is that the agreement to arbitrate will be held to cover her qui tam action. If there is no clause purporting to ban qui tam actions inside the arbitration, then the relator will be able to pursue any qui tam claim inside the arbitral forum. If the arbitration agreement does contain a waiver or ban of the ability to bring qui tam claims, then it is an open question whether that ban can be enforced in the face of a state law anti-waiver policy. If the state's nonwaiver policy is deemed preempted, as was the policy in *Concepcion*, then that's it: the relator may not proceed with the qui tam action. If it is not preempted, then the relator may proceed in arbitration. In neither event, however, is the arbitration-agreement-bound relator able to proceed in court.

IV. The Political Prospects of the New Qui Tam

The political prospects of the new qui tam are difficult to assess. On one side will be proponents of the legislation, including progressives who advocate for the rights of consumers, workers, and disadvantaged populations, along with their natural allies in the plaintiffs' bar, labor unions,

200. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336, 338 (2011).

201. *Id.* at 347–51.

202. *Id.* at 350 ("Arbitration is poorly suited to the higher stakes of class litigation.").

203. For example, the California Supreme Court in *Iskanian* observed that the ability "to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA." 327 P.3d at 149 (citations omitted).

civil rights groups, and liberal academia. In the opposing camp, big businesses and corporate defense lawyers will contest qui tam expansion, with the U.S. Chamber of Commerce and other corporate lobbying groups leading the charge.[204] And as these factions prepare to do battle, state lawmakers will find themselves in the middle. From the left, they will be pitched on the political virtues of a new and self-financing tool for enforcing popular protections for workers and consumers. From the right, they will hear warnings about the motivations of plaintiffs' lawyers and the economic perils of overenforcement.[205] Handicapping the prospects of this lobbying derby is a fraught business.

At the outset, we might expect Republican legislators—who currently hold legislative supermajorities in thirty states[206]—to instinctively align with corporate lobbyists against the new qui tam. After all, Republican orthodoxy relies, in part, on "lawyer baiting [and] litigation hating" for its electoral success.[207] Traditionally, this potent formula has enabled conservatives to "unite and expand the Republican coalition of . . . small-government conservatives, big businesses, small businesses, and other groups" to defeat remedial legislation or the politicians who champion these causes.[208]

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204. *See* ALYSSA KATZ, THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE 182 (2015) (observing that the Chamber "has made strides in state politics," contributing "nearly $4 million a cycle" to gain hold of state legislatures around the country and even more to oppose laws that it doesn't favor).

205. In a similar vein, critics lobbied against PAGA in the early 2000s, insisting that passage would put California's economy at a competitive disadvantage. *See, e.g.*, S.R. COMM., BILL ANALYSIS OF S.B. 796, S.2003–2004-796, 2d Extraordinary Sess., at 7 (Cal. 2003) (reporting on concerns voiced by the business community that passage would shift the balance in "disproportionate favor" of employees, "to the detriment of already-overburdened employers," and would invite "bounty hunting attorneys" to flood into California, driving business to friendlier states).

206. Heading into the November 2018 elections, Republicans controlled both legislative chambers in thirty-two states, while Democrats controlled both chambers in only fourteen states. Adam Nagourney & Sydney Ember, *Election Consolidates One-Party Control over State Legislatures*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/statehouse-elections.html [https://perma.cc/KCH6-9JMW]. In 2018, Democrats won full control—i.e., both the governor and legislature—in six states, raising their total to fourteen, and won key gubernatorial races in states such as Colorado, Kansas, Maine, Michigan, Minnesota, New York, Oregon, Pennsylvania, and Wisconsin. Tim Storey & Wendy Underhill, *Election 2018: Midterm Analysis*, NAT'L CONF. ST. LEGISLATURES (Nov. 13, 2018), http://www.ncsl.org/research/elections-and-campaigns/between-a-ripple-and-a-wave.aspx [https://perma.cc/P7AL-HYQF]; *2018 Gubernatorial Election Results*, NAT'L GOVERNORS ASS'N (Nov. 20, 2018, 5:00 PM), https://www.nga.org/governors/election-results/ [https://perma.cc/CPT2-ABLW]. These state electoral victories could smooth passage of qui tam expansion and other progressive bills.

207. Jeff Shesol, *So Sue Me: Republicans Learn to Love Litigation*, NEW YORKER (July 17, 2014), https://www.newyorker.com/news/news-desk/so-sue-me-republicans-learn-to-love-litigation [https://perma.cc/JH3H-PSDL]; *see also* KATZ, *supra* note 204, at 70 (quoting Frank Luntz: "It's almost impossible to go too far when it comes to demonizing lawyers").

208. KATZ, *supra* note 204, at 160–62 (recounting how Tom Daschle's (D-SD) alliance with trial lawyers was used by the Chamber and its allies in negative ads to defeat him—the first Senate party leader to be removed from office in fifty-two years).

And yet, there is at least some reason to believe the new qui tam could disrupt traditional political alliances and unite new coalitions, if only because qui tam *saves* the state money on enforcement and *generates* money through penalties—no small feat in an era of ballooning state-level deficits.[209] This is critical because a majority of states have seen their tax revenues drop in recent years and commentators expect the revenue-side picture to darken, as pressure mounts to spend on Medicaid, education, pensions, and infrastructure projects, among other areas.[210] In this climate, proposals for relieving the financial strain of enforcing employment and consumer laws—and, indeed, *adding* funds to the state treasury—should be appealing to budget hawks.[211] And while there are precious few recent examples of conservative state legislators abandoning party orthodoxy based on concerns with fiscal rectitude, it does happen. If Kansas lawmakers could abandon the tax-cuts-forever religion of Kansas Governor Sam Brownback, this reasoning goes, mightn't some legislators jump off the Chamber of Commerce train?[212]

There's a similar dynamic on the left. At first blush, we'd assume progressive lawmakers will support measures to empower advocates for workers and consumers to promote enforcement actions. But here too, we can expect some strange bedfellows. Some traditional class action law firms have evinced ambivalence about our model, preferring to put all of their

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209. In California, for example, penalties collected under PAGA have "nearly doubled each year beginning in 2014, growing from $5 million to over $34.6 million in 2018." Elmore, *supra* note 134, at 15.

210. *See, e.g.*, John Jordan, *Governor Warns SALT Impact on State Revenues as 'Serious as a Heart Attack,'* GLOBEST.COM (Feb. 5, 2019, 11:51 AM), https://www.globest.com/2019/02/05/governor-warns-salt-impact-on-state-revenues-as-serious-as-a-heart-attack/ [https://perma.cc/8B79-NP9Z] (covering a press conference in which New York Governor Cuomo revealed a dramatic decline in state tax revenue). For example, economists expect that state Medicaid spending will increase by 3.5% in 2019. ROBIN RUDOWITZ ET AL., MEDICAID ENROLLMENT & SPENDING GROWTH: FY 2018 & 2019 4–5 (2018), http://files.kff.org/attachment/Issue-Brief-Medicaid-Enrollment-and-Spending-Growth-FY-2018-2019 [https://perma.cc/9XF9-SAPW].

211. *See, e.g.*, Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007) (discussing how private attorneys general "free[] up civil rights enforcement from any conservative political agenda or administration"). It bears remembering that two self-professed budget hawks were largely responsible for expanding the whistleblower provisions of the federal FCA: Republican Senator Charles Grassley sponsored the 1986 amendments that significantly strengthened the whistleblower provisions, and President Ronald Reagan signed them into law. HENRY SCAMMELL, GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA'S STOLEN BILLIONS 66–68, 79 (2004).

212. Famously, a hard-nosed plan to cut taxes orchestrated by former Kansas Governor Sam Brownback starved the state of funds for its schools and other services. Kansas Republicans became bitterly divided over the issue, and in 2017, "[f]ed up with gaping budget shortfalls, inadequate education funding and insufficient revenue," a faction of state Republicans finally sided with Democrats to override Brownback's veto and rescind the tax cuts. Julie Bosman et al., *Brownback Tax Cuts Set Off a Revolt by Kansas Republicans*, N.Y. TIMES (June 7, 2017), https://www.nytimes.com/2017/06/07/us/sam-brownback-kansas-budget-override.html [https://perma.cc/U73Z-UMN9]. Similar rifts are materializing in Nebraska, Iowa, and other Republican-controlled states whose economies have suffered as a result of major tax cuts. *Id.*

lobbying eggs into the basket of trying to frontally overturn *Concepcion* and restore the ability to proceed with full-fledged aggregate litigation in court.[213] From their perspective, the "second-best" world of new qui tam is a distant second indeed.

One objection seems to be that the new qui tam undercompensates plaintiffs' lawyers. To be sure, the standard method for determining attorneys' fees in a class action—the "percent-of-fund" approach, where lawyers earn up to 25% or so of the fund—gives way, in our model, to statutory fee-shifting. Plaintiffs' counsel, in fee-shifting cases, receive only their hourly rates times the hours reasonably worked—an amount known as the "lodestar"—but with no adjustment for risk. On the face of it, this compares unfavorably to class actions, where class counsel receives a percentage of the fund created—typically, from 10% in mega-cases to 33% in smaller ones—a fee that is often several times the lodestar.[214] So, from the vantage point of class lawyers, the qui tam model fails to compensate them for the risk they take in prosecuting uncertain litigation.[215]

Still, shifted fees are only one part of the overall financial reward a successful lawyer may reap from qui tam. Nothing stops the attorney from contracting for a contingent share of the client's bounty. Moreover, where individual class members would be bound by a class-banning arbitration clause, a victory in the qui tam court case may make it economical to assemble a large portfolio of small individual claims and to prevail in the arbitral setting based on principles of preclusion.[216] As Martin Malin observed in the wake of *Epic Systems*, plaintiff-side employment lawyers have started to file "hundreds, and in some cases thousands, of individual arbitration demands"—an approach made easier by the new qui tam.[217] And

213. Congressional efforts to overturn the Court's FAA jurisprudence are ongoing. For example, the Arbitration Fairness Act (AFA), which would broadly invalidate predispute arbitration clauses imposed on consumers and employees, has been repeatedly introduced by congressional Democrats since 2005. *See* Imre Stephen Szalai, *Correcting a Flaw in the Arbitration Fairness Act*, 2013 J. DISP. RESOL. 271, 271, 281 (discussing the history of the AFA bills). But the AFA has never once made it out of committee and is surely no closer to enactment in today's political environment.

214. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 119–20 (2006).

215. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 129, 141 (Timothy Lytton ed., 2005) (stating the class action lawyers' business model depends upon claim aggregation in order to "take advantage of economies of scale," "reduce the per-plaintiff cost of pursuing claims," and help pay for early and risky investments "in discovery, experts, trial preparation, and other resource-intensive litigation work").

216. *See* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 454–56 (2014) (proposing efficient methods for serializing individual arbitrations).

217. *See* Martin H. Malin, *Where Have All the Claims Gone?*, JOTWELL (Oct. 18, 2018), https://worklaw.jotwell.com/where-have-all-the-claims-gone/ [https://perma.cc/YG23-LLRD] (reviewing Estlund, *supra* note 99); *see also* Elmore, *supra* note 134, at 26 (discussing onslaught of individual

as for putting all our eggs in the qui tam basket, there is simply no reason to believe that the enactment of new qui tam legislation will undercut efforts to overturn *Concepcion* in Congress or the Supreme Court. The qui tam device does not by any means replicate the benefits of class actions—aimed as they are at compensatory damages—and is not intended to.

So, the politics of the new qui tam are less clear than one might think. Nevertheless, at the beating heart of the proposed legislation is a classic left vs. right issue, and it is reasonable to suppose in the near term that the new qui tam will find its greatest receptivity in more progressive states. Whether the substantive merits of the new qui tam will outweigh any perceived political detriments, for liberal legislators, is a separate question and one worth consideration.

Conclusion

The commitment of federal authorities to protect the rights of workers and others is at, if not an all-time low, then surely a post-*Lochner*-era trough point. Meanwhile, the ability of private enforcers to police worker and consumer rights is hamstrung as never before—or not since the appearance of the modern class action rule in 1966. The advent of FAA-protected class action waivers has removed aggregate litigation as a cop on the beat in the commercial precincts of our lives: in online commerce, consumer finance and banking, telephone and wireless, internet and cable-television access, credit cards, payday lending, for-profit colleges, and a majority of all employment relationships in the United States, aggregate litigation has been retired as a beat cop. It is off the force and off the beat, and it has not been replaced.

It therefore falls to state enforcement agencies to carry an unprecedented enforcement burden. In principle, the states can ignore that burden—and states with strong laissez-faire traditions likely will. But elsewhere, particularly in more progressive states, the options are to either (a) find the funding to support radically stepped-up state-level enforcement activity, or (b) do something else. We are proposing something else.

Properly established and administered, the new qui tam regime will more than pay for the burden the state will assume in vetting cases and approving settlements. From 2010 to 2014, California netted just under $20 million in PAGA revenues.[218] But those revenues—while sufficient to support the state's activities in vetting and monitoring cases—are artificially

arbitrations that followed the decertification of *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018), where "class counsel who have already invested resources in developing and litigating a class claim have little to lose" and much to gain in arbitration).

218. Corey J. Cabral, *Governor Brown's Budget Proposal Targets Misguided and Inefficient PAGA Litigation*, 26 CAL. EMP. L. LETTER 6, 7 (2016) (referencing information obtained through the California Public Records Act showing the state "received no fewer than 1,298 PAGA distributions between July 2010 and June 2014," for a sum of $19,953,000).

depressed, and perhaps by orders of magnitude. In practice, most PAGA cases are brought by an employee in a single lawsuit alongside the employee's own individual or putative class damages claims. The PAGA claim is a cudgel, wielded for leverage by the plaintiff's lawyer. Even if his case is not certifiable under Rule 23, or the California analogue, he has his PAGA claim as a threat. And then when the case settles, at whatever stage, the plaintiff and the defendant make an entirely artificial allocation as between the PAGA claim and the private class or individual claim.[219] Since PAGA receipts are mostly remitted to the state, the incentive structure dictates that plaintiff's counsel will allocate the vast majority of settlement dollars to the private claims. Consequently, PAGA revenues are artificially—and we believe monumentally—depressed.

On our model, the statute would make clear that the new qui tam claim may not be joined with a private claim. This is the de facto rule under the federal qui tam statute. Courts recognize that "joinder of FCA claims with other claims" places the FCA relator "at odds with the role a normal plaintiff plays in representing her own interests."[220] And in the rare case where FCA and private damages claims *are* brought in a single filing, courts generally hold they "should be severed under Fed. R. Civ. P. 20(b)."[221] California legislators should take note: while the federal FCA avoids revenue-depressing conflicts of interest, PAGA all but invites the self-interested allocation of settlement proceeds by the dual-role relator-plaintiff. There is

219. *See, e.g.*, Ferreri v. Bask Tech., Inc., No. 15-CV-1899-CAB-MDD, 2016 WL 6833927, at *5 (S.D. Cal. Nov. 11, 2016) (denying settlement that "possibly results in a waiver of all PAGA claims in exchange for no compensation"); Viceral v. Mistras Grp., Inc., No. 15-cv-02198-EMC, 2016 WL 5907869, at *8–9 (N.D. Cal. Oct. 11, 2016) (approving an allocation of 0.15% of the total monetary settlement to PAGA claims, but acknowledging that judges should be "mindful of the 'temptation to include a PAGA claim . . . [solely] as a bargaining chip'"); O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110, 1135–36 (N.D. Cal. 2016) (disapproving settlement where parties sought to settle the PAGA claim for 0.1% of the potential verdict value and opining that plaintiffs may have used "the PAGA claim simply as a bargaining chip in obtaining a global settlement" of their individual claims); Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 944 (N.D. Cal. 2016) (requiring that PAGA penalties be included in an estimate of a maximum realistic award so that the court can properly evaluate whether a proposed settlement fairly allocates recovery between PAGA and individual or class claims); Alonzo v. First Transit, Inc., No. B277109, 2018 WL 5118644, at *32 (Cal. Ct. App. Oct. 22, 2018) (stating that a challenge to a PAGA settlement claiming the inclusion of PAGA claims "was clearly nothing more than a bargaining chip, a deal sweetener, to induce a . . . settlement"). *But see In re* Uber FCRA Litig., Case No. 14-cv-05200-EMC, 2017 WL 2806698, at *7 (N.D. Cal. June 29, 2017) (finding an exceedingly low PAGA award relative to the settlement value was appropriate due to the weakness of the plaintiffs' case and the overlap with other pending litigation).

220. United States *ex rel.* Rattan v. Episcopal Health Servs., No. 11-CV-6259 (KAM), 2015 U.S. Dist. LEXIS 174197, at *16 (E.D.N.Y. July 13, 2015); *see also* United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 852 (7th Cir. 2009) ("[C]ombining [an FCA qui tam case] with a personal damages suit [is] awkward."); United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 360 (5th Cir. 2003) ("[W]e do not see convenience in trying the [qui tam and private damages claims] together . . . .").

221. *Lusby*, 570 F.3d at 853.

no reason for the drafters of new qui tam legislation to repeat these errors. Nor should we impose upon state attorneys the burden of protecting against self-dealing settlement allocations among joined claims—a daunting prospect in the simplest of cases.

Under the new qui tam, with a no-joinder policy, self-interested litigants will not have carte blanche to lever the statute for private gain. Program revenues will not be artificially depressed and should amply support a robust monitoring operation within the state attorney general's office. It is beyond the scope of this Article to financially model prospective qui tam revenues or the costs of monitoring activities. But even with the massive artificial suppression of revenues that we see under PAGA, the state has taken in far more than enough to run its monitoring program—and indeed, it has recently stepped up the program considerably.[222] We imagine that new qui tam revenues will more than support the state's activities in reviewing complaints, approving settlements, and performing whatever other due diligence or supervisory activities it sees fit.

So the new qui tam enforcement regime will be self-sustaining. And the specific model we propose—where there is no relator-injury requirement—will survive Article III challenges and FAA preemption analysis, for all the reasons discussed above. But how much political flak are we courting by moving away from a relator-injury rule? Surely, the Chamber of Commerce will paint a dark picture: ragtag plaintiff–lawyer hordes entering the state, launching hundreds of lawsuits of their own creation against local businesses.

But the fears are unsupported. The whistleblower that we contemplate, on our proposed model, would be any person with information of wrongdoing that is not publicly available—precisely the limitation that is already at work, and working quite well, in the federal qui tam statute. The only proviso here is that there is no good policy reason to make the "non-public information" limitation mandatory. If a state attorney general wishes to greenlight a qui tam case where the underlying information was already known or knowable from public sources, he should certainly be able to. For political purposes, the statute could certainly provide a presumption against cases based on publicly available information. And for administrative purposes, we could require that a qui tam relator designate in its filing with the state if the claim is supported by publicly available information. But the self-financed qui tam review and monitoring operation in the attorney general's office will serve as

222. In 2016, California Governor Jerry Brown's budget sought to use collected penalties to fund a "PAGA Unit" within the Labor & Workforce Development Agency—with the resources to better investigate and monitor qui tam legislation brought under the PAGA statute. The budget proposal asserted that the cost of the additional oversight for the PAGA Unit was "likely to be offset if not exceeded by larger penalty recoveries to the state." Kyle C. Worrell, *California Governor Brown's Proposed PAGA Unit May Have Power to Challenge PAGA Settlement in Court*, NAT'L L. REV. (Feb. 24, 2016), https://www.natlawreview.com/article/california-governor-brown-s-proposed-paga-unit-may-have-power-to-challenge-paga [https://perma.cc/76ES-A7GR].

an effective check against the roving-hordes problem that will no doubt be conjured by the Chamber of Commerce. All of which is to say there is no warrant here for tying the hands of state enforcers and artificially limiting the pool of possible qui tam claims based upon their provenance in the public record.

Efforts to make the new qui tam a reality are already underway, if just barely.[223] Consumer and employee advocates led by the tireless David Seligman of Towards Justice and Rachel Deutsch at the Center for Popular Democracy, among others, are working with legislators in a handful of states, and proposed legislation has been introduced in at least two.[224] And as the viability of the new qui tam model in the face of political, legal, and operational challenges is road tested—in academic literature and debate, in early-adapter legislation, and possibly in court cases—we would hope and expect that state-level policy makers will discover a durable solution to the enforcement gap.

223. *See* Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2238 (2018) (describing a mini-movement pioneered by "consumer and labor advocates [who] have offered up draft qui tam legislation in at least five states").

224. As of this writing, new qui tam bills have been formally introduced in Maine, S.P. 558, 129th Leg., Reg. Sess. (Me. 2019); New York, A. 7958, 2017–2018 Leg., Reg. Sess. (N.Y. 2017), S. 6553, 2017–2018 Leg., Reg. Sess. (N.Y. 2017); Vermont, H. 789, 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018); and Washington, H.B. 1965, 66th Leg., Reg. Sess. (Wash. 2019).