THE CLASH: SQUARING MANDATORY ARBITRATION WITH ADMINISTRATIVE AGENCY AND REPRESENTATIVE RECOURSE

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ABSTRACT

Mandatory predispute arbitration clauses requiring individual, final, and binding arbitration and excluding all class or representative actions, whether in court or arbitration, are often embedded in employment contracts and nearly all aspects of commercial and consumer transactions. The Federal Arbitration Act ("FAA") requires courts to enforce agreements to arbitrate. However, both state and federal administrative agencies regulate the sectors in which arbitration contracts are used. Likewise, state and federal legislation may authorize or "deputize" private individuals to assert representative private attorney general or qui tam actions to enforce legislation on behalf of the state or agency. Strict enforcement of these arbitration clauses can thus impair an individual's access to legislative and administrative schemes otherwise established to address specific areas of public policy.

This Article examines the impact of private arbitration on individuals' rights to access agency regulatory procedures and to assert representative claims under state laws authorizing private attorney general or federal qui

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tam enforcement. Although the scope of FAA preemption is established doctrine, state and federal courts continue to variously analyze the FAA's preemptive impact on administrative and regulatory schemes. For instance, courts differ on how to square FAA preemption against regulatory administrative procedures providing substantive protections, laws that "deputize" aggrieved individuals to assert representative claims on behalf of the government, and situations in which a federal agency has declared its statutory scheme exempt from FAA preemption.

This Article argues that the FAA, where applied to preempt and thus deny access to simplified and protective state and federal agency procedures, violates not only constitutional guarantees of federalism, with regard to the states' sovereign right to regulate traditional matters of public concern, but also separation of powers. Established doctrine, requiring exhaustion of administrative remedies, deference to agency rulings and expertise, as well as respect for state authority under the FAA's "savings clause," also supports maintaining such access. This Article proposes alternative reforms to retain the benefits of agency regulation and expertise while respecting contractual obligations and promoting informed decisionmaking.

TABLE OF CONTENTS

INTRODUCTION

Do mandatory predispute arbitration agreements displace a party's right to access state and federal administrative agency procedures, or laws authorizing representative actions?[1] Consider the case involving Frank, an employee who works at a local automobile dealership in California. Frank believes that his employer has failed to pay his due wages, overtime, and vacation pay. As required under state and federal law, posters in the

1. Although arbitration is contractual and presumably voluntary, the terms "mandatory" or "forced" arbitration have come to refer to situations in which "binding arbitration [is] imposed by the stronger party on the weaker in an economic relationship through the use of an adhesive contract clause." Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 221 (2004).

dealership's employee workroom contain information regarding Frank's rights as an employee.[2] The notice concerning wage disputes explains that an employee may file an online complaint with the state Department of Labor Standards Enforcement ("DLSE"), which will trigger an administrative hearing with the employer before the state Labor Commissioner.[3] The DLSE procedure is free and provides for the ability of the employee to be represented by the Labor Commissioner in the event of an employer appeal, a one-way attorney's fees provision, and the posting of a bond by the employer.[4]

Frank contends that his employer engages in widespread violations of workplace laws, including a pattern and practice of violating state and federal wage and hour employment laws. His state's Private Attorney General's Act ("PAGA") authorizes an aggrieved employee to file a civil action in a representative capacity on behalf of the state and to seek penalties for Labor Code violations.[5] Suppose that the employer's practices also allegedly violate the federal Fair Labor Standards Act ("FLSA").[6] The National Labor Relations Act ("NLRA"), in addition to protecting workers from unfair labor practices, authorizes workers to engage in collective action.[7] Were Frank to have a discrimination claim, state and federal laws

2. Federal and state laws generally require employers to display notices in the workplace informing employees of their employment rights and of the respective state and federal agencies in charge of enforcing these rights. *See, e.g.*, *Workplace Postings*, CAL. DEP'T INDUS. REL., http://www.dir.ca.gov/wpnodb.html (last visited Oct. 21, 2015) (listing required notices of employee rights under state and federal laws, such as those pertaining to wages, unemployment, worker's compensation, whistleblower protection laws, discrimination, harassment, pregnancy, family leave, medical and disability leave, and equal opportunity); Wage & Hour Div., *Workplace Posters*, U.S. DEP'T LABOR, http://www.dol.gov/whd/resources/posters.htm (last visited Oct. 21, 2015) (providing the posters that are required to be posted in the workplace under federal law).

3. *See* CAL. LABOR CODE §§ 96, 98 (West 2011) (authorizing the Labor Commissioner to take assignments of state wage claims, workers' compensation awards, and employment-related claims).

4. *See* Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*), 311 P.3d 184, 191–92 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014). In a "Berman" administrative hearing, the DLSE is required to assist the employee in presenting and appealing their legal claims. *Id.* Although the standard rules of court and evidence are inapplicable, the Commissioner makes a decision and the courts have a duty to enforce that judgment. *Id.* If no appeal of the decision is filed within ten days, the judgment becomes final and is enforceable as a civil action. *Id.* An employer who appeals must first post a bond in the amount of the judgment and, if unsuccessful, the employer is responsible for the employee's legal fees incurred because of the appeal. *Id.*

5. CAL. LABOR CODE § 2699 (authorizing private citizens to pursue civil penalties on behalf of the state for workplace violations).

6. The FLSA establishes a national minimum hourly wage, as well as standards for overtime pay, child labor, and recordkeeping that apply in both the private and public sectors. 29 U.S.C. §§ 206–207 (2012). The FLSA, which also provides for civil liability and criminal sanctions, is enforced by the Wage and Hour Division of the U.S. Department of Labor. *Id.* §§ 204, 215–216.

7. *Id*. §§ 157, 158(d). Collective action includes the right of employees to file a collective legal action. *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 565–66 (1977) (noting that collective action includes

would permit private action on his part, although many of those laws require that he first file a formal discrimination charge with the respective administrative agency responsible for enforcing such laws.[8] Applicable state and federal laws also provide Frank with the right to pursue recourse through a discrimination claim with the Equal Employment Opportunity Commission ("EEOC"),[9] or an unfair labor practice claim with the National Labor Relations Board ("NLRB").[10]

Yet according to Frank's employment contract, all disputes must be heard in individual arbitration. In this process, Frank would typically be required to pay a filing fee and a portion of the arbitrator's fee,[11] to

seeking mutual aid and protection for the improvement of working conditions through recourse to administrative and judicial forums); Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, at 6 (Oct. 28, 2014) (describing collective legal action as the foundation and core substantive right of the NLRA).

8. 42 U.S.C. § 2000e-5 (2012). The U.S. Equal Employment Opportunity Commission ("EEOC") is responsible for enforcing federal anti-discrimination employment laws. *Employees & Job Applicants*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/ (last visited Oct. 21, 2015). After a complainant files a discrimination claim with the EEOC, the EEOC conducts an investigation and will either prosecute the claim on behalf of the employee or dismiss the charge and issue the complainant a Notice of Right to Sue, in which case a lawsuit must be filed within ninety days. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/charge.cfm (last visited Oct. 21, 2015); *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/lawsuit.cfm (last visited Oct. 21, 2015). Fair Employment Practices Agencies also operate at the state level to enforce similar state laws. *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employees/fepa.cfm (last visited Oct. 21, 2015). Other federal agencies charged with enforcing workplace laws include the Occupational Safety and Health Administration ("OSHA"). *How to File a Claim with OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/as/opa/worker/complain.html (last visited Oct. 21, 2015).

9. Federal laws prohibit discrimination on the basis of a protected status such as gender, race, national origin, age, or disability. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–e17 (2012) (prohibiting discrimination on the basis of race, gender, national origin, and other categories); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012) (prohibiting discrimination on the basis of age); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012) (prohibiting discrimination for persons with disabilities).

10. *What We Do: Investigate Charges*, NLRB, https://www.nlrb.gov/what-we-do/investigate-charges (last visited Oct. 21, 2015). Other federal laws regulate workplace safety and retirement benefits. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2012) (regulating workplace safety); Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461 (2012) (regulating pension, welfare, and benefit plans, and authorizing the Secretary of Labor, a participant, a beneficiary, or a trustee to bring a civil action for the enforcement of ERISA rights). *See also* Jondavid S. DeLong, *Enforceability of Predispute Agreements to Arbitrate Claims Arising Under Employment Retirement Income Security Act of 1974 (ERISA) (29 USCS §§ 1001 et seq.)*, 116 A.L.R. FED. 525 (1993) (providing an overview of the government's enforcement of ERISA).

11. *See, e.g.*, *Employment Arbitration Rules and Procedures*, AM. ARBITRATION ASS'N 30–31 (2015), https://www.adr.org/aaa/faces/aoe/lee/employment/employmentarbitration (providing for varied fee schedules depending on whether arbitration was employer promulgated or individually negotiated); *JAMS Employment Arbitration Rules & Procedures*, JAMS 26 (July 1, 2014),

participate in selecting a privately hired arbitrator (who is likely to be known by the employer as a "repeat player"[12]), and to engage in this proceeding regardless of whether he could secure an attorney or advocate.[13] The arbitration proceeding would be private, and the decision final and binding, with extremely limited rights of appeal.[14]

Frank just wants help getting his due wages and holding his employer accountable to comply with employment laws. The legislature has designed an administrative process to assist employees with these types of recurring issues. Legislation also appears to authorize Frank to act in a representative capacity to enforce these laws. But would an employment contract requiring arbitration and banning class actions prevent Frank from pursuing these claims in an administrative or judicial forum, or from enlisting state or federal administrative agency relief? Abdul Mohamed, a driver for Uber, had similar concerns when he was fired without explanation after the company conducted a background check on him.[15]

The Federal Arbitration Act ("FAA") requires courts to enforce agreements to arbitrate, subject to defenses that "exist at law or in equity for the revocation of any contract."[16] Enacted in 1925, the FAA was

http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf (providing for each party pro rata payment of arbitrator fees). Practically, an individual's ability to afford and procure counsel for individual arbitration, particularly for small-dollar claims, is much more difficult than obtaining counsel for a class action claim, which provides much more leverage and incentive for counsel. *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1242 (2013) (describing the affidavits of trial attorneys who attested that they would only take consumer claims that could be brought as class actions); Mohamed v. Uber Techs., Inc., Nos. C-14-5200 EMC and C-14-5241 EMC, 2015 U.S. Dist. LEXIS 75288, at *56–57 (N.D. Cal. June 9, 2015) (agreeing that an employee had established proof of "hefty fees" that he could incur in arbitration; if administered by JAMS, fees would include an initial $5,000 retainer, a $7,000 daily hearing, and a $700 hourly professional fee).

12. The "repeat player" notion posits that employers or parties who more frequently use arbitration and select arbitrators are not only more experienced with the process, but also obtain more favorable outcomes. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 191 (1997).

13. In contrast, the state Labor Code process may allow the Labor Commissioner to act on behalf of the employee. CAL. LABOR CODE § 96 (West 2011).

14. *See* 9 U.S.C. § 10 (2012) (providing for judicial vacatur of arbitral awards only in limited situations of fraud, an arbitrator's evident partiality or misconduct in the proceedings, or exceeding powers).

15. *Mohamed*, 2015 U.S. Dist. LEXIS 75288, at *9–10. Uber's driver agreement contained an arbitration provision requiring individual arbitration only and prohibiting class, collective, or representative claims in arbitration or court. *Id.* at *14.

16. 9 U.S.C. § 2 (2012) ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

intended to place arbitration contracts on equal footing with other contracts, to overcome a then-existing judicial hostility to contracts depriving courts of jurisdiction, and to provide a procedure in federal court for the enforcement of arbitral agreements and awards.[17] The modern-era U.S. Supreme Court, however, regards the FAA as establishing both a national policy favoring arbitration, as well as the basis for enforcing arbitration contracts "as written."[18] Notwithstanding, critics contend that such enforcement, primarily in the context of mandatory consumer and employment arbitration, contravenes state and some federal laws, precludes class actions, displaces access to administrative regulatory schemes, and can effectively preclude the vindication of federal and state statutory rights. The FAA preemption rule, particularly as declared by the Supreme Court in *AT&T Mobility v. Concepcion* to void state laws restricting consumer class action waivers, thus severely restricts states' ability to ensure judicial access through protective legislation and can also impair individuals' meaningful access to state and federal administrative and regulatory regimes.[19]

Predispute arbitration clauses, which require individual, final and binding arbitration and which exclude class or representative actions, are often embedded in employment and nearly all aspects of consumer financial and commercial transaction contracts.[20] At the same time, state

17. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

18. *See, e.g.*, DirecTV, Inc. v. Imburgia, No. 14-462, slip op. at 10 (U.S. Dec. 14, 2015) (holding that FAA preemption applies even if an arbitration agreement references contrary state law); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (rejecting the argument that arbitration prevented an effective vindication of antitrust rights); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (upholding contractual waivers of class actions); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (ruling that the FAA preempts state administrative adjudication); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (holding that the FAA Section 1 exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" does not exempt general employment arbitration).

19. In *Concepcion*, the U.S. Supreme Court ruled that the FAA preempts the California Supreme Court's judicial ruling deeming class action waivers unconscionable. *Concepcion*, 131 S. Ct. at 1753. *See also* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 713 (2015) (describing the judicial expansion of FAA preemption power as unprecedented and unexplained, and arguing that this "impact preemption" is contrary to the purposes and objectives of the FAA).

20. These industries include financial, nursing home, healthcare, and professional services. *See* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 235 n.8 (2008) (documenting studies on the increasing use of arbitration); Linda Demaine & Deborah Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: An Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62–64, 73 (2004) (analyzing findings from an empirical

and federal administrative agencies operate to regulate many sectors in which arbitration contracts are used. Strict enforcement of arbitration clauses may deny access to administrative schemes otherwise established to address specific areas of public policy.[21]

The U.S. Supreme Court in *EEOC v. Waffle House* recognized the province of the EEOC to combat workplace discrimination when it held that a mandatory arbitration clause in an employment contract, although binding on the employee, did not bar the EEOC, a nonparty to the arbitration agreement, from acting on the employee's behalf to pursue victim-specific remedies for discrimination, such as back pay, reinstatement, and damages.[22] However, in *Preston v. Ferrer*, in which a party sought to have a dispute brought before the California Labor Commissioner under the state's Talent Agent Act ("TAA"), rather than in private arbitration, the Court announced that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[23] Recent cases addressing situations such as those posed above with Frank have raised additional issues, including how to distinguish the Court's deference to agency action under *Waffle House* from the bar to administrative review in *Preston*, and whether parties to a predispute arbitration contract may meaningfully utilize state and federal administrative adjudicatory procedures.[24] Specifically, does the FAA preempt state laws that provide substantive protections through administrative agency oversight or that "deputize" an aggrieved employee to assert representative claims on behalf of the state? Does the FAA override federal agency review, such as when a federal agency determines that FAA enforcement conflicts with and therefore must accede to another federal statutory scheme?

This Article examines these questions, as well as the impact of mandatory arbitration on access to administrative agency regulation and

study of the prevalence of consumer and employment arbitration agreements, and reporting that consumers rarely understand the significance of the arbitration provision and have little opportunity to negotiate otherwise). In 2015, the Consumer Financial Protection Bureau issued a comprehensive study reporting incidences of arbitration clauses in consumer contracts. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), §§ 1.1–1.4.1 (2015) [hereinafter ARBITRATION STUDY].

21. *See infra* Part II.

22. EEOC v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002).

23. Preston v. Ferrer, 552 U.S. 346, 359 (2008).

24. *See infra* Part II.C (discussing D.R. Horton, Inc. v. NLRB (*D.R. Horton II*), 737 F.3d 344 (5th Cir. 2013), and Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (Oct. 28, 2014)).

representative procedures.[25] Part I briefly describes the FAA and its interpreted preemptive scope. Part II focuses on recent judicial decisions, which variously interpret the FAA's impact on state and federal regulatory schemes. Part III questions the constitutionality of the FAA's seemingly impenetrable preemptive scope: that is, where it is held to preempt access to state agency relief or to override federal agency jurisdiction. Denying access to simplified, protective agency procedures not only runs counter to the purported efficiency benefits of arbitration, but also unconstitutionally infringes upon the federalism guarantees for state sovereignty in the exercise of its police powers over traditional regulatory matters and upon the separation of powers vested in federal executive agencies.[26] Maintaining such access is also supported by established doctrine, requiring exhaustion of administrative remedies, deference to agency rulings and expertise, and regard for state authority under the FAA's savings clause. To the extent that FAA preemption still reigns,[27] Part IV proposes alternative courses for reform to retain the benefits of agency regulation and expertise while respecting contractual obligations and promoting informed decision making.[28]

25. In a previous article, I began to explore the impact of the preemptive effect accorded to the FAA on administrative adjudicatory processes. *See* Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 6 Y.B. ARB. & MEDIATION 59, 65 (2013) [hereinafter Weston, *Accidental Preemption*] (asserting that "[t]he vast preemptive effect accorded to the FAA poses a risk to deny access to, and the operation of, administrative agency procedures specifically established to handle certain claims"). Since then, significant questions and conflicting judicial rulings on this question have developed, warranting further study of this apparent clash of policies and federalism.

26. *See* Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 133 (2012) (noting the threat to state regulation posed by FAA preemption, stating that "[i]f Congress intended to bar state law from interfering with streamlined arbitration proceedings, state efforts to regulate arbitration procedure could be imperiled"). *See also id*. at 182 (advocating for state regulation of consumer and employment arbitration agreements).

27. *See infra* Part IV.A (discussing proposed amendments to the FAA and the low probability of their passage).

28. *See D.R. Horton II*, 737 F.3d at 362 (overruling the NLRB's decision that the right to collective action under the NLRA invalidates the class action waiver, but agreeing that the employer's arbitration clause impermissibly suggested that the employee waived all rights to report unfair labor practices to the Board); *Murphy Oil*, 361 N.L.R.B. No. 72, at 1–2 (affirming the rationale of *D.R. Horton II*).

I. THE FEDERAL ARBITRATION ACT OF 1925

A. CONTRACTUAL ARBITRATION'S ENFORCEMENT AND LIMITS

The FAA expressly provides procedures for enforcing arbitration agreements and awards in federal court.[29] Section 2 of the FAA states that:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[30]

The FAA's enforcement mandate is subject to two exceptions in what is referred to as its "savings clause."[31] First, arbitration contracts are subject to the same defenses applicable to contracts generally, such as fraud, duress, unconscionability, and violation of public policy.[32] Second, the FAA must yield where Congress commands.[33] Courts typically require

29. The FAA's legislative history and text indicate that it is intended to provide a procedure for the enforcement of arbitration agreements and awards in federal court. *See* Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 382, 396 (2007) [hereinafter Weston, *Preserving the FAA*] (describing the FAA's legislative history). The U.S. Supreme Court has since ruled that the FAA's enforcement provisions apply in state as well as federal court. Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984). The decision has been met with some controversy. *See infra* note 49.

30. 9 U.S.C. § 2 (2012).

31. *D.R. Horton II*, 737 F.3d 344, 358 (5th Cir. 2013). *See* Imburgia v. DirecTV, Inc., 170 Cal. Rptr. 3d 190, 194 (Ct. App. 2014), *cert. granted*, 135 S. Ct. 1547 (2015) (holding that an arbitration agreement can waive FAA preemption if it references a state law deeming class waivers unconscionable). The Supreme Court heard oral arguments in *Imburgia* on October 6, 2015, considering the question of "[w]hether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act." Brief for Petitioner at i, Imburgia v. DirecTV, Inc., No. 14-462 (U.S. May 29, 2015). It issued a ruling on December 14, 2015, reversing the California Court of Appeal and holding that their interpretation of the arbitration agreement was preempted by the FAA. *Imburgia*, No. 14-462, slip op. at 10 (holding that FAA preemption applies despite contractual agreement reference to invalidated state arbitration law).

32. 9 U.S.C. § 2; Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996) (noting that the FAA enforcement mandate is subject to "[g]enerally applicable contract defenses."); Barras v. Branch Banking & Trust Co. (*In re* Checking Account Overdraft Litig.), 685 F.3d 1269, 1277 (11th Cir. 2012) ("[T]here are instances wherein a state law may invalidate an arbitration agreement without being preempted by the FAA. Indeed, the phrase 'save upon such grounds as exist at law or in equity for the revocation of any contract' in § 2 must have meaning.").

33. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) ("[C]ourts must 'rigorously enforce' arbitration agreements . . . unless . . . 'overridden by a contrary congressional command.'" (citations omitted)). *See also* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (holding that the FAA requires courts to enforce agreements to arbitrate unless Congress has directed otherwise); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("Having made a bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue.").

that such a mandate be either explicit in the text, or implicit through direct conflict with another federal statute. For example, the Supreme Court has never construed a federal statute providing for a "right to sue" or precluding "any waiver" of its statutory protection to be a "congressional command" guaranteeing a right to a judicial forum.[34] Presumably, such language conveys a legal right, which may technically (although not always practicably) be heard in arbitration.[35] The Court has likewise rejected, absent specific evidence, the claim that parties could not effectively vindicate their federal antitrust rights in individual arbitration due to prohibitive costs and discovery, thereby warranting an exception to FAA arbitration.[36]

Explicit congressional commands to restrict the use of arbitration are generally found in certain industry-specific statutes, such as the Commodities Exchange Act[37] and the Motor Vehicle Franchise Dispute Resolution Process Act.[38] Congress has also provided for exemptions from arbitration on an *ad hoc* basis, typically in reaction to public outcry over arbitration's misuse—for example, when Jamie Leigh Jones, who was allegedly sexually assaulted by a coworker while working in Iraq, was required to arbitrate her claim against her employer, federal defense

34. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 669–70 (holding that claims arising under the Credit Repair Organizations Act ("CROA") are arbitrable despite CROA's "right to sue" provision, and stating that CROA's requirement that credit repair organizations notify consumers that they "have a right to sue" does not reflect congressional intent to preclude arbitration of CROA claims). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (enforcing arbitration agreement despite claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c)(1) (2012), which provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction"); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 420 (1986) (upholding arbitration of claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (2012), which provides that an injured party "may sue" in federal court); *Mitsubishi Motors*, 473 U.S. at 636–37 (upholding the arbitrability of Sherman Act antitrust claims, and noting that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function").

35. *CompuCredit*, 132 S. Ct. at 672 (describing the "right to sue" as a "[c]olloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA").

36. Although the Supreme Court recognized in *Green Tree Financial v. Randolph* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," it held that Randolph "failed to support" her assertion that "arbitration costs are high" with probative evidence. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 & n.6 (2000). *See also Italian Colors*, 133 S. Ct. at 2311 (similarly rejecting claims that costs of individually pursuing antitrust claims against merchants are prohibitively high absent specific evidence of financial impossibility).

37. 7 U.S.C. § 26(n)(2) (2012) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.").

38. 15 U.S.C. § 1226(a)(2) (2012) (authorizing only postdispute arbitration of motor vehicle franchise contract disputes in claims involving auto dealers and manufacturers).

contractor Halliburton.[39] However, Congress has not acted upon the Arbitration Fairness Act of 2013, which proposed prohibiting mandatory arbitration of consumer and employment contract disputes,[40] despite it having been reintroduced periodically since 2007.[41]

In another industry-specific example, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), which amended the Sarbanes-Oxley Act of 2002 ("SOX") to protect whistleblowers against retaliation by publicly traded companies by stating that predispute agreements to arbitrate rights under the Act are invalid.[42] Dodd-Frank also authorized the Consumer Financial Protection

39. Jones v. Halliburton Co., 583 F.3d 228, 231 (5th Cir. 2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009) (codified in 48 C.F.R. § 222.7402 (2012)) (restricting funding of federal contracts that require arbitration of civil rights, sexual assault, or harassment claims). This provision was added as a rider to the defense bill in response to Jones's case. Although Jones lost her trial, in which a jury determined she was not raped, she testified before the House Committee on the Judiciary regarding the protection of U.S. contractors in Iraq. *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing on H.R. 2740 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong., at 32–38 (2007) (statement of Jamie Leigh Jones, former employee of Kellogg Brown and Root (KBR)); The Associated Press, *Texas: Jury Rejects Assertion of Rape Against Military Contractor in Iraq*, N.Y. TIMES (July 8, 2011), http://www.nytimes.com/2011/07/09/us/09brfs-Kbr.html.

40. *See, e.g.*, Arbitration Fairness Act of 2013, S. 878; H.R. 1844, 113th Cong. § 2 (2013) ("(1) The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. (2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress. (3) Most consumers and employees have *little or no meaningful choice* whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights. (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions. (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises." (emphasis added)).

41. *See, e.g.*, Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

42. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5301 (2012); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(e)(2) (2012) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). *See* Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 224 (4th Cir. 2014) ("This [statutory] language represents a clear Congressional command that Dodd-Frank whistleblower claims are not subject to predispute arbitration."). However, this provision requires that whistleblower claims first be filed with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A) (2012). *See also* Subcomm. on the Sarbanes-Oxley Act of 2002, *2012 Midwinter Meeting Report*, AM. BAR ASS'N 66 (2012), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/02/federal_labor_standards_legislation_committee_midwinter_meeting/flsl2012_sarbanes-oxley.authcheckdam.pdf ("Prior to the enactment of Dodd-Frank Act, the Department of Labor and federal courts consistently held that Section 806 claims are subject to mandatory arbitration. The Dodd-Frank Act amended SOX

Bureau ("CFPB") to study the use of arbitration in contracts for consumer financial products or services.[43] On March 10, 2015, the CFPB issued its *Arbitration Study: Report to Congress 2015*, in which the CFPB found that "[t]ens of millions" of consumers are covered by arbitration clauses (most of which prohibit class actions)[44] and that arbitration clauses likely do not lead to lower prices for consumers.[45] Moreover, consumers generally do not know they are subject to an arbitration clause.[46] The CFPB has not to date announced whether it will take additional steps to regulate predispute arbitration agreements in financial contracts; however, it is expected to propose rules prohibiting waiver of class actions in financial service contracts with consumers.[47]

Despite these narrowly crafted and piecemeal industry exceptions, arbitration agreements are widely promulgated and enforced throughout the United States.[48]

B. THE FAA'S PREEMPTIVE SCOPE

With Congress's Commerce Power as its jurisdictional basis,[49] the FAA has been held to preempt numerous state laws that conflicted with,

by making unenforceable any predispute arbitration agreement or other attempt to condition employment on the employee's waiver of her rights and remedies under SOX." (citation omitted)).

43. 12 U.S.C. § 5518(a) (2012).

44. ARBITRATION STUDY, *supra* note 20, § 1.4.1.

45. *Id.* § 10.3 ("After multiple attempts, therefore, we did not find statistically significant empirical support for the theory that companies pass savings from their use of arbitration clauses onto customers.").

46. *Id.* § 1.4.2.

47. The CFPB held a field hearing on arbitration in Denver on October 7, 2015. News since then suggests that the CFPB will take action to ban class waivers. Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/.

48. Although arbitration is widely used in international commercial transactions, mandatory predispute arbitration clauses in the consumer and employment contexts are rarely used in Europe, and in fact, are mostly completely prohibited. Yasmine Tarasewicz & Niki Borofsky, *International Labor and Employment Arbitration: A French and European Perspective*, 28 A.B.A. J. LAB. & EMP. 349, 350 (2013) ("National laws drastically limit the extent to which employment-related issues can be arbitrated, often with the goal of protecting individual employees.").

49. Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984). The proposition that the FAA is more than a procedural statute and in fact must be substantively applied in state court has been the subject of much criticism, including by Justices Scalia, Thomas, and O'Connor, because the express language of Section 4 directs a federal district court to compel arbitration of a valid arbitration agreement. *See* 9 U.S.C. § 4 (2012) ("[T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."); Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) ("I agree with the respondents (and belatedly with Justice O'Connor) that *Southland* clearly misconstrued the Federal Arbitration Act."). Yet based on *stare decisis*, the FAA

disfavored, or presented obstacles to arbitration.[50] In 2011, in *AT&T Mobility v. Concepcion*, the U.S. Supreme Court ruled that the FAA preempted a California Supreme Court decision, which deemed, as a matter of California law, that class waivers in consumer arbitration contracts had the practical effect of exempting a party "from responsibility for [its] own fraud" and thus were unconscionable.[51] The *Concepcion* majority regarded California's rule permitting class arbitration as "likely to generate a procedural morass," thus making it an "obstacle" to the presumed streamlined, efficient, and cheap resolution of lawsuits fundamental to bilateral arbitration.[52] Not only has *Concepcion* seemingly struck the death knell for consumer and employment class actions, but the decision is also critically regarded as requiring nearly total FAA preemption, overriding state public policy.[53]

The FAA also applies to enforce the arbitration of federal statutory claims.[54] As noted above, the Court has been reluctant to find a conflict between the FAA and other federal statutes absent an explicit congressional command.[55] The Court in *American Express Co. v. Italian Colors Restaurant* upheld enforcement of an arbitration class waiver provision under the FAA, despite the merchant plaintiffs' claim that doing so prevented them from "effectively vindicating" their federal statutory rights

preemptive effect has been accepted and enforced in numerous arbitration cases. *See* Jill Gross, AT&T Mobility *and FAA Over-Preemption*, 4 Y.B. ARB. & MEDIATION 25, 25 (2012); Weston, *Preserving the FAA*, *supra* note 29, at 394 (calling for *Southland*'s reversal and the return of power to the states); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541 (2004) ("The Federal Arbitration Act is unconstitutional as applied to the states . . . .").

50. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a Montana law requiring conspicuous notice of arbitration provisions in contracts); *Southland*, 465 U.S. at 10 (holding that the FAA enforcement mandate preempted a California state law that required judicial recourse for franchise claims).

51. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (alteration in original) (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)).

52. *Id.* at 1753 (stating that California's judicial rule invalidating class action waivers as unconscionable "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

53. *See* Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 963 (9th Cir. 2012) (ruling that the FAA preempted a state rule exempting public injunctive relief claims from arbitration in a case of loan fraud); Horton, *supra* note 11, at 1221 ("[J]udges, scholars, and litigants often contend that the FAA 'bar[s] the states from imposing public policy limits on arbitration' . . . ." (alteration in original) (quoting G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 459 (1993))). *See also* Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 KAN. L. REV. 767, 794 (2012) ("*Concepcion* . . . violates the reserved role under the FAA for states to hold arbitration contracts to the standards required for all contracts.").

54. *See* sources cited *supra* note 34.

55. *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012).

because the cost of individually arbitrating an antitrust claim would exceed the potential recovery.[56]

As a result of its broad preemptive scope, the FAA preempts most state laws that delay or disfavor the enforcement of arbitration agreements.[57] Corporate America has responded to this endorsement by instituting contracts requiring individual arbitration of disputes in virtually every sector, with the primary intent (and effect) of avoiding class actions in both court and arbitration, and a corollary effect of deterring the pursuit of claims at all.[58]

II. THE CLASH: THE FAA'S IMPACT ON STATE AND FEDERAL ADMINISTRATIVE SCHEMES

While Congress has authorized the enforcement of agreements to arbitrate through the FAA, administrative agencies at the federal, state, and local levels have also been empowered by enabling statutes or executive delegation to implement public policy, establish rules and regulations, and adjudicate specific areas of public need and concern. At the federal level,

56. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311–12 (2013). In her dissent, Justice Kagan described such provisions as "[l]ess direct than an express exculpatory clause, but no less fatal." *Id.* at 2314 (Kagan, J., dissenting).

57. For example, the U.S. Supreme Court issued short, per curiam reversals involving three state court decisions in 2011 and 2012. Marmet Health Care Ctr., Inc. v. Brown**,** 132 S. Ct. 1201, 1203–04 (2012) (holding that the FAA preempted a West Virginia Supreme Court of Appeals ruling that had voided predispute arbitration clauses in nursing home contracts with respect to negligence claims on public policy grounds); Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500, 503 (2012) (vacating an Oklahoma Supreme Court decision, which held that noncompetition agreements in two employment contracts were invalid under Oklahoma law, and stating that the FAA, as "the supreme Law of the Land," governs enforceability of an arbitration clause from an employment contract containing noncompetition provisions (quoting U.S. CONST. art. VI, cl. 2)); KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011) (holding that the Florida District Court of Appeal erred in denying arbitration where only some claims were non-arbitrable, and vacating and remanding for consideration of the arbitrability of various claims).

58. *See* ARBITRATION STUDY, *supra* note 20, § 2.3 (finding arbitration agreements in over 50 percent of credit card loans, 92 percent of prepaid card agreements, 81 percent of prepaid charge cards, and 44 percent of all insured deposits in checking accounts). Further, 97 to 100 percent of the financial arbitration contracts reviewed in the study limited class actions. *Id.* § 2.5.5. The report also suggests that corporations intentionally use adhesion arbitration clauses to deter claims at all (in contrast to having that as an unintentional side effect). *See id.* § 1.1 (describing corporations' use of take-it-or-leave-it contracts to impose mandatory arbitration clauses). *See also* Jessica Silver-Greenberg & Michael Corkery, *Beware the Fine Print, Part II: In Arbitration, a "Privatization of the Justice System*," N.Y. TIMES DEALBOOK (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Jessica Silver-Greenberg & Robert Gebeloff, *Beware the Fine Print, Part I: Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES DEALBOOK (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

administrative agencies, commissions, and boards are charged with managing, implementing, and enforcing federal policy and regulations involving, *inter alia*, the workplace, the financial industry, and commerce.[59] State and local agencies function concurrently to address matters of local concern, including labor and employment, education, law enforcement, public health, agriculture, professional licensure, transportation, public assistance, commerce, and revenue.[60] Administrative agencies are held accountable and subject to public scrutiny through legislation requiring transparency and access to government officials.[61]

The FAA's command to enforce arbitration agreements "as written" may impact or even displace a party's access to state or federal administrative agency procedures.[62] In *Preston v. Ferrer*, the U.S. Supreme Court held that the FAA preempted California's TAA, which provided original jurisdiction to the Labor Commissioner to decide disputes involving fee claims between agents and performers and also allowed *de novo* review of the Labor Commissioner's determinations in court or arbitration.[63] The Court ruled that the administrative scheme was in conflict with the FAA because it would likely severely delay arbitration.[64] Rejecting the argument that the TAA merely required an exhaustion of administrative remedies before resorting to arbitration, the Court stated that

59. *Types of Administrative Agency Action: Rulemaking, Adjudication, Investigation*, USLEGAL INC., http://administrativelaw.uslegal.com/three-types-of-administrative-agency-action-rulemaking-adjudication-investigation/ (last visited Sept. 18, 2015); *Employment Litigation & Dispute Resolution*, U.S. DEP'T LABOR, http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (last visited Sept. 18, 2015) (noting a "steep rise in administrative regulation of the workplace" and the "explosion of litigation under laws that require individual lawsuits for enforcement," such as the FLSA, the Americans with Disabilities Act, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act).

60. The Tenth Amendment limits Congress's ability to intrude upon state sovereignty. *See, e.g.*, Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 979–80 (D.C. Cir. 1990) ("In reviewing the FTC's interpretation of its organic act, we must first determine whether Congress had an intention on the question at issue using the traditional tools of statutory construction. These tools include the language and structure of the Act, its legislative history, and any applicable canons of statutory construction. . . . There is nothing in the language of sections 5(a) and 18(a)(1) to indicate that Congress intended to authorize the FTC to reach the 'acts or practices' of States acting in their sovereign capacities." (citations omitted)).

61. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552a (2012) (requiring all federal government agencies to make records available electronically and to disclose certain "records" to "any person" on request); Government in the Sunshine Act, 5 U.S.C. § 552b (2012) (requiring notice and open public access to agency meetings).

62. Although the FAA does not use the term "as written," courts frequently employ that literal term in reference to the FAA's mandate to enforce arbitration agreements, placing less emphasis on the "savings" clause. Horton, *supra* note 11, at 1262 n.349.

63. Preston v. Ferrer, 552 U.S. 346, 359 (2008).

64. *Id.* at 357.

the FAA overrides "not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency."[65]

The arbitration process is presumed to provide simply another forum where parties are able to vindicate their legal rights.[66] After *Preston*, *Concepcion*, and *Italian Colors*, however, is the presumed right, or general duty, to exhaust administrative relief an "obstacle to arbitration" that thereby requires FAA preemption? Is a contract that bars access to state or federal administrative recourse contrary to public policy or unconscionable, and therefore unenforceable? The following section analyzes, post-*Concepcion*, what is left of the FAA's "savings clause" and of administrative review.[67]

A. THE FAA AND ACCESS TO STATE ADMINISTRATIVE REMEDIES

Despite arguably serial reversal by the U.S. Supreme Court in significant arbitration decisions,[68] the California Supreme Court continues to test the limits of FAA preemption. In *Sonic-Calabasas A*, *Inc.*, *v. Moreno* (*Sonic I*), the California Supreme Court considered whether the FAA might bar employees and consumers from accessing state administrative processes.[69] The plaintiff employee, Frank Moreno, filed a wage claim pursuant to the Labor Code, which triggered an administrative

65. *Id.* at 349–50 (ruling that the FAA prevented television courtroom's "Judge Alex" Ferrer from seeking administrative review of a TAA dispute between Ferrer and his entertainment agent, as a result of an arbitration clause in their contract). Entertainment industry unions argued that the TAA, a comprehensive regulatory and licensing scheme over talent agents, was crafted by the legislature as an exercise of its state police powers and that effective enforcement of the TAA was essential to the protection of workers. Brief of Screen Actors Guild, Inc. and American Federation of Television & Radio Artists, AFL-CIO as Amicus Curiae in Support of Respondent at 15, Preston v. Ferrer, 552 U.S. 346 (2008) (No. 01463). Notably, although both *Preston* and *Concepcion* underscored the ability of FAA preemption to ensure "streamlined proceedings," this goal may be better realized through specialized agency adjudication. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011); *Preston*, 552 U.S. at 357.

66. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1984) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

67. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008) (discussing the absurdity of the "evenhandedness" test, which provides that courts may only invalidate an arbitration agreement on unconscionability grounds if it employs the same unconscionability test as it would to any other contract).

68. *See supra* Parts I.B, II (discussing FAA preemption of California arbitration decisions in *Concepcion*, *Preston*, and *Southland*).

69. Sonic-Calabasas A, Inc. v. Moreno (*Sonic I*), 247 P.3d 130, 134 (Cal. 2011), *vacated*, 131 S. Ct. 496 (2011); *Sonic II*, 311 P.3d 184, 188 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

"Berman" hearing before the Labor Commissioner.[70] In response, Moreno's employer filed a petition in state court to compel arbitration, and the Labor Commissioner intervened on Moreno's behalf.[71] The trial court initially denied the motion to compel arbitration, reasoning that pursuant to the Labor Code, an arbitration agreement is unenforceable prior to a decision by the Labor Commissioner; however, the Court of Appeal reversed.[72] On review, the California Supreme Court appeared to accept that "[a] public policy based solely on the supposed superiority of an administrative forum over arbitration could no more survive FAA preemption than could a policy based on the supposed superiority of a judicial forum."[73] Yet it added that:

> [N]either do we understand the FAA to preempt a state's authority to impose various *preliminary proceedings* that delay both the adjudication and the arbitration of a cause of action in order to pursue important state interests. . . . The Supreme Court has never suggested that the FAA requires that these preliminary proceedings be bypassed in order to go directly to arbitration.[74]

The California Supreme Court in *Sonic I* held that the FAA did not preempt California's law prohibiting a waiver of the Berman hearing.[75] It distinguished *Preston v. Ferrer*, in which the Labor Commissioner had exclusive jurisdiction over the employee's statutory wage claim, from the case at bar, in which the administrative process served both to effectuate important statutory protections and as more than a preliminary proceeding to arbitration.[76] It concluded that an arbitration contract could not prevent an employee from pursuing a wage claim under a state administrative procedure with substantive worker protections.[77] But it apparently could. Within months of the *Concepcion* decision, the U.S. Supreme Court issued an order summarily vacating and remanding *Sonic I* for consideration in light of *Concepcion*.[78]

70. *Sonic I*, 247 P.3d at 153. A "Berman" hearing is an administrative hearing provided under the California Labor Code for employees seeking an administrative review of a wage claim before the Labor Commissioner. CAL. LABOR CODE § 98 (West 2011).

71. *Sonic I*, 247 P.3d at 153.

72. *Id.*

73. *Id.* at 151.

74. *Id.* (emphasis added).

75. *Id.* at 134.

76. *Id.* at 150.

77. *Id.* at 151.

78. *Sonic II*, 311 P.3d 184, 205 (Cal. 2013). *See also* Tony Lathrop, *From Class Action Waivers to State Administrative Hearing Waivers: How Far is the Reach of Concepcion?*, MVA LITIG. BLOG, (Nov. 18, 2011), http://blogs.mvalaw.com/litigation-law-blog/from-class-action-waivers-to-state-administrative-hearing-waivers-how-far-is-the-reach-of-concepcion/ ("[I]s the U.S. Supreme Court now

In *Sonic II*, the California Supreme Court reluctantly conceded that, under *Concepcion*, the FAA preempted its original ruling, which regarded the administrative process established to handle wage and hour claims expeditiously as a prerequisite to arbitration.[79] Despite acquiescing to FAA preemption, the Court's resistance held fast, as it remanded the case for determination of whether it may be unconscionable to require an employee to forego his statutory rights to an administrative hearing.[80] The Court stated:

> [T]he fact that the FAA preempts *Sonic I*'s rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying unconscionability analysis may not consider the value of benefits provided by the Berman statutes, which go well beyond the hearing itself.[81]

Sonic II suggests that an arbitration agreement may be unconscionable where it denies a party, such as a wage claimant, access to an administrative process that provides substantive policy protections—although that process admittedly postpones arbitration.[82] The U.S. Supreme

suggesting that the FAA may in fact require that such preliminary administrative proceedings be bypassed pursuant to a binding arbitration agreement? If so, the implications of *Concepcion* could be far broader than most probably have considered.").

79. *Sonic II*, 311 P.3d at 199–200 ("[B]ecause a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective 'to achieve "streamlined proceedings and expeditious results"' . . . [and] is thus preempted by the FAA." (citations omitted) (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011))).

80. *Id.* at 203 ("State law may not categorically require arbitration to be preceded by an administrative hearing because the hearing interferes with arbitral efficiency by substantially delaying arbitration. Thus, the fact that arbitration supplants an administrative hearing cannot be a basis for finding an arbitration agreement unconscionable."). *See also id.* at 189–92 (stating that a Berman waiver implicates a host of statutory protections designed to benefit employees with wage claims against their employers); *id.* at 221 ("Moreno has asserted an unconscionability defense, whose merits should now be determined by the trial court in the first instance in light of our decision today.").

81. *Id.* at 205. *See also* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 137 (Cal. 2014) ("*Sonic II* established an unconscionability rule that considers whether arbitration is an effective dispute resolution mechanism for wage claimants [and] . . . recognized that the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration.").

82. Since *Sonic II*, the Labor Commissioner has followed a procedure to intervene when an employer seeks to compel arbitration of a pending administrative wage claim, requiring the presiding court to assess the unconscionability of forgoing a Berman administrative hearing on a case-by-case basis. Ironically, the motion to compel arbitration presently involves a two to three-year litigation process involving the unconscionability assessment before even getting to a hearing—arbitral or administrative—on the merits of the wage claim. In contrast, on its own, a Berman hearing process generally concludes within six months of the initial claim. E-mail from Miles Locker, Partner, Law Office of Locker Folberg and Former Chief Counsel of the DLSE, to author (Oct. 13, 2014, 11:59 AM) (on file with author).

Court denied review of *Sonic II*, and the California Supreme Court ordered a remand for an unconscionability assessment.[83] Yet the federal appellate debate pitting unconscionability against FAA preemption is likely on the horizon.[84]

Sonic II is significant because if a private arbitration agreement can preclude an employee's ability to invoke an administrative process under the Labor Code, an employee's ability to access the range of other state and federal agencies charged with regulating public policy in areas such as housing, worker's compensation, occupational licensure, consumer protection, and healthcare may also be affected.[85] The decision, in other words, may bar agencies from exercising their statutory obligations, implicating federalism concerns. Amicus briefs filed by the California Labor Commissioner also articulated the concern that workers' substantive rights would be lost in favor of the "expeditious results" of arbitration, which is ultimately a misuse of the FAA.[86] The Labor Commissioner also stressed that the minimal time and resources required by a Berman hearing do not interfere with the fundamental characteristics of arbitration highlighted in *Concepcion*; furthermore, the ancillary benefits provided by such a hearing are essential to a worker's claim.[87] This argument by the Labor Commissioner was recognized in the Court's decision to remand the case for a determination of unconscionability, as mentioned above.[88]

B. THE FAA AND STATE PRIVATE ATTORNEY GENERAL ACT ("PAGA") CLAIMS

In *Iskanian v. CLS Transportation Los Angeles*, the California Supreme Court addressed a related issue concerning whether FAA preemption applies to preclude an individual employee from asserting representative claims for violations of employment laws in a PAGA

83. *Sonic II*, 311 P.3d at 203.

84. Justice Chin disagreed with the Court's remand for unconscionability analysis, contending that the FAA preempts the administrative process. *Id.* at 221. He maintained this position in *Iskanian*. *Iskanian*, 327 P.3d at 155–56 (Chin, J., concurring).

85. Weston, *Accidental Preemption*, *supra* note 25, at 69. *See also* Mid-Atl. Toyota Distribs., Inc. v. Charles A. Bott, Inc., 515 A.2d 633, 636 (Pa. Commw. Ct. 1986) (declining to compel arbitration before parties pursued an administrative hearing process, and stating that "there also exists in the courts a long-standing public policy of hesitancy to interfere with administrative proceedings before all administrative remedies have been exhausted").

86. Application of California Labor Commissioner Julie A. Su for Leave to File Amicus Curiae Brief and Amicus Curiae Brief Supporting Respondent Frank Moreno at 11, *Sonic II*, 311 P.3d 184 (No. S174475).

87. *Id.*

88. *See supra* text accompanying notes 82–83.

lawsuit.[89] Alleging violations of the state Labor Code, the employee in *Iskanian* filed a judicial action that included a representative claim pursuant to the state PAGA law, which permits an employee to bring a civil action seeking injunctive relief, civil penalties to be shared with the state, attorney's fees, and costs.[90] Iskanian's employment contract, however, required binding arbitration of "any and all claims" arising out of his employment and also included a waiver of class and representative actions.[91] Citing FAA preemption, the trial court granted the employer's motions to compel individual arbitration and to dismiss the class and PAGA claims.[92]

The California Supreme Court conceded that, under *Concepcion*, the FAA preempts the California law deeming class action waivers to be contrary to public policy.[93] Although the court agreed that individual claims remain subject to arbitration, it held that the FAA does not preempt PAGA, which provides employees the right to representative action.[94] The court reasoned that PAGA actions serve a law enforcement function, reduce the burden of enforcement of the Labor Code, and like whistleblower (qui tam) actions,[95] "deputize" aggrieved employees to act

89. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 133 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). Enacted in 2001, California's PAGA allows a private citizen to enforce the state's labor code by pursuing civil penalties on behalf of the state's Labor and Workforce Development Agency. CAL. LABOR CODE § 2699 (West 2011). Aggrieved employees may seek penalties for a large group of employees and share recovery with the agency. Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1121 (9th Cir. 2014).

90. *Iskanian*, 327 P.3d at 133.

91. *Id.* Iskanian's arbitration agreement stated that it was to be governed under the FAA, not individual state laws, and further prohibited class actions, providing that: "Except as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." *Id.*

92. *Id.* at 134. The appellate court affirmed, holding that the FAA preempted both a 2007 California ruling that held class action waivers as to certain unwaivable rights to be invalid as contrary to public policy, and a state law that invalidated waivers of employees' rights to bring representative actions under PAGA. *Id.*

93. *Id.* at 136 ("[S]tates cannot require a procedure that interferes with the fundamental attributes of arbitration, 'even if it is desirable for unrelated reasons[,]' . . . [and] *even if* a class waiver is exculpatory . . . it is nonetheless preempted by the FAA." (citations omitted) (quoting *Concepcion*, 131 S. Ct. at 1753)). The court also agreed that the NLRA did not preclude FAA enforcement of class action waivers. *Id.* at 141 (analyzing *D.R. Horton II*). *See infra* Part II.C.

94. *Iskanian*, 327 P.3d at 152.

95. *See id.* at 154 ("Qui tam actions enhance the state's ability to use such scarce resources [for prosecution and law enforcement] by enlisting willing citizens in the task of civil enforcement. . . . [T]he lack of government resources to enforce the Labor Code led to a legislative

on behalf of the government to recover civil penalties for Labor Code violations.[96] Distinguishing the rights of a public enforcement agency in a PAGA suit from private "parties' own rights and obligations" in private disputes subject to FAA preemption,[97] the Court cited *Waffle House*, stating:

> Whereas *Waffle House* involved a suit by the government seeking to obtain victim-specific relief on behalf of an employee bound by the arbitration agreement, this case involves an employee bound by an arbitration agreement bringing suit *on behalf of the government* to obtain remedies other than victim-specific relief, i.e., civil penalties paid largely into the state treasury. Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of *qui tam* action on behalf of the state for such remedies.[98]

In a PAGA action, the state works through the aggrieved employee to enforce the Labor Code against the employer.[99] The *Iskanian* court invoked federalism principles, reasoning that PAGA is a law enforcement mechanism in which aggrieved employees are "deputized" to act on behalf of the state and thus is within the state's historic police power to regulate outside the FAA.[100] It also stated that PAGA does not violate the principle of separation of powers under the California Constitution.[101] The court remanded the case, stating that waiver of a PAGA representative action was "contrary to public policy and unenforceable as a matter of state law."[102]

In a concurring opinion, Justice Chin disagreed, contending that FAA preemption applied and that unlike the EEOC, a nonparty in *Waffle House*, Iskanian was a party to the arbitration agreement.[103] Yet he concurred in the judgment on the basis that the arbitration provision could not preclude any access at all to PAGA, without clarifying how both would be

choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through PAGA.").

96. *Id.* at 146 (stating that "[u]nder [the PAGA] legislation, an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code Violations." (quoting Arias v. Superior Court, 209 P.3d 923 (Cal. 2009))). 75 percent of the civil penalties recovered go to the government, with the aggrieved employee recovering the remaining 25 percent. *Id.*

97. *Id.* at 150.

98. *Id.* at 151 (emphasis added) (citing EEOC v. Waffle House, Inc., 534 U.S. 279 (2002)).

99. *Id*. at 147.

100. *See id.* at 152 ("There is no question that the enactment and enforcement of laws concerning wages, hours, and other terms of employment is within the state's historic police power.").

101. *Id*. at 133.

102. *Id.* at 149.

103. *Id.* at 158 (Chin, J., concurring).

possible.[104] In a later case following *Iskanian*, U.S. District Court Judge Edward M. Chen wrote:

> FAA preemption of the rule against waiver of PAGA claims would do more than hinder the state's ability to enforce its laws through *qui tam* actions; preemption would "disable one of the primary mechanisms for enforcing the Labor Code." . . . Absent Congress's clear and manifest intent to disable the enforcement of one of California's police powers traditionally held by the state, this court is particularly reluctant to find FAA preemption of *Iskanian*'s rule against PAGA waiver.[105]

The "carve out" of PAGA claims from FAA preemption remains controversial.[106] Corporate advocates seeking reversal of *Iskanian* assert that the California Supreme Court was attempting yet another failed "end run" around the FAA by having legislatures "deputize" individuals to enforce otherwise preempted state laws.[107] Although a number of federal courts had rejected *Iskanian*,[108] the U.S. Supreme Court denied the certiorari petition to review the decision.[109] Since then, California state courts have continued to uphold the state law providing that rights under PAGA cannot be waived and have agreed that the FAA does not preempt the anti-waiver rule.[110] Until a 2015 decision by the Ninth Circuit,[111]

104. *Id.* ("[T]here *is* case law support—from the high court itself—for the conclusion that the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action *in any forum*.").

105. Hernandez v. DMSI Staffing, LLC, No. C-14-1531 EMC, 2015 U.S. Dist. LEXIS 12824, at *27 (N.D. Cal. Feb. 3, 2015) (citation omitted). Judge Chen also noted that "[n]or should FAA preemption be lightly considered in view of the historical purpose of the FAA and the federalism concerns which counsel deference to the state's exercise of traditional police power which is embedded in PAGA." *Id.*

106. *See* Fardig v. Hobby Lobby Stores, Inc., No. SACV 14-561 JVS(ANx) (C.D. Cal. June 13, 2014) (order granting defendant's motion to dismiss to compel arbitration and staying action) (deciding that under *Concepcion*, the FAA preempts the California rule rendering PAGA claims unenforceable, and that like class actions, PAGA representative lawsuits unduly burden and interfere with the fundamental attributes of arbitration); Ortiz v. Hobby Lobby Stores, Inc., 52 F. Supp. 3d 1070, 1088 (E.D. Cal. 2014) (rejecting *Iskanian* and enforcing PAGA waivers).

107. Petition for Writ of Certiorari at 3, CLS Transp. L.A., LLC v. Iskanian, No. 14-321 (U.S. Sept. 22, 2014), *cert. denied*, 135 S. Ct. 1155 (2015) (asserting that "[t]he Legislature and courts of California have a long and notable history of ignoring the preemptive effect of the FAA").

108. *Ortiz*, 52 F. Supp. 3d 1070; Lucero v. Sears Holding Mgmt. Corp., No.14-cv-1620 AJB (WVG), 2014 U.S. Dist. LEXIS 168782 (S.D. Cal. Dec. 2, 2014); Mill v. Kmart Corp., No. 14-cv-02749-KAW, 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. Nov. 26, 2014); Langston v. 20/20 Cos., No. EDCV 14-1360 JGB (SPx), 2014 U.S. Dist. LEXIS 151477 (C.D. Cal. Oct. 17, 2014); Chico v. Hilton Worldwide, Inc., No. CV 14-5750-JFW (SSx), 2014 U.S. Dist. LEXIS 147752 (C.D. Cal. Oct. 7, 2014).

109. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). The Court again denied review of the issue in *Bridgestone Retail Operations, LLC v. Brown*, 331 P.3d 1274 (Cal. 2014), *cert. denied* 135 S. Ct. 2377 (2015).

110. Williams v. Superior Court, 188 Cal. Rptr. 3d 83, 84 (Ct. App. 2015) ("We agree with the trial court that under *Iskanian*, the waiver of a right to assert a representative PAGA claim in any forum

federal courts in California were divided, even within a single district,[112] on whether the FAA preempts PAGA waivers and whether PAGA claims may be heard in arbitration.[113]

Mohamed v. Uber Technologies, *Inc.* involved a putative class action on behalf of drivers challenging Uber's use of background checks in the hiring and firing of drivers; the lawsuit asserted representative claims under PAGA as well as violations of state and federal laws.[114] Uber's driver contracts, signed via smartphone application, required individual arbitration of all disputes and precluded drivers from asserting class, collective, or representative claims, including PAGA claims.[115] It also contained a provision delegating decisional authority regarding interpretation to the arbitrator.[116] The court ruled that the delegation clause failed to evince a "clear and unmistakable" intent by the parties to waive their rights to have a court determine arbitrability questions and was nonetheless unconscionable because drivers would be forced to pay "exorbitant fees just to arbitrate arbitrability—fees which drivers would not need to pay to litigate arbitrability in Court."[117] The court also decided that the FAA does not preempt *Iskanian*'s rule that PAGA waivers violate public policy. It denied arbitration on the grounds that the state is the real party in interest in a PAGA action.[118] Similarly, the district court in *Valdez v. Terminix International Co.* held that PAGA claims must remain in court, reasoning

is unenforceable."); Franco v. Arakelian Enter., Inc., 184 Cal. Rptr. 3d 501, 504 (Ct. App. 2015) ("Following the rule announced in *Iskanian*, we reverse and remand . . . ."); Montano v. Wet Seal Retail, Inc., 182 Cal. Rptr. 3d 220, 227 (Ct. App. 2015) ("Under *Iskanian*, [an employee's] purported waiver of her right to bring a representative action under the PAGA cannot be enforced.").

111. *See infra* text accompanying notes 120–125.

112. *See* Nanavati v. Adecco USA, No. 14-cv-04145-BLF, 2015 U.S. Dist. LEXIS 49053, at *19–22 (N.D. Cal. Apr. 13, 2015) (acknowledging the conflict within the federal courts and the reasoning of *Iskanian* and *Hernandez*, but deciding that the FAA preempts PAGA). *But cf.* Alvarez v. Autozone, Inc., No. EDCV 14-02471-VAP (SPx), 2015 U.S. Dist. LEXIS 48447, at *13 (C.D. Cal. Apr. 13, 2015) (following *Iskanian* but holding that the employee must arbitrate individual claims and can agree to arbitrate PAGA claims or pursue such claims in a judicial forum).

113. Valdez v. Terminix Int'l Co., No. CV 14-09748 DDP (Ex), 2015 U.S. Dist. LEXIS 92177, at *24 (C.D. Cal. July 14, 2015) (noting that federal and state courts are divided on whether FAA-preempted PAGA claims are arbitrable).

114. Mohamed v. Uber Techs., Inc., Nos. C-14-5200 EMC and C-14-5241 EMC, 2015 U.S. Dist. LEXIS 75288, at *3 (N.D. Cal. June 9, 2015).

115. *Id.* at *86.

116. *Id.*

117. *Id.* at *45, *81.

118. *Id.* at *3–4. Uber contended that its drivers are independent contractors and not employees covered by PAGA. Yet the district court determined that the arbitration clause, although accessed and accepted via a smartphone app click-through, was unconscionable, as it sought to deny PAGA rights and to delegate decisions as to the validity of the arbitration agreement to an arbitrator. *Id.* at *62–63.

that private parties cannot waive a PAGA claim because it "belongs primarily to the state."[119]

The primary debate before the Ninth Circuit in *Sakkab v. Luxottica Retail North America, Inc.* was whether *Concepcion* mandated FAA preemption of *Iskanian*.[120] In a 2–1 decision, the majority held that the FAA does not preempt *Iskanian.* It reasoned that *Iskanian*'s rule holds PAGA claims unwaivable, whether in arbitration or in court, and thus constitutes generally applicable grounds for the revocation of "any contract" under the FAA's savings clause.[121] It also determined that the rule voiding PAGA waivers does not conflict with the legislative intent behind the FAA nor interfere with fundamental attributes of arbitration, suggesting that PAGA claims may be heard in arbitration.[122] In distinguishing *Concepcion*, which held that the FAA preempts the class action non-waiver rule, the court cited fundamental differences between class actions, which are brought on behalf of private litigants and require specialized procedures, and statutory PAGA claims, which are brought on behalf of the state.[123] The court also deemed significant the state's police powers and role in enforcing state labor laws, concluding that the FAA was not intended to preclude states from authorizing *qui tam* actions to enforce state laws.[124] The dissent, however, argued that there is "no question" that *Iskanian* is preempted and that the majority "ignored" *Concepcion.* [125]

The ability to "deputize" employees out of arbitration via PAGA or *qui tam*[126] thus appears to be a means for employees and others to avoid

119. Valdez v. Terminix Int'l Co., No. CV 14-09748-DDP (Ex), 2015 U.S. Dist. LEXIS 92177, at *25–28 (C.D. Cal. July 14, 2015).

120. Sakkab v. Luxottica Retail N. Am., Inc., No. 13-55184, 2015 U.S. App. LEXIS 17071, at *3 (9th Cir. Sept. 28, 2015).

121. *Id.* at *15–16.

122. *Id.* at *25–26 ("Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims.").

123. *Id.* at *23–26.

124. *Id.* at *35.

125. *Id.* at *37, *64 (Smith, J., dissenting) (citing the procedural complexity and morass of PAGA arbitration and stating that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons" (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011))).

126. *See* United States *ex rel.* Schultz v. Cancer Treatment Ctrs. of Am., No. 99 C 8287, 2002 U.S. Dist. LEXIS 21681, at *10 (N.D. Ill. Nov. 4, 2002) (holding that a qui tam action under the False Claims Act is not subject to an arbitration agreement). *See generally* Mathew Andrews, *Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203 (2015) (arguing that Congress should amend the False Claims Act to prohibit arbitration in qui tam actions).

arbitration. And PAGA waivers are likely the new frontier of arbitration litigation.[127]

C. THE FAA AND THE RIGHT TO FILE FEDERAL ADMINISTRATIVE PROCEEDINGS

Federal agencies are also confronted with questions involving the interplay between a seeming literal mandate to enforce arbitration contracts and their own rules and processes.[128] Although enabling legislation may delegate rulemaking and decisional authority to a federal agency, absent an express "contrary congressional command" to exempt the FAA,[129] the deference accorded to FAA arbitration policy can also hinder federal administrative adjudication.

1. The NLRB on Class Waivers and the Right to File Administrative Claims

Although *Concepcion* declared that the FAA preempted state bans on consumer class waivers, the NLRB nonetheless ruled in its 2012 *D.R. Horton* decision that federal labor law precludes employers from requiring employees to agree to arbitration restricting them from filing "joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial."[130] In *D.R. Horton*, an employee initiated a class arbitration alleging that the employer had violated overtime obligations under the FLSA.[131] The employer invoked the arbitration class waiver provision in the employee's contract, which the employee then cited as an NLRA violation in lodging an unfair labor practice charge with the Board.[132] The NLRB held that the arbitration agreement violated the employee's rights to engage in concerted activity under the NLRA.[133] The Board also concluded that the wording of the arbitration agreement unreasonably led employees to believe that they

127. *See* Erin Coe, *High Court's Refusal to Hear PAGA Case to Spur New Fights*, LAW360 (Jan. 21, 2015, 10:57 PM), http://www.law360.com/articles/613687/high-court-s-refusal-to-hear-paga-case-to-spur-new-fights (reporting that *Iskanian* will encourage more PAGA claims and that more employers will remove cases to federal courts).

128. *See infra* Part II.C.3 (discussing the Financial Industry Regulatory Agency and the CFPB).

129. *See supra* Part I.A (discussing the CFPB).

130. *D.R. Horton II*, 737 F.3d 344, 355 (5th Cir. 2013).

131. D.R. Horton, Inc. (*D.R. Horton I*), 357 N.L.R.B. No. 184, at 1 (Jan. 3, 2012), *rev'd*, *D.R. Horton II*, 737 F.3d 344.

132. *Id.* at 2.

133. *Id.* at 5; 29 U.S.C. § 157 (2012) (granting employees the right to engage in concerted activities); 29 U.S.C. § 158(a) (2012) (making it an unfair labor practice to interfere with employee rights).

could not file unfair labor practice charges with the Board in violation of the NLRA.[134]

i. Federal Courts Reject the NLRB Decision

Despite the Board's delegated authority to administer and interpret the NLRA, the Fifth Circuit reversed and ruled that the FAA does not conflict with the NLRA.[135] The court acknowledged that the Board was entitled to "considerable deference" on issues related to its expertise in labor relations, yet it stated that "[t]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[136] According to the court, the FAA and the NLRA are "equally important." The court repeated the *Concepcion* mantra that arbitration agreements must be enforced "according to their terms" and echoed the risks to defendants of class arbitration.[137] It concluded that "[e]ven explicit procedures for collective action will not override the FAA."[138] Other federal circuit courts have similarly rejected the Board's decision, upholding class waivers in employment arbitration agreements nearly uniformly.[139]

ii. Federal Courts Suggest the Right to File Federal Administrative Proceedings is Preserved

Significantly, however, the Fifth Circuit in *D.R. Horton II* agreed with the Board that the arbitration agreement's broad provision, which encompassed "all disputes" and included a waiver of an employee's right to file "a lawsuit or other civil proceeding," could reasonably be interpreted as prohibiting an employee from filing unfair labor practice claims with the NLRB.[140] Ambiguous agreements that can reasonably be understood to prohibit filing unfair labor practice claims with the NLRB violate the

134. *D.R. Horton I*, 357 N.L.R.B. No. 184, at 4.

135. *D.R. Horton II*, 737 F.3d at 360, 364.

136. *Id.* at 356 (citation omitted).

137. *Id.* at 360. *See also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 ("The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms.").

138. *D.R. Horton II*, 737 F.3d at 360. The Fifth Circuit noted that courts have generally allowed arbitration of NLRA claims and that arbitration agreements cannot be voided based on inequality in bargaining power. *Id.*

139. The NLRB's ruling has been rejected by the Ninth, Eighth, and Second Circuits. Richards v. Ernst & Young, LLP, 734 F.3d 871, 874 (9th Cir. 2013) (stating that "the only court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act" (citations omitted)); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297–98 (2d Cir. 2013).

140. *D.R. Horton II*, 737 F.3d at 363.

NLRA.[141] As such, the Court ordered that the agreement be rewritten to ensure that employees remained aware of their right to access administrative avenues for relief.[142]

Despite judicial rejection of the NLRB's ruling in *D.R. Horton II*, the Board reaffirmed its position in its 2014 ruling involving *Murphy Oil USA, Inc.*[143] While a California district court recognized this disagreement in *Nanavati v. Adecco USA, Inc.*, it rejected the plaintiff's claim that the NLRA precludes class action waivers in employment contracts, citing the federal circuit courts that rejected the NLRB's determination.[144] In short, the right to collective action under the NLRA does not appear to protect employees subject to arbitration contracts with class action bans.[145] Although employees can still theoretically file charges with the NLRB, the contracts governing their employment explicitly require individual arbitration and rarely, if ever, explain whether the employees have rights to seek relief via a state or federal agency. As the Fifth Circuit in *D.R. Horton II* warned, an arbitration clause can also impermissibly lead an employee to infer that their rights to report unfair labor practices have been waived.[146]

2. Arbitration's Impact on Federal Statutory Class Claims

The FLSA was enacted in 1938 for "the prime purpose of . . . aid[ing] the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[147] Under the FLSA, an employee may file a private suit seeking back pay, liquidated

141. *Id*. at 363–64.

142. *Id*. at 364.

143. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, at 1–2 (Oct. 28, 2014) (following *D.R. Horton I*, attacking a number of the Fifth Circuit's arguments, and considering itself not bound by *D.R. Horton II)*. The Fifth Circuit reaffirmed its rejection of the NLRB ruling in 2015. Murphy Oil USA, Inc. v. NLRB, 2015 WL 6457613, at *4 (5th Cir. Oct. 26, 2015) ("We do not celebrate the Board's failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence."). *See also* Litvinov v. UnitedHealth Group, Inc., 2014 U.S. Dist. LEXIS 36237, at *12 (S.D.N.Y. Mar. 10, 2014) (compelling individual arbitration of FLSA class claims, despite protests about employee rights to collective action under federal labor law). Although the parties in *UnitedHealth* settled, and the appeal was withdrawn before the Second Circuit issued a ruling, a rift between the federal courts and the NLRB persists. *See* UnitedHealth Group, Inc., 2014 NLRB LEXIS 611, at *15, *32 (N.L.R.B. Aug. 5, 2014) (concluding that an employer's enforcement of an arbitration agreement violated the NLRA by interfering with the rights of employees to engage in collective action and that the Board, a non-party to the agreements, was not bound by the rulings of federal district courts).

144. Nanavati v. Adecco USA, Inc., No. 14-cv-04145-BLF, 2015 U.S. Dist. LEXIS 49053, at *11–14 (N.D. Cal. Apr. 13, 2015).

145. *Id.* at *17.

146. *D.R. Horton II*, 737 F.3d at 364.

147. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

damages, attorney's fees, and costs "for and in behalf of himself . . . and other employees similarly situated."[148] The Wage and Hour Division within the Department of Labor administers and enforces the FLSA.[149] Where the Secretary of Labor intervenes and files a complaint seeking compensatory or injunctive relief under the FLSA, the individual employee's right of action is terminated.[150] Arbitration can cut off this intervention, as the agency is not authorized to intervene in private arbitration. The argument—that the FLSA makes collective action a substantive right and overrides the FAA mandate to enforce arbitration clauses—has been met with defeat in at least five federal circuit courts.[151]

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court rejected the argument that FAA enforcement of a class arbitration waiver would deny a party's "effective vindication" of their federal statutory rights by removing their economic incentive to bring antitrust claims.[152] Citing the purported national policy favoring arbitration, courts have also dismissed employee class claims alleging violations of federal employment statutes that authorize, and indeed arguably necessitate, class relief, such as the FLSA and pattern-and-practice discrimination claims.[153]

148. 29 U.S.C. § 216(b) (2012) ("An action to recover [for violations of FLSA's minimum wage and maximum hour requirements] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . .").

149. *The Fair Labor Standards Act (FLSA)*, U.S. DEP'T LABOR, http://www.dol.gov/compliance/laws/comp-flsa.htm (last visited Oct. 23, 2015). Over 130 million workers in more than 7 million workplaces are covered by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor. Wage & Hour Div., *Comprehensive FLSA Presentation: Fair Labor Standards Act*, U.S. DEP'T LABOR, http://www.dol.gov/whd/flsa/comprehensive.ppt (last visited Oct. 23, 2015).

150. Fair Labor Standards Act, 29 U.S.C. § 216(b)–(c) (2012). *See* Donovan v. Univ. of Tex. at El Paso, 643 F.2d 1201, 1204 (5th Cir. 1981) (providing that Section 217 allows the Secretary to seek broad injunctive relief and back wages for all affected employees without any requirement that they be specifically named in the complaint).

151. *See* Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014) (noting that the Second, Eighth, Fifth and Fourth Circuits have upheld class waivers of FLSA claims on the grounds that the FLSA contains no contrary congressional command to override the FAA); Sutherland v. Ernst & Young, 726 F.3d 290, 295, 298 (2d Cir. 2013) (ruling that an employee's ability to proceed collectively under the FLSA can be waived in an arbitration agreement, which was not rendered invalid even though her claim—with its potential recovery of less than $2000—was not economically worth pursuing individually when her attorney's fees and expert costs would likely reach $200,000); Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 488 (2d Cir. 2013) (ruling that the FAA applies to require individual arbitration of federal pattern-and-practice sex bias claims despite allegations of proof of system-wide discrimination).

152. American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

153. *See* sources cited *supra* note 151.

3. Financial Industry Regulatory Authority Stands Up to the FAA

One instance in which federal agency authority won out over FAA preemption involved the Financial Industry Regulatory Authority ("FINRA"), a private, independent organization, which regulates the securities industry. After *Concepcion*, brokerage company Charles Schwab & Co. ("Schwab") revised its predispute arbitration contracts to preclude class actions against the firm. Schwab's brokerage contracts fell under the purview of FINRA, which has been delegated the authority to regulate broker-dealer transactions for the protection of investors by the U.S. Securities and Exchange Commission ("SEC").[154] FINRA rules require arbitration of individual disputes through a FINRA arbitration procedure; however, the rules do not permit waivers of class actions in securities brokerage contracts.[155] Schwab initially sought to challenge the FINRA rule as preempted by the FAA's "as written" mandate, but was ordered by a California district court to first exhaust administrative remedies.[156]

A FINRA disciplinary panel then ruled that Schwab's actions violated FINRA rules, but that, under *Concepcion*, the FAA preempted those rules.[157] In an administrative appeal, the FINRA Board of Governors reversed, holding that the FINRA rules, including those barring class action waivers, constituted a "congressional command" sufficient to override the FAA's mandate.[158] It reasoned that FINRA was delegated authority, via the SEC and consequently the Securities Exchange Act, to regulate broker-dealers' arbitration agreements for the protection of investors. Thus, its rules barring class action waivers and mandating that investors be able to bring class claims in court were enforceable.[159] Schwab did not appeal this ruling.

154. In the Securities Exchange Act, Congress delegated to the SEC regulatory authority over broker-dealers and oversight of securities arbitration. 15 U.S.C. § 78d (2012). *See* Brief of Amici Professors Barbara Black & Jill Gross in Support of FINRA's Opening Brief at 6, Dep't of Enf't v. Charles Schwab & Co., No. 2011029760201 (FINRA May 6, 2013).

155. Dep't of Enf't v. Charles Schwab & Co., No. 2011029760201, 2014 WL 1665738, at *2 (FINRA Apr. 24, 2014) (reversing the disciplinary panel's ruling that the FINRA rules were preempted by the FAA).

156. Charles Schwab & Co. v. Fin. Indus. Regulatory Auth., 861 F. Supp. 2d 1063, 1069 (N.D. Cal. 2012) (dismissing the complaint because of Schwab's failure to fulfill the duty to exhaust administrative remedies as a jurisdictional prerequisite and noting that the benefits of this process included "the expertise and intimate familiarity with complex securities operations, which members of the industry can bring to bear on regulatory problems, and the informality and flexibility of self-regulatory procedures" (citation omitted)).

157. *Charles Schwab & Co.*, 2014 WL 1665738, at *2, *18.

158. *Id.* at *15.

159. *Id.* at *4.

III. THE FAA, AS INTERPRETED TO PREEMPT AGENCY GOVERNANCE, VIOLATES CONSTITUTIONAL GUARANTEES OF FEDERALISM AND SEPARATION OF POWERS

Strict enforcement of arbitration contracts requires that parties go directly to arbitration for dispute resolution. The standard of FAA preemption announced in *Concepcion* is seemingly impenetrable, given that recourse outside of individual arbitration could be viewed as "an obstacle" to arbitration.[160] Where mandatory arbitration prevents access to regulatory administrative schemes,[161] constitutional considerations of federalism[162] and separation of powers necessarily arise.[163] The FAA is not intended to override the U.S. Constitution or even policies favoring deference to agency oversight or doctrines requiring exhaustion of administrative remedies. Rather, arbitration's policy goals of efficient resolution and neutral expertise are compatible with administrative remedies.

A. ADMINISTRATIVE PROCESSES DO NOT CONFLICT WITH FAA PRIVATE ARBITRATION, AND JUDICIAL DEFERENCE TO AGENCY EXPERTISE FURTHERS IMPORTANT PUBLIC POLICY

Administrative processes providing substantive individual protections do not necessarily render arbitration agreements unenforceable. These remedies have coexisted easily with judicial forums and could also coexist

160. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011).

161. *See, e.g.*, Jean R. Sternlight & Elizabeth Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 81 (arguing that forced arbitration that prohibits class actions effectively immunizes the corporate drafter from liability because few individuals can afford to pursue small claims even in arbitration); Hermann Schwartz, *How Consumers Are Getting Screwed by Court-Enforced Arbitration*, NATION (July 8, 2014), http://www.thenation.com/article/180551/how-consumers-are-getting-screwed-court-enforced-arbitration (asserting that mandatory arbitration "[u]sually forces consumers who have been injured in small amounts to drop the matter entirely, even though the defendant may have harmed many others the same way, for too little is at stake for each individual to justify the time, trouble and expense of individual arbitration").

162. *See, e.g.*, Casarotto v. Lombardi, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., concurring) ("These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it. Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as 'therapy for their crowded dockets.'"), *vacated*, 515 U.S. 1129 (1995), *aff'd*, 901 P.2d 596 (Mont. 1995).

163. *See* Paul F. Kirgis, *The Roberts Court vs. the Regulators: Surveying Arbitration's Next Battleground*, 10 MAYHEW-HITE REP. DISP. RESOL. & CTS., ISSUE 3 (March 2012), http://moritzlaw.osu.edu/epub/mayhew-hite/2012/03/the-roberts-court-vs-the-regulators-surveying-arbitrations-next-battleground (positing that the next "arbitration battleground" will "pit the Supreme Court's conservative majority against federal agencies staffed by Democratic appointees seeking to use regulation to slow the arbitration juggernaut").

with arbitral forums. For example, the administrative exhaustion requirement—state and federal—is well-established jurisprudence and should apply equally to arbitration as it does to a judicial forum.[164] *Waffle House* recognized the importance of agency enforcement, even when a dispute is subject to arbitration.[165] As the Court noted, "binding the EEOC to the private arbitration agreement would [have] undermine[d] the detailed enforcement scheme . . . simply to give greater effect to an agreement between private parties that does not even contemplate the [agency's] statutory function."[166] These principles apply equally, whether it is a state or federal agency "tasked with enforcing an important public policy."[167]

The U.S. Supreme Court in *Chevron U.S.A.*, *Inc. v. Natural Resources Defense Council*, *Inc.* also recognized the importance of deferring to the expertise and interpretation of administrative agencies, which are empowered by the legislature to implement statutory schemes.[168] Under *Chevron*, where Congress has delegated rulemaking and enforcement to an agency, administrative agency rulings have the force of law and must be accorded deference.[169]

Private action, whether through individual lawsuits, class actions, or representative claims, also serves as a significant means for enforcing state and federal laws. As the California Supreme Court stated in *Iskanian*,

164. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 84–85 (2006) (requiring exhaustion of administrative remedies before resorting to a judicial forum for prison litigation); McKart v. United States, 395 U.S. 185, 193 (1969) (rejecting a defense to an indictment because the defendant failed to exhaust available administrative remedies).

165. EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("[T]he proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.").

166. *Id.* at 296.

167. Brief of Screen Actors Guild, Inc. & American Federation of Television & Radio Artists, AFL-CIO as Amicus Curiae in Support of Respondent at 25, Preston v. Ferrer, 552 U.S. 346 (2008) (No. 06-1463).

168. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *See also* Chem. Mfrs. Ass'n. v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 125 (1984); Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 811 F.2d 1563, 1568 (D.C. Cir. 1987) (deferring to an agency whose conclusions carry "great weight because the agency is 'unmistakably possessed of . . . specialized expertise'" (alteration in original) (quoting Consol. Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 745 F.2d 281, 291 (4th Cir. 1984))); Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. The Federal Arbitration Act: The Quintessential* Chevron *Case*, 16 LOY. CONSUMER L. REV. 1, 6 (2003) ("[T]he Court has recognized that certain statutory schemes require administrative agencies to promulgate regulations and form policies to fill any gaps left by Congress." (citing Morton v. Ruiz, 415 U.S. 199, 231 (1896))).

169. *Chevron*, 467 U.S. at 844. *See also* Seney v. Rent-A-Center, Inc., 738 F.3d 631, 635 (4th Cir. 2013) (applying *Chevron*'s deference to a regulatory agency's exercise of statutory authority and noting judicial uncertainty over how the *Chevron* rule squares against *McMahon*'s presumption of arbitrating statutory claims), *cert. denied*, 134 S. Ct. 2305 (2014); Lloyd, *supra* note 168, at 15.

PAGA laws authorizing private individuals to bring representative claims under the Labor Code help reduce the burden of enforcement.[170] Similarly, qui tam actions under both state and federal False Claims Act laws permit private individuals to act on behalf of the government in order "[t]o supplement governmental efforts to identify and prosecute fraudulent claims made against state and federal governmental agencies."[171]

That the FAA states in broad terms that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" should not categorically override agency rulemaking that is industry-specific and diligently enacted.[172] The legislature has delegated specific authority to agencies, which acknowledges essential agency functions and gives agency rules the force of law.[173] Agencies play a pivotal role in our government and their specialized expertise and experience regarding issues within their scope makes them uniquely situated to interpret and develop corresponding law.[174] This cornerstone of administrative law equally balances the policies favoring FAA arbitration and promotes, rather than conflicts with, arbitral values of efficiency and expertise. Administrative processes can help balance economic power, offer efficient dispute resolution processes, and

170. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 148 (Cal. 2014) ("'Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.' . . . The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." (quoting Sanders v. Pac. Gas & Elec. Co., 126 Cal. Rptr. 415, 421 (Ct. App. 1975))).

171. Rothschild v. Tyco Int'l (US), Inc., 99 Cal. Rptr. 2d 721, 725 (Ct. App. 2000) (describing the statutory purpose of qui tam actions and holding that a plaintiff's qui tam action did not preclude a separate unfair competition action based on the same factual allegations). A qui tam (whistleblower) lawsuit is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." People *ex rel.* Allstate Ins. Co. v. Weitzman, 132 Cal. Rptr. 2d 165, 167 (Ct. App. 2003). The False Claims Act, 31 U.S.C. §§ 3729–3730 (2012), provides for treble damages and statutory penalties, authorizes a private person to sue on behalf of the United States, and requires investigation by the Attorney General. California's state law is similarly patterned. CAL. GOV'T CODE § 12652 (West 2011) (stating that a person may bring a qui tam suit for the State of California and that in such suits, the Attorney General shall investigate).

172. 9 U.S.C. § 2 (2012).

173. McKart v. United States, 395 U.S. 185, 194 (1969) (discouraging judicial interference in agency functions prior to the exhaustion of administrative remedies, an expression of the autonomy invested in agencies by Congress).

174. *Id.* (describing how agencies' special expertise makes them the best suited for applying a statute in the first instance).

prevent litigation (or arbitration) of disputes once they are vetted through a relatively inexpensive and accessible administrative process.[175]

B. FEDERALISM AND SEPARATION OF POWERS COMMAND RESPECT FOR AGENCY DEFERENCE

The federalist system of governance in the United States recognizes a sphere of authority between the federal government and the states.[176] The Tenth Amendment protects state powers in providing that "powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."[177] The FAA, as interpreted by the Supreme Court, impermissibly infringes upon state sovereignty by using the Commerce Power to deprive states of their authority to regulate traditional areas of state police powers.[178]

The enactment and enforcement of laws concerning wages, hours, and other terms of employment are unquestionably "within the state's historic police power."[179] The state legislature exercises its police powers in employment and consumer protection to ensure compliance with these laws and may task administrative agencies with enforcement. As recognized by the California Supreme Court in *Iskanian*, these state powers cannot be removed by private agreement or even the FAA.[180] With respect to the FAA's effect on federal agencies, the separation of powers doctrine is violated by encroaching upon executive administrative agency functions.

175. *See* Woodford v. Ngo, 548 U.S. 81, 88 (2006) (noting that the exhaustion of administrative remedies doctrine is well established and serves to protect administrative agency authority and to promote efficiency).

176. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (requiring Congress to state clearly its intent when creating laws that may interfere with state government functions).

177. U.S. CONST. amend. X.

178. Scholars have contended that *Southland* was incorrectly decided because it ignored the Tenth Amendment. Yet an expansive interpretation of the FAA as a mandate to enforce arbitration agreements to the fullest extent of the Commerce Power collides with federalist values and should not be inferred absent a clearer statement by Congress. *See*, *e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and Federal Arbitration*, 67 LAW & CONTEMP. PROBS. 5, 5–6 (2004).

179. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 152 (Cal. 2014) (citing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

180. Iskanian's petition for review before the California Supreme Court made a federalism argument based on *Waffle House* that state statutory authority cannot be removed by private agreement. Iskanian also relied on two California state court cases, *Sullivan v. Oracle Corp.*, 254 P.3d 23 (Cal. 2011), and *Home Depot USA, Inc. v. Superior Court*, 120 Cal. Rptr. 3d 116 (Ct. App. 2010), to conclude that PAGA is a state statute enacted pursuant to California's police power and is thus entitled to a presumption against preemption. Without clear evidence of congressional intent, the FAA should not preempt PAGA. Brief for Petitioner at 5, *Iskanian*, 327 P.3d 129 (No. S204032).

These principles are compromised when the FAA is invoked to deny operation of administrative regulatory proceedings.

C. SQUARING THE ARBITRAL PARTY'S RIGHTS TO ACCESS AGENCY OPERATIONS

In an arbitral forum, a party's right to access and to represent an administrative agency is in flux. Under *Waffle House*, the agency itself, as a nonparty, may pursue claims against the employer or regulated entity.[181] According to *Preston*, a party to an arbitration agreement may not individually seek to have a dispute resolved in a judicial or administrative forum.[182] *Sonic II* invites an unconscionability assessment when arbitration precludes access to administrative processes that include substantive protections.[183] An agency does not have authority to intervene in a private arbitration, the way it would with an administrative or judicial hearing.[184] An agency may singly pursue an action, but without a complainant and with limited resources, the agency may lack statutory authority, resources, and reason to do so. *Iskanian* thus presents the use of qui tam and private attorney general actions as a mechanism to avert arbitral class waivers.[185]

181. For example, the NLRB brought a complaint against 24 Hour Fitness USA, Inc., alleging that 24 Hour Fitness's requirement that all of its employees waive their rights to any type of collective or class action suits—whether in arbitration or litigation—"violates protections guaranteed by the National Labor Relations Act." Office of Pub. Affairs, *Complaint Against 24 Hour Fitness Alleges Arbitration Policy is Unlawful*, NLRB (April 30, 2012), https://www.nlrb.gov/news-outreach/news-story/complaint-against-24-hour-fitness-alleges-arbitration-policy-unlawful. The complaint cites seven instances where classes of employees claimed wage and hour violations, and 24 Hour Fitness moved to compel those plaintiffs to individual arbitrations. *Id.*

182. Preston v. Ferrer, 552 U.S. 346, 349–50 (2008) (holding that "state laws [that] lodge primary jurisdiction in another forum, whether judicial or administrative," are preempted by the FAA).

183. *See* Michael Z. Green, *How the NLRB's Light Still Shines on Anti-Discrimination Law Fifty Years After Title VII*, 14 NEV. L.J. 754, 764 (2014) ("[P]arties cannot be required to forego the vindication of any substantive statutory rights."); Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 223 (2014) (suggesting that employers may act offensively to compel arbitration in response to an employee who seeks administrative relief through a federal agency and proposing a new cause of action—retaliatory employment arbitration—to address employer strategy when used to deter employees from filing agency complaints, such as unfair labor practices with the NLRB or discrimination with the EEOC).

184. Recall that in the procedural history of *Sonic I*, the Labor Commissioner intervened on behalf of the plaintiff employee in a state court hearing on the employer's motion to compel arbitration. *Sonic I*, 247 P.3d 130, 153 (Cal. 2011). *See also supra* note 82.

185. *See* Hernandez v. DMSI Staffing, LLC, No. C-14-1531 EMC, 2015 U.S. Dist. LEXIS 12824, at *22 (N.D. Cal. Feb. 3, 2015) (noting that PAGA claims—like qui tam actions—are between the state and employer and not two private contracting parties). *See also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 623 (2012) (advocating for state attorney generals, who are "[i]nsulated from the threats posed by class action waivers," to respond to the gap created by *Concepcion* by aggressively litigating consumer and wage-and-hour cases).

Despite the varied decisions, the courts in *Iskanian*, *Sonic II*, *D.R. Horton II*, and *Schwab* all agreed that a private party could not prohibit *all* access to a regulatory body and that contracts which suggest such a restriction may be voided.[186] Yet if a party may complain to a regulatory body, but not avail themselves of the agency's dispute resolution procedures, the guarantee of access to administrative regulation is largely hollow. The following proposals attempt to reconcile the apparent clash between pro-arbitration policy and respect for administrative and legislative policies.

IV. PROPOSALS TO REFORM THE FAA AND TO RETAIN AGENCY AND REPRESENTATIVE ACCESS

A. IDEALLY: GETTING CONGRESS TO ENACT CLARIFYING ARBITRATION LEGISLATION

The U.S. Supreme Court has, arguably incorrectly, interpreted the FAA to apply to ordinary employment (*Circuit City*),[187] to preempt state administrative procedures (*Preston*), and as a practical matter, to make impossible the enforcement of access to class relief necessary to vindicate even federal statutory rights (*Italian Colors*).[188] Even members of the Court concede *Southland*, which held that FAA preemption applies substantively in both state and federal court, was wrongly decided,[189] and *Concepcion* was a close 5–4 decision. But given the current overbroad construction of FAA preemption, Congress should act to clarify the FAA's scope and to institute reform.

Attempts to change the scope of mandatory predispute arbitration have met limited success. The proposed Arbitration Fairness Act of 2013, versions of which have been introduced since 2007,[190] seeks to prohibit

186. *See supra* Part II.C.

187. *See* Weston, *Preserving the FAA*, *supra* note 29, at 387 (disagreeing with the Court's interpretation that the exception in FAA Section 1 for "contracts of employment" was limited to the transportation industry). *See also supra* note 18.

188. *See* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 463–64 (2014) (criticizing the Court's decision in *Italian Colors*); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* DR Horton *and* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014) ("The Fifth Circuit majority's assumption, like the Supreme Court majority's in *Concepcion*, that individual determination of claims is better suited to arbitration is simply wrong in many cases.").

189. *See* Southland Corp. v. Keating, 465 U.S. 1, 24 (1984) (O'Connor, J., dissenting) (arguing that the majority's interpretation of 9 U.S.C. § 2 is "unquestionably wrong"). *See also supra* note 49 and accompanying text.

190. *See supra* notes 40–41 and accompanying text.

enforcement of predispute arbitration contracts in consumer, civil rights, antitrust, and employment matters.[191] Yet by recent count, the bill has only a three to six percent chance of passing.[192] A seemingly more modest proposal would amend the FAA to expressly preserve the right to enlist the aid of government agency processes and redress. For example, Congress has expressly exempted certain areas of traditional state regulation, providing for "reverse preemption"—such as in the McCarran-Ferguson Act, which recognizes states' authority to regulate "the business of insurance," including the ability to prohibit arbitration of such contracts.[193]

While arbitration does provide a forum to decide claims, it does not provide the same protections as an administrative forum. Compulsory arbitration denies consumers and employees important protections of our justice system, which include administrative remedies and the ability to utilize class or group actions to affordably obtain counsel less likely to take small claims or complicated antitrust cases on an individual basis.[194] Calls for the Court to acknowledge its erroneous expansion of the FAA and to return the FAA to its intended purpose and scope are many,[195] but the likelihood that Congress will meaningfully reform arbitration,[196] other than

191. As proposed, Section 402(a) of the Arbitration Fairness Act of 2013 states: "Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." Arbitration Fairness Act of 2013, S.878, 113th Cong. § 402(a) (2013).

192. *S. 878 (113th): Arbitration Fairness Act of 2013*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s878 (last visited Oct. 24, 2015).

193. 15 U.S.C. §§ 1011–1015 (2012); Scott v. Louisville Bedding Co., 404 S.W.3d 870, 880 (Ky. Ct. App. 2013) (holding that the McCarran-Ferguson Act, which places insurance-market regulation in the hands of state authorities, "negates, or 'reverse-preempts,' the FAA's apparent preemption of state regulation"); Richard Mancino & Joseph G. Davis, *Are Arbitration Clauses in International Insurance Contracts Enforceable? The Fourth Circuit Joins the Debate*, INS. COVERAGE L. REP., Aug./Sept. 2012, at 7, 7 n.3 (listing states that prohibit arbitration of insurance disputes). *See also supra* notes 37–41 and accompanying text.

194. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1334–40 (2015) (discussing the difficulty that complainants face in obtaining legal representation in arbitration).

195. *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1241 (2011) (analyzing the FAA's potential to displace state law but questioning Congress's intent to do so); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1189 (2011) (critiquing the "overpreemption" that recent FAA decisions have caused and suggesting a new way to approach FAA preemption).

196. S. 878 § 402(a) (providing that "[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute").

reacting in a piecemeal manner, is dim.[197] While efforts to amend the FAA should persist, other avenues may achieve comparable intended purposes.

B. ADOPT THE FINRA MODEL: CONDITION LICENSURE AND REGULATORY APPROVAL ON COMPLYING WITH DUE PROCESS FAIRNESS RULES REGARDING ARBITRATION

Like FINRA, the CFPB appears to have the requisite "congressional command" to regulate predispute mandatory arbitration, but only in the context of financial industry contracts. While one option is to render all predispute arbitration provisions in financial contracts void, like FINRA, any model should ensure due process and quality controls in the arbitration process.[198] Substantive rights protected by administrative procedures must be preserved if arbitration is used in place of administrative hearings.

Even without express congressional authority to exempt FAA preemption, agencies, as nonparties to an arbitration agreement, may condition regulatory approval or licensure upon adherence to process rules.[199] Federal and state regulatory agencies are not parties to arbitration contracts. Just as with the EEOC and the NLRB, agencies can thus address concerns of economies of scale to prosecute large-scale violations against parties shielded by an arbitral class waiver. As recognized in *Waffle House* and *Preston*, "[e]nforcement of the parties' arbitration agreement . . . does

197. *See supra* Part I.A (describing *ad hoc* and industry-specific exemptions to the FAA). *See also* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1332 (2011) (reporting over 139 proposed anti-arbitration bills).

198. By definition, arbitration is an *agreement* by or among parties to have disputes resolved in a private forum, with a final and binding decision rendered by a presumed neutral arbitrator. As a practical matter, few individuals are in a position to negotiate the terms of, or reject, arbitration. While arbitration theoretically has the benefit of providing a forum for the expeditious resolution of disputes, the process may become problematic when imposed on parties with lesser bargaining power and when it precludes access to collective action or government relief. When consensual and procedurally fair, arbitration can work.

199. FINRA has both an arbitration division and due process procedures in place to govern FINRA arbitrations, including a roster of approved arbitrators, the option for administrative appeal, and exclusions for class actions. These types of protections could be incorporated into the areas of employment and consumer protection. In particular, the CFPB should consider adopting these procedures to address schemes endangering consumers, such as payday loan scams. *See, e.g.*, Terrance F. Ross, *How John Oliver Beats Apathy*, ATLANTIC (Aug. 14, 2014), http://www.theatlantic.com/entertainment/archive/2014/08/how-john-oliver-is-procuring-latent-activism/376036 (exposing the predatory business of payday loans); *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AM. ARBITRATION ASS'N, https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited Sept. 8, 2015) (describing due process principles that should govern consumer disputes).

not displace any independent authority the Labor Commissioner may have to investigate and rectify [statutory] violations."[200]

C. ENFORCEMENT VIA PUBLIC REGULATORY PROSECUTION OR PRIVATE ATTORNEY GENERAL ACTIONS

Private citizens play an important role in the enforcement of laws, not only through private attorney general and qui tam actions, but also through class claims and public litigation. Private attorney general enforcement may be more effective due to the limited resources of public regulatory agencies to address the breadth of issues they are charged with governing.[201] The *Iskanian* exception to FAA preemption for PAGA claims may be short-lived if overturned by the U.S. Supreme Court, but it currently presents an option to pursue representative claims otherwise barred by private arbitration contracts. Other states might enact similar legislation to address concerns of mandatory arbitration.

D. PRACTICALLY AND SIMPLY: EDUCATE—CHANGE THE POSTERS AND AGENCY WEBSITES TO ADDRESS MANDATORY ARBITRATION AND ADMINISTRATIVE ACCESS

The mandated notices regarding workplace rights and administrative recourse contain a significant omission by not informing employees about the consequences of signing arbitration agreements. Federal and state regulatory agencies can employ simple yet practical steps to better inform parties about the consequences of predispute arbitration contracts. For example, regulatory notices and websites should be reformed, and mandated notices revised, to state expressly that the obligation to arbitrate does not prohibit a party from filing complaints with state or federal regulatory agencies. Agencies should also require that covered entities that use predispute arbitration contracts include such a proviso in their contracts. Better education may also provide the groundswell of concern to promote change in the federal legislation.

CONCLUSION

The preemptive force accorded to the FAA presents significant policy and practical concerns. Private arbitration may be an effective means for resolving disputes and avoiding class actions, but it should not be used as a

200. Preston v. Ferrer, 552 U.S. 346, 359 n.7 (2008).

201. *See* Edward Brunet, *The Primacy of Private Attorney General Enforcement in the United States*, SSRN (Aug. 10, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907949 (discussing the benefits and importance of private attorney general enforcement litigation).

tool to preclude access to administrative hearings before regulatory bodies. Protecting the right to administrative relief does not undermine arbitration but can in fact facilitate the same goals of fair and efficient resolution. The trend to compel individual arbitration and to deny an individual the ability to assert representative claims or to access administrative remedial schemes unfairly alters the scheme for justice. The FAA enforcement mandate should not be read to circumvent or to deny the right of parties to exhaust administrative remedies or to enlist the aid, expertise, and assistance of administrative agencies at least as a prerequisite to arbitration. Moreover, collective action is necessary to prompt policy changes and allow individuals to act as private attorneys general when agencies do not have the resources to assert all enforcement actions. Left unchecked, FAA preemption violates constitutional principles of federalism and separation of powers. Legislation amending the FAA should expressly preserve the right to enlist the aid of government agency processes and redress. While arbitration may be an effective and affordable forum to address many individual claims, broad FAA preemption threatens to undermine the fabric of the U.S. justice system by sweeping important claims into individual private arbitration, or more likely, the abyss of no resolution at all.