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QUI TAM CLAIMS – A WAY TO PIERCE THE FEDERAL POLICY ON ARBITRATION?: A
COMMENT ON *SAKKAB V. LUXOTTICA RETAIL NORTH AMERICA INC.*

By
Lauren Picciallo*

I. INTRODUCTION

In *Sakkab v. Luxottica Retail North America, Inc.*,¹ the Ninth Circuit held that the Federal Arbitration Act § 2² (hereinafter FAA) does not preempt representative Private Attorneys General Act³ (hereinafter PAGA) claims. Therefore, PAGA claims could not be barred by class action waivers, despite the Supreme Court holding in *AT&T Mobility v. Concepcion*.⁴ In concluding that the FAA did not preempt PAGA, the Ninth Circuit held that PAGA was a generally applicable statute. A generally applicable statute is a statute which applies to the contract in its entirety and not solely the arbitration clause. Further, the Ninth Circuit found that the PAGA claims did not conflict with any of the fundamental principles of the FAA, including enforcing the intent of the parties and the efficiency of arbitration. Lastly, the Ninth Circuit reasoned that PAGA, although containing similarities to class action arbitration, was critically different from class arbitration in that the suit was in essence a *qui tam* suit brought on the behalf state.

II. BACKGROUND

Shukri Sakkab, Plaintiff, was an employee of Lenscrafters, formerly known as Luxxotica Retail North America, Inc. (hereinafter Luxottica).⁵ On January 17, 2012, Sakkab filed a putative class action suit in the U.S. District Court for the Southern District of California alleging “(1) unlawful business practices, (2) failure to pay overtime compensation, (3) failure to provide accurate itemized wage statements, and (4) failure to pay wages when due.”⁶ The basis of the allegations arose from Luxxotica’s classification of Sakkab and others as supervisors to exempt them from overtime wages and time for meal and rest breaks.⁷

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¹ *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427-28 (9th Cir. 2015).

² Federal Arbitration Act, 9 U.S.C. § 2 (1925).

³ CAL. LAB. CODE § 2698 (2004).

⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (finding that statutes which conflict with the enforcement of the FAA are preempted by the FAA).

⁵ *Sakkab*, 803 F.3d at 427-28.

⁶ *Id.* at 427.

⁷ *Sakkab*, 803 F.3d at 427.

On March 27, 2012, Sakkab added a PAGA cause of action to the complaint.⁸ PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.”⁹ On April 23, 2012, Luxottica filed a motion to compel arbitration pursuant to the arbitration agreement.¹⁰ The agreement provided:

You and the Company each agree that no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that relates in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative) arbitration claim).¹¹

Sakkab argued that the PAGA claims could not be arbitrated because he should not be denied a forum for the representative PAGA claims, and the arbitration agreement prohibited him from bringing class actions.¹² On the other hand, Luxottica argued that the FAA preempts California law, specifically the FAA preempts the *Iskanian* rule;¹³ therefore, the representative PAGA claim would be barred pursuant to the arbitration agreement.¹⁴ The district court granted the motion to compel arbitration on all counts.¹⁵ The district court relied on the U.S. Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, to find that the FAA would preempt the PAGA claims.

III. COURT’S ANALYSIS

The Ninth Circuit started the analysis by setting forth the laws at issue in the case.¹⁶ The laws included the Private Attorneys General Act, *Iskanian v. CLS Transportation Los Angeles, LLS*, and the FAA.¹⁷

⁸ *Id.*

⁹ *Id.* at 429.

¹⁰ *Id.* at 428.

¹¹ *Id.*

¹² *Sakkab*, 803 F.3d at 428.

¹³ *Id.* at 429.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Sakkab*, 803 F.3d at 429.

¹⁷ *Id.* at 429-33.

The Ninth Circuit set forth that the PAGA was enacted to correct two perceived flaws in the California Labor Code.¹⁸ The first flaw, the Ninth Circuit stated, was that no civil fines were available to citizens for certain Labor Code violations.¹⁹ The only redress for a violation had been criminal sanctions, available to be prosecuted by the district attorneys. Therefore, many victims of violations were left uncompensated.²⁰ Hence, PAGA was enacted to provide another redress for Labor Code violations.²¹ As a result of bringing a PAGA action, California imposed civil penalty damages, the proceeds of which would be divided between the private individual, and the rest to the California government.²²

Further, PAGA provides another monetary redress, if a suit for a violation would not otherwise provide for compensation.²³ Specifically, “PAGA provides that the penalties are generally \$100 for each aggrieved employee per pay period for the initial violation and \$200 per pay period for each subsequent violation.”²⁴ Therefore, the PAGA class action may heighten the penalty to make the suit economically worthwhile.

The second flaw that PAGA redressed was the shortage of government resources.²⁵ Even though PAGA afforded the government civil penalties, “there was a shortage of government resources to pursue enforcement.”²⁶ As set forth by the legislature of California, the loss to the state’s government from unprosecuted violations amounted to a tax loss of “three to six billion dollars annually.”²⁷ Further, the negative effect that PAGA was aimed to redress included “33,000 serious and ongoing wage violations,” by the garment industry, but the state was only able to indict 100 per year for all industries.²⁸

Next, the Ninth Circuit analyzed the California Supreme Court’s holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, which found that PAGA waivers are prohibited in agreements because such a waiver would be in violation of two provisions of the California Civil Code.²⁹ First, the *Iskanian* court found that a PAGA waiver would be in violation of California Civil Code § 1668, which states that agreements that would

¹⁸ *Id.* at 429.

¹⁹ *Id.*

²⁰ *Sakkab*, 803 F.3d at 429.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 429. (citing CAL. LAB. CODE § 2699(f)(2)).

²⁵ *Sakkab*, 803 F.3d at 429.

²⁶ *Id.* at 429-30. (citing CAL. LAB. CODE § 2699(f)(2)).

²⁷ *Id.* at 430.

²⁸ *Sakkab*, 803 F.3d at 430.

²⁹ *Id.* at 430-31 (discussing *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014)).

exculpate a party from a violation of law are unenforceable.³⁰ The California Supreme Court reasoned that allowing PAGA to be waivable would be negating one of the primary mechanisms for Labor Code enforcement.³¹ Further, the California Supreme Court reasoned that since an agreement which waives PAGA suits would avoid law enforcement, such an agreement would be “against public policy” and “may not be enforced.”³² The second provision that a PAGA waiver would violate is Civil Code § 3513, which sets forth that a law established for a public reason may not be contravened by private agreement.³³ Such a waiver would harm the state’s public interest in “enforcing the Labor Code” and receiving “proceeds of civil penalties used to deter violations.”³⁴ Lastly, the *Iskanian* Court held that although that case concerned an individual agreement, agreements to waive representative PAGA claims would be unenforceable, as well.³⁵

A. The Iskanian Rule is a Generally Applicable Rule.

Next, the Ninth Circuit set forth the controlling law in the Federal Arbitration Act. Typically, the FAA preempts state law “to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Further, the only way to invalidate an arbitration clause under FAA § 2, is by a showing of “generally applicable contract defenses, such as fraud, duress, or unconscionability.”³⁶ In order to be a “generally applicable” rule, the rule must not “single out arbitration agreements”³⁷ and must put arbitration agreements on “equal footing.”³⁸ Further, if a state rule is “generally applicable” to contract law, the rule is preempted if it conflicts with the FAA.³⁹

Lastly, the Ninth Circuit briefly mentioned the Court’s holding in *AT&T Mobility, LLC v. Concepcion*.⁴⁰ There, the United States Supreme Court held that the “FAA preempted [a] California law providing that class action waivers in certain consumer

³⁰ *Iskanian*, 327 P.3d at 148.

³¹ *Id.* at 149.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 149.

³⁵ *Iskanian*, 327 P.3d at 155.

³⁶ *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011).

³⁷ *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

³⁸ *Casarotto*, 517 U.S. 681 at 687.

³⁹ *AT&T Mobility*, 131 S.Ct. at 1748.

⁴⁰ *Sakkab*, 803 F.3d at 433.

contracts of adhesion were unconscionable and unenforceable.”⁴¹ The Court found that the law was preempted by the FAA, though the law was “generally applicable” to all contracts, because it “conflicted with the purposes of the FAA.”⁴²

The Ninth Circuit concluded that the issue rests on whether the *Iskanian* rule is “generally applicable” and whether it conflicted with purposes of the FAA.⁴³ Because the *Iskanian* rule prevents any waiver of PAGA claims, and not just a waiver that occurs as a result of an arbitration clause, the Ninth Circuit concluded that the rule is “generally applicable.”⁴⁴

B. The Iskanian Rule Does Not Conflict with the Principles of the FAA.

Due to the holding in *AT&T Mobility v. Concepcion*, the Ninth Circuit looked to whether the principles of the FAA conflict with the *Iskanian* Rule.⁴⁵ As stated by the Ninth Circuit, the principle reason the FAA was enacted was to defeat the judicial hostility toward arbitration.⁴⁶ Thus, state laws prohibiting arbitration in specific types of claims are preempted.⁴⁷ As the *Iskanian* rule only finds that agreements to waive representative PAGA claims are unenforceable, and does not express any preference regarding whether individual PAGA claims are litigated or arbitrated, the Ninth Circuit concluded that the *Iskanian* rule does not prohibit the arbitration of any type of claim.⁴⁸

Another purpose of the FAA is to “enforce the terms of arbitration agreements.”⁴⁹ According to the Ninth Circuit, applying the FAA to all terms, no matter whether the terms are within the FAA § 2 savings clause, would negate any meaning held by the clause.⁵⁰ The savings clause states that an agreement to submit to arbitration “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*”⁵¹ The Ninth Circuit concluded that Congress could not have intended to strip the savings clause of all meaning.⁵² Rather, Congress intended

⁴¹ *Sakkab*, 803 F.3d at 433 (citing *AT&T Mobility*, 131 S.Ct. at 1748-53).

⁴² *AT&T Mobility*, 131 S.Ct. at 1748.

⁴³ *Sakkab*, 803 F.3d at 433.

⁴⁴ *Id.*

⁴⁵ *Id.* at 431.

⁴⁶ *Id.* at 433.

⁴⁷ *Id.*

⁴⁸ *Sakkab*, 803 F.3d at 433.

⁴⁹ *Id.*

⁵⁰ *Sakkab*, 803 F.3d at 434.

⁵¹ Federal Arbitration Act, § 2.

⁵² *Sakkab*, 803 F.3d at 434.

that the FAA preempt only generally applicable contract defenses that interfere with arbitration.⁵³

The Ninth Circuit looked to *AT&T Mobility v. Concepcion* to find which generally applicable contract defenses may interfere with arbitration.⁵⁴ In *AT&T Mobility*, the state law was found to be unenforceable because the law interfered with the contractually desired arbitral procedures.⁵⁵ Specifically, the law in *AT&T Mobility* “provided that class action waivers in certain consumer contracts of adhesion were unconscionable.”⁵⁶ However, according to the United States Supreme Court, such a rule would impose “classwide arbitration procedures on the parties against their will”⁵⁷ and in essence restrict the parties’ freedom of contract. Further, the Ninth Circuit recognized that the Supreme Court in *AT&T Mobility* observed that “the switch from bilateral class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedures of class arbitration because the procedures were required to protect the due process rights of absent parties.”⁵⁸

The Ninth Circuit, however, distinguished PAGA claims from class action suits.⁵⁹ While class action suits are procedural devices for resolving the claims of absent parties, PAGA actions are the equivalent of a federal *qui tam* suit.⁶⁰ Here, a *qui tam* suit is a mechanism which encourages employees to file suits regarding labor code violations on the government’s behalf.⁶¹ PAGA suits, unlike class actions, are penalties an “employee-plaintiff may recover on behalf of the state.”⁶² Also unlike class actions, PAGA arbitrations “do not require the formal procedures of class arbitrations.”⁶³ Further, no due process protections for the “absent employee” are present, as the PAGA claimant is merely a “proxy” of the state.⁶⁴

⁵³ *Sakkab*, 803 F.3d at 434.

⁵⁴ *Id.* at 434-35 (citing to *AT&T Mobility*, 131 S.Ct. at 1745).

⁵⁵ *Id.* at 434-35.

⁵⁶ *Id.* at 434 (citing to *AT&T Mobility*, 131 S.Ct. at 1755).

⁵⁷ *Sakkab*, 803 F.3d at 435 (citing *AT&T Mobility*, 131 S.Ct. at 1745).

⁵⁸ *Id.* (citing *AT&T Mobility*, 563 S.Ct. at 1751).

⁵⁹ *Sakkab*, 803 F.3d at 435.

⁶⁰ *Id.* at 435.

⁶¹ *Sakkab*, 803 F.3d at 435 (an employee brings the PAGA suit “as the proxy of agent of the state’s labor law enforcement agencies,” as such, the proxy may “obtain civil penalties for violations committed against absent employees.”).

⁶² *Sakkab*, 803 F.3d at 435.

⁶³ *Id.*

⁶⁴ *Id.* at 435-36 (other differences include the fact that other employees may not opt out of a PAGA action, no inquiry into the counsel’s ability to represent other absent employees is made, no requirement as to “numerosity, commonality, or typicality”).

The majority opinion found the dissent incorrect in concluding that *AT&T Mobility* requires a court to enforce all waivers of representative claims.⁶⁵ The essential issue was not whether a rule interfered with the parties' freedom to limit arbitration, as the dissent claimed. Rather, the majority stated that the essential issue is whether the procedures which the statute or rule prohibits interfere with arbitration.⁶⁶ The Ninth Circuit concluded against finding that the rule interfered with arbitration, as the individual employee brings suit on behalf of the government and not all other individuals.⁶⁷

The Ninth Circuit also found that the mere fact that the civil penalties would be greater does not mean that the FAA would preempt the *Iskanian* rule.⁶⁸ Neither would the FAA preempt PAGA claims if the arbitration agreement specifically stated that PAGA claims were waived.⁶⁹ Additionally, the FAA does not require courts to enforce agreements which waive representative PAGA actions because the penalties an aggrieved employee would recover under formal procedures of litigation are more attractive than arbitration's informal procedures.⁷⁰

The Ninth Circuit suggested that the representative PAGA claims would not make arbitration more "costly" and "slower."⁷¹ The Ninth Circuit analogized PAGA claims with other claims that are more complex, such as antitrust claims, that would make arbitration more costly.⁷² However, such complexity does not mean that "a rule declining to enforce waivers of such claims interferes with the FAA in any meaningful sense, since, unlike class claims, parties are free to arbitrate them using the procedures of their choice."⁷³ Any "procedural morass" is thus the parties' choice.⁷⁴ In conclusion, the Ninth Circuit found that the agreement did not set forth whether the parties would choose to arbitrate or litigate PAGA claims. Therefore, the Ninth Circuit remanded the issue to the district court.⁷⁵

⁶⁵ *Sakkab*, 803 F.3d at 436.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 437.

⁶⁹ *Sakkab* 803 F.3d at 437 (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005), which found that an agreement that waived punitive damages during arbitration would be unenforceable as applied to the District of Columbia Human Rights Act).

⁷⁰ *Id.*

⁷¹ *Id.* at 438.

⁷² *Sakkab*, 803 F.3d at 438.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 440.

IV. SIGNIFICANCE

This case is significant because the Ninth Circuit allowed an alternative to an absolute waiver of a representative suit, despite an arbitral agreement containing a class action waiver. In practice, PAGA claims have many similarities to class actions, as the Ninth Circuit set forth.⁷⁶ Nevertheless, the Ninth Circuit concluded that a party cannot waive a PAGA claim via an arbitration clause.

Courts have already used the holding in *Sakkab* to enforce a PAGA claim. For example, in *Zackaria v. Wal-Mart Stores, Inc.*, the U.S. District Court for the Central District of California held that despite the court's order of a waiver of class action claims in the contract, the Plaintiff is not thereafter barred from instituting a PAGA suit.⁷⁷ In coming to such a conclusion, the court relied in part on *Sakkab*, specifically the holding that PAGA claims are akin to *qui tam* actions, rather than class action suits.⁷⁸ Other courts have had to decide on similar issues.⁷⁹

Whether other courts will similarly hold that parties cannot waive representative *qui tam* claims via a waiver of class arbitration should be an interesting development in arbitration, the consequences of which may have significant legislative impact. For example, state legislatures may be able to enact statutes that enable *qui tam* claims for other violations that the state does not have enough resources to litigate. The State could theoretically enact *qui tam* claims for state tax violations, environmental law violations, or labor code violations, for example. The plaintiff thus may have the ability to sue where he or she would not have otherwise, due to the cost of arbitration.⁸⁰

Further, the *Sakkab* holding is significant because of the Ninth Circuit's interpretation of *AT&T Mobility v. Concepcion* and class actions. The Ninth Circuit held that *AT&T Mobility* merely set forth that a "law providing that class action waivers in certain consumer contracts of adhesion were unconscionable and unenforceable, was preempted by the FAA."⁸¹ Further, the Ninth Circuit found that *AT&T Mobility v. Concepcion* held that class arbitration was unenforceable if parties waived class action arbitration in the contract, as to enforce otherwise would be in violation of the freedom to

⁷⁶ *Sakkab*, 803 F.3d at 437 (in both class actions and PAGA claims in arbitration there would be limited opportunity for review and Defendants may face "hefty" civil penalties).

⁷⁷ *Zackaria v. Wal-Mart Stores, Inc.*, 2015 WL 6745714 * at 1-11 (C.D. Cal. 2015).

⁷⁸ *Sakkab*, 803 F.3d at 429.

⁷⁹ See *Kag West, LLC v. Malone*, No. 15-cv-03827-THE, 2015 WL 6693690 at *3 (S.D. Cal. 2015) (citing *Sakkab* for support in the conclusion that the arbitrator would have to decide not only the "forum for litigation, but also must determine "the intent of the parties with regard to the arbitration clause and PAGA claims); *Ridgeway v. Nabors Completion & Production Services Co.*, No. CV 15-03436 DDP (VBKx), 2015 WL 597545 at *11 (C.D. Cal. 2015) (holding that a PAGA claim cannot be waived under an arbitration clause's waiver of class actions); *but see Brown v. American Airlines, Inc.*, CV 10-8431-AG (PJWx) 2015 WL 6735217 * 5 (C.D. Cal. 2015) (finding that a PAGA claim is denied are unmanageable except for inaccurate wage statement claims).

⁸⁰ *AT&T Mobility*, 131 S.Ct at 1760 (Breyer, J., dissenting) ("In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.").

⁸¹ *AT&T Mobility*, 131 S.Ct. at 1746.

select informal procedures.⁸² These holdings effectively limit *AT&T Mobility v. Concepcion*, as the case could have been more expansively interpreted to bar any law which limits a parties choice of process, including the limits that PAGA may place on the streamlined arbitral hearing.⁸³ *AT&T Mobility v. Concepcion*, could additionally be interpreted so as to bar any claims that would limit the party's freedom of contract to choose who can be a part of the arbitral agreement.⁸⁴ PAGA claims, contrary to the Ninth Circuit's reading of *AT&T Mobility v. Concepcion*, could limit a party's freedom of contract because the PAGA claim mandates the participation of the state, a party which was not in the original arbitral agreement.

V. CRITIQUE

Whether the Supreme Court would have reached the same conclusion as the Ninth Circuit is questionable. The *Sakkab* decision seems to be a break away from freedom of contract in that the Ninth Circuit does not enforce the arbitration agreement according to the terms of the contract.

First, the Ninth Circuit held that the parties have a choice to arbitrate or litigate representative PAGA claims but the parties cannot waive them altogether by incorporating a class action waiver. Further, the Ninth Circuit reasoned that the representative PAGA claims could not be waived by a class action waiver because the party is bringing the suit on behalf of the state. However, the state was never a part of the agreement. Therefore, freedom of contract is abridged because the state is stepping in to control a private contract. Similarly, the court recognized that the parties likely did not expect the enforcement of PAGA claims pursuant to their agreement.⁸⁵ Nevertheless, the Ninth Circuit found that PAGA claims cannot be waived and therefore that the claims can either be litigated or arbitrated.

Effectively, the Ninth Circuit has gone awry of freedom of contract in three respects: (1) although the court admitted that the parties likely intended the PAGA claim to be within the class action waiver, it found that the PAGA still can be brought; (2) the court enforced the PAGA claims on the behalf of the state, even though the state is not a party to the contract; and (3) the court allowed the alternative of litigation despite the parties' agreement to arbitrate all disputes arising from the employment. In contrast, the Supreme Court consistently protects the parties' freedom of contract and strives to enforce the intent of the parties with regard to the arbitral clause, even if doing so would

⁸² *Sakkab*, 803 F.3d at 435 (citing *AT&T Mobility*, 131 S.Ct. at 1751).

⁸³ *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1748 (2011) (“The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

⁸⁴ *Id.* at 1748-49 (parties may agree to “limit *with whom* a party will arbitrate its disputes.”).

⁸⁵ *Sakkab*, 803 F.3d at 437 (“We recognize that *Sakkab* and *Luxottica* likely expected the waiver of representative PAGA claims to be enforced, and that the *Iskanian* rule prevents that expectation from being fulfilled.”).

deter a claim from being arbitrated.⁸⁶ Likewise, the Supreme Court has never made the alternative of litigation available to arbitration waivers that essentially impede the bringing of a suit.⁸⁷

Lastly, the Ninth Circuit broke from the reasoning of the Supreme Court in two other respects. Part of the majority's reasoning was the importance of PAGA claims to the state of California in prosecuting violations of the Labor Code.⁸⁸ However, other claims in the past, have been deterred due to the class action waiver, despite the importance of the statute.⁸⁹ Another reason the court found that representative PAGA claims cannot be waived is that the claims do not have an effect on the parties' ability to choose the arbitral procedures. However, the same can be said about class action. In class action waivers, the parties are still able to choose the extent of discovery, the number of arbitrators, whether arbitrators are to write a statement of reasons, et cetera; however, according to the Supreme Court in *AT&T Mobility*, class actions can be waived.

VI. CONCLUSION

The Ninth Circuit, in *Sakkab v. Luxottica*, has interpreted *AT&T Mobility v. Concepcion*, narrowly, thereby allowing the arbitration of PAGA claims despite a class action waiver. Further, the Ninth Circuit, while finding an equitable outcome for the litigation of PAGA claims by allowing the parties to choose whether to arbitrate or litigate the claims, strays from the doctrine of freedom of contract which has been relied upon by the Supreme Court's decisions on arbitration. Lastly, the *Sakkab* holding has the possibility of being applied in other legislative settings.

⁸⁶ *Id.*

⁸⁷ *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308 (2013) (“No contrary congressional command overrode the overarching principle, reflected in the text of the Federal Arbitration Act (FAA), that arbitration was a matter of contract, as would require the court to reject merchants' waiver of class arbitration in their contract with charge-card issuer, which waiver the issuer sought to enforce with respect to merchants' federal antitrust claims against issuer; *even if costs for merchants to individually arbitrating their antitrust claims exceeded potential recovery for each merchant*, federal antitrust laws did not guarantee an affordable procedural path to the vindication of every claim or evince an intention to preclude a waiver of class-action procedure, and congressional approval of the federal rule of civil procedure allowing class proceedings did not establish an entitlement to class proceedings for the vindication of statutory rights”) (emphasis added); *AT&T Mobility*, 562 U.S. at 1761 (Breyer, J., dissenting) (“In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.”).

⁸⁸ *Sakkab*, 803 F.3d at 430 (“Our conclusion that the FAA does not preempt the *Iskanian* rule is bolstered by the PAGA's central role in enforcing California's labor laws.”).

⁸⁹ See *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308 (2013) (finding that although the waiver may deter antitrust claims, which have importance in preventing price fixing, the class action waiver should be enforced).