

IN THE GOVERNMENT’S SHOES:
ASSESSING THE LEGITIMACY OF
STATE QUI TAM PROVISIONS

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Recently, a wave of state legislatures have enacted qui tam provisions to police citizen behavior in a variety of politically and legally contentious environments. The current literature on private enforcement views qui tam as a homogenous species of private enforcement and does little to identify any distinctions within qui tam itself. This gap in the scholarship has made it difficult to assess the legitimacy of the recently adopted state qui tam provisions. This Note adds to this literature by identifying distinctions between different forms of qui tam and creating a Taxonomy that places a qui tam provision within six distinct categories according to the nature of the underlying governmental claim, the practical effect of the provision, and the normative values underlying the provision.

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INTRODUCTION

Texas’s so-called “heartbeat” abortion bill took effect on September 1, 2021,¹ and it immediately spurred a nationwide debate in the legal community² and the broader public.³ The law, known as S.B. 8, bans medical providers from providing abortion care whenever an ultrasound can detect electrical activity in embryonic cells, which Texas lawmakers defined as a fetal heartbeat⁴ and can appear as early as six weeks into pregnancy.⁵ Importantly, the law puts forth a unique enforcement regime: It prohibits state and local officials from bringing criminal prosecutions or civil enforcement actions and instead empowers private citizens to bring

1. Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–212 (West 2022)).

2. See, e.g., Lauren Moxley Beatty, *The Resurrection of State Nullification—And the Degradation of Constitutional Rights: SB 8 and the Blueprint for State Copycat Laws*, 111 *Geo L.J. Online* 18, 20, 33 (2022), <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/08/Beatty-State-Nullification.pdf> [<https://perma.cc/7NA7-W4MH>] (arguing Texas’s abortion law was an attempt to nullify a federal constitutional right and that similar attempts have traditionally failed constitutional scrutiny); Press Release, DOJ, Justice Department Sues Texas Over Senate Bill 8 (Sept. 9, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-texas-over-senate-bill-8> [<http://perma.cc/G7XS-XFQC/>] (“The Act is clearly unconstitutional under longstanding Supreme Court precedent” (internal quotation marks omitted) (quoting Attorney General Merrick Garland)).

3. See, e.g., Maggie Astor, *Here’s What the Texas Abortion Law Says*, *N.Y. Times* (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html> (on file with the *Columbia Law Review*) (detailing the major features of the Texas abortion law); Adam Serwer, *A Strategy of Confusion*, *The Atlantic* (Sept. 10, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/republicans-strategy-confusion/620029/> (on file with the *Columbia Law Review*) (“The Texas law’s critics have seized on its perverse social incentive—bribing Texans to inform on one another—as potentially creating a nightmare scenario, a kind of privatized surveillance state.”).

4. See Tex. Health & Safety Code Ann. § 171.201(1) (2023) (defining “fetal heartbeat” as “cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac”). Medical and reproductive health experts have said the law’s references to “heartbeats” are misleading, however, because embryos at early stages of pregnancy have not developed a heart. Bethany Irvine, *Why “Heartbeat Bill” Is a Misleading Name for Texas’ Near-Total Abortion Ban*, *Tex. Tribune* (Sept. 2, 2021), <https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/> [<http://perma.cc/8AEC-AWWT/>].

5. Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes Into Effect as the U.S. Supreme Court Takes No Action*, *Tex. Tribune* (Aug. 31, 2021), <https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/> [<http://perma.cc/AW3J-2KH5/>] (last updated Sept. 1, 2021).

civil actions to punish statutory violations.⁶ If these private enforcers prevail at trial, they are rewarded with \$10,000 in statutory damages per offense and attorney's fees.⁷ While the Supreme Court's decision to abandon the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*⁸ mooted many of the federal constitutional arguments against S.B. 8's restrictions,⁹ the law's enforcement mechanism and its implications have commanded continued scholarly attention.¹⁰

In the debate over S.B. 8's legitimacy, scholars have emphasized the differences between "traditional" private enforcement regimes and the "recent" adaptations that employ similar enforcement mechanisms as S.B. 8. This Note draws on Professor Sean Farhang's definition of "private enforcement regimes" as the set of legislative decisions that determine "who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof."¹¹ Traditional private enforcement regimes include the many well-established statutes that have tasked members of the public with enforcing regulatory laws,¹² including antidiscrimination law,¹³ banking regulation,¹⁴ and consumer protection.¹⁵ According to Professor Luke Norris, these traditional private enforcement regimes fall into one of two lanes: (1) when the private enforcer is alleging direct, individualized harm that the regulation prohibits, or (2) when the private enforcer seeks to vindicate a shared public interest.¹⁶

6. Tex. Health & Safety Code Ann. § 171.207.

7. Id. § 171.208(b).

8. 142 S. Ct. 2228, 2242 (2022).

9. See Larissa Jimenez, 60 Days After *Dobbs*: State Legal Developments on Abortion, Brennan Ctr. for Just. (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [<http://perma.cc/7K68-K2NT/>] (noting that the *Dobbs* decision returned the question of abortion access to the states, which has led to a patchwork of policies).

10. See Jon D. Michaels & David L. Noll, Vigilante Federalism, 108 Cornell L. Rev. 1187, 1192 (2023) [hereinafter Michaels & Noll, Vigilante Federalism] (arguing S.B. 8 falls within a larger trend of state "private subordination regimes," which seek to "suppress the rights of disfavored or marginalized individuals and groups"); Luke P. Norris, The Promise and Perils of Private Enforcement, 108 Va. L. Rev. 1483, 1485 (2022) (placing S.B. 8 at the center of the developing "legal maelstrom" over private enforcement litigation).

11. Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. 3–4 (2010).

12. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, Private Enforcement, 17 Lewis & Clark L. Rev. 637, 685 (2013) ("Private enforcement of government-initiated or sanctioned policy potentially covers a virtually limitless array of policy areas . . ."); Norris, *supra* note 10, at 1493.

13. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018).

14. See Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2018).

15. See Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2018).

16. See Norris, *supra* note 10, at 1498–99.

Scholars have attacked the recent private enforcement regimes by distinguishing the statutes' targets and motivations from their traditional analogues. Professors Jon Michaels and David Noll have argued the recent enforcement regimes, which they refer to as "private subordination regimes,"¹⁷ are both the result of improper motives by state legislatures and the "product of . . . populist outrage discourse" that has recently emerged in right-wing politics.¹⁸ As Michaels and Noll note, these laws are frequently passed by GOP-led state legislatures.¹⁹ Professors Stephen B. Burbank and Farhang's research shows that in the past eight years, Republican Party support for private enforcement has grown substantially, challenging the conventional wisdom that business-friendly Republicans are generally opposed to statutory provisions facilitating access to the courts.²⁰ Burbank and Farhang argue this contradiction represents a major realignment in party dynamics that was spurred in part by conservative distrust of the Obama administration as an adequate enforcer of the conservative rights agenda.²¹ One argument against these recent enforcement regimes is that unlike traditional private enforcement regimes, which are designed to vindicate individual harms or shared public interests, the recent enforcement regimes are motivated by partisan beliefs and enforced by "culture warriors" who often have not suffered a material harm before bringing an action.²²

While the traditional–recent distinction has helped legal commentators develop theories on how society and the federal court system should adapt to the recent enforcement regimes,²³ this distinction does little to explain how legislatures should evaluate prospective enforcement regimes. Scholars have argued that legislatures should design private enforcement regimes to fit the "particular social and legal contexts in

17. Michaels & Noll, *Vigilante Federalism*, supra note 10, at 1191.

18. See Jon Michaels & David Noll, *Opinion, We Are Becoming a Nation of Vigilantes*, N.Y. Times (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html> (on file with the *Columbia Law Review*).

19. See Michaels & Noll, *Vigilante Federalism*, supra note 10, at 1194.

20. Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. Irvine L. Rev. 657, 660 (2021).

21. See *id.* at 686 ("[W]e found escalating Republican support for bills seeking to leverage private lawsuits to enforce rights that were primarily anti-abortion, immigrant, and tax, and pro-gun and religion.").

22. See Michaels & Noll, *Vigilante Federalism*, supra note 10, at 1192–93.

23. See, e.g., Beatty, supra note 2, at 19 (arguing that S.B. 8 is the first state law to successfully nullify federal law in U.S. history); Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Fetal-Heartbeat Law and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 Am. U. L. Rev. 1029, 1033–37 (2022) (documenting the substantive and procedural challenges posed by S.B. 8 and offering strategies to challenge the law); Laurence H. Tribe & Stephen I. Vladeck, *Opinion, Texas Tries to Upend the Legal System With Its Abortion Law*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html> (on file with the *Columbia Law Review*) ("[S.B. 8 is] an assault on our legal system and on the idea that law enforcement is up to the government, not our neighbors.").

which [the] unremedied systemic problems arise.”²⁴ Since the traditional–recent binary speaks in broad categories, legislatures may find this to be an unhelpful tool when forced to evaluate future private enforcement regimes in their fact-specific contexts. A more comprehensive categorization that accounts for the unique structure of the recent enforcement regimes could clarify how legislatures should view future laws that resemble the recent private enforcement regimes.

This Note argues that analyzing California’s Private Attorney General Act (PAGA) alongside the recent enforcement regimes can help develop a more nuanced private enforcement framework, specifically for *qui tam* actions. *Qui tam* is a subcategory of private enforcement in which private parties, rather than suing to vindicate their individual rights, instead assume the government’s role and bring claims on its behalf.²⁵ The California Supreme Court has described PAGA as a “type of *qui tam* action” that conforms to all of the traditional criteria of a *qui tam* provision.²⁶ This Note argues that the recent enforcement regimes share enough similarities with PAGA to more precisely be categorized alongside PAGA within this smaller *qui tam* subset of private enforcement regimes. Evaluating the recent enforcement regimes against other *qui tam* actions will offer more helpful insights into the laws’ practical and normative shortcomings.

To assist legislatures performing this evaluation of *qui tam* private enforcement provisions, this Note offers a practical Taxonomy for *qui tam* provisions. The current literature on private enforcement views *qui tam* as a homogenous species of private enforcement and does little to identify any distinctions within *qui tam* itself.²⁷ This Note attempts to fill this scholarly gap by creating a Taxonomy that places a *qui tam* provision within six distinct categories according to the nature of the underlying governmental claim, the practical effect of the provision, and the normative values underlying the provision. This theoretical framework for *qui tam* draws heavily from recent scholarship on private enforcement’s

24. See Burbank et al., *supra* note 12, at 685.

25. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 *Colum. L. Rev.* 1244, 1270 (2012) [hereinafter Engstrom, *Harnessing the Private Attorney General*] (providing an overview of the Federal False Claims Act (FCA) and noting that most enforcement efforts under the act are “initiated as private lawsuits brought pursuant to the FCA’s *qui tam* provisions”).

26. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 148 (Cal. 2014) (emphasis omitted).

27. See, e.g., Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1246–47 (treating the FCA’s *qui tam* provision and *qui tam* generally as synonymous and interchangeable concepts); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 *Vand. L. Rev.* 2129, 2144–46 (2004) (describing all *qui tam* relators as “substitute attorneys general” and situating them within a larger spectrum of private attorneys general).

theoretical purposes and core rationales.²⁸ The framework also draws from qui tam-related scholarship and case law to present an original contribution differentiating between the public and proprietary government claims underlying the qui tam action. The purpose of this categorization effort is to give legislatures a rubric to evaluate the legitimacy of proposed qui tam actions.

Importantly, legislatures likely enacted the recent qui tam provisions not to take advantage of the administrative efficiency of qui tam provisions but rather to evade judicial review. The Texas legislature adopted S.B. 8 to insulate the measure from then-constitutional limits on abortion restrictions.²⁹ A state legislature looking to perform an illicit end run around judicial protection of an established constitutional right will likely not bother to evaluate the legitimacy of the provision. The law's ability to successfully violate established constitutional rights—in other words, its illegitimacy—would likely be the point of such a measure.³⁰ Acknowledging this reality, however, does not eliminate the potential for states to adopt public qui tam provisions in good faith. In fact, before the recent spate of S.B. 8-style enforcement regime enactments, legal academics were calling for an expansion of state qui tam provisions to solve a variety of legal problems.³¹

This Note proceeds in three parts: Part I presents the history and background of three qui tam private enforcement models this Note uses to develop its Taxonomy; Part II presents the Taxonomy and categorizes the three qui tam models accordingly; and finally, Part III argues state legislatures looking to adopt public qui tam provisions should look to the PAGA model as a more practical and normatively justifiable alternative to the recent enforcement regimes, specifically comparing PAGA to Cal. S.B. 1327, a California law that adopts S.B. 8's problematic enforcement mechanism.

28. See Norris, *supra* note 10, at 1488 (putting forth a democratic theory of “popular participation” in regulatory governance).

29. See Adam Liptak, Justice Department Asks Supreme Court to Block Texas Abortion Law, *N.Y. Times* (Oct. 18, 2021), <https://www.nytimes.com/2021/10/18/us/politics/texas-abortion-law-supreme-court.html> (on file with the *Columbia Law Review*) (last updated Oct. 22, 2021) (discussing the claim that the law's drafters “have candidly acknowledged that the law was designed to deter constitutionally protected abortions while evading judicial review” (internal quotation marks omitted) (quoting acting Solicitor General, Brian Fletcher)).

30. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1189–90.

31. See, e.g., Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 *U. Mich. J.L. Reform* 1203, 1239 (2013) (proposing state legislatures pass statutory qui tam actions to enforce civil penalties for violations of state consumer protection and employment laws); Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 *DePaul L. Rev.* 357, 364–65 (2020) (similar).

I. QUI TAM'S HISTORICAL AND MODERN FORMS

This Note aims to present a workable framework for understanding and identifying *qui tam*'s variations. Therefore, before presenting the Taxonomy, this Note discusses *qui tam*'s historical background and the development into its modern forms. This Part more formally introduces the *qui tam* legal device, explains how the recent private enforcement regimes and PAGA diverge from this standard account, and canvasses the recent legal scholarship to understand where and how *qui tam* is currently being used. By analyzing *qui tam*'s modern forms alongside its historical analogues, this Note presents a more nuanced account of *qui tam* provisions than other private enforcement literature. This account will inform the Taxonomy presented in the following Part.

A. *Traditional Qui Tam and the Federal False Claims Act*

1. *Qui Tam in English Common Law and at the Founding.* — *Qui tam* is the accepted abbreviation for the phrase “*qui tam pro domino rege, . . . quam pro seipso in hac parte sequitur*,”³² which translates to “who as well for the king as for himself sues in this matter.”³³ *Qui tam* provisions appear to have originated in thirteenth-century English law, when private individuals began consolidating actions in the royal courts on both their own and on the Crown's behalf.³⁴ This dual capacity allowed royal courts, which generally heard only matters involving the Crown's interests, to hear private claims.³⁵ Over the next 150 years, *qui tam* grew in size and importance within English common law.³⁶ *Qui tam* statutes typically regulated economic activities, such as the pricing of wine and tanning leather,³⁷ and less frequently—but still commonly—regulated public functions and government behavior.³⁸

Qui tam's popularity would not last. As these statutes became more commonplace throughout the fifteenth and sixteenth centuries, so too did the instances of abuse.³⁹ Several reform efforts were undertaken

32. 3 William Blackstone, *Commentaries* *160 (emphasis omitted).

33. *Qui Tam Action*, *Black's Law Dictionary* (11th ed. 2019).

34. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000); Note, *The History and Development of Qui Tam*, 1972 *Wash. U. L.Q.* 81, 83 [hereinafter *History and Development of Qui Tam*] (“A *qui tam* suit, then, involves a combination of two distinct interests; one of which is public, the other private.”).

35. *Stevens*, 529 U.S. at 774.

36. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 *N.C. L. Rev.* 539, 570 (2000) (“[W]hat began as a trickle of *qui tam* statutes gradually became a flood.”).

37. See *id.* at 571.

38. See *id.* at 572–73.

39. See *id.* at 575–76 (explaining that as the law grew in popularity, a professional class of informers, who made their living by “pursuing *qui tam* litigation throughout the country[,]” arose with it).

throughout the sixteenth century⁴⁰ before finally, in 1623, “Parliament enacted sweeping legislation to curb the informer abuses.”⁴¹ Consequently, Parliament enacted fewer *qui tam* statutes in the seventeenth century than in previous centuries.⁴² *Qui tam* statutes experienced a resurgence in the eighteenth and early nineteenth centuries.⁴³ But this resurgence was short-lived, as reliance on *qui tam* dramatically declined with the development of modern police departments and public prosecutors.⁴⁴ In 1951, Parliament officially abolished all *qui tam* regimes, ending Britain’s long experiment with the enforcement device.⁴⁵

It is important to note that the claims for abuse, which British *qui tam* defendants complained of throughout *qui tam*’s history,⁴⁶ were mainly directed toward informers and not aggrieved parties. Early British *qui tam* provisions came in two statutory varieties: one for informers who gave information about statutory violations and the other for aggrieved parties who had suffered the harm the statute sought to prevent.⁴⁷ Frequent informers created schemes in which they brought feigned trials against friendly defendants to limit the defendant’s liability in future actions brought by the Crown.⁴⁸ These informers were also the main culprits of vexatious claims, in which aggressive plaintiffs would attempt to enforce obsolete or little-known rules against unwitting defendants.⁴⁹ Informer schemes, not aggrieved party actions, created the impetus for reform that ultimately spelled *qui tam*’s demise in British law.

This legacy of *qui tam* provisions carried over to the American colonies. During the colonial period, several informer statutes expressly

40. See *id.* at 585–89 (detailing the British government’s response to abusive *qui tam* enforcement).

41. History and Development of *Qui Tam*, *supra* note 34, at 90.

42. See Beck, *supra* note 36, at 589.

43. See *id.* at 591–601 (detailing two *qui tam* contexts that fueled this resurgence: (1) laws restricting religious dissenters and (2) laws aimed at controlling liquor sales).

44. See *id.* at 601.

45. See *id.* at 604–08; History and Development of *Qui Tam*, *supra* note 34, at 88 & n.44 (citing Common Informers Act 1951, 14 & 15 Geo. 6, c. 39 (UK)).

46. The debate over the *qui tam* abolition bill surfaced many of these criticisms. In those proceedings, members of Parliament described *qui tam* informers as “unnatural creature[s] of statute,” “parasite[s] who [are] legally empowered to sue for money for which [they have] not worked,” and “a form of legalised blackmail.” Beck, *supra* note 36, at 606 (internal quotation marks omitted) (first quoting HC Deb (9 Feb. 1951) (483) col. 2097 (UK) (statement of Mr. Hughes); then quoting *id.* (statement of Mr. Hughes); then quoting *id.* at 2100 (statement of Mr. Hughes)).

47. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000) (describing the two types of *qui tam* statutes Parliament drafted); History and Development of *Qui Tam*, *supra* note 34, at 90–91.

48. See History and Development of *Qui Tam*, *supra* note 34, at 89.

49. See *id.*

authorized *qui tam* suits.⁵⁰ Similarly, the first and subsequent early Congresses authorized a considerable number of *qui tam* statutes.⁵¹ The Supreme Court acknowledged as much when it stated that “[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.”⁵² Unsurprisingly, the prevalence of these early *qui tam* statutes also declined over the course of the nineteenth century. Most early *qui tam* statutes have either been repealed or remain essentially dormant.⁵³

The only federal *qui tam* provision that remains relevant today is the Federal False Claims Act (FCA). The FCA has been described as the quintessential whistleblower statute because of its longevity and continued relevance.⁵⁴ Congress originally enacted the FCA in 1863, midway through the Civil War, to curb fraud committed against Union contractors.⁵⁵ Since then, the FCA has authorized all private citizens, whom the statute refers to as “relators,” to sue on behalf of the United States to recover a portion of the compensatory damages owed to the government.⁵⁶ While the law fell out of favor for much of the twenty-first century,⁵⁷ the 1986 amendment to the FCA reinvigorated the Act’s *qui tam* framework and elevated its profile and use.⁵⁸

2. *The Modern FCA.* — Since Congress enacted these amendments, FCA *qui tam* claims have become the standard legal vehicle for enforcing claims of fraud against the government. FCA *qui tam* filings have grown

50. See, e.g., *Stevens*, 529 U.S. at 776 (citing Act of Sept. 10, 1692, ch. 21, 1692 N.Y. Laws 10, reprinted in 1 *The Colonial Laws of New York From the Year 1664 to the Revolution* 279, 281 (Albany, James B. Lyon 1894)).

51. See Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 *Yale L.J.* 341, 342 n.3 (1989) (listing several *qui tam* statutes—“in various forms and contexts”—authorized by early Congresses).

52. *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

53. Caminker, *supra* note 51, at 342.

54. See, e.g., Elmore, *supra* note 31, at 369 & n.48 (“The quintessential whistleblower *qui tam* statute is the False Claims Act . . .”).

55. See Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1270 (explaining the historical background of the FCA); Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 *Nova L. Rev.* 869, 871 & n.7 (1997) (same).

56. See *supra* notes 20–24 and accompanying text.

57. See Caminker, *supra* note 51, at 343 (noting that “[r]estrictive statutory amendments and judicial interpretations of the Act drove *qui tam* actions into a period of desuetude”).

58. See *id.* at 343–44; Elmore, *supra* note 31, at 369–70 (noting that in fiscal year 2017, \$3.4 billion of the \$3.7 billion in fraud settlements and judgments paid to the government were filed by FCA relators). For further empirical analysis of modern FCA claims, see Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1270–71; Walsh Burke, *supra* note 55, at 870–71.

from only a few dozen in 1987⁵⁹ to nearly 600 in 2021.⁶⁰ In fiscal year 2021, the DOJ reported \$5.6 billion in settlements and judgments under the FCA,⁶¹ \$1.6 billion of which arose from lawsuits filed by qui tam relators—the private citizens who brought government claims.⁶² Qui tam relators comprise a significant percentage of the FCA cases won by the government,⁶³ even though the FCA allows the DOJ to independently prosecute violators and intervene in any qui tam claim filed.⁶⁴ Two related reasons explain this trend. First, the requirement that relators be an “original source” to the alleged fraud limits frivolous claims and encourages true insiders to come forward.⁶⁵ The second reason is that much fraud is hidden from the government’s view and the information costs of effectively policing fraud only through public enforcers would be exorbitantly high.⁶⁶

Additionally, meritorious claims are likely driving this growth in qui tam relator suits. Professor David Freeman Engstrom’s empirical analysis of FCA qui tam claims showed a “steady maturation” rather than a “gold rush.”⁶⁷ Specifically, Engstrom found that qui tam’s per-filing “efficiency” did not appreciably decline between 1986 and 2014, even as high-dollar, high-publicity settlements have grown more common.⁶⁸ This evidence points away from widespread claims that the FCA has led to an inefficient explosion of qui tam enforcement.⁶⁹ Engstrom was less

59. See Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1270.

60. See Press Release, DOJ, Justice Department’s False Claims Act Settlements and Judgments Exceed \$5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> [<https://perma.cc/K454-Y23Z>] [hereinafter DOJ, False Claims Act Settlements and Judgments].

61. *Id.* The vast majority of this amount, about \$5 billion, was related to health care fraud. *Id.*

62. *Id.*

63. *Id.*

64. See 31 U.S.C. § 3730 (2018). Independent prosecution and intervention have been described as the FCA’s gatekeeper functions. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *Yale L.J.* 616, 620 (2013) [hereinafter Engstrom, *Agencies as Litigation Gatekeepers*] (“While the specific institutional designs vary, these proposals share a common aim: regulating private litigation efforts by granting agencies what I call litigation ‘gatekeeper’ authority.”).

65. 31 U.S.C. § 3730(e)(4); see also Pamela H. Bucy, *Private Justice and the Constitution*, 69 *Tenn. L. Rev.* 939, 947–49 (2002) [hereinafter Bucy, *Private Justice*] (explaining that Congress viewed “helpful” relators as those who brought information the government did not already know).

66. See Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1270 n.87.

67. See David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons From Qui Tam Litigation*, 114 *Colum. L. Rev.* 1913, 1996 (2014) [hereinafter Engstrom, *Private Enforcement’s Pathways*].

68. *Id.* at 1960 & fig.6 (defining efficiency as the “average success rate or dollar return to the federal fisc per qui tam case filed”).

69. *Id.* at 1963.

conclusive, however, in explaining why this was so. Engstrom qualified his empirical analysis with additional anecdotal evidence that pointed toward *qui tam* relator claims increasing in scale and scope, filling gaps left by political gridlock, and potentially taking advantage of a more relaxed DOJ.⁷⁰ Even with these uncertainties in mind, *qui tam*'s importance to the FCA's enforcement scheme is unquestioned. By crafting thorough jurisdictional and administrative controls, Congress transformed a once-forgotten statute into a major enforcement vehicle.

B. *Recent Private Enforcement Regimes*

Central to this Note's argument is the notion that S.B. 8 is not an idiosyncratic event but one point in a larger trend.⁷¹ Since 2021, states across the country have enacted dozens of laws that utilize what Michaels and Noll call the "private subordination" enforcement model.⁷² These laws include those that directly copy S.B. 8's enforcement mechanism to restrict abortion access,⁷³ laws that look to ban transgender students from using the bathrooms of their choice,⁷⁴ and laws that restrict educators from referencing sexual orientation.⁷⁵ Though the majority of the recent bounty enforcement acts have come from conservative state legislatures,⁷⁶ progressive lawmakers in California and Illinois have also pushed bounty enforcement regimes that seek to restrict access to firearms.⁷⁷

70. *Id.* at 1996.

71. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1190 ("S.B. 8 is merely one example of a broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities . . ."); Norris, *supra* note 10, at 1486 ("S.B. 8 is part of a new wave of private causes of action . . .").

72. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1194–211 (canvassing the private bounty landscape and finding state regimes have largely concentrated in three main legislative areas: (1) educational gag laws, (2) erasure of LGBTQ people, and (3) eliminating access to legal abortion).

73. Fetal Heartbeat Preborn Child Protection Act, Idaho Code §§ 18-8801 to -8808 (2024).

74. Tennessee Accommodations for All Children Act, Tenn. Code. Ann. §§ 49-2-801 to 805 (2024).

75. Parental Rights in Education Act, Fla. Stat. Ann. § 1001.42(8)(c) (West 2024).

76. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1224 ("Today's [bounty enforcement] regimes cannot be divorced from modern right-wing movements in America.").

77. See S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–22949.71 (2024) & Cal. Code Civ. Proc. § 1021.11 (2024)) (authorizing "[a]ny person, other than an officer or employee of a state or local governmental entity in this state" to bring a private action against any manufacturers, distributors, transporters, or importers of an enumerated firearm, setting damages at \$10,000 per weapon or firearm precursor part); Firearms Dealer and Importer Liability Act, H.B. 4156, 102 Gen. Assemb. (Ill. 2022) (similar).

The Supreme Court's decision in *Whole Woman's Health v. Jackson*⁷⁸ has exacerbated this trend. There, the Court dismissed a Texas abortion provider's pre-enforcement action seeking to enjoin several state officials, a state court judge, a state court clerk, and a private individual from enforcing S.B. 8, allowing its claims to go forward only against a group of state medical licensing officials.⁷⁹ The Court relied heavily on the law's decentralized enforcement regime. It held that even if the law gave government officials some enforcement authority, an injunction against their enforcement could not bind all of the unnamed private persons who might also bring S.B. 8 suits.⁸⁰ At the time of the decision, court observers noted that the exception for licensing officials offered little consolation because the law intentionally relies on private citizens for enforcement.⁸¹ The Court's decision left S.B. 8 largely intact, essentially nullifying a constitutional right.⁸² In the months following *Whole Woman's Health*, the S.B. 8-style enforcement regime model predictably⁸³ increased in popularity.⁸⁴

While not all recent enforcement regimes use identical language,⁸⁵ scholars have noted several broad characteristics that define the category. Three main structural features identify the recent enforcement regimes: (1) they grant broad standing to ensure community enforcement of the underlying social policy, (2) they severely limit—or completely eliminate—state and local officials' roles in furthering or enforcing the law's mandates, and (3) they regulate behavior in politically contentious areas.⁸⁶

78. 142 S. Ct. 522 (2021).

79. *Id.* at 531–37.

80. *Id.* at 535 (“[A] federal court exercising its equitable authority may enjoin *named* defendants from taking specified actions. But under traditional equitable principles, no court may . . . purport to enjoin challenged ‘laws themselves . . .’” (quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021)) (emphasis added)).

81. See Amy Howe, Court Leaves Texas' Six-Week Abortion Ban in Effect and Narrows Abortion Providers' Challenges, SCOTUSblog (Dec. 10, 2021), <https://www.scotusblog.com/2021/12/court-leaves-texas-six-week-abortion-ban-in-effect-and-narrows-abortion-providers-challenge/> [https://perma.cc/LJ2M-24E4].

82. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1222 (“The practical effect of the Supreme Court's non-decisions and the Fifth Circuit's interventions in the district court's proceedings was to leave S.B. 8 free to operate, eliminating access to legal abortions after the sixth week of pregnancy in the nation's second largest state.”).

83. See *Whole Women's Health*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (“[B]y foreclosing suit against state-court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree.”).

84. See Beatty, *supra* note 2, at 42–44 (noting that the Court's logic allowed states to copy the exact verbiage limiting executive official enforcement authority to avoid judicial review); *supra* notes 71–77 and accompanying text.

85. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1192 (stating that the recent private enforcement regimes vary on several dimensions).

86. See *id.* at 1196–97 (defining recent enforcement regimes).

First, the recent enforcement regimes grant broad standing. For example, Texas's S.B. 8 and California's S.B. 1327 grant standing to "any person" other than a state or government official to pursue a civil action.⁸⁷ Some regimes grant standing to a narrower subset of plaintiffs, such as the Tennessee Accommodations for All Children Act, which first requires schools to make reasonable accommodations to people who object to the presence of transgender people in public restrooms at public school-sponsored events and then grants any "person" who has requested an accommodation a private right of action to recover damages for violations.⁸⁸ But even this narrower subset of plaintiffs is broad enough to encompass most of the community. The Act grants standing to people with a tangential connection to the school who "for any reason" are unwilling to share spaces with transgender people.⁸⁹ Many recent enforcement regimes that regulate behavior in schools mirror the Tennessee law.⁹⁰ So an essential component across the spectrum of recent enforcement regimes is broad standing requirements that enable community enforcement of the substantive social policy.

Second, the recent enforcement regimes limit the involvement of state officials. S.B. 1327 and S.B. 8 both exemplify this feature. Each law contains a clause expressly prohibiting state official enforcement.⁹¹ Other laws go even further. For example, Ohio's H.B. 68—which seemingly allows any person (e.g., opposing coaches, parents, fans) to dispute a high school athlete's gender—prohibits state agencies as well as private, state-affiliated organizations from playing any role in enforcing the law.⁹² As the Supreme Court's ruling in *Whole Women's Health* showed, limiting state actors' involvement can insulate laws from pre-enforcement challenges.⁹³ *Whole Women's Health* demonstrates that even the most constitutionally suspect laws can survive pre-enforcement challenges this way. As these laws often operate on the margins of constitutional rights, limiting state involvement is a central design feature.

87. Cal. Bus. & Prof. Code § 22949.65(a) (2024); Tex. Health & Safety Code Ann. § 171.208 (West 2023).

88. See Tenn. Code Ann. §§ 49-2-803(a), -804 (2024).

89. *Id.* § 49-2-803(a)(1).

90. See Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1198–207 (canvassing recent trans-exclusionary and "anti-CRT" state public education statutes).

91. See Cal. Bus. & Prof. Code § 22949.64(a) ("No enforcement of this chapter may be taken or threatened by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person . . ."); Tex. Health & Safety Code Ann. § 171.207 (using nearly identical text).

92. See *Saving Ohio Adolescents From Experimentation Act*, Ohio Rev. Code Ann. § 3313.5320(D) (2024) ("No agency or political subdivision of the state and no accrediting organization or athletic association that operates or has business activities in this state shall process a complaint, begin an investigation, or take any other adverse action . . .").

93. See *supra* notes 78–82 and accompanying text.

Third, these laws are often responding to contentious political debates. The laws discussed so far have dealt with access to abortion care, gun safety, transgender rights, and critical race theory. Each has a more pronounced political dimension than other government regulations like food safety or utility rates. Michaels and Noll argue that these recent enforcement regimes are the latest invention of a surging Christian nationalist movement that has previously transformed federal statutory protections for civil rights and installed reactionary conservative judges throughout the federal judiciary.⁹⁴ But one does not have to believe that these laws are part of a larger right-wing plot to acknowledge they almost exclusively touch on culture-war flash points.⁹⁵

These recent enforcement regimes are also not cabined to conservative states, as illustrated by California's S.B. 1327.⁹⁶ The law was introduced in the wake of the *Whole Woman's Health* decision and explicitly borrowed S.B. 8's language to create a private enforcement regime regulating the manufacture and distribution of certain firearms within the state.⁹⁷ Like S.B. 8, the law explicitly precludes enforcement by state and local governments and is enforced solely through private litigation.⁹⁸ Also like S.B. 8, the law incentivizes these private enforcers with a \$10,000 prize for successful enforcement actions.⁹⁹ The law's authors acknowledged these similarities, noting that they attempted to utilize S.B. 8's "flawed logic" to try to address what they felt was a significant issue in California.¹⁰⁰

94. Michaels & Noll, *Vigilante Federalism*, *supra* note 10, at 1214–17.

95. See Hannah Natanson, Clara Ence Morse, Anu Narayanswamy & Christina Brause, *An Explosion of Culture War Laws Is Changing Schools. Here's How.*, *Wash. Post* (Oct. 18, 2022), <https://www.washingtonpost.com/education/2022/10/18/education-laws-culture-war/> (on file with the *Columbia Law Review*); Claire Suddath, *The Culture Wars Playing Out in Legislation Near You*, *Bloomberg* (Feb. 24, 2022), <https://www.bloomberg.com/news/newsletters/2022-02-24/-don-t-say-gay-bill-and-other-culture-war-laws-have-chilling-effect> (on file with the *Columbia Law Review*).

96. S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–22949.71).

97. Andrew Willinger, *California's New 'Bounty-Hunter' Gun Law*, *Bloomberg L.* (Aug. 15, 2022), <https://news.bloomberglaw.com/us-law-week/californias-new-bounty-hunter-gun-law> (on file with the *Columbia Law Review*) (reporting that California's passed S.B. 1327, which created a private enforcement regime, was modeled after S.B. 8).

98. Bus. & Prof. § 22949.65(a); see also Willinger, *supra* note 97.

99. Bus. & Prof. § 22949.65(b)(2)(A)(i). This Note focuses on the financial incentives S.B. 1327 provides private enforcers and does not discuss the law's attorney-fee-shifting provision for actions challenging the law's constitutionality. The attorney-fee-shifting provision states that parties seeking "declaratory or injunctive relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any . . . law that regulates or restricts firearms" will be "jointly and severally liable to pay the attorney's fees of the prevailing party." Cal. Civ. Proc. Code § 1021.11(a) (2024). In a recent decision, a federal district court enjoined the provision's enforcement, holding that § 1021.11 "severely chills both First Amendment rights and Second Amendment rights." *Miller v. Bonta*, 646 F. Supp. 3d 1218, 1224 (S.D. Cal. 2022).

100. See Shilpi Agarwal, *How California's Proposed "Gun Safety" Law Threatens to Erode Constitutional Rights for All*, *ACLU Cal. Action* (May 2, 2022), <https://aclucalaction.org/>

Notwithstanding these similarities, S.B. 1327 can be distinguished from S.B. 8 in certain respects. The major distinction is the status of the constitutional right the two laws implicate. When S.B. 8 was passed, *Roe v. Wade* and *Planned Parenthood v. Casey* were still good law. As discussed above, S.B. 8 was a brazen attempt by the Texas legislature to create an end run around the constitutional right to abortion. By comparison, gun regulations are more of an open question. While the Supreme Court's decision in *New York State Pistol & Rifle Ass'n v. Bruen* may have signaled the Court's hostility toward firearm regulations, the majority opinion does not make clear exactly which types of gun regulations are constitutionally prohibited.¹⁰¹ S.B. 1327 then operated on the margins of the constitutional right, while S.B. 8 explicitly flouted established rights.

Even though S.B. 1327 and S.B. 8 do not operate on identical legal and cultural backgrounds, read together they still represent a significant departure from how *qui tam* has primarily operated in the United States. The previous section's discussion of the FCA makes clear that *qui tam* in the United States is most recognizable when government funds are at issue.¹⁰² The government's proprietary interest in the funds it places within the market animates every FCA claim.¹⁰³ Even for those claims in which the FCA is used to vindicate statutory rights created to further a social goal or policy,¹⁰⁴ the FCA's availability as an enforcement vehicle is predicated on there being a material, false claim against the government. The Supreme Court has recently held that the FCA should not be interpreted as a "vehicle for punishing garden-variety . . . regulatory violations."¹⁰⁵ In many FCA cases that implicate public programs, the Court's analysis primarily focuses on vindicating the government's proprietary interest in reclaiming fraudulently acquired funds rather than furthering the public purpose of the program the suit is based on.¹⁰⁶

2022/05/how-californias-proposed-gun-safety-law-threatens-to-erode-constitutional-rights-for-all/ [https://perma.cc/SU22-KYTK] ("Indeed, one of the authors of [S.B. 1327] has touted it as taking advantage of the 'flawed logic' of SB 8, to try to address what is certainly a significant problem in our state: the proliferation of illegal guns.").

101. See 142 S. Ct. 2111, 2132 (2022) ("[W]e do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment . . .").

102. See *supra* section I.A.

103. See *supra* notes 59–66 and accompanying text.

104. See, e.g., *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 668 F. Supp. 2d 548, 570–71 (S.D.N.Y. 2009) (ruling in favor of an FCA *qui tam* relator suit that sought to enforce fair housing obligations).

105. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2003 (2016).

106. See, e.g., *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (holding that for fraudulent military contractor claims "[w]hat [the FCA] demands is . . . that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim *paid* or approved by the Government'" (emphasis added) (quoting 31 U.S.C. § 3729(a)(2) (2006))); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009) (establishing that for claims implicating the Small Business Innovation Research program, the FCA attaches liability "not to the underlying fraudulent activity or

In contrast, S.B. 1327 and S.B. 8 operate specifically to vindicate the public policy purposes behind the law. Both S.B. 1327 and S.B. 8 begin with declarations by the legislature expressing the importance of regulating the private behavior.¹⁰⁷ Neither are predicated on the government's proprietary interest like the FCA, and yet each grants standing to private parties to enforce public regulations—and vindicate public injuries—without any showing of a particularized injury to the private enforcer. S.B. 1327, S.B. 8, and the other recent enforcement regimes thus employ some of the familiar elements of qui tam enforcement while diverging from contemporary qui tam's focus on government funds.

C. *California's Private Attorney General Act*

PAGA allows aggrieved employees to file civil actions against their employers for violations of California's labor code.¹⁰⁸ PAGA claimants bring these civil actions as an "alternative" to civil enforcement actions that could have been brought by California's Labor and Workforce Development Agency (LWDA).¹⁰⁹ If successful, PAGA claimants recover twenty-five percent of any civil penalties defined in the labor code, with the remaining seventy-five percent distributed to the LWDA.¹¹⁰ PAGA therefore shares several features with traditional qui tam provisions. Both the FCA and PAGA allow for private civil actions in place of government enforcement, limit the private citizen's award to a fraction of the total recovery, and primarily benefit the general public, not the party bringing the action.¹¹¹ This is why

to the government's wrongful payment, but to the claim for payment" (internal quotation marks omitted) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999)); *United States ex rel. Lee v. N. Metro. Found. for Healthcare, Inc.*, No. 13-CV-4933(EK)(RER), 2021 WL 3774185, at *14 (E.D.N.Y. Aug. 25, 2021) (rejecting the proposition that all civil rights violations related to housing necessarily give rise to FCA liability).

107. See S.B. 1327, 2022 Cal. Stat. 146 (codified at Cal. Bus. & Prof. Code §§ 22949.60–.71 (2024)) ("The Legislature hereby finds and declares that the proliferation of assault weapons, .50 BMG rifles, and unserialized firearms poses a threat to the health, safety, and security of all residents of, and visitors to, this state."); Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. § 2 (Tex. 2021) (codified at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2023)) ("The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.").

108. See Cal. Lab. Code § 2699(a) (2024).

109. *Id.*

110. *Id.* § 2699(i).

111. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981))); *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1127 (Cal. 2020) ("Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action.").

the California Supreme Court has stated PAGA is “a type of qui tam action.”¹¹²

PAGA’s structure differs from the recent enforcement regimes in three key aspects: (1) PAGA supplements, rather than creates, a new regulatory regime, (2) PAGA grants standing to a narrower group of private parties, and (3) PAGA preserves an agency gatekeeper function.

First, PAGA’s legislative history makes it clear that, unlike S.B. 8, the California legislature passed PAGA to supplement an already existing enforcement regime. Specifically, the California legislature sought to address two problems with the enforcement of California’s Labor Code: (1) several labor code violations were essentially unenforced because they were punishable only by criminal misdemeanor, rather than civil penalty or other sanction; and (2) there was a shortage of government resources to pursue enforcement of labor code violations when a civil penalty was identified.¹¹³ In the committee report published before PAGA’s enactment, the California Assembly Committee on Labor and Employment noted that in 2001, the Division of Labor Standards Enforcement (DSLE) was issuing fewer than 100 wage citations per year throughout the state, despite evidence from the DOL indicating there were over 33,000 ongoing wage violations in Los Angeles’s garment district alone.¹¹⁴ The committee also noted that between 1980 and 2000, the DSLE’s budget grew by twenty-seven percent, while the California workforce grew forty-eight percent over that same period.¹¹⁵ While S.B. 8’s crafters utilized qui tam to avoid judicial review and provide an end run around the constitutional right to an abortion, PAGA was adopted to supplement a pre-existing regulatory scheme that failed to adequately enforce protections for workers within the state.¹¹⁶

PAGA also differs from the recent enforcement regimes by specifically defining the qui tam claimant’s eligibility or standing to sue. As previously stated, PAGA enables an aggrieved employee to bring civil actions against employers in violation of the labor code.¹¹⁷ The Act defines an aggrieved employee as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”¹¹⁸ Conversely, S.B. 8 and other copycat enforcement regimes allow for either “any person” or a slightly narrower class of enforcers (that are still representative of the entire community) to bring civil actions to enforce

112. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 148 (Cal. 2014) (emphasis omitted).

113. See *id.* at 146 (reviewing the legislators’ stated purposes for PAGA enactment).

114. Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 3 (Cal. 2003).

115. *Id.* at 4.

116. See *Iskanian*, 327 P.3d at 146 (citing underenforcement as a reason the legislature passed PAGA).

117. Cal. Lab. Code § 2699(a) (2024).

118. *Id.* § 2699(c).

statutory violations.¹¹⁹ PAGA's sponsors specifically included the aggrieved employee provision to decrease the risk of frivolous claims brought by persons who suffered no harm from the alleged wrongful act.¹²⁰

PAGA also preserves a role for the state agency by defining a set of procedures claimants must follow before asserting their claim. An employee seeking to file a PAGA claim must notify the employer and the LDWA of the specific violations alleged, including facts to support the allegation and a modest filing fee.¹²¹ If the agency does not investigate, issue a citation, or respond to the notice within sixty-five days, the employee is free to sue.¹²² California courts have interpreted this notice requirement to allow state agencies "to decide whether to allocate scarce resources to an investigation."¹²³ Similar to the FCA, PAGA claimants divide the damages and penalties with the LWDA, with the latter receiving three-fourths of the total damages and penalties entered against the defendant.¹²⁴

While these differences certainly distinguish PAGA from the recent enforcement regimes, there are similarities between the two models that support seeing them as *qui tam* variations that are not completely distinct from each other. The most significant similarity is the character of the underlying government claim.¹²⁵ While the legislative history describes PAGA as establishing a "private right of action,"¹²⁶ the California Supreme Court has interpreted the law as being designed primarily to benefit the general public, not the party bringing the action.¹²⁷ That Court emphasized that PAGA claims are fundamentally a law enforcement action designed to protect the public because claimants bring PAGA actions for statutorily defined civil penalties rather than compensatory damages.¹²⁸ The California Supreme Court has also held that PAGA claims do not grant a private right of action because the "government entity on whose behalf the plaintiff files suit is always the real party in interest."¹²⁹ Similarly, the

119. See *supra* notes 87–90 and accompanying text.

120. See Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 7 (Cal. 2003) ("The sponsors . . . have attempted to craft a private right of action that will not be subject to . . . abuse . . .").

121. Cal. Lab. Code § 2699.3(a)(1)(A)–(B).

122. *Id.* § 2699.3(a)(2).

123. *Williams v. Superior Ct.*, 398 P.3d 69, 79 (Cal. 2017).

124. Cal. Lab. Code § 2699.3(i).

125. See *supra* notes 24–28 and accompanying text.

126. See Assemb. Comm. on Lab. & Emp., B. Analysis of S.B. 796, 2003–2004 Reg. Sess., at 7 (Cal. 2003).

127. See *Arias v. Superior Ct.*, 209 P.3d 923, 933–34 (Cal. 2009).

128. *Id.*

129. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 147–48 (Cal. 2014); see also *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130 (Cal. 2020) ("[C]ivil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones' *not* to redress employees' injuries." (quoting *Williams v. Superior Ct.*, 398 P.3d 69, 79 (Cal. 2017))).

recent enforcement regimes do not purport to primarily benefit the party bringing the suit, as the broad standing offered to private enforcers in S.B. 1327 and S.B. 8 demonstrates.¹³⁰

Another notable commonality is that PAGA and some of the recent enforcement regimes provide similar remedies. As previously stated, PAGA claimants who successfully bring enforcement actions are rewarded with a portion of the civil penalties exacted against the defendants. That PAGA restricts claimant remedies to the civil penalties defined in the statute and does not allow compensatory damages further supports the notion that PAGA claimants are not bringing their own claims and are merely stepping into the government's shoes. Similarly, the recent enforcement regimes that exclusively reward private enforcers with the statutory sanctions levied against defendants resemble criminal enforcement¹³¹ and make clear that the government is the true party in interest. Both PAGA and the recent enforcement regimes arguably authorize private citizens to bring what amounts to a law enforcement action against violators.

II. A PRACTICAL TAXONOMY FOR EVALUATING QUI TAM ENFORCEMENT PROVISIONS

Comparing the form and function of the FCA, PAGA, and the recent enforcement regimes reveals important features of qui tam enforcement that recent discussions have missed. The conversation around S.B. 8 and similar private enforcement regimes has largely focused on the differences between the recent enforcement regimes and traditional private enforcement regimes like the citizen suit provisions in federal environmental and antidiscrimination laws.¹³² These accounts very helpfully diagnose the normative shortcomings of the recent enforcement regimes but fail to provide legislators with much instruction on how to evaluate future iterations. As illustrated in Part I, the FCA, PAGA, and the recent enforcement regimes are all variations of qui tam enforcement because each allows private citizens to step into the shoes of the government and bring claims on its behalf. Part I also laid out how the qui tam provision's structural components—the grant of standing, the available remedies, and the connection to other regulatory enforcement—vary between the models. But there is more to say about the theoretical distinctions between these qui tam models and how one should assess their practical and normative effects.

This Part discusses these theoretical distinctions as follows. First, it considers the differences between the types of government claims

130. See *supra* notes 86–89 and accompanying text.

131. See Guha Krishnamurthi, *SB 8's Fines Are Criminal*, *Yale J. on Regul.: Notice & Comment* (Sept. 11, 2022), <https://www.yalejreg.com/nc/sb8-fines-criminal/> [<https://perma.cc/393D-ZM3B>] (arguing S.B. 8 penalties are more accurately described as criminal sanctions).

132. See *supra* notes 12–17 and accompanying text.

brought under each qui tam model and puts forth a novel categorization distinguishing between public and private qui tam claims. Next, it discusses qui tam's normative and practical purposes and presents criteria for assessing each. Finally, it synthesizes and distills this information into a practical Taxonomy for qui tam to help legislators distinguish between legitimate and illegitimate bills.

A. *The Public–Private Distinction*

This Note argues qui tam provisions can be distinguished at a high level by the character of the underlying government claim the qui tam provision is enforcing. As the discussion in the previous Part highlights, the government claims underlying qui tam provisions can be public or private in nature.

The FCA and PAGA provide useful examples of this distinction. As previously stated, the FCA seeks to protect the government's proprietary interest in the funds it places in the market.¹³³ The government's proprietary interest in these funds animates every FCA claim. Also, the fact that FCA relators' claims are connected to government programs is often inconsequential since a court's analysis regularly turns on the materiality of the fraudulent claims, not their connection to the underlying social policy.¹³⁴ Any market participant can bring this type of restitution claim when they are a victim of fraud. Accordingly, the underlying government claim in FCA relator suits can be thought of as a private qui tam action.

PAGA and the recent enforcement regimes are different. While the FCA aims to recover funds allocated through fraud when the government acts as a market participant, PAGA and the recent enforcement regimes' purpose is to enforce statutory regulations on private behavior. These regulatory enforcement actions resemble criminal sanctions,¹³⁵ and they are the types of claims normally reserved for government officials. Put differently, PAGA and the recent enforcement regimes can be described as public qui tam models because the underlying claim is of the sort typically brought by a public actor (e.g., a prosecutor or agency regulator).

Congress's definition for inherently governmental activity in the Federal Activities Inventory Reform Act (FAIR Act) offers a helpful analogue for understanding the public–private qui tam concept.¹³⁶ The FAIR Act defines an activity as inherently governmental when it is so "intimately related to the public interest" as to mandate performance by federal employees.¹³⁷ The OMB has issued guidance establishing the "nature of the function" test for determining inherently governmental

133. See *supra* notes 102–106 and accompanying text.

134. See *supra* notes 102–106 and accompanying text.

135. See *supra* notes 125–130 and accompanying text.

136. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382, 2384 (codified at 31 U.S.C. § 501 note (2018)).

137. *Id.*

functions.¹³⁸ The nature of the function test asks whether the function involves the exercise of “sovereign powers,” which are “governmental by their very nature.”¹³⁹

Claims brought under PAGA or the recent enforcement regimes clearly satisfy the nature of the function test as they are governmental by their nature. Both models authorize claimants to levy civil penalties against statute violators. Imposing statutory penalties that are not tied to any recoupment of government funds serves a distinctly punitive function.¹⁴⁰ This punitive imposition falls squarely within the police powers of a state and is by nature an exercise of sovereign authority.¹⁴¹ This is not to say that the federal standard just described has any legal significance for how these state laws operate or are interpreted. But it does suggest that PAGA and the recent enforcement regimes are operating in areas that can be described, at least on this account, as inherently governmental, or what this Note refers to as public.

The state government transferring its standing to PAGA or recent enforcement regime claimants to bring claims that are inherently governmental raises important questions about the claimants’ qualifications. If these qui tam models are operating in public areas, then the claimants are bringing claims that are normally reserved for government officials. It is akin to the government allowing private citizens to prosecute each other for criminal violations. These types of claims are normally reserved for government officials precisely because private motivations may not properly consider the effects on the public. A critical question that arises from this analysis is: When is deputizing private citizens in this way appropriate or beneficial? This question is addressed more fully in following sections.¹⁴²

138. Publ’n of the Off. of Fed. Procurement Pol’y, OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56237 (Sept. 12, 2011). The guidance also established the “exercise of discretion” test, which states that a function is inherently governmental when it requires the exercise of discretion that commits the government to “a course of action where two or more alternative courses of action exist,” and the decisionmaking is not limited by other policies or guidance. *Id.* If either of the tests are met, the activity is considered an inherently governmental function. Since the PAGA and recent enforcement regime qui tam models satisfy the nature of the function test, and the nature of the function test is a more helpful tool for explaining the public–private distinction, this Note will not discuss the exercise of discretion test further.

139. *Id.*

140. See *United States v. Halper*, 490 U.S. 435, 448–49 (1989) (holding that a civil sanction that serves the goals of punishment, like deterrence or retribution, is a punishment).

141. See Francis C. Amendola et al., 16A Corpus Juris Secundum: Constitutional Law § 699, Westlaw (database updated Mar. 2024) (“Police power is the exercise of the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society.”).

142. See *infra* section II.B.

In sum, qui tam models can first be categorized based on whether the underlying government claim is of a public or private nature. While every qui tam action can be thought of as a public claim in the sense it is brought on behalf of the government, the discussion above highlights how the government's relationship to the defendant affects the character of the suit. In the FCA context, the government seeks to be made whole from the defendant's fraudulent actions. The government's relationship to the defendant is then equivalent to any normal market participant seeking remedial action for a private wrong. This is a private qui tam action. But the government's relationship to the defendant is much different in the PAGA or recent enforcement regime context. Under those models, the government is looking to impose sanctions pursuant to its sovereign right to promote public safety and the general welfare of society. This can be described as an inherently governmental function and what this Note calls a public qui tam action.

B. *Qui Tam's Practical and Normative Objectives*

While the public-private distinction is theoretically valuable for identifying the different qui tam models, it sheds little light on whether the deputization is appropriate or how lawmakers should view proposed qui tam provisions. That assessment requires an accounting of the practical and normative objectives of qui tam. By taking these underlying aims into consideration, lawmakers will be able to assess the legitimacy of proposed qui tam actions.

This Note relies heavily on Professor Norris's article, *The Promise and Perils of Private Enforcement*, to frame qui tam's core principles.¹⁴³ In that article, Norris recounts the rationales that supported popular participation in regulatory enforcement. Specifically, Norris argues that early twentieth-century debates surrounding the adoption of the modern regulatory state are particularly helpful in framing current discussions of private enforcement regimes.¹⁴⁴ Following the Industrial Revolution, these debates asked critical questions about how society should be regulated in an evolving context and who should enforce those regulations.¹⁴⁵ Drawing from this history, Norris articulates three core rationales to explain why popular participation in regulatory governance (i.e., private enforcement in courts) could be democratically valuable: Private enforcement can (1) reduce power imbalances; (2) allow affected persons and communities to bring the experience of expertise to crafting, interpreting, and enforcing regulatory norms; and (3) fuel deliberation.¹⁴⁶ Norris puts forth a convincing theoretical framework for judging a private enforcement regime's democratic value. In addition to the public-private distinction

143. Norris, *supra* note 10.

144. See *id.* at 1508.

145. See *id.*

146. *Id.* at 1509–15.

laid out above, this Note's Taxonomy incorporates a version of these rationales to assist lawmakers in judging the efficacy and democratic legitimacy of proposed *qui tam* actions.

This Note, however, uses the popular participation core principles differently than Norris's article. To simplify the analysis, this Note places the three core principles into practical and normative buckets. Whereas Norris's analysis viewed these principles as factors in a holistic evaluation,¹⁴⁷ this Note argues that the factors can be more readily operationalized if their description incorporates their effect on the evaluation of the *qui tam* provision. Accordingly, the first factor, reducing structural imbalances, and the third factor, fueling deliberation, can best be described as normative factors because they are relevant to what the *qui tam* provision should achieve. The second factor, leveraging expertise and allowing for regulatory dynamism, however, is better described as a practical factor because it is relevant to how the *qui tam* provision should function. The Taxonomy therefore relies heavily on Norris's theoretical framework, while modifying it to better serve its purpose to help legislators evaluate prospective *qui tam* provisions.

The Taxonomy also differs from Norris's account by offering an additional practical factor legislators should bear in mind when considering "private" *qui tam* provisions. In private *qui tam*, the private party brings claims that are analogous to what an ordinary private citizen could bring against another market participant who had defrauded them in a market transaction. These private *qui tam* provisions are not regulating behavior but seeking redress for past wrongs. For this reason, Norris's participatory democracy theory—which, as described above, draws its analytical force from the debates surrounding the enactment of the modern regulatory regime—is less applicable to private *qui tam* provisions. To account for this, the Taxonomy offers different criteria for private and public *qui tam* provisions when determining if they fulfill their practical purpose. To determine the practicality of public *qui tam*, legislators should ask whether the provision satisfies Norris's second core principle: Does the provision allow affected persons to leverage the expertise of experience to inform when to trigger an enforcement action? To determine the practicality of private *qui tam*, legislators should instead ask whether the provision effectively plays a structural, gap-filling role in regulatory governance.

The scholarship on *qui tam* enforcement and the lessons from the FCA's revival support using regulatory gap-filling as the criteria for determining private *qui tam* practicality. The gap-filling role is the most prominently featured defense of the utility and functionality of private *qui tam*.¹⁴⁸ The importance of the gap-filling theory for private *qui tam*

147. See *id.* at 1490–91.

148. See, e.g., Alexandra Lahav, *In Praise of Litigation* 40–41 (2017) ("When the government fails to regulate, private litigation fills the breach. . . . [L]itigation works as a

provisions is also apparent in the 1986 FCA amendments. Scholars have noted that one of the most significant changes made by the 1986 amendment was its alteration of the Act's jurisdictional bar that allowed relators to go forward whenever they were an original source of information about the fraud.¹⁴⁹ Congress's rationale behind the jurisdictional bar was to limit the potential relators to those individuals who could offer helpful information to the government, the thought being that relators should not share in the government's compensatory damages if the government already knew about the fraud being disclosed or if the information disclosed did not make the government's case stronger.¹⁵⁰ This history and scholarship suggest the structural, gap-filling role can be an effective means for determining the practicality of a private qui tam provision.

The Taxonomy also differs from Norris's framework by giving increased weight to the factors that affect the operation of the provision. As a tool for legislatures, the Taxonomy prioritizes whether a provision satisfies qui tam's practical purposes over its normative purposes. Generally speaking, legislatures enact statutes to improve their constituents' material conditions and to promote the general welfare pursuant to their police powers. It follows then that a qui tam provision that does not enable effective enforcement of federal or state laws¹⁵¹ frustrates this

complement to other types of enforcement."); Zachary D. Clopton, Redundant Public-Private Enforcement, 69 Vand. L. Rev. 285, 290 (2016) (arguing that private enforcement can respond to public enforcement "errors, resource constraints, information problems, [and] agency costs"); Engstrom, Agencies as Litigation Gatekeepers, *supra* note 64, at 632 ("In regulatory regimes where information about wrongdoing remains hidden—and so is prohibitively costly for public enforcers to discover or dislodge—there will be little or no enforcement at all unless private parties can be induced to surface information about wrongdoing."); Myriam Gilles, The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans, 86 Fordham L. Rev. 2223, 2228 (2018) ("[S]tate consumer and labor law . . . goes underenforced when private attorneys general are disempowered . . .").

149. 31 U.S.C. § 3730(e)(4) (2018); see also Bucy, Private Justice, *supra* note 65, at 947–48 (highlighting how the altered jurisdictional bar contributed to an increased volume in FCA claims following the amendments' enactment).

150. See Pamela Bucy, White Collar Practice: Cases and Materials 488–89 (3d ed. 2005) (noting that the jurisdictional bar was originally included "in an effort to ensure that relators do not simply file an FCA action that re-packages information which government relators already know about"); see also United States ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) ("[T]he principal intent[] [of the 1986 amendments] was to have the *qui tam* suit provision operate somewhere between . . . unrestrained permissiveness . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources."); United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984) (reversing a lower court decision allowing the State of Wisconsin to maintain an FCA action because the information was already in the federal government's possession).

151. What counts as effective enforcement depends on the action the government is seeking to regulate and the level of enforcement they are seeking to implement. See Engstrom, Harnessing the Private Attorney General, *supra* note 25, at 1253–54 (arguing that optimal private enforcement design requires lawmakers to consider how they will harness

larger legislative goal. To put it plainly, an impractical qui tam provision may not be worth the paper it's printed on.

Lawmakers drafting or evaluating qui tam provisions can determine whether a qui tam provision will enable effective enforcement by checking if the provision satisfies the respective practical functions of public and private qui tam. Public qui tam satisfies its practical function when it allows affected persons and communities to leverage the expertise of experience when enforcing the law. Private qui tam does so when it effectively performs a structural, gap-filling function. When either of those provisions fails to satisfy its function, the qui tam provision may be outsourcing enforcement to parties without the requisite experience or knowledge to do so.¹⁵² This could lead to “[w]asteful overdeterrence and unnecessary expenditure of social resources.”¹⁵³ For these reasons, the Taxonomy treats the practical purpose of qui tam as a threshold factor for legislative determinations of a qui tam provision's legitimacy.

C. *Establishing a Practical Framework*

When these different elements come together, a framework begins to emerge. The Taxonomy first asks whether the qui tam claimant's underlying governmental claim is best categorized as public or private.¹⁵⁴ From this starting point, the Taxonomy lays out three tiers a qui tam provision may fall under: (1) qui tam that fulfills its practical and normative purpose; (2) qui tam that fulfills its practical purpose but fails to live up to its normative purposes; and (3) qui tam that fails to accomplish either its practical or normative purposes.¹⁵⁵ The table below lays out these distinctions and presents the six categories of qui tam provisions the Taxonomy contemplates.

private enforcers to sufficiently incentivize them to bring suits and to constrain them from bringing nonmeritorious claims).

152. Norris, *supra* note 10, at 1512–14 (“The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.” (internal quotation marks omitted) (quoting John Dewey, *The Public and Its Problems* 154 (1927))).

153. Engstrom, *Harnessing the Private Attorney General*, *supra* note 25, at 1254.

154. See *supra* section II.A.

155. See *supra* section II.B.

TABLE 1.

Practical Taxonomy for Qui Tam Enforcement			
	(1)	(2)	(3)
Public	Leverages expertise of affected individuals/communities and fulfills normative purposes	Leverages expertise of affected individuals/communities but fails to live up to normative purposes	Fails to satisfy the practical purpose
Private	Fills regulatory gaps by effectively incentivizing private parties to bring claims forward and fulfills normative purposes	Fills regulatory gaps by effectively incentivizing private parties to bring claims forward but fails to live up to normative purposes	

Within this structure, a qui tam provision is only legitimate if it fulfills its practical purpose: either allowing affected persons and communities to bring their expertise of experience to interpreting and enforcing regulatory norms or constructing a claimant pool that incentivizes helpful informants to come forward.¹⁵⁶ Conversely, qui tam provisions in the third tier that fail to fulfill this practical purpose would be illegitimate per se. Qui tam provisions in the second tier will be a closer call, and their legitimacy will depend on weighing the normative factors Norris proposes in his theory of democratic participation.

The following Part revisits the qui tam models discussed above and orients them within the Taxonomy to illustrate its use.

III. HOW STATE LEGISLATURES SHOULD VIEW QUI TAM PROVISIONS MOVING FORWARD

A. *Employing the Taxonomy*

Before analyzing the qui tam models under this Taxonomy, it is important to first acknowledge a limitation of using these laws as illustrations. The Taxonomy is designed to help legislatures distinguish between legitimate and illegitimate qui tam provisions when they are proposed. The Taxonomy's goal then is to answer the question posited earlier: whether deputizing citizens to enforce statutory obligations through a qui tam provision is both appropriate and beneficial in a specific

156. See *supra* notes 150–153 and accompanying text.

context. The following sections analyze qui tam provisions discussed earlier, at times using empirical data and anecdotal observations to evaluate whether the statutes satisfy the Taxonomy's criteria. Since the Taxonomy is developed to provide an ex ante framework for evaluating proposed statutes, using ex post enforcement data seems inappropriate for this task. It is important then to emphasize that the foregoing analysis is merely an illustration of how one can employ the Taxonomy. In practice, the analysis would rely on projections and predicted effects rather than concrete data. And while this Taxonomy could be adapted to evaluate a host of provisions that are already in effect, that is beyond the scope of this Note.

1. *Private Qui Tam—The FCA.* — The FCA is a first-tier private qui tam provision under the Taxonomy because it satisfies both the practical and normative purposes of private qui tam. Starting with the practical purpose, the FCA plays a vital gap-filling role in the government's enforcement of fraud claims. In an influential article on private attorneys general, Professor William Rubenstein described qui tam relators under the FCA as “substitute attorneys general” who literally fill in for the Attorney General's office.¹⁵⁷ Scholars have noted that the DOJ relies on qui tam relators to “test the waters” in federal court before the agency chooses to spend its reputational capital and resources.¹⁵⁸ The DOJ has also acknowledged the practical effect FCA relators have on recovering fraud against the government, saying in a press release that “[t]he False Claims Act is one of the most important tools available to the department both to deter and to hold accountable those who seek to misuse public funds.”¹⁵⁹ The FCA model therefore easily satisfies private qui tam's practical purpose as it offers an effective incentive for private parties to bring claims, and those claims are sufficiently supported by agency gatekeepers.¹⁶⁰

The FCA also satisfies the normative purposes the Taxonomy considers. First, the FCA minimizes power imbalances by providing members of the public with a direct role in arguing against violations of regulatory

157. See Rubenstein, *supra* note 27, at 2143–46 (“[FCA relators] literally perform the exact functions of the attorney general's office though they themselves are not attorneys general.”).

158. See Engstrom, *Private Enforcement's Pathways*, *supra* note 67, at 1986–87 (describing the DOJ's reliance on FCA relators as a product of being “resource constrained and risk-averse”).

159. DOJ, *False Claims Act Settlements and Judgments*, *supra* note 60 (internal quotation marks omitted) (quoting Acting Assistant Attorney General Boynton).

160. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 *Law & Contemp. Probs.* 167, 199–200 (1997) (“[T]he *qui tam* model offers a unified structure combining the incentives of private litigation with the benefits of government supervision and monitoring.”). Successful FCA enforcement has led commentators to urge expanding the FCA qui tam models to other areas. See Barry M. Landy, Note, *Detering Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File Qui Tam Lawsuits*, 94 *Minn. L. Rev.* 1239, 1264–68 (2010) (urging Congress to amend the FCA to explicitly grant public employees standing to serve as relators).

norms.¹⁶¹ Particularly, the FCA's structure has enabled the development of a highly specialized relators bar who continuously bring successful claims on behalf of individual relators.¹⁶² The availability of this relators bar has resulted in average relators reclaiming substantially larger impositions than business competitors and also gaining DOJ intervention on their claims at a higher rate.¹⁶³ Second, the FCA increases deliberation. Scholars have noted that the availability of qui tam relators has sometimes shaped enforcement priorities as private relators put forward claims not initially considered by agency enforcers.¹⁶⁴ And while there is some evidence that qui tam relators have pushed FCA enforcement into statutory ambiguities,¹⁶⁵ some argue that this statutory drift is necessary to combat agency capture and regulatory stagnation.¹⁶⁶ The FCA clearly satisfies both of private enforcement's normative purposes since it is structured in a way that minimizes power imbalances while increasing deliberation. It is no mystery then why the FCA has been such a regulatory success story.¹⁶⁷

2. *Public Qui Tam—PAGA.* — PAGA is also a first-tier qui tam provision. As previously discussed, the nature of the underlying government claim places PAGA within the “public” qui tam category.¹⁶⁸ That means the practical purpose is satisfied only if the Act allows affected individuals and communities to leverage their expertise of experience to determine when to trigger enforcement actions. PAGA satisfies this requirement because it limits its grant of standing to aggrieved employees directly affected by labor code violations.¹⁶⁹ Norris argues that people who are subject to regulated behavior often satisfy private enforcement's practical purpose

161. See Norris, *supra* note 10, at 1520–21.

162. See Engstrom, *Private Enforcement's Pathways*, *supra* note 67, at 1995 (“[T]he rapid emergence of a highly specialized relators’ bar has given the DOJ access to a ready pool of repeat-play private enforcers with strong reputational incentives to toe the government line and predict, rather than force, agency enforcement priorities.”).

163. See Engstrom, *Harnessing Private Enforcement*, *supra* note 67, at 1295–98 (comparing success rates and DOJ intervention rates between insider and outsider qui tam litigants).

164. See Engstrom, *Private Enforcement's Pathways*, *supra* note 67, at 1986 (noting the DOJ increased its activity in policing healthcare fraud in the early 2000s after intervening in a qui tam action); David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust “Reposed in the Workmen”*, 30 *J. Legal Stud.* 531, 565 (2001) (“The availability of qui tam proceedings has also influenced enforcement priorities.”).

165. See Engstrom, *Private Enforcement's Pathways*, *supra* note 67, at 2000–01 (“[A] qui tam regime may, relative to a cash-for-information approach, prove more susceptible to statutory ‘drift’ that is largely outside of public control as private enforcers rush to exploit regulatory ambiguities . . .”).

166. See *id.* at 2003–04 (“[P]rivately driven legal innovations . . . can improve, rather than degrade, democratic politics by offering a salutary counterweight to ‘capture’ and other patterns of political control within the legislative or administrative process.”).

167. See Bucy, *Private Justice*, *supra* note 65, at 948 (describing the FCA as an “extraordinarily successful” regulatory tool).

168. See *supra* notes 120–130 and accompanying text.

169. See *supra* note 117 and accompanying text.

because they have both the information and the dignitary interest to trigger regulatory enforcement.¹⁷⁰ And while ex-post data is not necessary for this analysis, the data on PAGA claims supports this notion. In 2019 alone, California collected over \$88 million in PAGA claims.¹⁷¹ An analysis of these claims showed that PAGA claimants generate high-quality complaints and regularly bring forward labor violations that would otherwise have gone unenforced.¹⁷² Additionally, PAGA has become the only legal recourse for millions of California employees who have signed arbitration agreements.¹⁷³ PAGA enables these workers to highlight labor violations that would otherwise be relegated to the arbitration system.¹⁷⁴ PAGA claimants then, having been personally affected by the regulated entity, have the information and interest necessary to bring quality claims against their employers. PAGA clearly satisfies the practical purpose of public qui tam.

PAGA also satisfies the normative purposes of public qui tam. There is no question whether the Act minimizes power imbalances. It allows employees to enforce the state's labor code against their employers. The employer–employee relationship is perhaps the quintessential example of a power imbalance and one of the first targets of the burgeoning regulatory state in the early twentieth century.¹⁷⁵ Despite almost a century of federal legislation regulating labor law, power imbalances between employers and workers persist today and by some accounts are worse than they have ever been.¹⁷⁶ PAGA operates against this backdrop, and while it does not remove half a century of hostility toward labor law,¹⁷⁷ it does offer employees additional power to hold employers accountable for labor code

170. See Norris, *supra* note 10, at 1523.

171. See Rachel Deutsch, Ray Fuentes & Tia Koonse, California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions From Lawbreaking Corporations 8 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/02/UCLA-Labor-Center-Report_WEB.pdf [<https://perma.cc/5DA5-G6UJ>].

172. *Id.* at 9.

173. See *id.*

174. See Andrea Cann Chandrasekher & David Horton, Arbitration Nation: Data From Four Providers, 107 Calif. L. Rev. 1, 9 (2019) (finding that businesses that arbitrate often in a single arbitration provider “perform particularly well within that institution”).

175. See Hiba Hafiz, Structural Labor Rights, 119 Mich. L. Rev. 651, 655 (2021) (describing the National Labor Relations Act's passage in 1935 as a turning point in American labor history and arguing the act was designed to overcome the power disparity between employers and their workers).

176. See *id.* at 656 (“[W]hile *employers* retain rights to integrate, disintegrate, consolidate, or tacitly coordinate their power to their advantage under corporate, antitrust, contract, and property law, *workers'* collective rights have eroded to the point where they lack any substantive ability to function as *counter* structure—as effective countervailing power against employers.” (footnote omitted)).

177. See Marion Crane & Ken Matheny, Beyond Unions, Notwithstanding Labor Law, 4 U.C. Irvine L. Rev. 561, 578 (2014) (“Broad public support for labor law and unionism with its ideology of collectivism has declined since the New Deal era, and labor law is seen as ‘out of sync’ with a legal architecture premised on individual rights.” (footnote omitted)).

violations. PAGA also increases deliberation on the issues of worker protection and labor law in California. PAGA claims have nudged California corporations to shift their practices and adopt a culture inching closer to compliance.¹⁷⁸ Due to PAGA, human resource professionals have strongly urged employers to increase investment in efforts to comply with the labor code.¹⁷⁹ Additionally, the LDWA's annual average recovery of \$42 million in civil penalties and filing fees from PAGA claims goes toward enhancing business education and compliance efforts.¹⁸⁰ In addition to satisfying the practical purposes, PAGA also satisfies both of the normative purposes underlying public qui tam enforcement. PAGA can then be categorized as a first-tier (and thus legitimate) public qui tam provision within the Taxonomy.

B. *Reevaluating Recent Enforcement Regimes*

One major takeaway from the previous section is that PAGA has proven to be a practically and normatively acceptable enforcement mechanism for California's labor code. But, despite its success, few states have proposed their own PAGA provisions, and besides California, none have put the model into effect.¹⁸¹ On the other hand, many states, both conservative and liberal, have enacted statutes that fall within the recent enforcement regime model.¹⁸² While an analysis of each of these statutes could further refine the Taxonomy's categorization method, that is beyond this Note's scope. Instead, this Part compares PAGA, which was analyzed in the previous section, with S.B. 1327, California's gun safety statute that was briefly discussed in section I.B. Comparing these two California statutes can draw a sharper distinction between the PAGA qui tam model and the recent enforcement regime model without having to discuss every variation the recent enforcement regime model may take. This section will then draw on this comparison to argue that states should

178. See Deutsch et al., *supra* note 171, at 7.

179. See *id.*

180. See Cal. Lab. Code § 2699(j) (2024) ("Civil penalties . . . shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code . . ."); Deutsch et al., *supra* note 171, at 8 (noting the LDWA's annual average recovery).

181. See Labor of Law: Ruling Could Slow Push for Laws Allowing Workers to Sue on Behalf of Government, Am. Law. (Apr. 7, 2022), <https://plus.lexis.com/api/permalink/8b9c134c-8e65-40d0-b432-92b5ef5a55c6/?context=1530671> (on file with the *Columbia Law Review*) (reporting that Colorado, Connecticut, Illinois, Massachusetts, New Jersey, New York, Oregon, and Washington have proposed or considered laws similar to PAGA, but none have actually passed).

182. See *supra* notes 71–77 and accompanying text; see also *supra* notes 85–95 and accompanying text (describing the three common characteristics across the recent enforcement regimes: (1) broad standing (2) little to no government oversight, and (3) a focus on contentious political issues).

reverse their current trend and explore implementing the PAGA qui tam model instead of the recent bounty regime.

The Taxonomy put forth in Part II is a useful starting point to compare PAGA and S.B. 1327. Like PAGA, S.B. 1327 is a public qui tam provision because the underlying claim is akin to a criminal proceeding against statute violators.¹⁸³ But, unlike PAGA, for the reasons explained below, S.B. 1327 fails to satisfy either of the Taxonomy's criteria for a legitimate public qui tam provision. In other words, S.B. 1327 is neither practically nor normatively justified.

First, S.B. 1327 fails the practical purpose test because it does not center affected individuals and communities within its enforcement scheme. The statute allows “[a]ny person, other than an officer or employee of a state or local governmental entity,” to bring civil actions enforcing the statute’s prohibitions on manufacturing and distributing certain firearms.¹⁸⁴ This broad grant of standing is not sufficiently narrowed to put the qui tam enforcers in a better position than government officials to enforce the statute. The enforcers in this scheme, just like S.B. 8 (which this law copies directly from), do not have the information or interest to trigger regulatory enforcement in any even-handed or impartial way.¹⁸⁵ The statute does not require the enforcers to be victims of gun violence or to have inside information on a ghost-gun-manufacturing operation, either of which would focus the enforcer pool. It simply requires them not to be connected to the state to insulate the law from pre-enforcement review.¹⁸⁶ Without this particularized interest, there is no practical value in allowing private citizens to bring what amount to criminal enforcement actions.¹⁸⁷

In the Taxonomy, failing the public qui tam practical purpose test places the statute in the per se illegitimate third tier of qui tam provisions. But notwithstanding this placement, determining whether S.B. 1327 fulfills the normative objectives can draw out the distinctions between it and PAGA even further. First, it is unclear whether the statute exacerbates or minimizes power imbalances. In a recent study, nearly one in four Californians reported that they or someone in their household owned at least one firearm.¹⁸⁸ Of the 19.9 million firearms owned in California, only five percent were described as the assault-type weapons regulated by

183. See *supra* section I.B.

184. Cal. Bus. & Prof. Code § 22949.65(a) (2024).

185. See Norris, *supra* note 10, at 1512–15 (providing the rationale behind this Taxonomy’s practicality requirement).

186. See *supra* notes 91–93 and accompanying text.

187. See *supra* section II.A.

188. See Nicole Kravitz-Wirtz, Rocco Pallin, Matthew Miller, Deborah Azrael & Garen J. Wintemute, *Firearm Ownership and Acquisition in California: Findings From the 2018 California Safety and Well-Being Survey*, 26 *Inj. Prevention* 516, 517 (2019).

S.B. 1327.¹⁸⁹ Such small ownership numbers would seem to cut against arguments that S.B. 1327 exacerbates power imbalances, but it is also relevant to consider who owns these weapons. That same study found that the vast majority of assault-type weapons were owned by people who own ten or more firearms,¹⁹⁰ a group that tends to be whiter, older, and more male than other gun owner groups.¹⁹¹ To further complicate the matter, the statute also addresses the sale and distribution of unserialized or “ghost guns,” which community violence-reduction workers say have had an outsized harm on socioeconomically marginalized communities throughout California.¹⁹² Untangling these threads to come to a definitive answer on this point is beyond the scope of this Note. For now, it is enough to say that the effect that S.B. 1327’s prohibitions on the sale or distribution of assault-type weapons and ghost guns has on pre-existing power imbalances is still unclear.

The other normative factor, increasing deliberation, more clearly cuts against S.B. 1327. The Act is designed in many ways to chill behavior and limit deliberation. For example, the Act removes a defendant’s ability to defend against an enforcement action by asserting nonmutual issue and claim preclusion.¹⁹³ This means winning on one claim would not stop other enforcers from bringing actions on the same matter, even if the issues had already been litigated. Under S.B. 1327, the defendant also cannot claim that the law violates the constitutional rights of a third party,¹⁹⁴ even though the gun distributor can argue that their right to sell these weapons is interdependent with their customers’ Second Amendment rights.¹⁹⁵ Much like S.B. 8 then, the law aims to chill behavior by threatening limitless private lawsuits and removing avenues for challenging the law’s constitutionality. California Governor Gavin Newsom proclaimed as much when he tweeted “[i]f the most efficient way to keep

189. *Id.* (noting that assault-type weapons made up 8.9% of the long guns, which in turn made up 55.3% of the total firearms reported, so assault-type weapons made up 4.92% of the total firearms reported).

190. *Id.*

191. See *id.* online supplementary app. 3.

192. See Abené Clayton, *Ordered Online, Assembled at Home: The Deadly Toll of California’s ‘Ghost Guns’*, *The Guardian* (May 18, 2021), <https://www.theguardian.com/us-news/2021/may/18/california-ghost-guns-deadly-toll> [<https://perma.cc/CRU6-NNCW>].

193. Cal. Bus. & Prof. Code § 22949.65(f)(5) (2024).

194. *Id.* § 22949.66(a) (“A defendant against whom an action is brought under Section 22949.65 [generally] does not have standing to assert the right of another individual to keep and bear arms under the Second Amendment to the United States Constitution as a defense to liability under that section . . .”).

195. See *Craig v. Boren*, 429 U.S. 190, 196 (1976) (finding third-party standing where continued enforcement of a statute would “materially impair the ability of” third parties to engage in constitutional behavior (internal quotation marks omitted) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972))).

these devastating weapons off our streets is to add the threat of private lawsuits, we should do just that.”¹⁹⁶

The above analysis illustrates the benefits of adopting a PAGA qui tam model rather than the recent enforcement regime model. PAGA is more practical than S.B. 1327 because it limits enforcement to those who are directly affected by the regulated behavior. This narrower grant of standing helps to ensure enforcement actions have a sufficient informational basis and are in line with the public interest. PAGA is also more normatively justifiable than S.B. 1327. While S.B. 1327’s impact on pre-existing power imbalances is unclear, it has a severe chilling effect on behavior and was specifically crafted to decrease deliberation. Conversely, PAGA has given workers a means to collectively hold employers accountable for labor code violations, and the majority of its proceeds have gone to increasing enforcement and education efforts. PAGA outperforms S.B. 1327 on each of the Taxonomy’s criteria. It is a more practical and normatively justifiable qui tam enforcement regime.

C. *The PAGA Model’s Uncertain Future*

The comparison above, and PAGA’s regulatory success,¹⁹⁷ raises the question of whether states are overlooking the PAGA qui tam model as an enforcement vehicle. Some scholars have argued that the PAGA qui tam model should be employed in more states but caution against applying the model outside of the employment law context.¹⁹⁸ Other scholars have argued that PAGA provides a workable mechanism outside of its original context and that states can utilize the model to hold defendants accountable for all mass harms (e.g., consumer protection) without being vulnerable to FAA preemption under *AT&T Mobility LLC v. Concepcion*.¹⁹⁹ Some have also considered adopting PAGA qui tam models for regulatory areas other than labor and consumer protection.²⁰⁰ These scholars believe

196. Office of the Governor of California (@Cagovernor), Twitter (Dec. 11, 2021), <https://twitter.com/Cagovernor/status/1469865007517089798> [<https://perma.cc/3W3N-VADQ>] (internal quotation marks omitted).

197. See *supra* notes 171–174 and accompanying text.

198. See Elmore, *supra* note 31, at 411 (arguing the risks of qui tam legislation generally could be minimized by using agency oversight to account for the interests of affected employees or by cabining the PAGA model to only allowing designated nonprofits to bring employee claims).

199. 563 U.S. 333, 341 (2011); see also Alexander, *supra* note 31, at 1234 (“A statute similar to PAGA that created a mechanism for private plaintiffs to sue to enforce statutory penalties in a *qui tam* action could offer a way for states to obtain private enforcement of state law in standardized transactions involving harm to large numbers of people”); Gilles, *supra* note 148, at 2237 (“[T]he public nature of the qui tam action and the penalty structure should allow enabling legislation [like PAGA] to elude FAA preemption under *Concepcion* and its progeny.”).

200. See, e.g., James Fisher, Ellen Harshman, William Gillespie, Henry Ordower, Leland Ware & Frederick Yeager, *Privatising Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 8 J. Fin. Crime 305, 314 (2001) (assessing the

PAGA offers a creative solution to a variety of administrative and regulatory issues, so why have states been slow to adopt PAGA models themselves?

One potential explanation is the PAGA *qui tam* provisions are politically difficult to create. As Professor Myriam Gilles points out, the PAGA model requires the state legislature to pass an enabling statute which can be a “perilous, uncertain, lengthy, and frustrating process.”²⁰¹ For example, despite intense lobbying by labor activists and organizations,²⁰² New York’s Empowering People in Rights Enforcement (EMPIRE) Act, which would create a PAGA-like *qui tam* enforcement vehicle for New York workers, has been stuck in committee for the last seven years.²⁰³

Another potential explanation for the PAGA model’s limited reach could be the Supreme Court’s recent posture on PAGA-related cases. In *Viking River Cruises, Inc. v. Moriana*, the Supreme Court overruled the California Supreme Court and held that a PAGA claimant may be compelled to arbitrate the “individual” component of their PAGA claim.²⁰⁴ The court’s ruling also suggested that PAGA’s standing requirements did not give a PAGA claimant the ability to bring a representative claim after their individual claim had been resolved through compelled arbitration.²⁰⁵ And in *Forwardline Financial, LLC v. Ahlmann*, the Supreme Court vacated a California Court of Appeal’s decision rejecting a company’s attempt to compel arbitration of an employee’s PAGA claims and remanded the matter in light of *Viking River Cruises*.²⁰⁶ Notably, the Supreme Court did not take the opportunity to reexamine the scope of their *Viking River Cruises* decision, instead choosing to issue a one paragraph memorandum opinion.²⁰⁷ The California Supreme Court subsequently reaffirmed PAGA’s future in *Adolph v. Uber Technologies, Inc.*, in which it held that under state law an order compelling arbitration of individual claims does not “strip the plaintiff of standing to litigate non-individual claims in

feasibility of using state *qui tam* to regulate the financial services industry); Alex Ellefson, Note, Landlord Bounty Hunters: *Qui Tam* as an Effective Tool for Housing Code Enforcement, 29 J.L. & Pol’y 460, 463 (2021) (arguing for using *qui tam* amendments to enforce the housing code).

201. Gilles, *supra* note 148, at 2238.

202. *Id.* at 2239.

203. See Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, Assemb. 7958, 2017–2018 Leg., Reg. Sess. (N.Y. 2017); Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, S. 6553, 2017–2018 Leg., Reg. Sess. (N.Y. 2017).

204. 142 S. Ct. 1906, 1924–25 (2022) (“Viking [is] entitled to enforce the [arbitration] agreement insofar as it mandated arbitration of Moriana’s individual PAGA claim.”).

205. *Id.* at 1925 (“PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.”).

206. 143 S. Ct. 522, 522 (2022) (mem.).

207. *Id.*

court.”²⁰⁸ Even with these positive developments, *Viking River Cruises* has made PAGA’s long-term viability uncertain. This uncertainty, combined with the large political lift to enact a PAGA-style model enabling statute, may be discouraging states from pushing forward on adopting PAGA qui tam models.

But, if this is the case, states may be being overly cautious. An interesting wrinkle to the Supreme Court’s decision in *Viking River Cruises*, which the California Supreme Court focused on in *Adolph*, was the Court’s second holding that, on state law grounds, PAGA’s standing requirements did not give a PAGA claimant the ability to bring a representative claim after they were forced to arbitrate their individual claims.²⁰⁹ Even without *Adolph*’s favorable interpretation, the California legislature could amend the statute to explicitly give aggrieved employees standing for representative PAGA claims after being forced to arbitrate their individual claims. Combined, these judicial and legislative solutions would greatly limit *Viking River Cruises*’s impact.²¹⁰ They would also create a blueprint for other states to adopt PAGA qui tam models that are structured to avoid this pitfall. Additionally, PAGA qui tam models that regulate outside of the consumer protection and labor contexts may completely avoid these issues if arbitration is a less prominent feature in that regulatory area. So, while the Supreme Court may put further restrictions on PAGA,²¹¹ for now, other states have a viable path forward to adopt PAGA-style qui tam models of their own.

CONCLUSION

As more states turn to private enforcement for their political and administrative advantages, the Taxonomy outlined in this Note can offer legislatures a valuable framework for evaluating prospective qui tam provisions. The Taxonomy places qui tam provisions within six discernable categories according to the underlying nature of the government’s claim and the provision’s practical effect and normative impact. State legislatures should use this Taxonomy to distinguish between legitimate qui tam provisions, which should be embraced, and illegitimate qui tam provisions, which should be avoided. Additionally, as state legislatures increasingly look to implement private enforcement regimes for public claims—claims that are usually brought by the government—they should

208. 532 P.3d 682, 692 (Cal. 2023) (holding that this interpretation of PAGA “best effectuates the statute’s purpose, which is to ensure effective code enforcement” (internal quotation marks omitted) (quoting *Galarsa v. Dolgen California, LLC*, 305 Cal. Rptr. 3d 15, 26 (Cal. Ct. App. 2023))).

209. See *Viking River Cruises*, 142 S. Ct. at 1925.

210. See Gregory Knopp, Aileen McGrath, Donna Mezas & Jonathan Slowik, California Supreme Court May Address Questions Left From *Viking River Cruises* in 2023, JD Supra (Aug. 9, 2022), <https://www.jdsupra.com/legalnews/california-supreme-court-may-address-6411593/> [<https://perma.cc/TV94-NZRV>].

211. See supra notes 199–204 and accompanying text.

more thoroughly consider the PAGA qui tam model. The PAGA qui tam model is a more practically and normatively justifiable alternative to some of the recent enforcement regimes that state legislatures have adopted across the country.