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Mass Arbitration 2.0

Andrew B. Nissensohn
Washington and Lee University School of Law, nissensohn.a23@law.wlu.edu

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Andrew B. Nissensohn*

Abstract

Over the past four decades, corporate interests, in concert with the Supreme Court, have surgically dismantled the American civil litigation system. Enacted nearly a century ago, the Federal Arbitration Act (FAA) was once a procedural law mandating that federal courts enforce arbitration agreements between sophisticated parties with equal bargaining power. Through death by a thousand cuts, corporate interests shielded themselves from nearly all methods of en masse dispute resolution. These interests weaponized the FAA into a "one size fits all" means to compel potential litigants with unequal bargaining power into arbitration. The so-called "Arbitration Revolution" is the subject of much scholarly literature, but a nascent offspring of the Revolution is forcing corporate interests to retreat from their decades-long crusade—Mass Arbitration.

In recent years, aggrieved plaintiffs, shackled by mandatory bilateral arbitration agreements, took matters into their own hands. Armed with highly-capitalized law firms and frequently untapped arbitration provisions, plaintiffs acquiesced to corporate demands and filed their disputes in arbitration. But this time they did it differently than others before

* J.D. Candidate, Class of 2023, Washington & Lee University School of Law; B.S., 2020, University of Florida. Thank you, Professor Alan Trammell, for serving as my Note advisor and providing your unparalleled expertise and guidance throughout the Note-writing process. I am forever grateful to the members of the *W&L Law Review* editorial board for their thorough edits and suggestions. Many thanks to Sasha Hoyt and Ryan D'Ercole, whose wisdom and guidance were instrumental in making this Note a reality. Finally, thank you to my family and friends—not only for their unconditional love and support, but for always pushing me to achieve my highest potential (and to have some fun along the way).

them: compiling thousands of nearly identical claims and filing demands for individual arbitration en masse.

Part I of this Note documents the Arbitration Revolution, whereby defense-side interests strategically dismantled the civil litigation system. Part II then proceeds to the emergence of Mass Arbitration and the initial responses of corporate interests. Importantly, this is a snapshot in time—it is inevitable that the defense bar will adapt to this dramatic change in the litigation sphere. But the question of how they will do so remains unanswered. Part III looks to Mass Arbitration 2.0 and details analyzes two potential paths under current Supreme Court precedent. Businesses might throw in the towel and return to the conventional civil litigation system, as Amazon recently did. Alternatively, they might "tighten the screws" and eliminate "saving grace" consumer-friendly terms that arguably kept their arbitration agreements afloat when challenged. Given the uncertainty of this response, Part IV proposes concrete actions needed to reverse the decades-long misguided interpretation of the FAA and safeguard the rights and interests of consumers and employees throughout America.

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Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swines and hounds.

John Adams[1]

INTRODUCTION

"In a contest between just me—a restaurant in Oakland—and American Express, who do you think wins?"[2] In 1993, Alan Carlson and his wife opened a small Italian

1. Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49 (2001).

2. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*¸ N.Y. TIMES (Oct. 31, 2015), https://perma.cc/TVH4-TAHF.

restaurant in Oakland, California.[3] Operating on razor-thin profit margins, the restaurant survived by fostering a sense of community, serving high quality food, and providing great service.[4] Ten years later, Carlson took on a corporate giant and sued on behalf of small business owners who were unable to turn away diners who used American Express cards even though the processing fees were 30 percent higher than competitors'.[5] In 2011, the Supreme Court would ultimately decide that his class action suit could not continue because of a pre-dispute arbitration agreement nestled in the Acceptance Agreement he had signed decades earlier.[6] The Court disregarded clear evidence that each claim required nearly one million dollars in expert fees while each plaintiff's maximum recovery was only $38,000.[7]

"It's the worst decision I ever made."[8] At 28, Matt Kilgore sought to fulfill his lifelong dream of becoming a helicopter pilot and enrolled at a for-profit flight school that a federal judge would later describe as an "airborne Ponzi scheme."[9] Following the advice of school representatives, Kilgore took out a loan from Keybank to pay the $55,950 tuition bill.[10] Much to his surprise, the flight school went bankrupt halfway through his training and he was left with no diploma and thousands of dollars of student loan debt.[11] Kilgore sued Keybank on behalf of himself and other students, alleging that the bank knew that "the private student loan industry—and particularly aviation

3. *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the Comm. on the Judiciary, U.S. S.*, 113th Cong. 13–16 (2013) (statement of Alan Carlson).

4. *Id.*

5. *Id.*

6. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231–32 (2013).

7. *Id.* at 231 (holding that an arbitration agreement was enforceable even though the costs of arbitration were prohibitively high as to make arbitration an economically infeasible forum).

8. Silver-Greenberg & Gebeloff, *supra* note 2.

9. *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the Comm. on the Judiciary, U.S. S.*, 113th Cong. 309–312 (2013) (statement of Matthew Kilgore).

10. *Id.*

11. *Id.*

schools—was a slowly unfolding disaster," and yet continued to do business with the flight school.[12] Bound by an arbitration agreement, Kilgore was denied his day in court to challenge the bank's corrupt practices and his loan accrued over $100,000 in interest.[13]

"They know we are desperate for the cash, so we will do whatever."[14] A single mother in San Francisco was a courier for DoorDash in the spare hours she had between working as a housekeeper and at a fast food restaurant.[15] When Victoria Diltz realized that DoorDash potentially had cheated her out of thousands of dollars by classifying her as an independent contractor, she attempted to enforce her federal statutorily-guaranteed rights, but in a different way than other, similarly situated individuals before her.[16] Diltz and 5,019 other Dashers filed individual demands for arbitration, forcing DoorDash into its preferred dispute resolution forum and to pay $9.5 million in filing fees.[17] This is Mass Arbitration.

The United States Constitution, and all fifty-one constitutions of the states and the District of Columbia, guarantee the right to trial by jury for civil plaintiffs in resolving disputes.[18] Although the courtroom is commonly believed to be the standard, if not the only, way to adjudicate disputes, the right to a day in court can be contractually waived in favor of arbitration.[19] Arbitration waivers that involve interstate

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12. *Id.*

13. *Id.*

14. Michael Corkery & Jessica Silver-Greenberg, *"Scared to Death" by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020), https://perma.cc/9RCR-TN5G.

15. *Id.*

16. *Id.*

17. Nicholas Iovino, *DoorDash Ordered to Pay $9.5M to Arbitrate 5,000 Labor Disputes*, COURTHOUSE NEWS SERV. (Feb. 10, 2020), https://perma.cc/JNS8-UWYK.

18. U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . . ."); *e.g.*, FLA. CONST. art. I, § 24; MICH. CONST. art. IV, § 27.

19. *See* Brian D. Weber, *Contractual Waivers of a Right to Jury Trial—Another Opinion*, 53 CLEV. ST. L. REV. 717, 718–22 (2006); City of Cincinnati v. Bossert Mach. Co., 243 N.E.2d 105, 107 (Ohio 1968).

commerce are governed by the Federal Arbitration Act (FAA).[20] What began as a procedural statute mandating that federal courts enforce arbitration agreements became a weapon for corporate interests to undermine the civil litigation system. Beginning in the 1980s, the defense bar, corporate interests, and conservative lawmakers embarked on a decades-long crusade through consumer and employee statutory rights—the Arbitration Revolution.[21] The Supreme Court, through a series of misguided decisions, aided and abetted this crusade and held that the FAA demanded the enforcement of egregiously one-sided pre-dispute arbitration agreements, including ones that forbade class treatment.[22]

Justice Sandra Day O'Connor penned a blunt rebuke to this path: "[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[23] Aggrieved individual after aggrieved individual pled with the Court to allow them to hold corporations accountable for the wrongs they committed. When the Court denied these cries for help, plaintiffs took their fate into their own hands and embarked on their own crusade through a blatantly one-sided system—Mass Arbitration.

Mass Arbitration emerged as a way for injured consumers and employees to bring meritorious claims against corporations for wrongs that otherwise would have gone by the wayside.[24] Highly-capitalized plaintiffs' firms heeded corporate demands and agreed to resolve disputes in arbitration.[25] Now, relying on the "consumer-friendly" provisions in these agreements, firms front the fees in anticipation of reimbursement after a favorable arbitration award.[26] Small-dollar claims that otherwise would never have been litigated are now being brought en masse in the corporation's handpicked resolution forum. Businesses are

20. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16).

21. *See infra* Part I.B.

22. *See infra* Part I.B.2.

23. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1993) (O'Connor, J., concurring).

24. *See infra* Part II.A.

25. *See infra* Part II.A.

26. *See infra* Part II.A.

shell-shocked by plaintiffs turning their own system against them. But, like any reprieve for the underdog, its time will soon come to an end and Mass Arbitration 2.0 will take hold.

While many scholars have detailed the Arbitration Revolution and its subsequent implications on substantive rights enforcement,[27] little scholarship exists regarding Mass Arbitration. This Note argues that while Mass Arbitration provides a window of opportunity for aggrieved claimants to effectively resolve meritorious disputes, the defense bar will circumvent its effects under the Supreme Court's arbitration jurisprudence.[28] Part I provides a history of the Federal Arbitration Act and the Arbitration Revolution, whereby the Supreme Court interpreted the Act to prohibit class waivers in mandatory arbitration agreements.[29] Part II explains what Mass Arbitration is and how it has materially changed the arbitration landscape.[30] Part III then analyzes potential responses from the defense bar and hypothesizes how Mass Arbitration 2.0 will look.[31] Part IV focuses on concrete actions that must be taken to ensure the longevity of the civil dispute resolution system.[32] This Note ultimately argues that the Supreme Court's current arbitration jurisprudence is insufficient to adequately protect consumer and employee rights. Absent congressional action, states should take matters into their own hands to protect their citizens.[33]

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27. *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101–09 (2006); Myriam Giles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 373 (2016). *See generally, e.g.*, David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387 (2012) [hereinafter Horton, *Unconscionability Wars*]; J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) [hereinafter Glover, *Disappearing Claims*]; Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575 (2020).

28. *See infra* Part III.

29. *See infra* Part I.

30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.

33. *See infra* Part IV.C.

I. OVERVIEW OF THE CURRENT ARBITRATION LANDSCAPE

Congress designed the FAA to provide some much-needed assurance that courts would enforce arbitration agreements between sophisticated parties. While the Act seemingly served its purpose for the first sixty years that it was in force, the Supreme Court later broadened its scope, holding that it applies to nearly all arbitration agreements that implicate interstate commerce.[34] The Arbitration Revolution—whereby the Supreme Court and corporate interests nearly eliminated consumer and employee rights—laid the foundation for Mass Arbitration.

A. The Early Years of the FAA

In 1925, Congress enacted the FAA in response to the judiciary's reluctance, consistent with standard contract law, to enforce mandatory arbitration provisions.[35] Scholars have long argued that Congress intended for the FAA to apply only to sophisticated parties with equal bargaining strength, attempting to resolve disputes in a cost- and time-efficient manner.[36] And, until the mid-1980s, courts enforced the FAA in

34. *See* Southland Corp. v. Keating, 465 U.S. 1, 12–13 (holding that the FAA is substantive federal law and is binding on both federal and state courts when interpreting covered arbitration agreements). Importantly, Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). The precise meaning of being engaged in "interstate commerce," however, is the subject of much litigation and debate. *See* Circuit City Stores v. Adams, 532 U.S. 105, 119 (2001) (holding that the Section 1 "residual clause" applies only to "transportation workers"). *But see* Sw. Airlines Co. v. Saxon, No. 21-309, 596 U.S. ___ (2022) (slip op., at 1) ("We think it . . . plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods.").

35. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 391–92 (arguing that the revocability doctrine, which provided unilateral revocation of arbitration agreements, was the reason for the judiciary's refusal to enforce arbitration agreements).

36. *See* Moses, *supra* note 27, 101–09 (2006); *id.* at 99–100 (arguing that the FAA, as subsequently interpreted by the Court, "would not likely have commanded a single vote in the 1925 Congress" (citing Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996))); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 467 (1996) ("The unrebutted legislative

conformity with this view: arbitration agreements between parties with unequal bargaining strength were disallowed.[37] Section 2 provides that written mandatory arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," the latter part being the "savings" clause of the statute.[38] Accordingly, parties challenging arbitration clauses typically argued that an applicable state contract law defense would make the agreement unenforceable.[39] Sections 3 and 4 of the Act implement the substantive provision of Section 2. Section 3 requires federal courts to stay any litigation subject to an arbitration agreement and compel arbitration.[40] Section 4 allows a party to petition the court to enforce an arbitration agreement when one party refuses to comply.[41]

From its enactment until the 1980s, the FAA was a procedural statute that governed how federal courts interpreted and enforced arbitration agreements.[42] Federal judges looked to the Act for guidance to determine whether an arbitration agreement must be enforced.[43] In recent years, however, the Supreme Court has continually reiterated that the primary purpose of the Act is "to ensure that 'private agreements to arbitrate are enforced according to their terms.'"[44] The Court paired this interpretation of the FAA with the degradation of the class action device, effectively eliminating small-dollar

history created prior to the FAA's passage establishes that only disputes arising out of commercial contracts were to be arbitrable . . . ."); *see also Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924).

37. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 437–38 (1953).

38. 9 U.S.C. § 2.

39. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339–41 (2011) (addressing a California state-law unconscionability defense); Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 231–32 (2013) (arguing that high costs of individually arbitration prevented the claimants from bringing demands for arbitration).

40. 9 U.S.C. § 3.

41. 9 U.S.C. § 4.

42. *See* Moses, *supra* note 27, at 110.

43. *See id.* at 112.

44. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (quoting Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

claims as an effective mechanism to enforce federal statutory rights.[45]

B. The Supreme Court's Blessing of the "Arbitration Revolution"

Over the past forty years, the Supreme Court interpreted the FAA to extend far beyond its original purpose. The Court has transformed the Act from a purely procedural mechanism applicable only in federal court into concrete substantive law that applies in both state and federal court.[46] This occurred even though one of the principal drafters of the Act believed that it would not affect state law or state courts whatsoever.[47] The Supreme Court, however, departed from this framework and

45. In 1966, Congress promulgated the modern class action device, Federal Rule of Civil Procedure 23, to increase judicial efficiency in the resolution of undifferentiated claims. *See* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 590–91 (2013) (explaining that one of the initial perceptions of the federal class action rule was that it would provide an "important substitute for . . . public administration," and effectively aggregate similar claims); *id.* at 596 ("If Rule 23 has any role to play in civil litigation, it must apply when class members have undifferentiated, small value claims that they would never litigate individually."). Subsequently, incidences of aggregated civil litigation nearly doubled between 1968 and 1977. Giles, *supra* note 27, at 373. In the 1980s, President Ronald Reagan, conservative lawmakers, and conservative interest groups pushed back on what they thought was an attempt to "socialize America" through a "litigation explosion" in which plaintiffs' firms sought windfall fees from excessive frivolous litigation. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5–7 (1986). President Reagan ensured that his judicial nominees subscribed to his judicial philosophy—strict constructionism and judicial restraint—to ensure the degradation of class litigation. *See* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319–20 (1989) ("Arguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation's history . . ."). *But see* Jake Faleschini & Billy Corriher, *Trump Is Disregarding Senate Norms to Get His Judges on the Bench*, CTR. FOR AM. PROGRESS (May 12, 2017), https://perma.cc/P3KR-MQWL (suggesting that President Donald Trump's method of selecting judicial nominees was intense and thorough, although it did go against traditional presidential and senate norms).

46. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983) ("The effect of [Section 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

47. *Id.*

transformed the Act into substantive law through a series of injudicious opinions.[48]

1. The End of the FAA as Procedural Law

In *Southland Corp. v. Keating*,[49] decided in 1984, the Court furthered the "liberal federal policy favoring arbitration"[50] and held that the FAA applies as substantive federal law in both federal and state courts.[51] The Court looked to the FAA's legislative history and concluded that the phrase "contracts involving interstate commerce" indicated that Congress intended the Act to be more than a mere procedural statute.[52] Previously, the FAA only governed how *federal* courts enforced arbitration agreements, but *Southland* extended the statute to state courts.[53] With the FAA's expansion in place, the defense bar jumped on board, intentionally drafting and enforcing these agreements to strip consumers and employees of their ability to effectively vindicate meritorious claims.[54]

2. The End of Class Treatment of Arbitration Disputes

Beginning in 2010, the arbitration landscape shifted in a way that continues to be detrimental to private statutory rights.[55] In *Stolt-Nielsen S.A. v. Animal-Feeds International Corp.*,[56] the parties had previously allowed an arbitration panel to determine whether their arbitration agreement permitted class-wide resolution where it was silent on the issue.[57] The

48. *See* Southland Corp. v. Keating, 465 U.S. 1, 12–13 (1984).

49. 465 U.S. 1 (1984).

50. *Moses H. Cone*, 460 U.S. at 24.

51. *See Southland*, 465 U.S. at 25.

52. *See id.* at 14 ("[T]o confine the Act's scope to arbitrations sought to be enforced in federal courts would frustrate what Congress intended to be a broad enactment.").

53. *Id.* at 865 (O'Connor, J., dissenting); *see* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 776 (2004).

54. *See* Stempel, *supra* note 53, at 774.

55. *See* Moses, *supra* note 27, at 113.

56. 559 U.S. 662 (2010).

57. *See id.* at 668.

panel found that the agreement permitted it, but the Supreme Court ultimately reversed this decision, finding that the panel overstepped its authority.[58] According to the Court, the panel supplanted the terms of the arbitration agreement with its own view of sound policy regarding class arbitration.[59] Relying on the premise that arbitration is "a matter of consent, not coercion,"[60] the Court held that a party cannot be compelled to submit to class arbitration absent an explicit agreement to do so.[61] The ruling was significant because it limited the availability of class-wide adjudication, essentially giving corporations the power to unilaterally veto class treatment.

One year later, in *AT&T Mobility LLC v. Concepcion*,[62] the Supreme Court again broadened the scope of the FAA and held that the Act preempts general state law contract defenses if they interfere with the "fundamental attributes of arbitration."[63] In *Concepcion*, the plaintiff brought a putative class action suit against AT&T alleging false advertising of "free cell phones" because customers were charged $30 in sales tax.[64] AT&T's consumer agreement contained an arbitration provision that forbade class actions and class-wide arbitration.[65] AT&T moved to compel individual arbitration, and the plaintiffs argued that the class arbitration provision was unconscionable because each claim was so small that, without class treatment, the plaintiffs would effectively be barred from bringing them.[66]

Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*,[67] the federal district court determined that the arbitration agreement was unconscionable.[68] The Ninth Circuit agreed with the district

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58. *See id.* at 672.

59. *Id.*

60. *Id.* (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

61. *See id.* at 684.

62. 563 U.S. 333 (2011).

63. *Id.* at 344.

64. *Id.* at 336–37.

65. *See id.* at 336.

66. *See id.* at 337.

67. 113 P.3d 1100 (Cal. 2005).

68. *See Concepcion*, 563 U.S. at 337–38 (stating that the district court held the arbitration provision unconscionable because AT&T "had not shown

court's preemption ruling, stating that the *Discover Bank* rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California."[69] Because the rule applied to class action waivers in all contracts and not just arbitration agreements, it placed arbitration clauses on the "exact same footing" as other contracts as the FAA required.[70]

At the Supreme Court, however, Justice Antonin Scalia, writing for the majority, held that the FAA preempts the *Discover Bank* rule because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71] Scalia reasoned that the overarching purpose of the Act is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[72] Whatever the "fundamental attributes of arbitration" may be (the Court did not define them), the majority reasoned that the *Discover Bank* rule ran afoul of them.[73] *Concepcion* made clear that a state cannot, through its legislature or its courts, circumvent the mandate of the FAA by relying on traditional state law contract defenses.[74] The freedom to contract, according to Justice Scalia, was such an ingrained fundamental freedom that it overpowered any interest in the apparent purpose of arbitrating in the first place.[75]

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that bilateral arbitration adequately substituted for the deterrent effects of class actions"). In *Discover Bank*, the California Supreme Court held that a class action waiver in a mandatory arbitration agreement is unconscionable when (i) the agreement is in a consumer contract of adhesion, (ii) the dispute predictably involves a small-dollar claim, and (iii) the party with superior bargaining power schemed to "deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 113 P.3d at 1108–10.

69. *Concepcion*, 563 U.S. at 337.

70. *See id.* at 338.

71. *Id.* at 352 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

72. *Id.* at 344.

73. *See id.* at 337 (arguing that the *Discover Bank* rule adds additional time and delay to litigation and supplants the FAA's primary purpose of ensuring the enforcement of arbitration agreements).

74. *See id.* at 343 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

75. *Id. But see* MARGARET JANE RADIN, BOILERPLATE 19 (2013) ("The notion that a coerced or deceptive or completely covert divestment of an entitlement might qualify as a 'contract' is paradoxical.").

In upholding the class waiver, the Supreme Court discussed in dicta several "consumer-friendly" provisions in the agreement.[76] Pertinent to this Note, AT&T would (i) pay all costs of arbitration for nonfrivolous claims, (ii) not seek reimbursement for its attorneys' fees, and (iii) pay a minimum of $7,500 and double the plaintiff' attorney's fees if the arbitration award was greater than their last written settlement offer.[77] While it is unclear whether the Court would have decided differently if these provisions were absent from the agreement,[78] their presence provided a sufficient basis for the Court to find that the plaintiffs were actually in a *better* position in arbitration than they would be in the civil court system.[79] This conclusion, however, relies on a faulty assumption: that plaintiffs will be able to arbitrate small-dollar claims. In Justice Stephen Breyer's dissent, he agreed with the district court, noting that "the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[80]

In an apoplectic dissent, Justice Breyer contended that *Concepcion* directly implicated the doctrine of unconscionability.[81] The lack of class representation in arbitration agreements had the effect of foreclosing plaintiffs' ability to bring claims in the first place.[82] Under the traditional common law doctrine, the procedural nature of the agreement—specifically how the contract was formed—is key to determining its enforceability.[83] In addition, the Court's majority implicated and essentially shredded the effective vindication doctrine without explicitly mentioning it.[84] As

76. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

77. *Id.*

78. *See* Memorandum from Gibson, Dunn & Crutcher LLP, U.S. Supreme Court Finds that Class Action Waivers in Arbitration Agreements Are Enforceable Under the Federal Arbitration Act 4 (Apr. 27, 2011), https://perma.cc/D6F6-NBY3 (PDF).

79. *See Concepcion*, 563 U.S. at 352.

80. *Id.* (Breyer, J., dissenting) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

81. *Id.* at 358–59.

82. *Id.* at 365.

83. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 393.

84. *Concepcion*, 563 U.S. at 357–58 (Breyer, J., dissenting).

discussed below, claimants can seemingly use the effective vindication doctrine to defend against the enforcement of an arbitration agreement if the terms are so egregiously one-sided that enforcement would effectively eliminate a plaintiff's ability to vindicate their rights.[85] For now, it appears that the "consumer-friendly" provisions AT&T included in its consumer agreement provided the Supreme Court with sufficient cover to avoid invoking the unconscionability and effective vindication doctrines.[86] The question remains: What happens when consumers, who likely do not know these provisions exist, put them to the test?

The Court stated bluntly in *Concepcion* what it had only hinted at in its previous FAA jurisprudence: the FAA applies not only to parties with equal bargaining power, but broadly to *all* arbitration agreements that implicate interstate commerce.[87] The Court indicated that the holding would apply in the employment context as well, expanding the reach of the its misguided interpretation.[88] The case also had major effects on the redressability of claims and substantive law.[89] At the time of the decision, the defense bar accomplished what it long sought: universal judicial enforcement of class waivers, untethered by state law contract defenses.[90] As discussed in Part II.A, *Concepcion* and the Court's subsequent arbitration jurisprudence forced plaintiffs to find an innovative way to enforce statutorily guaranteed rights.[91]

3. The End of the Effective Vindication Doctrine—For Now

Five years later, the Supreme Court continued its diminution of substantive rights enforcement and held that arbitration agreements should be rigorously enforced according

85. *See infra* Part III.B.1.

86. *See infra* Part III.B.2.

87. *See Concepcion*, 563 U.S. at 347 n.5.

88. *See id.*

89. *See* Glover, *Disappearing Claims*, *supra* note 27, at 3064–68; Keren, *supra* note 27, at 578 (arguing that the Supreme Court's interpretation of the FAA has "created a growing awareness that the process has had an immense impact on matters of substantive law and issues of socio-economic justice").

90. *See* Keren, *supra* note 27, at 578–79.

91. *See infra* Part II.A.

to their terms.[92] In *American Express Co. v. Italian Colors Restaurant*,[93] Alan Carlson, the owner of a small restaurant in Oakland, California, sued for himself and on behalf of other merchants who accepted American Express cards.[94] Carlton alleged violations of the Sherman Act[95] and sought damages under of the Clayton Act.[96] The merchants argued that American Express leveraged its monopoly power to force them to accept their credit cards at fees 30 percent higher than other credit card companies.[97]

Predictably, American Express moved to compel individual arbitration as required by the Acceptance Agreement.[98] In response, the plaintiffs argued that the exorbitantly high costs of antitrust litigation would effectively prohibit individual arbitration.[99] Indeed, an economist estimated that the cost of expert testimony necessary to prove the antitrust claims[100] might exceed one million dollars,[101] while the maximum amount an individual plaintiff could recover was $38,549 if the judge awarded treble damages.[102] American Express did not dispute this fact.[103] Even more egregiously, the arbitration agreement had a strict confidentiality provision that prevented Italian Colors from "informally arranging with other merchants to produce a common expert report."[104] This economic inefficiency served as a deterrent to potential plaintiffs who would otherwise be entitled to relief under federal law.

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92. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

93. 570 U.S. 228 (2013).

94. *Id.*

95. The Sherman Antitrust Act of 1890, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7.)

96. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.).

97. *Italian Colors*, 560 U.S. at 231.

98. *Id.*

99. *See id.* at 232.

100. *See id.* at 243 (Kagan, J., dissenting) ("[G]ood luck proving an antitrust claim without [economic testimony]!").

101. *See id.* at 231 (majority opinion).

102. *Id.* at 231–32.

103. *See In re* Am. Express Merchants' Litig., 667 F.3d 204, 210 (2d Cir. 2012).

104. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 246 (2013) (Kagan, J., dissenting).

Despite these observations, the Court held that the prohibitively high costs associated with arbitrating a statutory claim do not affect the enforceability of the arbitration agreement.[105] The Court instead focused on the *right* to pursue a statutory remedy and disregarded the necessary costs of pursuing that remedy.[106] So long as there remains *some* means for plaintiffs to redress statutorily-provided causes of action, no matter how impractical, arbitration provisions forbidding class arbitration are enforceable.[107] Under this reasoning, as long as an agreement does not explicitly require a party to expressly waive their right to pursue a specific statutory cause of action, the agreement will not implicate the effective vindication doctrine.[108]

More troubling was the Court's complete disregard of the importance of privately enforcing antitrust violations.[109] Justice Scalia, again writing for the majority, put it simply: "The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[110] When Congress drafted the antitrust statutes, it evidenced an intention to include the general public in the enforcement mechanisms and it was in "no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[111]

If properly applied, the effective vindication doctrine can provide an avenue for plaintiffs to invalidate pre-dispute arbitration agreements and push back against the elimination of consumer-friendly provisions.[112] In its current form, however, what would eliminate a claimant's "right" is purely subjective.[113]

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105. *See id.* at 238.

106. *See id.* at 236.

107. *Id.*

108. *See id.* at 234.

109. *See* Glover, *Disappearing Claims*, *supra* note 27, at 3082–83.

110. *Italian Colors*, 570 U.S. at 233.

111. California v. Am. Stores Co., 495 U.S. 271, 284 (1990); *see Italian Colors*, 570 U.S. at 241 (Kagan, J., dissenting) (arguing that the purpose of the Sherman Act's private cause of action, among other things, was to promote "the public interest in vigilant enforcement of the antitrust laws" (quoting Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329 (1955))).

112. *See infra* Part IV.B.

113. Part IV.B., *infra*, proposes changes to the effective vindication doctrine to account for this inconsistency.

After *Italian Colors*, corporations can shield themselves from these private enforcement mechanisms through pre-dispute arbitration agreements.[114]

4. The End of Collective Action Enforcement

The defense bar claimed yet another victory five years later when the Court held that arbitration agreements in employment contracts were enforceable even when the employee brings a claim under the National Labor Relations Act's[115] (NLRA) guaranteed right to collective action.[116] In each of the three consolidated cases in *Epic Systems Corp. v. Lewis*,[117] the employer and employee entered into mandatory individual arbitration agreements to resolve employment disputes.[118] The employees sued in federal district court, alleging wage theft under the Fair Labor Standards Act[119] (FLSA). When the employers attempted to compel arbitration, the plaintiffs argued that enforcement of the arbitration agreement would violate the FLSA, and that the NRLA's collective bargaining guarantee supplanted the mandate of the FAA.[120] In a 5–4 decision, the Supreme Court, held that the FAA must be enforced and neither the FLSA nor the NRLA precluded the agreements' enforcement.[121] Consistent with *Concepcion* and *Italian Colors*, the Court's holding solidified the FAA's applicability to the adjudication of *explicit* statutory causes of action, all but eliminating employees' ability to bring collective actions for wage theft, discrimination, or other employment-related disputes.[122]

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114. *See* John L. Schwab, *The Vindication of Rights Doctrine: Still a Key to the Courtroom or Arbitration's Latest Casualty?*, 15 U.C. DAVIS BUS. L.J. 243, 254 (2015).

115. Pub. L. No. 74-198, 49. Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 157–169).

116. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).

117. 138 S. Ct. 1612 (2018).

118. *See id.* at 1619–20.

119. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

120. *Epic Sys.*, 138 S. Ct. at 1622.

121. *Id.* at 1632.

122. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. (forthcoming 2022) (manuscript at 22) (on file with author) (explaining that *Epic Systems*

Each of the cases discussed above added a brick in the wall, obscuring from consumers and employees the ability to effectively sue corporations for otherwise legally sufficient claims of injury. To summarize, the Supreme Court has held that the Federal Arbitration Act (i) created a federal policy favoring arbitration;[123] (ii) is substantive law applicable in both state and federal courts;[124] (iii) requires the parties to an arbitration agreement to explicitly agree to class arbitration;[125] (iv) preempts state contract law defenses that "frustrate [the] purpose" of the Act, despite the explicit inclusion of common law defenses in the statute;[126] and (v) applies even where federal statutes guarantee seemingly conflicting rights.[127] The arbitration landscape isolates aggrieved claimants and forecloses nearly every mechanism by which they can have a day in court.[128] Contrary to the Court's vision in *Italian Colors*, the "some means" to vindicate statutory rights has proven insufficient.

C. Effects of the Arbitration Revolution

The perpetual expansion of the FAA was termed one of the "most profound shifts in our legal history."[129] Today, arbitration agreements regularly appear in contracts of adhesion,[130] binding consumers and employees absent an objection in a specified

represents the idea that "[c]orporate entities could use private procedural ordering to avoid civil liability for wrongdoing").

123. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

124. *See* Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984).

125. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).

126. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347 n.6 (2011).

127. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627–28 (2018).

128. *See infra* Part I.C.

129. *See* Silver-Greenberg & Gebeloff, *supra* note 2 (quoting Judge William G. Young, a federal judge appointed by President Ronald Reagan).

130. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 392 (defining an "adhesion contract" as a contract that is "nonnegotiated" and "unilaterally drafted").

period.[131] Although consumers can withdraw from a pre-dispute arbitration agreement, doing so eliminates their ability to enjoy the business's products and services.[132] Likewise, because employers present these contracts in a take-it-or-leave-it fashion, employees who wish to not be bound will likely lose their jobs. Some argue that these agreements are efficient, reducing litigation costs and passing the savings on from corporations to employees through higher wages and to consumers through lower prices.[133] The data does not support this contention.[134]

Justice Samuel Alito, writing for the majority in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[135] argued that because arbitration lacks the "procedural rigor and appellate review of the courts," parties in bilateral agreements can realize the benefits of arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[136] While Justice Alito argued that the principles of bilateral arbitration—two parties resolving a dispute in a civilized and efficient manner—make it ostensibly superior to traditional litigation, parties can only reap the supposed benefits of arbitration if it can be commenced. Unfortunately, with the Supreme Court's approval of the arbitration and class waiver agreements in *Concepcion*, *Italian Colors*, and *Epic Systems*, many corporations adopted arbitration procedures that mirror those

131. *See* Anjanette Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 667–69 (2013).

132. *See Concepcion*, 563 U.S. at 346–47 ("The times in which consumer contracts were anything other than adhesive are long past."); Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. J. 63, 69.

133. *See, e.g.*, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1216 (2003) (discussing arguments that support the widespread use of contracts of adhesion).

134. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY FACT SHEET 3 (2015), https://perma.cc/7Z35-HR5Z (PDF) ("The CFPB found no statistically significant evidence that the companies that eliminated their arbitration clauses increased their prices . . . relative to those that made no change in their use of arbitration clauses.").

135. 559 U.S. 662 (2010).

136. *Id.* at 685.

agreements, effectively eliminating a plaintiff's right to trial by jury.[137]

The immediate effects of the Supreme Court's arbitration jurisprudence were profound. Not only did corporations subsequently include provisions that mandated arbitration, but they dramatically tilted the scale in their favor by limiting the scope of discovery in the arbitral forum,[138] shortening the statute of limitations for claims, and, most importantly for this Note, prohibiting class-wide litigation.[139] Class waivers provided the foundation of the Arbitration Revolution and Mass Arbitration.[140]

Pre-dispute arbitration is attractive to businesses because they can craft an adjudication system with more advantageous procedural rules than those that exist in court.[141] In a 2004 study, researchers analyzed major corporations' use of arbitration provisions across thirty-seven industries.[142] The results showed that 69.2% of businesses in the financial sector included arbitration clauses in their consumer agreements.[143] After the 2008 Financial Crisis, members of Congress were greatly concerned about the effect of pre-dispute arbitration agreements on consumer rights.[144] In response, in the Dodd-Frank Wall Street Reform and Consumer Protection Act,[145] Congress required the Consumer Financial Protection

137. *See infra* Part III.B.

138. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005).

139. *See*, *e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

140. *See infra* Part II.A.

141. *See* Stephen J. Ware, ALTERNATIVE DISPUTE RESOLUTION, § 2.3(c) (2001) ("Not only does the parties' contract determine whether a dispute goes to arbitration, the contract also determines what occurs during arbitration . . . .").

142. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS. 55, 58–62 (2004).

143. *Id.* at 62. The study defined "financial category" to include credit card providers, banking institutions, and tax consultant services. *Id.* at 59.

144. F. Paul Bland & Gabriel Hopkins, *Consumer Financial Protection Bureau Considering Important Rule on Arbitration Agreements*, ADVOC. MAG. (Feb. 2016), https://perma.cc/RRQ3-XKY7.

145. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.).

Bureau (CFPB) to study the impact of these agreements in the consumer finance sector.[146] Subsequently, the Court decided *Concepcion* and the scope of the Bureau's report increased.[147] The CFPB released its preliminary results on pre-dispute arbitration clauses and found a significant increase in their use across a multitude of industries.[148]

Beyond consumer agreements, the prevalence of class waivers in employment contracts also increased substantially.[149] In the 1990s, a mere 2% of nonunion employee agreements contained arbitration provisions.[150] Today, the situation is significantly worse. According to a 2017 study, "[t]he percentage of nonunion, private-sector employees covered by . . . mandatory-arbitration clauses has more than doubled since the early 2000s."[151] Approximately 60.1 million American workers no longer have access to courts to adjudicate their legal employment rights and instead must file arbitration claims.[152]

A 2019 study found that eighty-one of the one hundred largest companies in the United States use arbitration in their consumer agreements—seventy-eight of which contain class waivers.[153] In 2019 alone, these agreements allowed employers to pocket $9.2 billion from workers who made less than thirteen dollars per hour, disproportionately affecting women and people of color.[154] The alarm was so great that the CFPB implemented

146. 12 U.S.C. § 5518(a).

147. *See* Bland & Hopkins, *supra* note 144.

148. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (12–15) (2013) [hereinafter CFPB Preliminary Results], https://perma.cc/FYM5-BYQL (PDF).

149. Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018, 5:30 AM), https://perma.cc/4Z78-FEK4.

150. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 4 (2018), https://perma.cc/2EGE-QJY3 (PDF).

151. Gershman, *supra* note 149.

152. COLVIN, *supra* note 150, at 5.

153. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 238 (2019).

154. *See* HUGH BARAN & ELISABETH CAMPBELL, NAT'L EMP. L. PROJECT, FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET $9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS 1 (2021), https://perma.cc/8BRP-NTWY (PDF).

a rule that would prohibit certain financial companies from including pre-dispute arbitration agreements in their consumer agreements.[155] However, Congress passed, and then-President Donald J. Trump signed, a joint resolution disapproving of the final rule, resulting in its removal from the Code of Federal Regulations.[156]

The rapidly increased use of pre-dispute arbitration agreements was a natural and foreseeable consequence of the Supreme Court's misguided interpretation of the FAA. The Court has consistently viewed the enforcement of an arbitration agreement under the FAA as a matter of "consent, not coercion."[157] It is illogical, however, that a consumer or employee consented to resolve disputes in arbitration when the agreements are in contracts of adhesion. In a strange twist of fate, businesses are now on their back foot, wondering what they consented to in these arbitration contracts. Plaintiffs have begun to leverage arbitration provisions en masse to inflict maximum cost on corporate defendants. It is possible that the rise of Mass Arbitration could force businesses to retreat from their forty-year crusade through consumer and employee substantive rights.

II. WHAT IS MASS ARBITRATION?

In recent years, plaintiffs' attorneys have acquiesced to the Supreme Court's demand that arbitration agreements be "enforced according to their terms."[158] After all, the defense bar spent the better part of the last four decades carefully crafting a favorable body of law in hopes of shielding its corporate clients from liability for wrongdoing against consumers and

155. Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (previously codified at 12 C.F.R. § 1040).

156. Joint Resolution of Disapproval, Pub. L. No. 115-74, 131 Stat. 1243 (2017).

157. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)); *see also, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("[P]arties are generally free to structure their arbitration agreements as they see fit." (internal quotations omitted)).

158. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

employees.[159] In doing so, the drafters of the agreements included consumer-friendly provisions to mask the near-complete degradation of viable avenues to hold businesses responsible.[160]

Conforming to the letter, but not the spirit, of the Court's FAA jurisprudence, plaintiffs' attorneys compiled thousands of individual claims against companies, filing demands for arbitration en masse.[161] This recent phenomenon has been termed Mass Arbitration—the "ultimate Judo move"[162]—and reawakened corporate dispute resolution.[163] Mass Arbitration is "both a response to and a product of a decades-long campaign by defense-side interests to dismantle the infrastructure for enforcing substantive rights."[164] Professor Maria Glover argues that Mass Arbitration has four principal elements:

> (1) leveraging arbitration fees and fee-shifting provisions in arbitration agreements; (2) arbitrating individual claims—or credibly threatening to do so—to impose asymmetrical costs on defendants; (3) selecting higher-threshold-value individual claims . . . ; [and] (4) generating aggregate settlements from a mass of individual claims . . . .[165]

These four elements provide the framework for Mass Arbitration and any deviation could cause the machine to cease.[166] The American Arbitration Association (AAA) has recognized the increase in Mass Arbitration claims and recently

159. *See* Glover, *supra* note 122 (manuscript at 4).

160. *See generally* Myriam Giles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012).

161. *See* Glover, *supra* note 122 (manuscript at 4).

162. David Horton, *All Alone in Arbitration*, 72 FLA. L. REV. F. 75, 80 (2021) [hereinafter Horton, *All Alone in Arbitration*].

163. *See id.*; Memorandum from Gibson, Dunn & Crutcher LLP, As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them 1 (May 24, 2021) [hereinafter Gibson Dunn Mass Arbitration Advisory], https://perma.cc/L8W3-H593 (PDF) ("Mass arbitration is a recent phenomenon in which thousands of plaintiffs—often consumers, employees, or independent contractors—bring arbitration demands against a company at the same time.").

164. Glover, *supra* note 122 (manuscript at 4).

165. *Id.* (manuscript at 64).

166. *See id.* (manuscript at 64–65).

adopted a sliding scale for consumer arbitration fees.[167] States have enacted "representative claim" statutes, such as the California Private Attorneys General Act (PAGA),[168] to protect their citizens from the harsh effects of arbitration.[169] The legality of these statutes is currently before the Supreme Court.[170] While the long-term effects of this change are unclear, these responses reflect the recognition of the potential widespread effects of Mass Arbitration.

A. How Did Mass Arbitration Become a Reality?

While the mechanics of the Mass Arbitration strategy are constantly developing, some hallmark characteristics have already formed. Critically, plaintiff attorneys have leveraged fee-shifting arbitration fee-shifting provisions to push Mass Arbitration into action. To avoid the invalidation of arbitration agreements, businesses include claimant-friendly provisions, such as those that require them to pay all upfront arbitration fees.[171] This is the heart of Mass Arbitration: plaintiffs' firms' ability to recover costs from defendant corporations.[172] While some argue that arbitration agreements have led to a more efficient resolution of disputes between parties,[173] a sweeping consequence was the near elimination of small-dollar claims brought by consumers and employees.[174] The most straightforward explanation for this result is the balancing of the exorbitantly high costs of effectively arbitrating a negative value claim against the low rate of return.[175] It was not until the

167. *See* Mark Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, JDSUPRA (Mar. 2, 2021), https://perma.cc/4QPB-LL6T.

168. CAL. LAB. CODE §§ 2698–2699.6 (West 2016).

169. *See infra* Part II.D.

170. *See infra* Part II.D.

171. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

172. *See* Glover, *supra* note 122 (manuscript at 64).

173. *See* Letter from Neil L. Bradley, Exec. Vice President & Chief Pol'y Officer, Chamber of Com. of the United States of America, to Jerrold Nadler, Chairman, U.S. House Comm. on the Judiciary, & Jim Jordan, Ranking Member, U.S. House Comm. on the Judiciary (Oct. 27, 2021), https://perma.cc/CQ72-7B5Q (PDF).

174. Glover, *supra* note 122 (manuscript at 4).

175. *See* Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 342–43 (2015) ("Most class actions seeking money damages

advent of highly-capitalized plaintiffs' firms willing to cover the initial arbitration costs with hopes of prevailing that the possibility of litigating these small-dollar claims became more than an illusory "right."[176]

Armed with some of the best civil defense attorneys in the country, Keller Lenkner LLC ("Keller Lenkner") financed thousands of arbitration claims against large corporations such as Uber, Postmates, and Amazon.[177] Well-funded firms such as Keller Lenkner are necessary cogs in the Mass Arbitration machine because they pay the upfront filing fees in anticipation that once they prevail, the corporation will reimburse them and pay their attorney's fees per the terms of the arbitration agreement.[178] For example, Keller Lenkner paid approximately $8 million to the AAA to initiate the arbitration claims against Intuit Turbo Tax ("Intuit").[179] The firm was able to leverage Intuit's promise to reimburse successful arbitration fees in order to initiate a Mass Arbitration.[180] The defense bar will no doubt respond to this plaintiff-friendly exploitation of arbitration agreements; however, before focusing on that response, it is important to briefly survey the current landscape of Mass Arbitration and how some corporations have already addressed it on an individual basis.

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represent individuals with negative value claims. An individual claim has a negative value when the litigation costs to bring it would exceed the possible benefit from suit."); *see also* David Marcus, *Making Adequacy More Adequate*, 88 TEX. L. REV. 137, 143 (2010) ("Because no rational class member would bring her own individual [negative value] suit under these circumstances, the value of a recovery in an individual action . . . is zero."); *e.g.*, *Concepcion*, 563 U.S. at 337; Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231–32 (2013).

176. *See Gerchen Keller Capital, LLC Launches New $250 Million Commercial Litigation Finance Fund*, GERCHEN KELLER CAP., LLC (Jan. 13, 2014, 8:00 AM), https://perma.cc/W8CX-Z2KJ.

177. *See* Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), https://perma.cc/45Q7-E4CN.

178. *See Concepcion*, 563 U.S. at 337.

179. Defendant's Opposition to Motion to Intervene at 7, *In re* Intuit Free File Litig., No. 3:19-cv-02546 (N.D. Cal. Dec. 7, 2020), ECF No. 189.

180. *See* Declaration of Rodger R. Cole in Support of Defendant's Opposition to Motion to Intervene ¶ 17, In re *Intuit Free File Litig.*, No. 3:19-cv-02546 (N.D. Cal. Dec. 7, 2020), ECF No. 192 ("Keller does not recover the filing fees and collects no attorney's fees unless it obtains recovery for its clients."); *see also* Glover, *supra* note 122 (manuscript at 64).

B. Mass Arbitration in Action

Chipotle, along with many other employers, requires its employees to sign arbitration agreements that prohibit class treatment for all claims, including discrimination under Title VII of the Civil Rights Act of 1964[181] and allegations of wage theft under FLSA.[182] Nearly three thousand employees brought a collective action suit against Chipotle, alleging that the company had general policies and practices that required employees to work "off the clock."[183] The company attempted to force them into arbitration, relying on the terms of its standard employment agreement.[184] After multiple years of litigating the enforceability of the arbitration agreement, and the Supreme Court's decision in *Epic Systems*, the judge granted Chipotle's motion to compel and ordered the parties to resolve the dispute in arbitration.[185] When one-hundred-and-fifty employees heeded Chipotle's demands and filed individual arbitration demands,[186] Chipotle pleaded with the court to stay the arbitration proceedings, and said if the court did not, it would suffer "irreparable harm."[187] The judge promptly denied the request and the parties proceeded to confidential arbitration.[188] Chipotle

181. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

182. *See* Dave Jameison, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HUFFINGTON POST (Dec. 20, 2018, 3:09 PM), https://perma.cc/HEP6-2F9H. *See generally* Collective Action Complaint, Turner v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612 (D. Colo. Sep. 22, 2014), ECF No. 1.

183. Collective Action Complaint, *supra* note 182, ¶¶ 35–36.

184. *See* Defendant's Supplemental Brief in Support of its Motion to Dismiss at 2, *Turner*, No. 1:14-cv-02612 (D. Colo. April 16, 2018), ECF No. 182.

185. *See* Order Granting Defendant's Motion to Dismiss at 1, *Turner*, No. 1:14-cv-02612 (D. Colo. Aug. 3, 2018), ECF No. 187; Michael Hiltzik, Column, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits over Wage Theft*, L.A. TIMES (Jan. 4, 2019, 7:00 AM), https://perma.cc/8CUQ-BTMT (explaining the house of cards Chipotle built and how it imploded).

186. Jameison, *supra* note 182.

187. Defendant's Motion to Stay Order Granting Defendant's Motion to Dismiss at 6–9, *Turner*, No. 14-cv-02614 (D. Colo. Aug. 31, 2018), ECF No. 198. The title of this filing bleeds irony, further supporting the argument that defendants are fearful of Mass Arbitration.

188. *See* Order Denying Defendant's Motion for Entry of Judgement and Motion to Reinstate Stay at 1, *Turner*, No. 14-cv-02614 (D. Colo. Nov. 20,

was forced to reckon with its own system of dispute resolution—one it never thought would come to fruition.

Intuit, a giant in the self-tax-preparation industry, suffered its own dose of Mass Arbitration. In 2019, consumers filed a class action lawsuit against Intuit, alleging that the company steered individuals away from free tax services which would have sufficiently served the individual's needs and toward purchasing upgraded services.[189] Intuit moved to compel arbitration, relying on its consumer agreement that mandated arbitration to resolve any dispute between it and its customers.[190] The court granted the motion, finding that the plaintiffs signed mandatory individual arbitration agreements and there were no applicable contract defenses that would permit the court to depart from the FAA's demand to "rigorously enforce" agreements of that nature.[191] Intuit got what it wished for and the claims were forced into arbitration—but not without the significant costs the company agreed to pay.[192] As of late 2020, Intuit owed approximately $23 million in arbitration fees after already paying over $13 million.[193] To avoid arbitrating the large number of cases filed, Intuit reached a preliminary settlement agreement with a plaintiffs' firm that would apply to a group of individuals harmed.[194]

Before Intuit could jam through the settlement, Keller Lenkner filed arbitration demands for 125,000 individual consumers alleging the same fraudulent business practices.[195]

2018), ECF No. 212; Jameison, *supra* note 182 ("[T]his is their worst-case scenario, apparently—and the scenario they asked for.").

189. Class Action Complaint and Demand for Jury Trial ¶¶ 20–33, *In re* Intuit Free File Litig., No. 3:19-cv-02546 (N.D. Cal. May 12, 2019), ECF No. 1.

190. Motion to Compel Arbitration at 7, *In re* Intuit Free File Litig., No. 3:19-cv-02546 (N.D. Cal. Oct. 28, 2019), ECF No. 97.

191. *See* Alison Frankel, *Intuit Defends $40 Million Class Settlement, Attacks Mass Arbitration Firm*, REUTERS (Dec. 9, 2020, 5:42 PM) [hereinafter Frankel, *Intuit Defends $40 Million Settlement*], https://perma.cc/7YHL-YZXW.

192. *See id.*

193. *See* Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Settlement Amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM) [hereinafter Frankel, *Judge Breyer Rejects Intuit Settlement*], https://perma.cc/WW6A-6YYV.

194. *Id.*

195. *Id.*

The firm strongly opposed the settlement agreement, arguing that Intuit could not unilaterally rescind the arbitration agreement in circumstances in which the company found it advantageous to do so.[196] Intuit accused Keller Lenkner of being "unethical" when the firm sought to exclude their clients from the agreement.[197] Keller Lenkner forced Intuit to face Mass Arbitration. Evidently, Intuit found it more advantageous to pursue a global settlement agreement than to adjudicate the claims through arbitration, its own handpicked means to adjudicate disputes.[198] But Intuit surely would not be the last company to experience the effects of Mass Arbitration.

In 2019, more than five thousand DoorDash couriers filed individual arbitration demands with the AAA, alleging that DoorDash misclassified them as independent contractors in violation of FLSA and the California Labor Code.[199] Each individual demand contained specific factual allegations and was filed on the AAA's arbitration demand form.[200] The plaintiffs' firm paid filing fees totaling more than $1.2 million, after which the AAA ordered DoorDash to pay its share—$12 million—as required by the arbitration agreement.[201] DoorDash argued that because of "deficiencies" in the arbitration demands, it was under no obligation to do so, and would not pay the required fees.[202] The AAA administratively closed the file.[203]

196. Alison Frankel, *Mass Arbitration Firm Scrambles to Keep 125,000 Clients Out of $40 Million Intuit Class Action*, REUTERS (Nov. 18, 2020, 10:53 AM) [hereinafter Frankel, *Mass Arbitration Firm Avoids Class Actions*], https://perma.cc/C4KJ-FZJX.

197. *Id.*

198. *See* Frankel, *Intuit Defends $40 Million Settlement*, *supra* note 191; *infra* Part III.A.

199. Petition for Order Compelling Arbitration ¶ 22, Abernathy v. DoorDash, Inc., No. 3:19-cv-07545 (N.D. Cal. Nov. 15, 2019), ECF No. 1.

200. Motion to Compel Arbitration at 1, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. C 19-07545).

201. Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

202. *Id.*

203. The remedy available when a defendant refuses to pay arbitration fees is unclear. *Compare* Brown v. Dillard's, Inc., 430 F.3d 1004, 1010, 1013 (9th Cir. 2005) (holding that Dillard's breached its agreement with the plaintiff when it refused to partake in arbitration), *with* Cinel v. Barna, 142 Cal. Rptr. 3d 329, 334 (Cal. App. 2012) (holding the defendant waived its right to arbitration by refusing to resolve a fee dispute).

The *next day*, DoorDash circulated an updated contractor agreement to its couriers.[204] Not coincidentally, this new agreement removed the AAA as the arbitration provider and replaced it with the International Institute for Conflict Prevention & Resolution (IICPR).[205] But a forum change comes with a rule change—and that rule change dramatically favors defendants in Mass Arbitration.[206]

DoorDash couriers filed a petition for an order to compel DoorDash to arbitrate and to require the company to pay the filing fees.[207] When granting the plaintiffs' motion, the court stated: "You are going to pay that money. You don't want to pay millions of dollars, but that's what you bargained to do and you're going to do it."[208] Interestingly enough, here the "little guy" was the one attempting to compel arbitration and DoorDash was fighting tooth and nail not to have its handcrafted agreement enforced. The facts of this case illustrate that the defense bar and corporations immediately recognized the threat of Mass Arbitration and scrambled to deter its effects. Ultimately, Mass Arbitration will likely force businesses to change their standard agreements.[209] While they may do this

204. Alison Frankel, *DoorDash Accused of Changing Driver Rules to Block Mass Arbitration Campaign*, REUTERS (Nov. 20, 2019, 6:34 PM), https://perma.cc/FB6P-7G67 [hereinafter Frankel, *DoorDash Accused of Changing Driver Rules*]; Motion for a Temporary Restraining Order, *Abernathy* at 7–9, No. 3:19-cv-07545 (N.D. Cal. Nov. 17, 2019), ECF No 10.

205. *See* Frankel, *DoorDash Accused of Changing Driver Rules*, *supra* note 204.

206. Three days before DoorDash updated its contractor agreement with the new arbitration provider, the IICPR published its "Employment-Related Mass-Claims Protocol." *See CPR Launches New Claims Protocol and Procedure*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Nov. 6, 2016), https://perma.cc/SVT9-B2Q9. This updated protocol applies when "greater than 30 individual employment-related arbitration cases of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s)," and where the parties have agreed to arbitrate the case according to the rules governing CPR arbitrations. EMPLOYMENT-RELATED MASS-CLAIMS PROTOCOL 2, INT'L INST. FOR CONFLICT PREVENTION & RESOL., https://perma.cc/YD3H-6F7Z (PDF). Cases are of a nearly identical nature "if they arise out of a factual scenario and raise legal issues so similar one to another that application of the Protocol to the number of cases at issue will reasonably result in an efficient and fair adjudication of the cases." *Id.* at 2.

207. *Id.*

208. Iovino, *supra* note 17.

209. *See infra* Part III.

using the same techniques they used to dismantle the class action device, key differences between the two mechanisms will make this difficult to accomplish.

C. The Moral Conundrum of Class Actions and Mass Arbitration

To attempt to combat Mass Arbitration, the corporate defense bar characterizes it as it does class actions—a mechanism that enables plaintiffs to force defendants into settling meritless claims to avoid the daunting costs of litigation. A study of Mass Arbitration disputes does not support this characterization.[210] The adoption of Federal Rule of Civil Procedure 23 caused a major shakeup to the civil litigation system.[211] In response to the steady increase of class action suits filed, Judge Henry Friendly of the Second Circuit said that class actions force defendants into "blackmail settlements,"[212] whereby plaintiffs' firms bring thousands of "frivolous" claims and threaten to certify a class under Rule 23(b)(3), forcing corporate defendants to settle the claims to avoid exorbitant litigation costs.[213] The daunting threat of blackmail settlements led the Committee on Rules of Practice and Procedure to amend Rule 23 to allow interlocutory appeal of class certifications.[214] Out of the despondent fear that corporations were flooded with meritless class action lawsuits, there was a massive push to prohibit class treatment in consumer and employee agreements.[215] Judges further limited the availability of Rule 23 class actions through heightened certification requirements.[216]

Although defense bar advocates argued that Mass Arbitration provides the same "blackmail settlement" regime as

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210. *See* Glover, *supra* note 122 (manuscript at 109–10).

211. *See* Marcus, *supra* note 45, at 592 (characterizing the modern class action rule as revolutionary and calling it an "American story").

212. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

213. *See* Horton, *All Alone in Arbitration*, *supra* note 162, at 80.

214. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

215. *See supra* Part I.C.

216. *See* Glover, *supra* note 122 (manuscript at 18) (characterizing the judiciary's motivation in creating elevated certification requirements as "judges' empathy for corporate defendants subject to the class action's tendency to impose settlement pressure").

Rule 23(b)(3), the evidence simply does not support the contention that claims brought through Mass Arbitration are frivolous.[217] Quite the opposite is true. Mass Arbitration has provided an avenue for consumers to enforce statutory rights and employees to adjudicate claims under the FLSA, NLRA, and Title VII, when they otherwise would not have the ability to bring these meritorious claims.[218]Plaintiffs' law firms bear a significant risk when they agree to pay millions of dollars in filing fees to initiate arbitration on behalf of their clients.[219] Assuming that these firms make economically rational decisions, they would not agree to pay the fees if they did not have a strong belief that the underlying disputes are meritorious and an expectation of prevailing in arbitration.[220] The "blackmail settlement" argument falls flat when applied to Mass Arbitration because the claims, as of now, are meritorious and the financial incentives to "scheme" the system are not present.

D. The Peculiar Case of the California Private Attorneys General Act

California's Labor Code provides an interesting wrinkle in squaring Mass Arbitration with the Supreme Court's arbitration jurisprudence. The California PAGA permits employees to sue to recover civil judgments against their employers for violating state labor laws.[221] Judgments are split between the State of California and the aggrieved employee—75 percent going to the State and 25 percent split among the aggrieved employees.[222] Similar to Rule 23, the California PAGA

217. *See id.* (manuscript at 111) ("Corporate interests have waged a methodical, relentless campaign to characterize 'small' claims as frivolous and to eliminate them.").

218. *See, e.g.*, Petition for Order Compelling Arbitration, *supra* note 199, ¶ 1.

219. *See* Glover, *supra* note 122 (manuscript at 13).

220. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp, 559 U.S. 662, 676–77 (2010) (arguing that the parties were "in complete agreement regarding their intent" and therefore knew the costs and benefits of initiating arbitration).

221. CAL. LAB. CODE §§ 2698–2699.6 (West 2016).

222. *Id.* § 2699(i).

does not confer substantive rights,[223] but rather is a procedural mechanism that provides an avenue for aggrieved employees to enforce the California Labor Code where the state could have brought a claim, but chose not to do so.[224]

This enforcement regime raises the question of whether the PAGA applies to employees who "agreed" to individually arbitrate claims with their employers. In one sense, such actions are representative claims, insofar as the claim is brought by one employee on behalf of all similarly situated employees.[225] Because the plaintiff in PAGA litigation acts as an agent of an absent state agency,[226] the principles of collateral estoppel bind both the aggrieved employee and the state to the judgment.[227] Therefore, it operates similarly to the class action device, but differs in the applicability of the Supreme Court's arbitration jurisprudence. Faced with the threat of these claims, employers immediately hit the ground running to challenge the constitutionality of the mechanism. While some potential defendants relish the idea of getting these claims resolved once and for all and binding the state to the judgment, most are daunted by the mechanism by which the result occurs.

In 2014, the Supreme Court of California held that employers cannot require employees to waive their rights to

223. *See* Amalgamated Transit Union, Loc. 1756 v. Superior Ct., 209 P.3d 937, 943 (Cal. 2009) (comparing the mechanisms employed in Rule 23 with those in the California PAGA).

224. CAL. LAB. CODE § 2699(a). Prior to filing a representative claim lawsuit, the aggrieved employee must provide notice to both their employer and the California Labor and Workforce Development Agency ("LWDA"). *Id.* § 2699.3(a)(1)(A). Only if the LWDA fails to respond or declines to intervene can the employee file the lawsuit. *Id.* § 2699.3(a)(2).

225. *Private Attorneys General Act (PAGA)—Filing*, CAL. DEP'T INDUS. RELS. (Dec. 2020), https://perma.cc/VP62-QW4M.

226. *See, e.g.*, Iskanian v. CLS Transp. Los Angeles LLC, 327 P.3d 129, 148 (Cal. 2014) ("[California is] always the real party of interest in the suit.").

227. *See* Taylor v. Sturgell, 553 U.S. 880, 894–95 (2008) (holding that a nonparty is bound by a judgment if that party was adequately represented by a party with the same interests to the suit); *see, e.g.*, Arias v. Superior Ct., 209 P.3d 923, 933 (Cal. 2009) ("[A] judgment in an employee's action under the act binds not only that employee but also the state labor law enforcement agencies.").

representative claims under the California PAGA,[228] and that such a prohibition does not "frustrate the purpose" of the FAA.[229] In *Iskanian v. CLS Transportation Los Angeles LLC*,[230] an employee agreed to resolve disputes with their employer through mandatory bilateral arbitration.[231] The agreement prohibited class action lawsuits in addition to representative PAGA claims.[232] Following violations of the California Labor Code, the employee brought a class action suit and a representative PAGA action against their employer, CLS Transportation Los Angeles.[233] After litigation on the enforceability of the waiver, the Supreme Court of California held that the employer's class action waiver was indeed enforceable.[234]

By contrast, the court held that the PAGA waiver was unenforceable.[235] Because the PAGA is intended to supplement insufficient resources to enforce labor laws, such a waiver would "disable one of the primary mechanisms for enforcing the [California] Labor Code."[236] In reconciling this holding with the United States Supreme Court's FAA jurisprudence, the court drew a distinction between the FAA and the PAGA. While the FAA governs resolution of disputes between *private* parties, the California PAGA is intended to efficiently resolve disputes between an employer and the state Labor and Workforce Development Agency.[237] Corporate defendants flocked to the Supreme Court, challenging the *Iskanian* rule.[238]

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228. *See Iskanian*, 327 P.3d at 149 (holding that an employment agreement that compels the waiver of claims under the PAGA is contrary to public policy and unenforceable under California state law).

229. *See id.*

230. 327 P.3d 129 (Cal. 2014).

231. *Id.* at 133.

232. *Id.*

233. *Id.*

234. *Id.* at 142–43.

235. *Id.*

236. *Id.* at 149.

237. *See id.* ("[T]he rule against PAGA waivers does not frustrate the FAA's objectives . . . because the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state.").

238. In 2018, a Postmates delivery driver filed a PAGA complaint in California state court alleging that, in violation of the California Labor Code,

In *Viking River Cruises v. Moriana*,[239] the Supreme Court decided whether the FAA mandates the enforcement of PAGA representative claim waivers.[240] Angie Moriana, a former sales representative employed by Viking River Cruises ("Viking"), filed a PAGA lawsuit alleging that Viking failed to provide her with her final wages within seventy-two hours of termination, as required by the California Labor Code.[241] The PAGA complaint also documented various violations of the Code allegedly sustained by other Viking employees.[242] Similar to many employees in the United States, Moriana was required to sign an arbitration agreement that contained a class action waiver as a condition of her employment.[243] Consequently, Viking moved to dismiss the representative PAGA claims and compel arbitration of Moriana's "individual" PAGA

Postmates improperly classified delivery personnel as independent contractors. Alison Frankel, *Beset by Arbitration Demands, Postmates Resorts to Class Action to Settle Couriers' Claims*, REUTERS (Nov. 19, 2019, 5:47 PM) [hereinafter Frankel, *Postmates Resorts to Class Actions*], https://perma.cc/ZY4F-CFZM. After failing to compel arbitration, Postmates petitioned the Supreme Court for a Writ of Certiorari. *See generally* Petition for Writ of Certiorari, Postmates, LLC v. Rimler, No. 21-119 (U.S. July 26, 2021). Shortly thereafter, Postmates notified the Court that it had reached a tentative settlement agreement with the plaintiffs and continued to request extensions for its response. Motion to Extend Time to File Response at 1, *Postmates*, No. 21-119 (U.S. Jan. 19, 2022). In the October 2021 term, two other Petitions for Writs of Certiorari were filed, asking the Supreme Court to address the identical issue. *See generally* Petition for Writ of Certiorari, Lyft, Inc. v. Seifu, No. 21-742 (U.S. Nov. 16, 2021); Petition for Writ of Certiorari, Coverall, N. Am., Inc. v. Rivas, No. 21-268 (U.S. Aug. 20, 2021).

239. No. 21-119, 596 U.S. ___ (2022).

240. Viking River Cruises filed a Petition for Writ of Certiorari presenting the identical question in *Postmates*. Petition for Writ of Certiorari at i, Viking River Cruises, Inc. v. Moriana, No. 20-1573, 596 U.S. ___ (May 10, 2021) ("The question presented is: Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.").

241. No. 21-119, 596 U.S. ___ (2022) (slip op., at 1).

242. These included provisions addressing overtime, rest periods, and pay statements. *Id.*

243. *Id.* (slip op., at 5) ("The agreement contained a 'Class Action Waiver' providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, *or representative PAGA action*." (emphasis added)).

claim—specifically the claim that arose from the violation that she personally suffered.[244]

The Court held that "the FAA preempts the *Iskanian* rule insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."[245] Further, a PAGA action asserting multiple violations under California's Labor Code affecting a range of different employees does not constitute "a single claim" in even the broadest possible sense.[246] Because arbitration is a matter of "consent, not coercion," Moriana could not circumvent the demands of individual arbitration through a PAGA claim.[247] *Viking River Cruises*, however, does not resolve all of the remaining issues in this complex and everchanging area of the law. There are still live questions that must be answered.

III. MASS ARBITRATION 2.0

"The Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original [FAA]."[248] The effects of Mass Arbitration are uniform across the consumer, employee, and antitrust landscapes because the Supreme Court has interpreted the FAA consistently regardless of the substance of the contractual relationship in each case.[249] Given the profound impacts of Mass Arbitration, it is inevitable that businesses, the defense bar, and interest groups will jump into action and try to circumvent its affects.[250] The key here is that this is a snapshot in time—the

244. *Id.* Relying on the *Iskanian* rule, the trial court denied the motion and the California Court of Appeal affirmed. *Id.*

245. *Id.* (slip op., at 12).

246. *Id.*

247. *Id.*

248. Moses, *supra* note 27, at 113.

249. *See generally, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (antitrust dispute); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (consumer dispute); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (employer-employee dispute); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (dispute between two sophisticated business entities).

250. *See* Glover, *supra* note 122 (manuscript at 93) (arguing that for Mass Arbitration to remain a viable means of dispute resolution, the "industry" must adapt to defense bar attacks); *Mass Arbitration is an Abuse of the Arbitration System*, U.S. CHAMBER, INST. FOR LEGAL REFORM (June 4, 2021), https://perma.cc/HH6K-A5EZ (arguing that plaintiffs' firms are abusing the

defense bar's response to Mass Arbitration is imminent, but the nature of the response remains unclear.

Whichever way corporations respond, whether uniformly or inconsistently, the tools that consumers and employees have at their disposal, including Mass Arbitration in its current incarnation, will change. This Note analyzes two potential corporate responses to Mass Arbitration. First, there may be a return to the traditional legal system for dispute resolution.[251] Conversely, corporations can "tighten the screws" and eliminate their own handpicked "consumer-friendly" provisions that made Mass Arbitration a reality.[252] Law firms have already provided recommendations to their clients on how to avoid "the draconian outcomes" of Mass Arbitration.[253] These include amending consumer agreements to require informal dispute resolution before arbitration is commenced, requesting individualized information in demands for arbitration, contractually prohibiting Mass Arbitration, and eliminating provisions that require the company to pay arbitration fees.[254]

The rush to fight against Mass Arbitration is grounded in the assumption that it is only an attempt by greedy plaintiffs' firms to extract exorbitant legal fees from clients with frivolous claims.[255] This assumption is based on the premise that

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arbitration system to get large settlement payouts from "frivolous and fraudulent" claims).

251. *See infra* Part III.A.

252. *See infra* Part III.B.

253. *See, e.g.*, Cecilia Y. Oh & Perie Reiko Koyama, *Retail Industry 2021 Year in Review: Retail Giant Drops Arbitration Clause—Is This the Right Move for Your Agreement?*, NAT'L L. REV. (Feb. 4, 2022), https://perma.cc/7LF9-F7CU (recommending amending arbitration agreements to eliminate consumers' ability to effectively leverage fee-shifting provisions).

254. *See, e.g.*, MICHAEL E. MCCARTHY ET AL., GREENBERG TRAURIG, ADVISORY: STEMMING THE TIDE OF MASS ARBITRATION 12–13 (June 2021), https://perma.cc/6EF5-RAZZ (PDF) [hereinafter GREENBERG TRAURIG ADVISORY ON MASS ARBITRATION].

255. *See, e.g.*, *id.* at 12; Gibson Dunn Mass Arbitration Advisory, *supra* note 163, at 1 ("[I]t is often difficult to identify and eliminate those frivolous claims before the arbitrations commence, and many arbitration providers insist on the company paying nonrefundable filing fees regardless of whether the claims have merits."); Frankel, *Intuit Defends $40 Million Settlement*, *supra* note 191 ("Intuit suggested that Keller Lenkner's true motivation is its own $8 million stake in its mass arbitration claim against the company.").

small-dollar claims are inherently frivolous,[256] but evidence does not support this.[257] Mass Arbitration demands are "claims by some of the most economically vulnerable members of our society, whom corporations have brazenly exploited, secure in the knowledge that there was no real way for them to fight back against unlawful treatment."[258] This faulty assumption took hold and Mass Arbitration 2.0 will soon be a reality.

A. Corporations Throw in the Towel and Return to Conventional Civil Litigation

Arbitration agreements are presented in contracts of adhesion, and, therefore, companies can singlehandedly alter the forum in which potential claims are resolved.[259] The odds that a consumer or employee will reject any new terms are incredibly low.[260] Consequently, the defense bar has spent the better part of the last forty years creating its own body of law to shield its clients from civil liability,[261] and some of its members have already abandoned that carefully crafted legal system in favor of the one they left behind. In June 2021, after receiving 75,000 demands for arbitration alleging that it illegally recorded voices through the Echo Dot Kids devices, Amazon eliminated its 350-word compulsory consumer arbitration agreement in

256. *See* Glover, *supra* note 122 (manuscript at 27) (differentiating small-dollar and meritless claims by stating that "individually unmarketable does not mean meritless; individually marketable does not mean meritorious").

257. *Id.*

258. *Id.*

259. *See, e.g.*, Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://perma.cc/9UF4-AWBZ; Opinion, *What Happens When You Click "Agree"?*, N.Y. TIMES (Jan. 23, 2021), https://perma.cc/CH3E-6WXW ("At its core, the arrangement is unbalanced, putting the burden on consumers to read through voluminous, nonnegotiable documents, written to benefit corporations in exchange for access to their services.").

260. *See* Defendant's Supplemental Brief at 14, Turner v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612 (D. Colo. Apr. 16, 2018), ECF No. 182

> [I]f you choose not to agree to the arbitration agreement, for example, once you have been given notice and an opportunity to look at it, read it, ask any questions, download it, save it, whatever you want to do—if you don't, *then you don't have to be an employee.* (emphasis added).

261. *See* Glover, *Disappearing Claims*, *supra* note 27, at 3082–83.

favor of a two-sentence forum-selection and choice-of-law provision.[262] Amazon abandoned its long-held pressure campaign to advance arbitration as a legitimate means of alternative dispute resolution and said, "Fine, sue us."[263]

Some businesses have eliminated pre-dispute arbitration provisions only for claims involving sexual assault or harassment in the workplace.[264] While Congress recently amended the FAA to prohibit the enforcement of agreements in this context,[265] the underlying rationale for removing the provisions in the first place provides an instructive framework for corporations eliminating arbitration provisions.[266]

Both Postmates[267] and Intuit,[268] along with other companies facing Mass Arbitration, attempted to unilaterally return to the class litigation system, negotiating and settling the claims. After Intuit prevailed on its motion to compel arbitration, it backtracked and found it to be more advantageous to negotiate a settlement agreement.[269] Postmates was able to get the Supreme Court of the United States to grant certiorari—a rare feat on its own—in its case challenging the applicability of the California PAGA, but it appears that it will backtrack and elect

262. *See Conditions of Use*, AMAZON.COM SERVS. LLC, https://perma.cc/7GGK-R72Q (last updated May 3, 2021) ("Any dispute or claim relating in any way to your use of any Amazon Service will be adjudicated in the state or Federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts. We each waive any right to a jury trial."); Randazzo, *supra* note 259 ("Amazon's decision to drop its arbitration requirement is the starkest example yet of how companies are responding to plaintiffs' lawyers pushing the arbitration system to its limits.").

263. Randazzo, *supra* note 259.

264. *See, e.g.*, Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), https://perma.cc/37SS-778E; Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), https://perma.cc/XUQ6-83J5.

265. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

266. *See infra* Part IV.D.

267. Frankel, *Postmates Resorts to Class Actions*, *supra* note 238.

268. Frankel, *Intuit Defends $40 Million Settlement*, *supra* note 191.

269. *See supra* Part II.B.

to settle millions of dollars' worth of claims to avoid the threat of Mass Arbitration.[270]

Allowing businesses to pick and choose when to permit class settlements in lieu of enforcing arbitration agreements is an inequitable sampling technique. This scenario is commonly "heads I win, tails you lose," with corporations either conveniently compelling arbitration for "meritless" claims or negotiating an agreement to settle meritorious ones.[271] These unilateral choices silence consumers, denying them a voice in deciding how their grievances will be adjudicated. In response, Keller Lenkner has forced businesses to adhere to the terms they fought tooth and nail for.[272] Businesses possess the authority to decide which avenue to pursue—if they believe that settling claims as a class is a more efficient way to resolve disputes, then they should amend their agreements and permit aggrieved consumers to bring class action lawsuits in the first instance.

B. "Tighten the Screws:" Eliminate "Saving Grace" Consumer-Friendly Terms

Corporations, to ensure their compulsory arbitration agreements will be enforced according to their terms, include provisions that give the illusion that arbitration is a practical forum for consumers and employees to adjudicate disputes.[273] The continued use of these provisions requires a careful cost-benefit analysis—weighing the benefits of class waivers with the "costs" of a steady increase in Mass Arbitration. In a

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270. *See* Motion to Extend Time to File Response at 1, Postmates, LLC v. Rimler, No. 21-119 (Jan. 19, 2022); Grace Elletson, *Workers Say $32M Postmates Deal May Moot High Court Petition*, LAW360 (Jan. 21, 2022, 2:02 PM), https://perma.cc/29DV-6QCD.

271. *See* Glover, *supra* note 122 (manuscript at 27–28).

272. *See, e.g.*, Motion to Intervene and In Opposition to Preliminary Approval of Class Action Settlement at 9–10, *In re* Intuit Free File Litigation, No. 3:19-cv-02546 (N.D. Cal. Nov. 30, 2020), ECF No. 177.

273. *See* Michael R. Booden, *How to Avoid Mass Arbitration Claims*, ACC DOCKET (Apr. 20, 2022), https://perma.cc/2YST-NZCK ("In order to avoid having courts (and in every state the standard may be different) declare arbitration clauses in adhesion contracts unenforceable because of one or more of these contract defenses, class-action lawyers often recommend that companies pay all administrative, arbitrator compensation and hearing fees."); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

firm advisory, after concluding that the costs of arbitration far outweigh the benefits, Greenberg Traurig recommended that corporations consider amending their arbitration agreements to curb the effects of Mass Arbitration.[274] Ticketmaster, for example, amended its terms of service to require a potential claimant to "personally meet and confer" with Ticketmaster to informally resolve the dispute.[275] It is only after this "personal meeting" that a claimant can submit a demand for arbitration which delays or impedes the Mass Arbitration mechanism.[276]

The key for the defense bar is to effectively hinder Mass Arbitration while also ensuring that courts will enforce these amended agreements.[277] This Note addresses this balance and analyzes the elimination of consumer-friendly provisions under the Supreme Court's arbitration jurisprudence. As discussed above, it is these provisions that enabled Mass Arbitration in the first place.[278] Because the Court's interpretation of the FAA does not rest on the language of the Act or its legislative history, it is unlikely that eliminating these provisions would invalidate an arbitration agreement on unconscionability grounds.[279] If companies were to eliminate these provisions, the Court might be forced to define the outer bounds of the effective vindication doctrine.[280]

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274. *See* GREENBERG TRAURIG ADVISORY ON MASS ARBITRATION, *supra* note 254, at 12–13 ("Although it is a prospective measure, perhaps the strongest way a company can avoid or limit mass arbitration filings in the future is by amending its arbitration agreement to address the claimants' filing strategy preemptively.").

275. *Terms of Use*, TICKETMASTER, https://perma.cc/R6YD-6ZTF (last updated July 2, 2021); *see* Booden, *supra* note 273 (recommending, among other things, that companies require consumers to consent to mediation hosted by their own mediators prior to commencing arbitration).

276. Medintz, *supra* note 177.

277. GREENBERG TRAURIG ADVISORY ON MASS ARBITRATION, *supra* note 254, at 13 ("When amending the arbitration agreement, striking a balance between what is needed to ameliorate the risk of mass claims and what is needed to ensure that the contract will still be enforced by a court may go a long way.").

278. *See supra* Part II.A.

279. *See infra* Part III.B.

280. *See infra* Part III.B.

1. Unconscionability?

It would be hard to overstate the importance of the modern unconscionability doctrine to the defense bar's calculus in responding to Mass Arbitration. Relying on the FAA's savings clause, claimants seeking to bring classwide or representative claims despite an arbitration agreement mandating individual adjudication argued that the enforcement of the agreement would be "unconscionable."[281] In most jurisdictions today, modern unconscionability consists of two elements: procedural and substantive unconscionability.[282] Procedural unconscionability concerns the circumstances of contract formation, "such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print."[283] Substantive unconscionability focuses on whether specific contractual terms are overtly one-sided or prejudicial to one party with unequal bargaining power.[284] Procedural unconscionability is especially relevant to Mass Arbitration as mandatory bilateral arbitration agreements are typically found in contracts of adhesion.[285] Removing some clauses, however, could implicate substantive unconscionability as well if the agreement becomes so egregiously one-sided that it eliminates the ability to litigate a dispute.

Eliminating consumer-friendly provisions would likely push courts to reexamine the underlying rationales of the holdings that led to the current arbitration landscape. In its brief before the Court in *Concepcion*, AT&T heavily relied on the consumer-friendly provisions in its consumer agreement to advance the legitimacy of arbitration.[286] AT&T went so far as to

281. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 391–94.

282. *See* U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2012); Horton, *Unconscionability Wars*, *supra* note 27, at 393.

283. Horton, *Unconscionability Wars*, *supra* note 27, at 393.

284. *See id.*

285. *See id.* at 392 (addressing how courts and scholars squared contracts of adhesion with contract law and the Federal Arbitration Act); Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191, 194–96 (2020).

286. *See* Brief for Petitioner at 6, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893) (characterizing the features of the arbitration agreement in a way that "encourage[s] consumers to pursue claims through bilateral arbitration").

say that it made the arbitration process "easy to use"—a consumer "need only fill out and mail a one-page Notice of Dispute form" posted on AT&T's website.[287] Why would a corporation wholeheartedly endorse an agreement that easily subjects it to litigation? If bringing an arbitration claim was simple, as to only require filling out and mailing a form on a website, it is unrealistic to believe that AT&T would fight for the agreements' enforceability without some ulterior motive.

The answer is simple: these "friendly" provisions "existed to *facilitate the enforcement* of the class-action waivers."[288] The defense bar concluded that individual arbitration would not be economically efficient and thus concern over the exercise of the fee-shifting provisions was far less than the concern over the enforceability of a class waiver.[289] The "consumer-friendly" provisions that make arbitration "easy to use" are little more than vague aspirations—like dangling a treat in front of a dog and never actually giving it to her.

The filing fees for arbitration are higher than court fees[290] and often far exceed the value of the individual claim itself,[291] eliminating the rational economic incentive to bring the claim.[292] Through Mass Arbitration, plaintiffs' attorneys resolved this economic inefficiency by fronting the initial filing fee, anticipating reimbursement for the filing fees and

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287. *Id.* at 7–8.

288. Glover, *supra* note 122 (manuscript at 37).

289. *See id.* ("The calculus by corporations here was as obvious as it was rational. Even with the fee-shifting provisions in the arbitration agreements, individual arbitration would not frequently be economically rational for an ordinary claimant or her lawyer.").

290. *Compare* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES 1–4 (2020), https://perma.cc/9KQL-QYQG (PDF) (stating that individual consumer arbitration filing fees are $200 and the arbitrator's fees can be as much as $2,500 per day), *and* AM. ARB. ASS'N, EMPLOYMENT/WORKPLACE FEE SCHEDULE 1–4 (2020), https://perma.cc/BP4V-944C (PDF) (stating that individual filing fees are $300, and the arbitrator's fees are subject to change), *with* 26 U.S.C. § 1914(a) (providing that the filing fee for civil cases in district court is $350).

291. *See* Glover, *supra* note 122 (manuscript at 52)

> For instance, to a couple earning $32,877 a year, the $200 they were owed by Intuit (TurboTax) was a significant amount of money. But the portion of the arbitration filing fee for which they were responsible, pursuant to their arbitration agreement, was $200 making the claim economically irrational for the plaintiffs (or their counsel) to pursue.

292. *Id.*

attorneys' fees, as well as adequate compensation for their client upon the claim's successful resolution.[293] Thus, one possible response to Mass Arbitration is to remove this economic incentive from the calculation and eliminate fee-shifting provisions in the agreements.[294]

This analysis relies on two assumptions: first, that the Supreme Court, when it has an opportunity to review the enforceability of "bare bones" arbitration agreement, will adhere to the principles of stare decisis; and second, that corporations eliminate *all* consumer-friendly provisions.[295] It is important to be clear about what the holding in *Concepcion* was—the FAA preempts any state law or rule that "condition[s] the enforceability of arbitration agreements on the availability of class-wide arbitration procedures."[296] The holding was grounded in the principle that the FAA's "liberal policy favoring arbitration" outweighed a state's legitimate interest in alleviating the impact of consumer's uneven bargaining power.[297]

While *Concepcion*'s facts dealt with the corporate-consumer relationship, its principal framework applies to the employer-employee dynamic as well.[298] The Supreme Court recognizes that it has rejected *every* argument to come before it that the FAA conflicts with other federal statutory provisions.[299] Though the Court is misguided in this interpretation, the status quo poses a significant barrier for employees to challenge class representation waivers. For example, employees seeking

293. *See id.* (manuscript at 6) (noting that when Keller Lenkner filed 12,501 individual arbitration demands on Uber, it further demanded that Uber reimburse $18.75 million in filing fees).

294. *See* Booden, *supra* note 273 (recommending that companies amend arbitration agreements to require consumers to pay fees equal to those charged in small claims court).

295. For purposes of this Note, a "bare bones" arbitration agreement is one that contains provisions mandating individual bilateral arbitration and does not include any fee-sharing provisions or financial incentives for claimants to bring meritorious claims.

296. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

297. *Id.*

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

299. *See id.* at 1627 (noting that the Court has rejected the argument that federal statutes, including the Sherman and Clayton Acts, the Securities Act, and RICO, conflict with the mandate of the FAA).

guidance on the applicability of federal labor laws to their employment arrangements regularly face unscalable obstacles in the way of adequately enforcing their rights.[300]

Unconscionability has long been recognized as a legitimate means to overcome these obstacles, and courts would be hard-pressed to avoid an unconscionability ruling given the immense unfairness of a "bare bones" arbitration agreement.[301] The defense bar, nevertheless, will continue to stack the deck in its favor and argue that it is merely reinvigorating arbitration in a way that ensures a fair and expeditious dispute resolution process. Perhaps there is a straight-faced argument that plaintiffs' firms abused the "consumer-friendly" system businesses created by initiating Mass Arbitration. Given the current ideological split of the Supreme Court, the Court likely would agree with the argument that eliminating such terms is releveling the playing field between plaintiffs and defendants.[302]

Assuming drafters included these provisions to force the Supreme Court's hand, absent its current jurisprudence, arbitration agreements with class waivers are unconscionable.[303] Most pre-dispute arbitration agreements are included in contracts of adhesion, requiring a party with little to no bargaining power to accept the terms or forgo the business's services.[304] Substantively, if the agreement is plainly one-sided, such as by restricting access to discovery or mandating that the claimant pay exorbitant filing fees, the agreement is per se unconscionable and Section 2's saving clause should kick in.[305]

For instance, DirecTV, a subsidiary of AT&T, provides that it will pay *all* costs of arbitration for nonfrivolous claims of less than $75,000, regardless of who wins, in its customer

300. *See* Booden, *supra* note 273 (clarifying that the FAA still mandates enforcement of arbitration agreements for disputes involving wage disputes, Title VII discrimination, and the Equal Pay Act).

301. *See* Glover, *supra* note 122 (manuscript at 19).

302. *Id.*

303. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 393–94.

304. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347 (2011) (explaining that the fact that a contract is adhesive is insufficient to invalidate it); *see also* RADIN, *supra* note 75, at 41 (explaining how identical contracts of adhesion proliferate through a particular industry, causing the contracts to "occup[y] the territory in which a consumer is participating").

305. *See infra* Part IV.A.

agreement.[306] This agreement makes Mass Arbitration a viable means of adjudication—providing leverage to plaintiffs' firms to effectively resolve meritorious claims. An agreement lacking a fee-shifting structure and incentives for meritorious claims would be nothing more than a class waiver. This would require individual claimants to arbitrate claims and waive their right to their day in court. The Supreme Court will be forced to address whether the FAA is a mechanism to circumvent liability, or if the FAA's savings clause has any force at all.

Current Justices have pushed for the Court to adopt a broader interpretation of the FAA that would guarantee the enforceability of nearly all arbitration agreements. For instance, Justice Clarence Thomas, concurring in *Concepcion*, argued that arbitration agreements subject to the FAA should be fully enforced unless the opponent of the agreement can "successfully challeng[e] the formation of the arbitration agreement, such as by proving fraud or duress."[307] He reiterated this idea in *Italian Colors*, stating that, because the high costs of litigation do not implicate fraud or duress, the agreement was enforceable.[308] By that standard, essentially no arbitration agreement would be unconscionable,[309] as traditional consumer agreements are presented as contracts of adhesion and by their nature do not involve duress or fraud.[310]

306. *See DirecTV Residential Customer Agreement*, DIRECTV § 8 (Nov. 1, 2020), https://perma.cc/WEG8-CJAY.

307. *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring). Notably, Justice Thomas adheres to the view that the FAA does not apply in proceedings in state court. *See* Allied-Bruce Terminix Cos., Inc., v. Dobson, 513 U.S. 265, 285–96 (1995) (Thomas, J., dissenting) (arguing at the time Congress passed the FAA, "[i]t would have been extraordinary for Congress to attempt to prescribe procedural rules for state courts"); *see also* Kindred Nursing Centers L.P. v. Clark, 581 U.S. 246, 257 (2017) (Thomas, J., dissenting); Viking River Cruises, Inc., v. Moriana, No. 21-119, 596 U.S. ___, ___ (2022). (slip op., at 1) (Thomas, J., dissenting).

308. Am. Express Co. v. Italian Colors Rest. 570 U.S. 228, 239 (2013) (Thomas, J., concurring).

309. *See* Horton, *Unconscionability Wars*, *supra* note 27, at 394 (noting that because the Supreme Court has taken such a narrow view in interpreting Section 2 of the FAA, traditional common law defenses appear to be unpersuasive).

310. *See* J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177, 178–79 (1999).

The Supreme Court seems unlikely to invalidate the agreements based on substantive or procedural unconscionability.[311] With a 6-3 conservative majority and a plethora of precedent to rely on, it would be easy for the Court to invoke stare decisis and find that these agreements are consistent with and fulfill the spirit of the FAA. After all, conservative Courts have had no issue looking past the text of the FAA previously and there is no reason to believe unconscionability would prevail the next time it comes before the Supreme Court. If class arbitration, and by analogy Mass Arbitration, sacrifices informality—the so-called principal advantage of arbitration—the Court in its current form would likely be highly receptive to agreements that reinstate the informality of the process. But once again, the "benefits" of arbitration cannot be realized if arbitration cannot commence.

2. Effective Vindication Doctrine?

The effective vindication doctrine should be an adequate mechanism for courts to invalidate one-sided arbitration agreements. Unfortunately, the Supreme Court's current incarnation of the doctrine undercuts its force. The Court, in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*,[312] created the effective vindication doctrine—a principle that may provide some much-needed legal reprieve for plaintiffs in the Court's jurisprudence.[313] There, the Court decided whether an arbitration agreement was enforceable in a lawsuit that alleged antitrust violations in an international commercial transaction.[314] The Court held that an agreement to arbitrate a federal statutory claim would be valid "so long as the prospective litigant effectively may vindicate its statutory cause of action in

311. *See* Glover, *supra* note 122 (manuscript at 19).

312. 473 U.S. 614 (1985).

313. *Id.* at 637 (stating that there is no reason not to enforce an arbitration agreement so long as the "prospective litigant may vindicate its statutory cause of action").

314. *Id.* at 628. The Second Circuit had previously held that the arbitration was unenforceable because the "pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.*

the arbitral forum."[315] This substantially raised the plaintiff's burden, requiring them to show that the arbitration agreement amounted to a prospective waiver of their *right to pursue* statutory remedies.[316] Applying this standard, the Court found that the adjudication of an antitrust claim in arbitration does not require a plaintiff to forfeit any statutorily guaranteed rights or remedies.[317] The Court, albeit in a footnote, placed a small yet important limitation on its unwillingness to strike down the agreement in this case: if an agreement contained other prohibitive clauses, such as a choice-of-law provision or a forum-selection clause, the Court would "have little hesitation in condemning the agreement as against public policy."[318] While this case principally dealt with international commercial arbitration, it provided a foundation for the effective vindication doctrine in consumer and employer arbitration.[319]

While certain federal statues provide sufficient policy grounds that should invoke the doctrine, the categories of applicable policy concerns remain undefined. As confusion grew in the lower courts about the function of *Mitsubishi Motors*'s holding, the Supreme Court provided much-needed guidance on its application. In *Green Tree Financial Corp.-Alabama v. Randolph*,[320] the plaintiff filed a class action against Green Tree

315. *Id.* at 637 (finding that, as long as the arbitral forum provides a sufficient manner for a litigant to effectively vindicate a statutory cause of action, "the statute will continue to serve both its remedial and deterrent function"). Current Justices do not unanimously view this as the central holding of *Mitsubishi Motors*. *Compare* Am. Express v. Italian Colors Rest., 570 U.S. 228, 235 n.2 (2013) (arguing that the *Mitsubishi Motors* Court withheld a determination on whether "the arbitration agreement's potential deprivation of a claimant's right to pursue federal remedies may render that agreement unenforceable"), *with id.* at 246–47 n.3 (Kagan, J., dissenting) (arguing that what the *Mitsubishi Motors* Court did not rule on was whether the agreement *in fact* eliminated the claimant's federal rights).

316. *Mitsubishi Motors*, 473 U.S. at 640; *see* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 377–78 (2014).

317. *See Mitsubishi Motors*, 473 U.S. at 640.

318. *Id.* at 637, n.19.

319. *See generally* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

320. 531 U.S. 79 (2000).

Financial under the Truth in Lending Act[321] and the Equal Credit Opportunity Act.[322] Despite previously agreeing to submit disputes to arbitration, the plaintiff argued that because of the cost-prohibitive nature of arbitration and the lack of cost-shifting provisions in the agreement, she could not effectively vindicate her rights in the arbitral forum.[323] The Court explained that although claims "arising under a statute designed to further important social policies" could be forced into arbitration, there are circumstances that would amount to a waiver of the statutory rights.[324]

Holding that the plaintiff must arbitrate her claims, the Court articulated a two-part test to determine whether an arbitration agreement effectively prohibits a plaintiff's ability to pursue statutory rights.[325] A court must first determine whether the parties agreed to submit their claims to arbitration and assess whether Congress evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[326] It is then the plaintiff's burden to establish the prohibitively high costs.[327] Applying this test, the Court found that the plaintiff did not adequately prove that they would incur the alleged costs, and for that reason, enforced the agreement.[328]

Although the effective vindication doctrine did not invalidate the agreements in *Mitsubishi Motors* or *Randolph*, the Court indicated that it would strike down an arbitration clause that amounted to a prospective elimination of a claimant's ability to bring a claim.[329] The Court later had

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321. Pub L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f).

322. Pub. L. No. 94-239, 90 Stat. 251 (1976) (codified as amended at 15 U.S.C. §§ 1691–1691(f)).

323. *See Randolph*, 531 U.S. at 80–81.

324. *See id.* at 89 (explaining that claims involving important social policies may be arbitrated because "so long as the prospective litigant may effectively vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions" (internal quotation omitted)).

325. *Id.* at 90.

326. *Id.*

327. *Id.* at 81.

328. *See id.* at 84.

329. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue

opportunities to "strike down" an arbitration agreement that fell in this reservation, but declined to do so.[330] As discussed above, in her dissent in *Italian Colors*, Justice Elena Kagan fiercely attacked the majority's construction of *Mitsubishi Motors*, arguing that the facts in the case constituted a clear instance in which the Court should invalidate the agreement.[331] Because Congress intended to promote "the public interest in the enforcement of the antitrust laws,"[332] evidenced by its enactment of a private cause of action in the federal antitrust laws, an agreement should be invalid when the costs of arbitration are prohibitively high.[333]

While applicable to other contexts, the effective vindication doctrine is vital to privately enforce the antitrust laws.[334] Without a rule that prohibits exculpatory clauses that prohibit federal causes of action, Justice Kagan argued, "a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability."[335] American Express took advantage of this blatant loophole and effectively shielded itself from liability.

Plaintiffs have yet to convince the Court that any contract provision implicates the effective vindication doctrine. Prior to 2013, a plaintiff's inability to effectively vindicate a statutory cause of action in the arbitral forum appeared to be a cognizable defense against the enforcement of a mandatory individual arbitration agreement.[336] If corporations were to eliminate the cost-sharing provisions currently found in many arbitration agreements, the effective vindication doctrine, as articulated in *Mitsubishi Motors* and constrained in *Italian Colors*, would be

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statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

330. *See, e.g.*, American Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

331. *Id.* (Kagan, J., dissenting).

332. Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329 (1955).

333. *See Italian Colors*, 570 U.S. at 243.

334. *Id.* at 241 (Kagan, J., dissenting).

335. *Id.* ("The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.").

336. *See* Schwab, *supra* note 114, at 250–51 (explaining the conundrum that courts faced in applying the effective vindication doctrine before the Supreme Court's holding in *Italian Colors*).

an unlikely vehicle to strike down an agreement.[337] Corporate responses to combat Mass Arbitration are of a different magnitude than the circumstances that plaintiffs last argued the effective vindication doctrine before the Supreme Court.[338] For example, the "bare bones" arbitration agreement here is much less consumer-friendly from the ones at issue in *Italian Colors* and *Concepcion*.[339] Arguably, the doctrine may actually do some work here, but it seems to be limited to instances "where an arbitration agreement precludes the assertion of certain statutory rights and cases where *filing and administrative fees in arbitration* 'are so high as to make access to the forum impracticable.'"[340]

Despite arguments that *Italian Colors* went too far in its destruction of the doctrine,[341] a straightforward application of its holding leads to the conclusion that the elimination of cost-allocation provisions could eliminate a plaintiff's *right* to pursue a claim if it amounted to an all but absolute forfeiture of a statutorily guaranteed right.[342] The current doctrine will not help, even under egregious circumstances. While the prohibitively high costs of individual arbitration may be insufficient to invalidate a bare-bones arbitration agreement,[343] if a corporation limits the specific remedies available or restricts where and when an arbitration demand may be brought, the Court may be forced to reexamine its strict application of the effective vindication doctrine.

For instance, consider an arbitration agreement that would require the claimant to pay all upfront fees for an arbitration that could only take place in-person in the city where the business is headquartered and prohibits any form of injunctive

337. *See id.* at 250 (arguing that the Supreme Court created a double standard in applying the effective vindication doctrine).

338. *See supra* Part I.C.3.

339. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2010); *Italian Colors*, 570 U.S. at 235–36.

340. Chukwumerije, *supra* note 316, at 377–78.

341. *See* Glover, *supra* note 122 (manuscript at 12).

342. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013).

343. *See id.* at 236 (stating that filing and administrative fees "attached to arbitration" would need to be "so high as to make access to the forum impracticable"). The Court has never found arbitration to meet this "so high" standard. *See supra* Part I.C.3.

relief or nominal damages. While the agreement does not explicitly require a consumer to waive their rights under, let's say, the Sherman Act, the restrictive provisions would effectively foreclose a party's *right* to pursue a claim.[344] Because the Supreme Court has set such a high bar for plaintiffs to invoke the effective vindication doctrine, in its current form, the doctrine does not adequately protect consumer and employee rights. As Justice Kagan summarizes the majority opinion in *Italian Colors*: "Too darn bad."[345]

IV. WHAT NOW? HOW PLAINTIFFS WILL NO LONGER HEAR "TOO DARN BAD"

As the Concepcions suggested to the Supreme Court, corporate-minded interests have engaged in a "parade of horribles," nearly eliminating the ability of a consumer or employee to hold businesses accountable.[346] Mass Arbitration in its current form allows plaintiffs to come up for air. While the system will inevitably adapt to restrict the ability for consumers and employers to adjudicate disputes,[347] the right to have a day in court is as fundamental as any right, and concrete steps must be taken to ensure it is preserved.

A. Overrule Concepcion and Limit the Preemptive Effect of the FAA

The Supreme Court, apparently relying on the text of the FAA, has consistently held that the Act preempts state statutory and common law that "frustrate[s] its purpose."[348] This reliance appears to be unfounded because the statutory language in no way supports the implication that Congress intended the FAA to be substantive federal law. As Justice Breyer argues in his dissenting opinion in *Concepcion*, federal arbitration law normally leaves matters of contract defenses,

344. *See Italian Colors*, 570 U.S. at 235–36 (explaining that a provision that forbid the assertion of certain statutory rights would be unenforceable under the doctrine).

345. *Id.* at 240 (Kagan, J., dissenting).

346. *See* Brief for Respondent at 32, *Concepcion*, 563 U.S. 333.

347. *See supra* Part III.

348. *Concepcion*, 563 U.S. at 347 n.6 .

such as duress and unconscionability, to the states.[349] Contract law has, after all, forever been a matter of state statutory and common law.[350]

California masterfully crafted the *Discover Bank* rule and applied the "same legal principles to address the unconscionability of class arbitration as it does to address the unconscionability of any other contractual provision . . . ."[351] Section 2 of the FAA specifically permits this, as it allows for invalidation only upon grounds that permit "revocation of any contract," placing arbitration agreements on equal footing with all other contracts.[352] But through misguided statutory interpretation, the Supreme Court ignored Congress's intent and forced its own policy preferences to find in favor of corporate interests.[353] The California courts established the rule, and as Justice Breyer argued, "Why is this kind of decision . . . not California's to make?"[354] The Supreme Court should allow states to reclaim what is rightfully theirs. It is time to eliminate the preemptive effect of the FAA.

B. Reinvigorate the Effective Vindication Doctrine

In its current form, the effective vindication doctrine is little more than a mirage—an empty promise from the Supreme Court to invalidate an agreement that crosses the illogical line it drew. If the effective vindication doctrine is to "prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights,"[355] its standard must provide a role for courts to assess whether the agreement, in fact, is engineered to thwart any meaningful ability to bring a claim, not whether the agreement explicitly prohibits a statutory claim. *Randolph* provides a subjective standard,

349. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 364–65 (2011) (Breyer, J., dissenting) (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010)); *id.* at 362 (arguing that the majority is unable to trace its holding "to the history of the arbitration statute itself").

350. *See* Glover, *supra* note 122 (manuscript at 19).

351. *Concepcion*, 563 U.S. at 365.

352. 9 U.S.C. § 2.

353. *See supra* Part I.C.

354. *Concepcion*, 563 U.S. at 366 (Breyer, J., dissenting).

355. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (Kagan, J., dissenting).

allowing plaintiffs to avoid arbitration if they can concretely establish that the costs of arbitration would be so prohibitively high that they would effectively be foreclosed from bringing the claim.

Justice Kagan refined this in her *Italian Colors* dissent.[356] The "prohibitively high cost" qualifier in *Mitsubishi Motors* and *Randolph* must not be read only to relate to the costs of access to the arbitral forum.[357] Under this framework, the mechanism that forecloses the effective vindication of a federal right is irrelevant to the analysis. Therefore, the agreement must be read in its entirety—and if the agreement read as a *whole* precludes the ability of a plaintiff to enforce a federal statutory right, *right now*, then the effective vindication doctrine would forbid its enforcement.[358] While a class action waiver is evidence of the elimination of a right to pursue a statutory cause of action, its presence does not preclude the applicability of the effective vindication doctrine.[359] For example, if the arbitration agreement in *Italian Colors* contained the class waiver, but provided that American Express would reimburse the expert fees if the claimant prevailed, the doctrine likely would not apply.[360] Nevertheless, the goal of the doctrine is not to strike down every arbitration agreement, rather it is to promote arbitration in feasible situations and forbid it when agreements are drafted in a predatory way.

Mass Arbitration may soon be a thing of the past, but, if reinvigorated, the doctrine could prevent the enforcement of an agreement that forecloses the ability for a claimant to vindicate their rights. Consequently, without the doctrine, companies have little incentive to draft provisions that facilitate arbitration, running afoul of the intent of the FAA. It is past time for courts to provide new life to this ever-important doctrine.

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356. *See id.* at 240–253.

357. *See, e.g.*, Brief for Petitioners at 65–66, *Italian Colors*, 570 U.S. 228, 2012 WL 6755152, at *40.

358. *See supra* Part III.B.2.

359. Justice Kagan goes to great lengths in her *Italian Colors* dissent to emphasize that the temporal inquiry is *right now*, not in the "ye olde glory days." *Italian Colors*, 570 U.S. at 251 (Kagan, J., dissenting).

360. *See id.* at 246 n.2.

C. States Enact Representative Claim Statutes

Given the general success of representative claim statutes, states should swiftly enact them and arm their citizens with a legal mechanism to hold employers accountable for flagrant violations of state labor laws. The California PAGA provides a concrete framework for states to use to protect employee rights and effectively enforce state labor laws.[361] Following in California's footsteps, New York legislators introduced the Empowering People in Rights Enforcement ("EMPIRE") Worker Protection Act,[362] which would enable an aggrieved employee, whistleblower, or representative organization to bring a labor code enforcement action on behalf of the State.[363]

The Supreme Court's decision in *Viking River Cruises* weighed the broad interpretation of the FAA against states' interests in choosing how best to best enforce their labor provisions. *Concepcion* and its progeny do not mandate the enforcement of arbitration agreements that would strip the state of its police power.[364] The Court made clear that the FAA does not require states to enforce agreements that effectively waive statutory rights. Other states should follow suit and combat the effects of the Supreme Court's misguided interpretation of the FAA.[365]

D. The Easiest Solution: Congressional Action

Congressional action in the arbitration arena has long been a dream that has not come to fruition. In February 2022, however, Congress passed the Ending Forced Arbitration of

361. *See supra* Part II.C.

362. S.B. 12, 2021–2022 Leg. Sess. (N.Y. 2022).

363. *Id.*

364. *See* Respondent's Brief in Opposition at 19, Viking River Cruises, Inc., v. Moriana, No. 20-1573, 596 U.S. ___ (Sept. 10, 2021) (arguing the state's interest in its police power far outweighs the interest in enforcing a pre-dispute arbitration agreement).

365. To protect citizens while also decreasing the risk of preemption, some states have adopted laws that complement the FAA. *See, e.g.*, 710 ILL. COMP. STAT. 15/1–14 (2022) (establishing separate rules for arbitration relating to healthcare); CONN. GEN. STAT. § 52-407uu (2022) (providing that an arbitration panel may award punitive damages against an employer if the employer violates the state's arbitration laws).

Sexual Assault and Sexual Harassment Act of 2021.[366] The Act prohibits the enforcement of employer agreements that mandate arbitration for sexual assault and harassment claims.[367] In both the 116th and 117th Congresses, Democratic members introduced the Forced Arbitration Injustice Repeal Act of 2022 ("FAIR Act"),[368] which would amend the FAA to prohibit pre-dispute arbitration agreements that "force arbitration of future employment, consumer, antitrust, or civil rights disputes."[369] The United States House of Representatives passed the FAIR Act in March 2022, but the Act is currently stalled in the Senate Judiciary Committee.[370] Its fate is all but doomed given the equally-divided Senate and the 60-vote filibuster threshold.[371] Congress should pass this bill to end once and for all this dark era of consumer and employee rights.[372]

Wholesale revision or Congressional reworking of the FAA may be ideal, but for forty years Congress has stood by while the Supreme Court developed its current framework. It is nice to hold on to the dream, but advocates must be comprehensive in addressing the issues at hand—whether in the short or long term. They cannot simply hope that Congress will do something, because history is clearly not on their side.

CONCLUSION

Mass Arbitration threw a curveball to the defense bar's attempt to eliminate civil liability. Creative law firms, however,

366. Pub. L. No. 117-90, 136 Stat. 26 (2022). *See generally* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1 (2022).

367. *See* Pub. L. No. 117-90, 136 Stat. 26 (2022).

368. H.R. 963, 117th Cong. (2021).

369. *Id.* § 2 (2021). One study found that if even 20 percent of employers complied with the FAIR Act, $1.8 billion would be put back in workers' pockets annually. BARAN & CAMPBELL, *supra* note 154, at 2.

370. H.R. 963, 117th Cong. (2021). Interestingly, Representative Matt Gaetz was the only House Republican to vote for the passage of the bill. *Id.*

371. At the time of the writing of this Note, the Senate companion bill to H.R. 963 currently has no Republican cosponsors in the United States Senate. *See* S.505, 117th Cong. (2021).

372. Levi Sumagaysay, *FAIR Act Is Being Revived in Washington, Raising Hopes for the End to Forced Arbitration*, MARKET WATCH (Feb. 11, 2021, 10:44 AM), https://perma.cc/4RTH-CVEV.

forced corporations' hands by compelling individual arbitration, and, while the immediate effects have been profound, it is only a matter of time before businesses amend their arbitration agreements to circumvent Mass Arbitration. Unfortunately, the Supreme Court's arbitration jurisprudence promises nothing more than a grim future for consumer and employee rights. If corporations eliminate the "saving grace" provisions from their agreements which make Mass Arbitration feasible, plaintiffs likely will not have an adequate path to their invalidation under the Court's current interpretation of the FAA.

The purpose of the FAA is to facilitate arbitration, not to insulate parties from liability. While congressional action to correct the consequences of the Court's misinterpretation would be ideal, heightened partisanship and strong corporate opposition make it an infeasible solution. Given that reality, courts must shift their focus away from the "fundamental freedom to contract" to the ultimate purpose of the U.S. civil litigation system. For too long, corporate interests have prevailed in the Supreme Court. Consequently, egregiously one-sided arbitration agreements have been successfully enforced.[373] This does not facilitate arbitration—it eliminates it. Reinvigorating the effective vindication doctrine would resolve this discrepancy. Courts would only enforce an arbitration agreement, in conformance with the demands of the FAA, when it is crafted to facilitate arbitration. But if the agreement removes plaintiffs' ability to realistically use the arbitral forum, looking at the realistic consequences of enforcing the agreement will adequately protect consumer and employee rights.[374]

Regrettably, relying on the Supreme Court to fix the issue it created has proven impracticable.[375] Therefore states must enact representative claim statutes, such as the California PAGA, to arm their citizens with adequate legal tools to combat corporate defense tactics.[376] It is time to close this nightmarish period for consumer and employee rights and allow parties to effectively resolve their disputes. Aggrieved plaintiffs will no longer hear "too darn bad."

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373. *See supra* Part I.C.
374. *See supra* Part IV.B.
375. *See supra* Part I.C.
376. *See supra* Part IV.C.